2012 WL 6192730 (E.D.N.C.) (Trial Motion, Memorandum and Affidavit)
United States District Court, E.D. North Carolina,
Western Division.

AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA, Dean Debnam, Christopher Heaney, Susan Holliday, CNM, MSN, and Maria Magher, Plaintiffs,
v.
Eugene A. CONTI, Jr., in his official capacity as Secretary of the North Carolina Department of Transportation, Michael Robertson, in his official capacity as Commissioner of the North Carolina Division of Motor Vehicles, and Michael Gilchrist, in his official capacity as Colonel of the North Carolina State Highway Patrol,
Defendants.

No. 5:11-CV-00470 (F).
July 31, 2012.

Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment

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Pursuant to Local Civil Rules 7.1, 7.2 and 56.1, Plaintiffs American Civil Liberties Union of North Carolina, Dean Debnam, Christopher Heaney, Susan Holliday, CNM, MSN, and Maria Magher file this brief in support of their motion for summary judgment.

INTRODUCTION

This is a case about the right to free speech. The North Carolina General Assembly passed legislation permitting North Carolina drivers to engage in speech with private elements through a special license plate dedicated to the abortion debate. The State, however, permits expression of only one side of the debate. The First Amendment is designed to protect citizens against exactly that type of abuse. Binding Fourth Circuit precedent directly on point makes it clear that viewpoint discrimination on this very issue violates the First Amendment to the United States Constitution.

NATURE OF THE CASE

Plaintiffs bring this case pursuant to 42 U.S.C. § 1983, as well as the First and Fourteenth Amendments to the United States Constitution. Plaintiffs challenge the constitutionality of the provisions of House Bill 289, "An act to authorize the Division of Motor Vehicles to issue various special registration plates." This statute authorizes a "Choose Life" license plate but not a license plate expressing an alternative viewpoint. Plaintiffs seek declaratory relief as permitted by 28 U.S.C. §§ 2201 and 2002, Rules 57 and 65 of the Federal Rules of Civil Procedure, and the general and equitable powers of this Court. Defendants do not contest that Plaintiffs have standing to bring this action. Order at 2, Dec. 8, 2011.

The Plaintiffs now move for summary judgment pursuant to Federal Rule of Civil Procedure 56(a), as the pleadings and discovery materials on file show that there is no genuine issue of material fact and the Plaintiffs are entitled to judgment as a

matter of law. Fed. R. Civ. P. 56(a), (c).

STATEMENT OF FACTS

On June 18, 2011, the North Carolina General Assembly passed House Bill 289, entitled "An act to authorize the Division of Motor Vehicles to issue various special registration plates" [hereinafter the Act]. Answer of Defs. Conti and Robertson at ¶ 19, Oct. 25, 2011 [hereinafter Answer]. Governor Beverly Perdue signed the bill into law on June 30, 2011. Answer at ¶ 19. The relevant provisions of the Act became effective upon its passage. *Id.*

The Act creates scores of new specialty license plates, including one plate urging viewers to "Choose Life." The legislature has previously authorized a wide variety of specialty plates including "Stock Car Racing Theme," N.C. Gen. Stat. § 20-63(b)(7) (2012), to "National Wild Turkey Federation," § 20-63(b)(10), "Autism Society of North Carolina," § 20-79.4(b)(14), "Shag Dancing," § 20-79.4(b)(121), "Buddy Pelletier Surfing Foundation," § 20-79.4(b)(23), and many others. *See also* Answer at ¶ 22. There are even several specialty license plates displaying the insignia of out-of-state colleges and universities that rival North Carolina institutions of higher learning academically and athletically. *See* Collegiate Plates, North Carolina Division of Motor Vehicles, https://edmv-sp.dot.state.nc.us/sp/SpecialPlatesList? category=collegiate (last visited July 20, 2012) (featuring license plates bearing, for example, the insignias of Georgia Tech and Florida State University); *see also* Order at 3 n.3. The Act brings the total of specialty license plates authorized by the North Carolina legislature to approximately 150. Answer at ¶ 20.

