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NAACP's Fighting Confederate Flags Protected Speech?
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Roadside Rest Areas as Designated Public Forums Constitute Improper Prior Restraint of Free
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STATEMENT OF FACTS

Until recently, South Carolina has flown the Confederate battle flag over the statehouse, now flown over a confederate monument a few yards away as a result of legislative compromise. n1 Other states defeated in the Civil War have maintained state sponsorship of this symbol, i.e., Mississippi and Georgia, through its placement within their state flags. Alabama has finally discontinued the practice of flying the flag over its statehouse. n2 In response to South Carolina's conduct, the NAACP has greeted visitors to South Carolina at interstate roadside information centers by peacefully picketing, leafleting, and informing them about the economic boycott of South Carolina. They have informed these traveling citizens of the interesting phenomenon of continued state flying of a symbol routinely exploited associated with racist messages by the Ku Klux Klan and European-American Unity and Rights Organization (EURO, led by David Duke of Louisiana). Members of EURO have also appeared at the rest areas in response to the NAACP presence.

South Carolina's Attorney General, Charlie Condon, now attempts to require prior permitting of NAACP and EURO activities at eight rest stops, including seven interstate highway and one noninterstate, federally funded highway stops. He also seeks declaratory judgment that their speech activities are a "public nuisance" that may imperil traffic safety and encourage "highway hypnosis." He requests the state court to find that NAACP and EURO speech violates state and federal law and highway safety regulations "and conforming state policies" because it may encourage drivers to avoid the rest areas because NAACP and EURO visitors have expressed political views rather than
encouraged drivers to rest at rest areas. The South Carolina sign in the information/area prohibits meetings or other group activities and commercial use. Attorney General Condon also seeks to collect from the NAACP and EURO the costs of police and public safety services occasioned by their activities at the Welcome Centers. n3

I. Does South Carolina’s flying a Confederate flag over the statehouse compel speech repugnant to those who disagree politically with the views shorthanded by the symbol?
   A. Is the statehouse flagpole a traditional or designated public forum?
   B. Though arguably ambiguous in political meaning, is the Confederate flag a political symbol?
   C. Does the state’s flying the Confederate flag occasion irreparable constitutional injury?

II Does the state’s requiring a permit of NAACP and EURO visitors to South Carolina information centers constitute improper prior restraint of political speech?
   A. Is the permit requirement nondiscriminatory? Are other visitors to South Carolina information centers required to obtain permits before speaking or congregating?
   B. Does the permit requirement contain procedural safeguards protecting speech? Or does it allow unfettered discretion by state officials to engage in impermissible viewpoint discrimination?

III Is the NAACP’s economic boycott of South Carolina protected political speech?

IV Does the NAACP’s and EURO’s political speech or expressive conduct violate federal or state constitution or law by imperiling traffic safety?
   A. Is the NAACP’s and EURO’s political speech protected under the federal First Amendment freedom of speech and the South Carolina Constitution’s “freedom of speech, petition, and assembly” provisions?
   B. Does federal or pre-existing, articulated state law preclude political speech in the South Carolina rest/information centers?
      1. Is a rest area a “traditional” or “designated public forum”?
      2. Is South Carolina’s interest in traffic safety a compelling governmental interest sufficient to overshadow the injury caused by suppressing political speech?
      3. Has South Carolina narrowly tailored its proscription of NAACP and EURO political speech in the information/rest areas?
      4. May South Carolina charge the NAACP for its police services at the information/rest areas?
      5. Is providing political information inconsistent with traffic safety?

SHORT ANSWERS

1. Yes. However, speech that offends is the core of the First Amendment. The Statehouse flagpole is a designated public forum. While the Confederate flag symbolizes racism and
hatred to those who seek its elimination, existing case law does not support that view as a legal position. While those harmed by racism and hatred believe the state's flying the Confederate flag irreparably injures them, the courts disagree thus far. The cure for the state's thirty-eight years of coerced speech is better speech, e.g., the NAACP's demanding that South Carolina, Mississippi, and Georgia use their designated public fora to fly the Black Power flag and the Rainbow Flag for thirty-eight years or more over the South Carolina, Mississippi, and Georgia statehouses.

2. Yes. Because prior restraint bears a heavy presumption against its constitutional validity, since ordinary, presumably speaking picnickers and travelers need not apply for permits to speak, the state's requiring a permit of those expressing political views is improper prior restraint as a content-based restriction of political speech. The state may not erect cumbersome obstacles to a type of speech absent compelling state interest without procedural safeguards to contain the unfettered discretion of state officials like Charlie Condon or the South Carolina police. No procedural safeguards appear in the complaint.

3. Yes, Madison's First Amendment protection of speech, assembly, and petition firmly protects the NAACP's economic boycott as political speech, linking his drafting the First Amendment while the Framers economically boycotted British tea to the NAACP's boycott of Claiborne Hardware.

