

**PUBLISHED**

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**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

PLANNED PARENTHOOD OF SOUTH  
CAROLINA INCORPORATED; RENEE  
CARTER,

*Plaintiffs-Appellees,*

v.

B. BOYKIN ROSE, in his official  
capacity as the Director of the  
Department of Public Safety of the  
State of South Carolina; JON E.  
OZMINT, in his official capacity as  
the Director of the Department of  
Corrections of South Carolina; KIM  
S. AYDLETTE, in her official capacity  
as the Director of the Department of  
Social Services of South Carolina,  
*Defendants-Appellants.*

No. 03-1118

LIBERTY COUNSEL; LOUISIANA  
LAWYERS FOR LIFE; LOUISIANA  
FAMILY FORUM; LOUISIANA LAW &  
JUSTICE FOUNDATION,  
*Amici Supporting Appellant.*

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**ORDER**

Appellants filed a petition for rehearing and rehearing *en banc*.

Judge Luttig, Judge Michael, and Judge Gregory voted to deny the petition for rehearing.

On the poll requested by a member of the court on the petition for rehearing *en banc*, Judge Widener, Judge Niemeyer, Judge Williams, Judge Traxler, and Judge Shedd voted to grant rehearing *en banc*. Chief Judge Wilkins, Judge Wilkinson, Judge Luttig, Judge Michael, Judge Motz, Judge King, Judge Gregory, and Judge Duncan voted to deny rehearing *en banc*.

The petition for rehearing is denied, and because the poll of judges in active service failed to produce a majority in favor of rehearing *en banc*, the petition for rehearing *en banc* is also denied. Judge Wilkinson wrote an opinion concurring in the denial of rehearing *en banc*. Judge Shedd wrote an opinion, joined by Judge Williams, dissenting from the denial of rehearing *en banc*.

Entered for the Court,

/s/ Patricia S. Connor  
CLERK

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

At issue here is a South Carolina statute allowing citizens to opt for specialty license plates bearing the message "Choose Life." *See* S.C. Code Ann. § 56-3-8910. No specialty license plate with the opposite message is similarly available. Planned Parenthood of South Carolina, Inc. and Renee Carter have challenged the statute authorizing the "Choose Life" plates. The statute's message could be reversed and the plaintiffs' position could be pro-life, not pro-choice, but the principles that govern this case would remain the same.

I vote to deny rehearing *en banc*. I simply do not believe the state should use license plates to practice viewpoint discrimination. *See Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 242 (Wilkinson, C.J., concurring in the denial of rehearing *en banc*). That is plainly what is happening here. The state is saying that its citizens may express one view on a profound controversy but not the other. Citizens are permitted to express their agreement with the officially sanctioned policy, but they have no sim-

ilar outlet to express their disagreement with it. This is a presidential election year. May a state issue plates touting one candidate, but not another? It is one thing for states to use license plates to celebrate birds and butterflies, military service, historical events and scenic vistas. It is quite another for the state to privilege private speech on one side — and one side only — of a fundamental moral, religious, or political controversy.

The state would argue that its viewpoint discrimination is permissible, because its license plates constitute pure government speech. But the speech here only becomes speech by virtue of a citizen's choice. When speakers mount a soapbox or hoist a placard, one presumes they are free to create their own messages. I am not convinced that the mere presence of a license plate allows the state unlimited authority to channel would-be speakers into privileged categories of expression of the state's own choosing.

Just as I considered *Sons of Confederate Veterans* "a free speech case, not . . . a Confederate flag case," *id.* at 242, this to me is a First Amendment case, not a case about abortion. "It will not do to decide the same question one way between one set of litigants and the opposite way between another." Benjamin N. Cardozo, *The Nature of the Judicial Process* 33 (1921). The fact that Americans have deep differences of opinion on subjects such as these is all the more reason to recognize the unifying force of the First Amendment principle — namely, that none of us has the right to compel assent to our views, but that all of us have the right to express them. The state's failure to be neutral on the right to speak about our most divisive issues will give rise to great resentment. The confidence that all are treated equally with respect to belief, conscience, and expression enables Americans to transcend difference and to make "e pluribus unum" the lasting legacy of our nation.