The "Choose Life" plate costs $25.00 annually in addition to the regular yearly registration fees. *Id.* at ¶ 23. From this price, $15.00 of every plate sold will go to the Carolina Pregnancy Care Fellowship, a private organization which funds and supports crisis pregnancy centers in North Carolina. *Id.* According to its website at the time of the filing of this action

> the Carolina Pregnancy Care Fellowship (CPCF) is a statewide, 501(c)3 nonprofit, pro-life organization committed to offering help and encouragement to those God calls into pregnancy care ministry, especially those located in North Carolina. The Carolina Pregnancy Care Fellowship is the official state contact for Choose Life, Inc., the national organization devoted to getting the Choose Life license plates on the road in all fifty states.

Id. at ¶ 23. The funds collected from the "Choose Life" plate are expressly prohibited from "be[ing] distributed to any agency, organization, business, or other entity that provides, promotes, counsels, or refers for abortion." *Id.* at ¶ 23.

The Act provides that the North Carolina Division of Motor Vehicles [hereinafter the DMV] is only authorized to develop the plate once it has received 300 applications from private individuals. *Id.* at ¶ 24. The applications are received through the Carolina Pregnancy Care Fellowship, the sole nongovernmental recipient of funds from the "Choose Life" plate. *Id.* at ¶ 25. The Carolina Pregnancy Care Fellowship, as agent of the DMV, has received the requisite 300 applications for the "Choose Life" plate. Exhibit A, Def. Michael Robertson's Resp. to Pl. American Civil Liberties Union of North Carolina's First Req. for Produc, of Docs. at Request #1: September 22, 2011 email from Bobbie Meyer to Angela Hatcher, Feb. 27, 2012.[1]

[1] The parties engaged in discovery subsequent to the Court granting Plaintiffs' request for a preliminary injunction. The discovery responses did not produce any information or material fundamentally changing the central facts or case law on point.

Once the DMV issues the "Choose Life" plate, it will be available to any interested vehicle owner in the State of North Carolina. Answer at ¶ 27. The DMV invites automobile owners to "[s]how off *your* special interest with one of our plates." *Special Interest Viewer*, North Carolina Division of Motor Vehicles, https://edmv-sp.dot.state.nc.us/sp/demo/special_viewer_specialinterest.htm (last visited on July 23, 2012) (emphasis added). Act supporter Representative Tim Moore also underlined the private elements in the "Choose Life" speech when he told the North Carolina House Finance Committee on June 2,

2011, that it constituted "voluntary *speech that people are making* by purchasing the license plate." Verified Compl. at ¶ 33 (emphasis added).

During the 2011 Legislative Session, various legislators proposed amendments to House Bill 289 to include another specialty plate that would state: "Trust Women. Respect Choice," or simply "Respect Choice." *Id.* at ¶¶ 28-31. Such amendments were offered six times; each time they were rejected. *Id.* at ¶ 32.

Plaintiffs are North Carolina vehicle owners who are interested in obtaining a specialty license plate with a slogan expressing support for a woman's right to reproductive choice, including the right to abortion. *Id.* at ¶¶ 8-12. In light of the actions of the North Carolina General Assembly, they are unable to make their voices heard.[2]

[2] As noted in Judge Fox's Order enjoining the program of administration provided by Session Law 2011-392 or issuance of the "Choose Life" plates, "North Carolina does not have a general statutory administrative mechanism through which organizations or individuals can propose or obtain specialty plates." Order at 2-3. There is an exception "to this general rule ... for certain civic organizations," but it is limited. *Id.* at 3 n.3. Civic organization plates only "shall bear a word or phrase identifying the civic club and the emblem of the civic club." N.C. Gen. Stat. § 20-79.4(b)(42) (2012).