4. No. Sections 131 and 120 (improperly labeled Section 1209) of the Highway Safety portion of the Code of Federal Regulations cited by Condon do not independently preclude political speech, mandate silence or mental rest, or even relate to the peaceful carrying of pickets or distributing of leaflets. Further, Section 131 explicitly regulates "advertising" through erected signs, i.e., commercial speech through billboards, not political, verbal and written
speech.

A. In fact, while the rest areas are indeed designed to promote the safety of the driver through physical rest, they also are intended to provide "information of interest to the traveling public." n5 Surely, information about boycott and statehouse flags and monuments is information of interest to the traveling public. Thus, rather than discourage political speech, the Code of Federal Regulations encourages information-exchange in the rest areas. Thus, NAACP's and EURO's speech are protected in the rest areas. Consequently, the rest/information area is at least a designated public forum, if not a traditional public forum. Condon cites no state law violated by defendants.

B. Other sections of the Code of Federal Regulations not cited by Condon refute his presentation of visitor silence and mental emptiness as necessary to the governmental interest of traffic safety. In fact, some sections support speech and assembly as consistent with traffic safety, e.g., those encouraging carpooling and innovative ways to promote traffic safety. Even if traffic safety were a sufficient interest to compel suppressing political speech, the context of the very regulations on which Condon relies refute his argument. Clearly, providing information is not inconsistent with traffic safety, and Congress did not view political information as inconsistent enough to note the exception. Further, South Carolina's effort to proscribe political speech is void for overbreadth and vagueness.

ARGUMENT

1. While clearly state action, South Carolina's flying the Confederate flag over the statehouse and a government building do not yet improperly compel private citizen speech to support controversial, political views repugnant to some citizens.

Flying a flag is speech, especially a political flag. In American Legion Post 7 v. Durham, the
Fourth Circuit analyzed flags as "pure speech." The Legion had been cited for flying an "oversized and well recognized symbol of political speech," the American flag. As the court noted, political flags enjoy a particularly favored position in the First Amendment hierarchy. Id. Burning a flag is protected political expressive conduct. *Texas v. Johnson.* So is affixing a peace symbol and flying the flag upside down. *Spence v. Washington.* As the *Spence* court noted, "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." Durham's ordinance limiting the Legion's political speech to smaller size thus burdens political speech. Yet the Durham burden closely resembles New York City's incidental burden restricting rock concert volume in *Ward v. Rock Against Racism.* In *Ward,* the Supreme Court had upheld the scheme limiting volume as a valid time, place, and manner restriction. Yet the Legion's position is stronger because the flag is a political symbol. Thus, South Carolina's flag-flying is political speech.

Does South Carolina's political choice to fly the Confederate flag constitute "state action"?
The application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes "state action" under the Fourteenth Amendment. South Carolina has attempted to apply state rules of law in state court in a manner alleged to restrict First Amendment freedoms. The Eleventh Circuit in *Coleman v. Miller,* one variation on Confederate flag jurisprudence, simply assumed that Georgia's flying the Confederate flag constituted state action. Thus, South Carolina's choice likely constitutes "state action" as well.

Though South Carolina's flying the Confederate flag is state action, the courts have not concluded that such governmental display of the symbol of this particular political view is compelled speech. In *Coleman,* an African American reported that Georgia's choice to fly the Confederate flag over state office buildings like the statehouse forced him to adopt a message endorsing
discrimination against African Americans, a message he found morally offensive. n16 Because hate
groups like the Ku Klux Klan frequently flew that flag, he reported that it thus inspired in him a fear
of violence, sense of self-devaluation, and view of personal exclusion from Georgia’s state processes.
n17 Because he relied only on his own testimony to establish the disproportionate racial effect
required to violate the Fourteenth Amendment’s equal protection clause, Coleman failed to convince
the court that Georgia’s action tangibly harmed African Americans or comparatively harmed white
citizens less. n18 Moving to a First-Amendment claim, Coleman argued that Georgia’s
prominently flying the flag on government buildings forced him to be “an instrument for fostering
public adherence to an ideological point of view he f[ound] unacceptable.” Wooley v. Maynard. n19

As Justice Jackson noted for the Supreme Court, the government cannot force individuals
affirmatively to endorse messages with which they disagree. See West Virginia Board of Education
v. Barnette. n20 Yet, because Coleman had not been required to salute the Confederate flag, the
Eleventh Circuit ruled that Coleman had demonstrated no such governmental coercion of “a belief or
state of mind.” n21 Further, the Coleman court found that the Confederate flag was not an
unambiguous message of racism. Thus a citizen’s having to enter public buildings over which the
battle flag flew did not infringe his First Amendment rights or occasion constitutional injury because
it did not associate that citizen with the flag’s message.

