

PUBLISHED

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.*

Appeal from the United States District Court  
for the District of South Carolina, at Charleston.  
Patrick Michael Duffy, District Judge.  
William O. Bertelsman, Senior District Judge for the  
Eastern District of Kentucky, sitting by designation.  
(CA-01-3571-23-2)

Argued: September 23, 2003

Decided: March 22, 2004

Before LUTTIG, MICHAEL, and GREGORY, Circuit Judges.

---

Affirmed by published opinion. Judge Michael wrote a separate opinion and announced the judgment. Judge Luttig wrote an opinion concurring in the judgment. Judge Gregory wrote an opinion concurring in the judgment.

---

### COUNSEL

**ARGUED:** Tracey Colton Green, Assistant Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL, Columbia, South Carolina, for Appellants. Carrie Y. Flaxman, PLANNED PARENTHOOD FEDERATION OF AMERICA, New York, New York, for Appellees. **ON BRIEF:** Henry McMaster, Attorney General, John W. McIntosh, Chief Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL, Columbia, South Carolina, for Appellants. Roger Evans, Donna Lee, PLANNED PARENTHOOD FEDERATION OF AMERICA, New York, New York; Peter L. Murphy, LAW OFFICES OF PETER L. MURPHY, Columbia, South Carolina; Michael P. O'Connell, STIRLING & O'CONNELL, P.A., Charleston, South Carolina, for Appellees. Mathew D. Staver, Erik W. Stanley, Joel L. Oster, Anita L. Staver, Rena M. Lindevaldsen, LIBERTY COUNSEL, Longwood, Florida, for Amicus Curiae Liberty Counsel. J. Michael Johnson, ALLIANCE DEFENSE FUND, Shreveport, Louisiana, for Amici Curiae Lawyers for Life, et al.

---

### OPINION

MICHAEL, Circuit Judge, writing separately in parts I, II, and III and announcing the judgment in part IV:

South Carolina has a statute that authorizes a specialty license plate imprinted with the words "Choose Life." A comparable plate with a pro-choice message is not available. Planned Parenthood of South Carolina, Inc. (PPSC) and Renee Carter have sued three South Caro-

lina officials on First Amendment grounds, claiming that the statute authorizing the Choose Life plate amounts to viewpoint discrimination by the State. The district court agreed and declared the statute unconstitutional. We affirm in three opinions, with Judge Luttig and Judge Gregory each writing separately to concur in the judgment.

### I.

In 2001 the South Carolina legislature enacted a statute, *see* S.C. Code Ann. § 56-3-8910 (the Act), that authorizes the issuance of a specialty license plate bearing the message "Choose Life." The Act directs the Department of Public Safety (DPS) to begin production of the plate when it receives either 400 prepaid applications or a deposit of \$4000 from an interested individual or organization. S.C. Code Ann. § 56-3-8910(C). Sale of the Choose Life plate is expected to generate additional revenue for the State; the fee for the special plate is seventy dollars every two years in addition to the regular fee. *Id.* § 56-3-8910(A). Proceeds from the sale of the Choose Life plate are to be placed in a special account administered by the Department of Social Services (DSS). *Id.* § 56-3-8910(B). The DSS may award grants from this account to local, private nonprofit organizations that provide "crisis pregnancy services," but grants may not go to "any agency, institution, or organization that provides, promotes, or refers for abortion." *Id.* The Act makes the Choose Life plate available to any interested vehicle owner in the State. *Id.* § 56-3-8910(A).

South Carolina also has a more general statute that authorizes the issuance of specialty license plates to nonprofit organizations. *Id.* § 56-3-8000. An organization interested in obtaining a specialty plate may apply to the DPS by submitting proof of its nonprofit status along with 400 prepaid applications or a \$4000 deposit, a design for the plate, and a marketing plan for its sale that is subject to DPS approval. The plate may bear only the "emblem, a seal or other symbol" of the organization that the DPS "considers appropriate," *id.* § 56-3-8000(A), and the DPS has the discretion to "alter, modify, or refuse to produce" any organizational plate that "it deems offensive or [that] fails to meet community standards," *id.* § 56-3-8000(H). Finally, the plate is available only to certified members of the organization.