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is no genuine dispute as to a material fact and when it appears that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Haavistola v. Cmty. Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 214 (4th Cir. 1993). Summary judgment must be granted in those cases in "which it is perfectly clear that no genuine issue of material fact remains unresolved and inquiry into the facts is unnecessary to clarify the application of the law." *Haavistola*, 6 F.3d at 214. "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." *Teamster Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991).

ARGUMENT

This is a case about whether the state can " 'manipulate the public debate through coercion rather than persuasion ...' -- in other words, to exercise viewpoint discrimination." *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dept. of Motor Vehicles*, 288 F.3d 610, 624 (4th Cir. 2002) [hereinafter *SCV*] (quoting *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) [hereinafter *Turner*]). The "principal inquiry" in assessing a claim of viewpoint discrimination "is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "A regulation can discriminate based on viewpoint without affirmatively suppressing a certain viewpoint. Discrimination can occur if the regulation promotes one view above others." *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 795 (4th Cir. 2004) (Michael, J., writing separately and announcing the judgment of the court); *see also Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

Whether viewpoint discrimination is permissible here turns on the nature of the "Choose Life" license plate speech, "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). The Free Speech Clause thus allows viewpoint discrimination, but only "when the government speaks for itself and is not regulating the speech of others." *Rose*, 361 F.3d at 792. For example, the government "may determine the contents and limits" of programs it "creates and manages" such as "school[s], museum[s], or clinic[s]." *Id.* at 795-96 (distinguishing the current controversy from the government speech found in *Rust v. Sullivan*, 500 U.S. 173 (1991)). Conversely, "the government may not discriminate based on viewpoint when it regulates private speech." *Id.* at 792; *see also Rosenberger*, 515 U.S. at 828 ("In the realm of private speech or expression, government

regulation may not favor one speaker over another."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 ("The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favors some viewpoints or ideas at the expense of others.' ") (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

Governmental restriction of "mixed (both government and private)" speech must also be viewpoint neutral. *Rose*, 361 F.3d at 794-99; *see also id.* at 800 (Luttig, J., writing separately and concurring in the judgment) ("[A]t least where the private speech component is substantial and the government speech component less than compelling, viewpoint discrimination is prohibited."). The determination that speech is hybrid "is generally dispositive in viewpoint discrimination cases," *id.* at 792 (Michael, J., writing separately and announcing the judgment of the court), and plaintiffs "may seek equal treatment in the form of a level playing field, regardless of whether this is achieved by extending benefits to the disfavored group or by denying benefits to the favored group," *id.* at 790.

The Fourth Circuit has crafted a durable four-factor test for differentiating between governmental, private, and hybrid speech. The test examines:

> (1) the central purpose of the program in which the speech in question occurs; (2) the degree of editorial control exercised by the government or private entities over the content of the speech; (3) the identity of the literal speaker; and (4) whether the government or private entity bears the ultimate responsibility for the content of the speech.

SCV, 288 F.3d at 618 (internal quotation marks omitted). Pursuant to this test, the Fourth Circuit held that South Carolina's "substantially similar," Defs.' Resp. to Motion for Prelim. Inj. at 4 [hereinafter Defs.' Resp.], "Choose Life" license plate "embodie[d] a mixture of private and government speech," *Rose*, 361 F.3d at 793. Accordingly, the state adoption of "a political position while disguising its advocacy as that of private vehicle owners" was unconstitutional viewpoint discrimination. *Id.* at 799. *See also id.* at 800 (Luttig, J., writing separately and concurring in the judgment) ("[V]anity license plates are quintessential examples of ... hybrid speech."). Applying these factors to the North Carolina "Choose Life" license plate demonstrates that it constitutes hybrid government and private speech wherein viewpoint discrimination is impermissible.[3]