With Coleman, the Eleventh Circuit confirmed its holding in NAACP v. Hunt, n22 in which
African Americans challenged Alabama’s flying the Confederate flag above the capitol dome. The
NAACP presented that the flag chilled free speech because it created emotional difficulty for those
who had to salute the American flag positioned atop the Capitol while the Confederate flag flew.
n23 The court contended that the law could not make decisions based on sensitivity though it agreed
that the flag signaled discriminatory intent. Arguing that the plaintiffs had presented no specific
factual proof of disproportionate impact, Justice Johnson presented in dicta that, while the claim was precluded by res judicata, because all citizens were equally exposed to the flag and citizens of all races offended by its position, the court would have nevertheless rejected Hunt's First Amendment challenge because "Alabama d[id] not compel its citizens to carry or post the flag themselves, or to support whatever cause it m[ight] represent." n24

Yet in Hunt, the NAACP had persuasively argued that the flag was government speech which improperly conveyed a limited rather than evenhanded set of messages, providing a limited public forum to that limited set of messages. n25 Government speech itself is not protected by the First Amendment. n26 Further, the government may not favor certain views by granting public fora to those whose views it finds acceptable while denying them to those it finds unacceptable. n27

The process of government's granting public fora is especially important when the government's dedication of a forum suppresses controversial speech, i.e., engages in impermissible viewpoint discrimination. Cinevision Corp. v. City of Burbank. n28 Nor may government monopolize the marketplace of ideas, drowning out citizen sources of speech. Red Lion Broadcasting Co. v. FCC. n29 Thus, the government may not confer radio frequencies on those broadcasters it prefers. Nor may the government "compel persons to support candidates, parties, ideologies or causes that they are against." Hunt. n30 Yet the Hunt court summarily found that the capitol dome was not public property "by tradition or designation a forum [used] for public communication." Perry Educ. Assn. v. Perry local Educator's Assn. n31 Thus, falling under the weakest rules for First Amendment scrutiny of fora, Alabama could reserve the dome as a nonpublic forum for its own communicative purposes if the reservation was "reasonable and ... not an effort to suppress expression because the officials oppose[d] the speaker's view." Hunt. n32 Because Alabama did not actually legislate its citizens to salute the Confederate flag, the court viewed the
state's using the capitol dome to fly the Confederate flag as reasonable and not suppressive of contrary views. Acknowledging that flying the Confederate flag was a political matter, the remedy lying within voting process and democratic process, the Hunt court concluded that Alabama could continue to fly the Confederate flag. Whether it had to open the forum to contrary views was not addressed.

In a case which much more clearly analyzed the forum, Sons of Confederate Veterans v. Holcomb, n33 the Sons sought a declaratory judgment from the federal district court to require Virginia to place the Confederate flag on their specialty license plates. The court first reviewed whether the plates represented speech of the Commonwealth or of the Sons. Having determined that the specialty plates represented private speech of the Sons, the court reasoned the plates thus implicated their First Amendment rights, just as specialty plates of occupational and civic associations, and "so forth" represented private speech. n34 The court distinguished such private, specialty-plate speech from the state motto "Live Free or Die" on the official licenses of Wooley. n35 The plates were property of the Commonwealth; i.e., the Commonwealth controlled the forum. Yet the Plaintiffs' speech being the issue, the "politically engaged" Sons viewed the Confederate flag as their protected political speech. n36

As the Holcomb court noted, the Sons' speech did not fall into one of three categorical exceptions to speech protection, i.e., fighting words, defamation, and obscenity. See R.A.V. v. St. Paul. n37 Thus, the Confederate flag logo was protected speech on the license plate. As the Holcomb court noted about the same symbol, "regardless of the type of forum, any government regulation of speech must be viewpoint-neutral." Sons of Confederate Veterans v. Glendening. n38 The Mississippi Supreme Court in Daniels v. Harrison County Bd. of Supervisors also argued, as a matter of public policy, that divisive flags like the Confederate flag and swastika belonged in
museums, not flying at government facilities. n39 This is consistent with the Supreme Court's recent proscription against government's "exercis[ing] viewpoint discrimination, even when the limited forum is one of its own creation." Rosenberger v. Rector & Visitors of Va. n40 The Holcomb court viewed the state's effort to avoid displaying the Confederate flag on the state specialty forum because of political controversy as understandable but doubly inappropriate because it highlighted the political nature of the speech, its protected status, and impermissible viewpoint discrimination. n41

Having found that the state had violated the First Amendment through impermissible viewpoint discrimination, the Holcomb court indicated that such a determination sufficed to overturn the ban as unconstitutional, but the court also chose to analyze the forum. As the court outlined, government property typically divided into three categories for First Amendment analysis: traditional public forum, designated public forum, and nonpublic forum. Cornelius v. NAACP. n42 Typical traditional fora included streets, parks, and town squares. A designated public forum "consists of public property which the state has opened for use by the public as a place for expressive activity." Perry. n43 For such fora, reasonable time, place, and manner restrictions are permissible, and content-based regulations necessitate furthering a compelling state interest. Finally, a nonpublic forum is public property that has not been opened to expression by tradition or designation. Such property permitted governmental regulation of speech provided regulations are reasonable and not an effort to suppress speech government officials oppose. n44