SHEDD, Circuit Judge, dissenting from the denial of rehearing *en banc*:

According to the panel, the South Carolina General Assembly may enact a statute declaring "Choose Life" the official motto of the state, and that message may be printed on every standard license plate issued to vehicle owners in the state, but the General Assembly may

not take the *less* intrusive step of enacting a statute authorizing a specialty license plate bearing precisely the same message for interested vehicle owners willing to pay a higher fee. Not only is this result bizarre on its face, but it also reflects a misapplication of our recent decision in *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) ("SCV"). Because the panel's decision unduly restricts the ability of elected officials to express the views of their constituents on *any* issue, however controversial, I dissent from the denial of rehearing *en banc*.<sup>1</sup>

### I.

South Carolina issues a license plate to the owner of every vehicle registered in and licensed by the State. S.C. Code Ann. § 56-3-1210. The State owns every license plate, but state law requires that the plate be displayed on the vehicle. *Id.* There are two basic methods by which South Carolina permits issuance of specialty license plates. One method for obtaining a specialty plate is by application to the Department of Public Safety ("DPS") pursuant to the administrative approval process described in S.C. Code Ann. § 56-3-8000. Under this statute, a certified nonprofit organization (or a member of such organization) desiring a specialty plate must apply to DPS and submit four hundred prepaid applications or a \$4,000 deposit, as well as a marketing plan for sale of the plate. *Id.* § 56-3-8000(A)-(B). DPS has discretion to "alter, modify, or refuse to produce" any organizational specialty plate that it deems "offensive" or that "fails to meet community standards." *Id.* § 56-3-8000(H). Once approved, a specialty plate under this section is available only to certified members of the relevant organization. *Id.* § 56-3-8000(D). Revenues generated by sales of such a plate may be spent only to defray the costs of producing nonprofit organizational plates pursuant to this section. *Id.* § 56-3-8000(F).

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<sup>1</sup>It is important to note that the panel's analysis applies equally to *all* messages printed on specialty license plates, not just messages concerning abortion. Given the wide variety of messages currently appearing on specialty plates in South Carolina, *see* discussion *infra*, the implications of this decision are far-reaching indeed.

A second method for obtaining a specialty plate is by direct action in the General Assembly. The General Assembly has enacted separate statutes authorizing issuance of specialty plates to members of certain organizations. *See, e.g.*, S.C. Code Ann. § 56-3-3410 (National Wild Turkey Federation); *id.* § 56-3-3800 (American Legion); *id.* § 56-3-7100 (Shriners); *id.* § 56-3-8200 (Rotary International); *id.* § 56-3-8400 (Lions Club); *id.* § 56-3-8600 (Ducks Unlimited). Likewise, the General Assembly has authorized specialty plates recognizing organizations for issuance to any interested vehicle owner. *See, e.g., id.* § 56-3-3600 (South Carolina Nurses); *id.* § 56-3-4100 (South Carolina Elks Association); *id.* § 56-3-90 (Sertoma International). In addition, the General Assembly has approved specialty plates for disabled veterans, *id.* § 56-3-1120; former prisoners of war, *id.* § 56-3-1150; Medal of Honor recipients, *id.* § 56-3-1850; Purple Heart recipients, *id.* § 56-3-3310; Normandy Invasion survivors, *id.* § 56-3-5350; Pearl Harbor survivors, *id.* § 56-3-5920; and World War II veterans and their spouses, *id.* § 56-3-8800, among others. The General Assembly has even approved a specialty plate commemorating the introduction of the "Shag" as South Carolina's state dance. *Id.* § 56-3-3910.

The General Assembly does not authorize specialty plates merely to recognize certain individuals, organizations, and the official dance. Some authorizing statutes earmark revenues generated from sales of specialty plates to support identified programs. *See, e.g., id.* § 56-3-5010 (earmarking a portion of the fees generated by the "Public Education: A Great Investment" plate for the purchase of computers in identified school districts); *id.* § 56-3-7300 (requiring fees collected for sales of a Saltwater Fishing plate to be deposited into a special account for management and conservation of the state's marine resources); *id.* § 56-3-7910 (requiring fees collected for sales of the *H.L. Hunley* submarine plate to be distributed to the Fund to Save the *Hunley* for continued curation efforts); *id.* § 56-3-9100 (earmarking proceeds from sales of the South Carolina Technology Alliance plate for development of high technology programs and businesses); *id.* § 56-3-930 (earmarking proceeds from sales of "United We Stand" plates for deposit into a fund created to establish rewards for the capture of terrorists); *id.* § 56-3-9500 (designating proceeds from sales of "God Bless America" plates for use by the South Carolina National Guard for homeland security purposes); *id.* § 56-3-9600 (designating

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