[3] While acknowledging it featured "substantially similar" facts, Defs.' Resp. at 4, Defendants argue the four-factor test and the outcome in *Rose* are not binding in the current controversy as the Supreme Court "effectively announced a new test for identifying government speech ... in *Johanns v. Livestock Mktg. Assoc.*, 544 U.S. 550 (2005)." Order at 2. This claim does not survive scrutiny for myriad reasons.
First, the Fourth Circuit has continued to apply the four-factor test in cases subsequent to the *Johanns* decision. *See Turner v. City Council of Fredericksburg*, 534 F.3d 352, 354 (4th Cir. 2008) [hereinafter *Fredericksburg]; WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 299 (4th Cir. 2009).
Second, the analysis in *Johanns* and related cases are not incompatible with the four-factor test. *Johanns* involved a "government-compelled subsidy of the government's own speech," 544 U.S. at 557, whereas *Rose*, like the current controversy, involved private individuals paying a fee to show their special interest via a license plate on their car, 361 F.3d at 788. *See also* Answer at ¶¶ 23, 27. Given the fundamentally distinct facts in *Johanns* and *Rose*, it is unsurprising that the courts arrived at different conclusions regarding the constitutionality of the respective speech in question. *Compare Johanns*, 544 U.S. at 566-67, *with Rose*, 361 F.3d at 799-800. However, the courts reached these disparate ends via similar means. The Supreme Court's government speech jurisprudence in *Johanns*, as well as *Summum*, focused both on who had editorial control over the speech *and* the tenuous connection between private actors and the speech in question. *See Johanns*, 544 U.S. at 565-66 (noting "an employee of one of the respondent associations said he did not think the beef promotions" at the heart of the lawsuit "would be attributed to his group"); *Summum*, 555 U.S. at 471 (noting "there is little chance that observers will fail to appreciate the identity of the speaker," the government). The four-factor test similarly takes into account governmental control over the speech in question *and* the identity of the speaker, as well as who is held responsible for the speech. *See SCV*, 288 F.3d at 618. Justice O'Connor spoke to the general consistency between the supposedly incompatible tests employed in *Johanns* and *SCV* (and, by extension, its progeny, *Rose*) by joining with the Court majority in *Johanns*, *see* 544 U.S. 550, and making *SCV* the basis for her opinion in *Fredericksburg*, *see* 534 F.3d at 354.

> Finally, five of six circuits considering this issue subsequent to *Johanns* have rejected Defendants' interpretation, concluding that specialty license plates at least partially implicate private speech. *See Roach v. Stouffer,* 560 F.3d 860, 867 (8th Cir. 2009); *Choose Life II., Inc. v. White,* 547 F.3d 853, 864 (7th Cir. 2008); *Ariz. Life Coal., Inc. v. Stanton,* 515 F.3d 956, 968 (9th Cir. 2008); *Children First Found., Inc. v. Martinez,* No. 05-0567-CV (2d Cir. Mar. 6, 2006) (unpublished) (attached as Exhibit B pursuant to Local Rule 7.2(d)); *Women's Emergency Network v. Bush,* 323 F.3d 937, 945 n.9 (11th Cir. 2003); *but see Am. Civil Liberties Union of Tenn. v. Bredesen,* 441 F.3d 370, 380 (6th Cir. 2006).

As in *Rose*, the first two factors weigh "in favor of a government speech designation." *Id.* at 793 (Michael, J., writing separately and announcing the judgment of the court). Like the South Carolina analog, the Act "makes the Choose Life plate available to any interested vehicle owner and provides that proceeds from the sale of the plate will be distributed to local pregnancy crisis organizations, but not to family planning organizations that provide or promote abortion services." *Id.; see also* Answer at ¶ 23. It is thus plain that the State's purpose is "to promote the expression of a pro-life viewpoint." *Rose,* 361 F.3d at 793. In another reflection of the South Carolina experience, "the idea for a Choose Life plate originated with the State, and the legislature determined that the plate will bear the message 'Choose Life.' " *Id.* Accordingly, the State exercises "editorial control over the content of the speech on the Choose Life plate." *Id.* Such viewpoint expression and editorial control are compatible with "a government speech designation," but do not determine the final result. *Id.*