Applying these criteria, the Holcomb court turned to four factors from Cornelius to test which forum pertained as follows: government policy, government practice, nature of the property, and compatibility of fit between expressive activity and forum. n45 Government practice of permitting a wide range of specialty plates and the nexus between controversial, private speech
interests and payment to speak on the plates were particularly persuasive in that case. Based on two factors particularly, the controversial stances taken on the plates and the very existence of such plates, the court found that the specialty plate program was, though not a traditional forum, clearly a public forum opened by the state to private citizens and thus a designated public forum. Further, the Confederate flag was undeniably controversial, private speech even if ambiguous in meaning.

In a case suggesting how to manage offensive speech inoffensively, Griffin v. Veterans Affairs, the Fourth Circuit examined the constitutional import of the Veterans Administration's following federal regulations, proscribing "partisan activities" and "display of any ... foreign flags." 

The Veterans Administration (V.A.) thus had not opened the forum to expression of political viewpoints, and Point Lookout was thus a nonpublic forum. The V.A. had chosen to fly the Confederate flag two days per year in the national cemetery, but Griffin argued that restrictions causing failure to fly the flag more frequently were facially and specifically unconstitutional. The Fourth Circuit disagreed, reversing the district court and finding that the purpose of Point Lookout was honoring, in tranquil and nonpartisan surroundings, those having given their lives for the Nation. The Court viewed the Secretary's restrictions for this nonpublic forum to be "reasonable" as a means of insuring the integrity of the VA's message, i.e., a government message that they would honor Confederate soldiers as "citizens of the United States" and "Americans." The Flag Manual on which the VA relied indicated that flags "may not be displayed on NCA property as a means of political activity or similar conduct that promotes any particular viewpoint" (limiting most forms of expression on VA property).

As the Fourth Circuit pointed out, the government is entitled to promote particular messages and take steps to insure that its messages are not garbled so long as its restrictions are reasonable,
they need not be the most or the only reasonable limitations. *Cornelius.* n49 Drawing from *R.A.V.*, as the Court pointed out, the First Amendment likely may not tolerate the kind of favoritism of political speech that Griffin apparently advocated in arguing that flying the Confederate flag to honor "Confederate dead" as "Confederates" rather than as "Americans" does not occasion counterspeech.

n50 Because the V.A. actually did not allow other flags to fly than the American flag, the groups endorsing the Confederate flag actually enjoyed an advantage over other groups politically. As the Court noted, the V.A. may not license one side to fight freestyle while forcing the other to follow Queensberry rules. Though Griffin presented the V.A.'s restrictions as unconstitutional prior restraint, the Court found no First-Amendment problem, no entitlement to daily display of the Confederate flag in a nonpublic forum, and thus no prior restraint.

In this case, because it is not a street, park, or town square, South Carolina's statehouse flagpole is not a traditional public forum. Yet, unlike the V.A. in *Griffin*, the state has opened this forum to express controversial, private speech through flying the Confederate flag on that flagpole every day of the year for 38 years, i.e., speech expressing the views of EURO and the Ku Klux Klan. The very existence of the flagpole for controversial private speech like the Confederate flag, just as in *Holcomb*, supports that the state designated its flagpole as a public forum. The *Coleman* court found discriminatory intent coloring the Confederate flag's adoption in Georgia. n51 The controversial nature of that flag when flying over a statehouse underscores its venerable history as the battle flag lifted over South Carolina to cement massive resistance, spearheaded by John D. Long, after the Supreme Court's landmark implementation decision in *Brown v. Bd. of Education.*

n52

In a recent case, implicitly using its flagpole as a designated public forum, Ohio's Statehouse flew the rainbow flag as a part of a gay pride celebration. Defendant-appellant Spingola climbed the
flagpole and cut it down, stating that a gay pride flag should not fly from a government flagpole.

*Columbus v. Spingola.* n53 Ohio's Tenth Appellate District examined Spingola's argument that the trial court erred in refusing to instruct the jury as to his necessity defense for his convicting him for criminal damaging. Because the state's flying the rainbow flag was lawful, the court refused the appeal, drawing on Ohio's delineation of a necessity defense as response to unlawful action. n54. While most of the case has little relevance to constitutional issues, Ohio's using its flagpole as a designated public forum has supported statehouse flagpoles as designated public fora. Obviously, Spingola saw the flag as political speech and responded with unlawful expressive conduct. Had he requested to fly an anti-gay pride flag, the results might have been different.