Additional statutory provisions authorize various other specialty plates, most of which recognize veterans or members of civic organizations; these plates can be issued only to the designated honorees or organization members. *See, e.g., id.* § 56-3-3310 (recipients of Purple Heart); § 56-3-2810 (volunteer firemen); § 56-3-5910 (Pearl Harbor survivors); § 56-3-5350 (Normandy invasion survivors); § 56-3-7860 (Shriners). Other plates, such as those bearing messages of state pride, are authorized for issuance to any vehicle owner. *See, e.g., id.* § 56-3-3950 (authorizing the "Keep South Carolina Beautiful" plate). None of these plates, however, bears a message on a politically controversial subject.

PPSC never applied for an organizational plate (one with only an emblem or symbol) under S.C. Code Ann. § 56-3-8000. However, in 2001, when a bill to authorize the Choose Life plate was being considered at a subcommittee hearing in the South Carolina House of Representatives, a PPSC representative testified that the bill should be amended to add a "provi[sion] for a license plate for automobile owners who wish to express [the pro-choice] view." J.A. 29-30. That bill died in committee. A bill to authorize the Choose Life plate was also introduced in the South Carolina Senate in 2001, but consideration of the bill was blocked by parliamentary objections. Later on in the 2001 legislative session, a bill authorizing a NASCAR specialty license plate was amended to provide for the Choose Life plate; the amended bill passed both houses in June 2001 and was signed into law by the Governor in September of that year. It does not appear that any pro-life organization initiated the idea of a Choose Life plate. Rather, the statutory provision for the plate (the Act) came about because of the perseverance of two legislators who were acting on their own initiative.

There are notable differences between the Act authorizing the Choose Life plate and § 56-3-8000, which authorizes specialty plates for nonprofit organizations. First, the Act authorizes a plate bearing a specified message, but § 56-3-8000 authorizes plates bearing only the symbol or emblem of an organization. Second, the Act authorizes the issuance of the Choose Life plate to any interested person, but § 56-3-8000 authorizes the issuance of an organizational plate only to certified members of an organization. Finally, § 56-3-8000 does not automatically entitle an organization to its own plate; the section vests

certain discretion in the DPS to reject an application or to modify the proposed symbol. S.C. Code Ann. § 56-3-8000(H).

Within days after the Act went into effect, the plaintiffs (PPSC and Carter) filed suit seeking declaratory and injunctive relief against the state officials (the State) charged with administering the Choose Life license plate program and with distributing the proceeds from the sale of the plate. Plaintiff PPSC is an organization that provides family planning services to women, including first-trimester abortions and abortion referrals. Plaintiff Carter is a South Carolina resident who owns a passenger car registered in that state. The plaintiffs claim, among other things, that the Act violates the First Amendment because it regulates access to a speech forum on the basis of viewpoint. Both sides moved for summary judgment on the merits, and the State in addition claimed that the plaintiffs lacked standing to sue. The district court concluded that the plaintiffs had standing and granted their motion for summary judgment, holding that the Act discriminates based on viewpoint in violation of the First Amendment. *Planned Parenthood of S.C., Inc. v. Rose (PPSC)*, 236 F. Supp. 2d 564 (D.S.C. 2002). The State appeals, and our review is de novo. *Higgins v. E.I. DuPont de Nemours and Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988).

## II.

The threshold question is whether the plaintiffs have standing to challenge the Act. Standing doctrine is "an amalgam of prudential as well as constitutional concerns." *Finlator v. Powers*, 902 F.2d 1158, 1162 (4th Cir. 1990). The constitutional concern about standing is rooted in Article III, which limits federal court jurisdiction to actual "cases" and "controversies." A justiciable case or controversy requires a "plaintiff [who] has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Thus, to establish standing, a plaintiff must show (1) an actual or threatened injury (2) that was caused by the putatively illegal conduct of the defendant and (3) that is likely to be redressed by a favorable decision. *Heckler v. Mathews*, 465 U.S. 728, 738 (1984); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

# 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.