In regard to the third and fourth factors, the case law makes it clear that "the identity of the literal speaker" and the party bearing "ultimate responsibility for the [content of the] speech" in "Choose Life" cases is the private vehicle owner. *Id.* at 793-94 (internal quotation marks omitted). As Judge Michael stated in his *Rose* opinion

> I note, as our court did in *SCV*, that the Supreme Court has held that even messages on standard license plates are associated at least partly with the vehicle owners. [288 F.3d] at 621; *Wooley v. Maynard,* 430 U.S. 705, 717, 97 S. Ct. 1428, 51 L. Ed.2d 752 (1977) (holding that vehicle owner had First Amendment right to cover the "Live Free or Die" motto on New Hampshire plate). This association is much stronger when the vehicle owner displays a specialty license plate. Although a specialty license plate, like a standard plate, is state-owned and bears a state-authorized message, the specialty plate gives private individuals the option to identify with, purchase, and display one of the authorized messages. Indeed, no one who sees a specialty license plate imprinted with the phrase 'Choose Life' would doubt that the owner of that vehicle holds a pro-life viewpoint. The literal speaker of the Choose Life message on the specialty plate therefore appears to be the vehicle owner, not the State, just as the literal speaker of a bumper sticker message is the vehicle owner, not the producer of the bumper sticker. The same reasoning leads me to conclude (under the fourth *SCV* factor) that the private individual bears the ultimate responsibility for the speech on the Choose Life plate. Although the Choose Life plate was made available through state initiative, the private individual chooses to spend additional money to obtain the plate and to display its pro-life message on her vehicle.

Id. at 794. The logic employed by Judge Michael to discern the "literal speaker," *Id.*, predicts the U.S. Supreme Court's reliance on the "little chance that observers will fail to appreciate the identity of the speaker" in determining the nature of speech involved in *Summum.* 555 U.S. at 471.[4] A citizen is even "less likely to associate the plate messages with the State" when there is a large "array of specialty license plates available." *Rose,* 361 F.3d at 798. Similarly, a requirement that the State collect "a designated amount of money from private persons" before producing specialty license plates constitutes a "curious" trigger for government speech and instead points towards private speech. *SCV,* 288 F.3d at 620.

[4] *Johanns* exhibits a similar reliance, noting "in the only trial testimony on the subject that any party has identified, an employee of one of the respondent associations said he did *not* think the beef promotions would be attributed to his [private] group" in support of its conclusion that the speech in question was governmental. 555 U.S. at 566-67.

The current controversy features each fact that persuaded the Fourth Circuit in *Rose* to find that the private vehicle owner was "the literal speaker" bearing "ultimate responsibility for the content of the speech." *Rose*, 361 F.3d at 792-93. This case involves a license plate message, and "the Supreme Court has held that even messages on *standard* license plates are associated at least partly with the vehicle owners." *Id.* at 794 (emphasis added) (citing *Wooley*, 430 U.S. at 717). This "association is much stronger when the vehicle owner displays a specialty license plate" as here. *Id.; see also SCV*, 288 F.3d at 621; *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 862-63 (7th Cir. 2008); *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 967 (9th Cir. 2008). Anyone contacting the DMV to obtain a "Choose Life" license plate for their car clearly "holds a pro-life viewpoint" they wish to communicate. *Rose*, 361 F.3d at 794.