Similarly, South Carolina has created a designated public forum, allowing arguably racially discriminatory speech and may not commit constitutional injury through discriminating impermissibly by viewpoint. Yet such viewpoint discrimination has not been sufficiently tested. Though the Confederate flag is an unambiguous symbol of racists, likely of racism as well, demonstrated by EURO's turning out at the rest areas to support its flying, the *Holcomb* court does not find it to be unambiguous. Nor did the Eleventh Circuit in *Coleman.* Thus, flying the Confederate flag on a statehouse flagpole is not constitutional injury because flying it does not unambiguously deprive anyone of constitutional, First-Amendment rights. n55. Yet flying the Confederate flag is undeniably a political matter. n56

However, even if one cannot prove that the Confederate flag is an unambiguous symbol of racism, despite its popularity with hate groups, the flagpole is a designated public forum, and the flag—because controversial and judicially determined to have discriminatory intent—is firmly a political symbol. Thus, since government has no independent speech right, South Carolina may not espouse that political view without permitting counterspeech, i.e., the espousal of contrary,
controversial, arguably ambiguously racist views in its same designated political forum, i.e., flying a contrary flag on the South Carolina statehouse flagpole. While South Carolina may reserve the dome for private, political expression, it may not suppress contrary political views. Thus, the NAACP and PFLAG need to request that South Carolina fly political, controversial, possibly ambiguously racist flags on the South Carolina statehouse flagpole. Though they may not have sufficiently ambiguously racist legacy, possible flag counterspeech could include flying the Black Power and rainbow flags. If indeed, the South Carolina legislature and government have not favored a particular form of political speech over another in a designated public forum that South Carolina opened to a particular political symbol, South Carolina will fly these flags, perhaps as long as it flew the Confederate flag, i.e., 38 years. Should South Carolina refuse to fly controversial political flags expressing contrary views, First Amendment injury will exist because South Carolina will have impermissibly discriminated against a contrary, private, political viewpoint.

II.  

*South Carolina’s requiring permits before NAACP and EURO visitors to South Carolina information centers may speak about political concerns is improper prior restraint of political speech.*

Because speech about the Confederate flag on the South Carolina statehouse flagpole is political, NAACP and EURO speech about that flag’s placement is also political speech. So is speech about the NAACP’s boycott of South Carolina to impact South Carolina’s legislative choices about that flagpole’s use as a designated public forum. n57 South Carolina’s requiring permits of NAACP and EURO visitors to roadside rest areas, obstructing their informing visitors of the flagpole and the boycott, is improper prior restraint of political speech.

“Any system of prior restraints of expression comes to the [Supreme] Court bearing a heavy presumption against its constitutional validity.” *Bantam Books, Inc. v. Sullivan.* n 58 The Supreme
Court has consistently required definite and objective standards to be set forth and followed when government delegates to an official the power to limit citizen speech, containing the tendency of officials to exercise unfettered discretion. *See Shuttlesworth v. City of Birmingham*. n59

In particular, in *Freedman v. Maryland*, n60 the Supreme Court mandated four standards to satisfy when official permission is required to engage in First-Amendment expression as follows: 1) a permit must be granted or denied within the briefest possible time, the time specified in the ordinance; 2) if permission is denied, the ordinance must provide a specific, brief period within which a permanent or temporary injunction must be obtained; 3) any restraint imposed prior to a final judicial determination on the merits must be limited to maintaining the status quo for the shortest possible, specified time period; 4) prompt judicial determination must be assured.

In *FW/PBS, Inc. v. City of Dallas*, n61 the Court identified the two essential safeguards, i.e., specified, reasonable, time period for discussion, and access to prompt judicial review. The Attorney General's complaint fails to specify any time period though request for declaratory judgment presumably insures prompt judicial review. Both are constitutionally required. Outlining the constitutional burden on prior restraint even for commercial speech, *Young v. Roseville*, n62 recounts plaintiff-attorney's efforts to obtain permit to fly the Jolly Roger, modified to identify his law firm and areas of practice. The federal district court heard plaintiff's request for preliminary injunction of Roseville's attempt to enforce its ordinance requiring permitting of flags, signs, or banners. He sought permission twice to fly his flag, the second time text-free, both times which the official refused on the grounds that it was a banner, which could be banned outright, rather than a sign, which could be regulated. n63 Plaintiff claimed that Roseville's distinctions among flags, banners, and signs were impermissibly content-based. n64 Specifically, Roseville permitted unregulated flying of flags of foreign nations with diplomatic relations with the United States or
flags relating to any civic, charitable, religious, patriotic, corporate, fraternal or similar organization. But Roseville regulated flags of nations without diplomatic relations, e.g., Cuba or Iran. While Roseville defended the distinction based on differing legal treatment accorded commercial and noncommercial speech, the court elaborated that, even under the deferential Central Hudson standard accorded commercial speech, Roseville's ordinance failed. n65 As the plaintiff contended, under Roseville's ordinance, even a corporate flag flying the Pillsbury doughboy could be flown permit-free. Roseville's justifications for its permitting scheme were traffic safety and aesthetics. But, as the court noted, these were insufficient justifications for restricting even commercial speech. Though Roseville did not appear to have animus for the Jolly Roger's particular message, the permitting scheme was too vaguely defined, too imprecisely restrictive of speech, and failed to articulate definite and objective standards for officials to follow in limiting private speech. n66 Thus, the ordinance failed constitutional muster by allowing too much discretion to vest in city officials.

On first inspection, South Carolina's requiring a permit for NAACP as well as its opponent, EURO, to use a "rest area" for speech as well as rest purposes suggests that South Carolina at least may not be harboring animus against disfavored NAACP speech, just against political speech. But South Carolina's declaratory judgment action is based on impermissible prior restraint because it lists no law that relates to its claims. Those listed do not support the Attorney General's limits on noncommercial, political speech at all.

In specific, Title 23, Highways, n67 indicates that the Safety Rest Areas are for the "rest" and "information needs" of the motorist, to include "information centers ... at safety rest areas which provide information of interest to the traveling public." Thus, the NAACP's and EURO's activities completely accord with the expected and desired purposes of the rest areas. Further, no federal statutes or codes cited by the Attorney General require permits for First-Amendment political or
controversial activities. The Attorney General presumes that controversial speech is contrary to traffic safety because controversial speech is not listed as a goal of the rest area. But information-sharing is. Further, to avoid the "highway hypnosis" he decries, few tonics could be better than a rousing, robust political debate.

In fact, the federal codes control only some commercial speech carefully through Title 23, Section 131 for "commercial" advertising or affixed billboards. n68 As the statutory canon of construction goes, expressio unius est exclusio alterius, i.e., explicit exceptions are deemed exclusive. Daniels v. Harrison County Bd. of Supervisors n69 So, presumably, where the statute lists no other exceptions to First-Amendment protection of speech, no other exceptions presumably exist. Also, Section 131, controlling outdoor advertising, which simply regulates "erection and maintenance of outdoor advertising, signs, displays, and devices," requires that the Secretary of Transportation conduct a rulemaking process to insure that signs "giving specific information in the interest of the traveling public" be erected and maintained. n70 Permanent signs, i.e., those erected, which none of the NAACP or EURO signs are, will "conform to national standards ... promulgated by the Secretary."

n71 No other process is outlined in the Attorney General's complaint, and the federal regulations specify no other prior restraint on free speech. Further, neither NAACP nor EURO are advertising commercially or erecting billboards; and both provide political, i.e., highly protected, speech through "information in the interest of the traveling public." The state has also indicated no requirement that other visitors to South Carolina's information centers must obtain permits before picnicking or speaking to other visitors. In the sign copied for the complaint, no such requirement is posted at the information centers. Thus, because federal law requires no permit for political speech in rest areas, the request for permit is unconstitutional as applied.

While the federal regulations permit the state to "establish standards imposing stricter
limitations" on erected signs, displays, and devices, those signs regulated under Title 23 are erected signs, displays, and devices, not picket signs. The federal code urges the state to provide information as to "places of interest within the state." n72 Surely, South Carolina's statehouse and the monument several yards away are places of interest within South Carolina.

Federal regulations of the Department of Transportation do allow the state to "establish or permit information systems within the right-of-way ... which provide information of specific interest to the traveling public which do not visually intrude upon the main-traveled way of the highway." n73 Yet verbal interactions among NAACP and EURO members and other visitors, leafleting, and picketing at the rest area do not visually intrude on the main-traveled way. Title23, Section 625.4 restricts "appurtenances," not picketing or speech, controversial or noncontroversial. n74 Title 23 encourages "provid[ing]" rather than restricting "information in the specific interest of the traveling public." n75

Patently, South Carolina has interpreted federal regulations contrary to their express language and intent. Further, while the federal code identifies procedural safeguards to protect speech (e.g., the rulemaking process), the lack of such defined state safeguards allows unfettered discretion by state officials and police to suppress disfavored speech by creating cumbersome ostensible "federal" barriers to speech. The permit requirement appears unconstitutional as applied and likely pretextual.

The Attorney General's complaint misapplies federal law and ignores federal and state constitutional protections. Both the federal and South Carolina constitutions identify First-Amendment protections of speech dismissed lightly in the Attorney General's complaint, i.e., the First Amendment and its South Carolina cousin, n76 which essentially repeats the federal First Amendment protections for speech, petition, and peaceable assembly. The Attorney General's complaint identifies no instances of non-peaceable assembly by EURO or NAACP. Further, the
South Carolina Constitution, like the Fourteenth Amendment to the federal constitution, provides for
due process, i.e., "no person shall be finally bound by a judicial or quasi-judicial decision of an
administrative agency affecting private rights except on due notice and an opportunity to be heard
...nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the
General Assembly." n77 Federal statute also precludes discovery and admission as evidence of
certain reports. Thus, South Carolina's potential attempt to introduce evidence of traffic safety
against the NAACP and EURO, based on federal law, appears contrary to federal law. n78 In this
instance, because the NAACP and EURO received no notice and had no legislatively prescribed
procedure, i.e., procedural safeguards, South Carolina has attempted improper prior restraint on their
political speech. n79 Without procedural safeguards to protect speech, constitutional injury occurs.