Echoing South Carolina, the North Carolina specialty license plate regime features speech difficult, if not impossible, to attribute to the state. Our legislature has authorized approximately 150 specialty plates touching on everything from "Shag Dancing," § 20-79.4(b)(121), to the "Buddy Pelletier Surfing Foundation," § 20-79.4(b)(23). *See also* Answer at ¶ 22. There are even specialty plates directly *adverse* to the interests of our state: several plates display the insignia of out-of-state colleges and universities that rival North Carolina institutions of higher learning academically and athletically. *See Collegiate Plates*, North Carolina Division of Motor Vehicles, https://edmv-sp.dot.state.nc.us/sp/SpecialPlatesList?category=collegiate (last visited July 20, 2012) (featuring license plates bearing, for example, the insignias of Georgia Tech and Florida State University); *see also* Order at 3 n.3.[5] Both the variety and dissonant specific plates offered make citizens "less likely to associate the plate messages with the State." *Rose*, 361 F.3d at 798.

[5] This is by no means the most perverse specialty plate possible under Defendants' theory of the case. "Taken to its logical end," considering a specialty license plate government speech "would allow for the State to authorize license plates bearing messages endorsing a political candidate." Order at 14; *see also Planned Parenthood of S.C., Inc. v. Rose*, 373 F.3d 580, 581 (4th Cir. 2004) (Wilkinson, J., concurring) (concurring in the denial of an en banc rehearing, Judge Wilkinson asked rhetorically "May a state issue plates touting one [presidential] candidate, but not another?").

On the other hand, the process North Carolina drivers must go through to obtain a "Choose Life" license plate ensures a close association between driver and message. Citizens choosing to "show off [their] special interest" via a "Choose Life" plate must pay $25.00 annually in addition to the regular yearly registration fees. Answer at ¶ 23. And only when the DMV has received 300 applications with the associated fee can it develop the "Choose Life" plate. *Id.* at ¶ 24. Such requirements are surely "curious" triggers for the government to engage in speech. *SCV*, 288 F.3d at 620. They highlight an insoluble contradiction in Defendants' argument: the government has a message it wishes to deliver, but only once enough private individuals have paid for the privilege of hearing it. In fact, these requirements are only compatible with the conclusion that individuals are speaking and ultimately responsible for the "Choose Life" message on their car. *See id.* As Act supporter Rep. Tim Moore put it, the "Choose Life" plate constitutes "voluntary *speech that people are making* by purchasing the license plate." Verified Compl. at ¶ 33 (emphasis added).

In sum, applying Fourth Circuit precedent directly on point demonstrates the "Choose Life" license plate constitutes a hybrid of government and private speech. *Rose*, 361 F.3d at 794-99; *see also id.* at 800 (Luttig, J., writing separately and concurring in the judgment) ("[V]anity license plates are quintessential examples of ... hybrid speech."). This finding alone is "dispositive": the government cannot engage in viewpoint discrimination when the speech features "mixed (both government and private)" elements. *Id.* at 792, 794-99 (Michael, J., writing separately and announcing the judgment of the court). Yet, "this is precisely what has happened here." *Id.* at 795. "[T]he State has created a limited (license plate) forum for expression" and then "favored itself as a speaker within the license plate forum, giving its own viewpoint privilege above others." *Id.* While "a regulation can discriminate based on viewpoint without affirmatively suppressing a certain viewpoint," *Id.*, the North Carolina legislature went even further by voting down license plates supporting the other side of the abortion debate on six occasions. *See* Verified Compl. at ¶¶ 28-32. Allowing the "Choose Life" license plate on the road without a countervailing alternative would lead citizens incorrectly to "assume that the presence of one plate and the absence of another are the result of popular choice." *Rose*, 361 F.3d at 798. The First Amendment does not allow Defendants to stifle Plaintiffs' speech as part of their effort to "manipulate the public debate through coercion rather than persuasion." *SCV*, 288 F.3d at 624

(quoting *Turner*, 512 U.S. at 641).

CONCLUSION

The North Carolina General Assembly and Defendants acting in their official capacities seek to distort the public abortion debate by permitting North Carolina drivers to speak for only one side of the issue. The First Amendment protects citizens against exactly that type of abuse. As a matter of law, Plaintiffs are entitled to a judgment enjoining the offering of a "Choose Life" license plate without a countervailing alternative.

Respectfully submitted this 31st day of July, 2012.

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