III. Following the ironclad American tradition of political speech beginning with Madison's
writing the First Amendment while supporting boycott of British tea, the NAACP's politically
motivated economic boycott of South Carolina is protected political speech.

Having recognized the futility of wresting the Confederate flag from Southern strongholds on
First-Amendment and equal protection grounds, the NAACP employed protected counterspeech
through economic boycott with political ends. South Carolina, like Georgia, removed the
Confederate flag from the statehouse after months of nationally organized marches and economic
boycotts. n80 Leaders from Coca Cola, BellSouth, The Southern Company, and Georgia-Pacific
worked to change the Georgia flag for a year before the introduction of a compromise bill. Monied
speech, prompted by economic boycott, shifted Southern resistance. n81

Because monetary gain of the speakers had not tainted the NAACP's economic boycott for
political purposes, the First Amendment protected the boycott as speech. In a case distinguishable
from South Carolina ex rel. Condon v. NAACP, Federal Trade Commission v. Superior Court Trial
Lawyers Assn. (SCTLA), n82 the Supreme Court examined the First-Amendment protection of boycott by private attorneys, who regularly acted as court-appointed counsel for indigent defendants. When the attorneys in concert (SCTLA) refused to provide such representation until the District increased their compensation, the Federal Trade Commission (FTC) had filed a complaint against the attorney association after they returned to work, alleging that they had conspired to fix prices and conduct a boycott that constituted unfair competition under Section 5 of the FTC Act. Despite the unimpeachably political objectives, i.e., favorable legislation, the Court ruled that the economic motivation of the attorneys left their boycott outside the exception to antitrust law provided by previous Supreme Court ruling in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. Because the attorneys’ alleged restraint of trade was the means rather than the intended consequence by which respondents sought to obtain favorable legislation, the Noerr doctrine did not apply. n83 Because their actions allowed them economic leverage to raise their own compensation, their boycot also did not fall within the First-Amendment protection afforded politically motivated, civil rights boycotts by the Court in NAACP v. Claiborne Hardware Co. n84

However, the NAACP boycott of South Carolina falls squarely within the First-Amendment protection delineated first in Claiborne. Demonstrating the Court's continuing adherence to the earlier holding, the Supreme Court quoted Claiborne, in SCTLA, n85 that the "right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental ... change." n86 Distinguishing Claiborne from SCTLA, the Court noted that the former speakers “sought no special advantage for themselves. ” They merely sought “to change a social order that had consistently treated them as second class citizens.” n87 The present vitality of minority experience of second-class citizenship is revealed in different, poorer patterns of minority, particularly African-American, access to health care. n88 Further,
American physicians perceive African Americans more negatively, even when script, clothing, and looks of pseudopatients are similar. n89 Thus, for every service studied, African Americans receive poorer care, fewer surgical interventions, fewer diagnostic test, and fewer medical services, resulting in lower survival rates, longer hospitalizations, half-as-likely pain medication and twice-as-likely amputation. n90

In *Claiborne* itself, the Court had articulated crucial First-Amendment principles. Even when the organizer speaks in a fiery way as Charles Evers, the NAACP field secretary who instigated the boycott in *Claiborne*, did, i.e., threatening to "break [the] damn necks" of those who did not follow the boycott, the boycott enjoyed protection as did the organizers. In *Claiborne*, the boycott included such expressive conduct as protesters stopping patrons from going into white stores to communicate the fact that a boycott was in progress and to request that they not patronize white stores. n91 The Court concluded that the nonviolent elements of petitioners' expressive conduct, i.e., picketing, leafleting, marching, individual attempts at persuasion, speeches, other communication, including economic boycott, were all entitled to First-Amendment protection because "speech to protest racial discrimination is essential political speech lying at the core of the First Amendment." n92 The Court argued that "through exercise of their First Amendment rights of speech, assembly, association, and petition, rather than through riot or revolution, petitioners sought to bring about political, social, and economic change." n93 In specific, the Court ruled as follows:

1) political boycott and subsequent supportive, expressive conduct are protected under the First Amendment, n94

2) peaceful picketing of a business for political reasons cannot be burdened by state tort liability even if it interferes with prospective economic advantage, n95

3) violence and other criminal acts are bases of tort liability and not constitutionally protected
even if politically motivated \( n^96 \), but

4) the organizer of a boycott may not be held personally liable for the tortious or criminal acts of followers unless he/she demonstrably authorized, specifically directed, or ratified such acts. \( n^97 \)

Most pertinent, the Court viewed that "permissible scope of state remedies in this area is strictly confined to the direct consequences of such [violent] conduct and does not include consequences resulting from associated peaceful picketing" or other protected communication. \( n^98 \) Thus, damages were restricted to those directly, proximately caused by and chargeable to defendants. As the Court directed, the States "may not award compensation for the consequences of nonviolent protected activity." \( n^99 \) Thus, in order to award compensation, the State "must establish that the group itself possessed unlawful goals and that the [organizer] held a specific intent to further those illegal aims." \( n^{100} \) Voiding First-Amendment protection because many audience members were intimidated is "flatly inconsistent with the First Amendment." \( n^{101} \)

Thus, the general rule is that the expressive conduct of boycott for noneconomic purposes, including peaceful picketing, leafleting, and confronting sometimes intimidated others with political speech, is protected. Where the conduct is violent or self-serving in the economic sense, the conduct is not protected. \( n^{102} \) In the case here, unlike \textit{Claiborne}, the NAACP has made no fiery comments that could conceivably direct violence. Condon's complaint lists the following NAACP expressive conduct in support of the boycott: "seeking ro call the attention of travelers to the ... attempted economic boycott of South Carolina businesses ... holding signs, passing out flyers, or otherwise directly or indirectly making their views on public issues known to travelers." \( n^{103} \)

Holding signs, passing out flyers, and making views on public issues known to anyone are the core of First-Amendment protected expressive conduct. Each of the NAACP's expressive and
informative activities here is protected speech, each specifically listed among Claiborne’s own
description of First-Amendment protected boycott activity. In Claiborne, even the intimidated
audience may not avoid the speech of protected speakers; the “unrested” or tired audience holds less
sway for needs to avoid First-Amendment activity. While the Condon complaint speaks to the need
to insure that the “weary traveler” is not a “captive” audience, surely the weary traveler may simply
walk away or close his/her car window. n104

In a case firmly establishing the currency of Claiborne’s precepts, the Ninth Circuit has
followed the Supreme Court in Claiborne, expecting the pregnant about-to-be aborter or her
frightened abortionist to vote with feet or draperies. Planned Parenthood of the
Columbia/Willamette, Inc. v. American Coalition of Life Ministries. n105 As the Brandenburg v.
Ohio Court clarified, “political speech may not be punished just because it makes it more likely that
someone will be harmed at some unknown time in the future” unless the speech can “produce
imminent lawless action.” n106 When the courts protect the publication by pro-lifers of a potential
“hit list” of doctors as protected speech, speech and pamphletting about boycott by NAACP and
EURO visitors to rest areas may not fall to speculative, undocumented concerns about potential
traffic safety problems. Such innocent, anemic concerns hardly qualify as exceptions to the general
rule protecting red-blooded, even bloodthirsty political speech.

In a case outlining a different justification for finding a boycott unprotected, the Second
Circuit applied Claiborne’s principles in Jews for Jesus v. Jewish Community Relations Council of
New York, Inc. (JCRC). n107 Defendants-appellees had successfully leveraged the Stevensville
Country Club with threatened economic boycott by the Jewish community unless the Stevensville
canceled its contract with plaintiff-appellant Jews for Jesus (JFJ). Plaintiff JFJ appealed the district
court ruling in favor of summary judgment for defendants, arguing that the speech in question was not
protected because it was used solely to compel the Stevensville to cancel its JFJ contract. Essentially, JCRC had contacted four Jewish groups, asking whether they would consider using a kosher catering or hotel facility that JFJ used. Next the defendants had contacted Mehl caterers, planned to cater the JCRC function and informed them that, if the Stevensville honored its JFJ contract, an important Orthodox Jewish group would have to cancel its planned convention. The caterers and the Orthodox Jewish group contacted the Stevensville separately with the same message. The President of the JCRC also informed the President of the Stevensville. \textsuperscript{108} JFJ, contract canceled, argued that defendants conspired to deprive them of their civil rights in violation of 42 U.S.C. § 1985(3) (1988) and tortiously interfered with JFJ's contract, and deprived them of their civil right to obtain public accommodation without discrimination on account of race and/or creed. Basing its holding on \textit{Claiborne}, the district court had reasoned that, because plaintiffs would have had no cause of action if defendants simply stopped patronizing the Stevensville without explanation, the collective conveyance of the reason did not change that underlying rationale. \textsuperscript{109} The Second Circuit, on review, stressed the Supreme Court's view that legal prohibition required race- or perhaps class-based animus behind the conspirators' actions. \textsuperscript{110}

Several courts, including the Second Circuit, have defined "class-based" animus to include discrimination based on religion, and plaintiffs argued that defendants had conspired to discriminate based on their espousal of evangelical Christianity. Defendants argued that their actions were based instead on JFJ's deceptive misuse of traditional Jewish symbols and practices, e.g., wearing yarmulkes. The Court ruled that these fact-based questions required jury trial rather than summary judgment. \textsuperscript{111} While Jews can sue for racial discrimination, \textit{see e.g., Le-Blanc-Sternberg v. Fletcher}, \textsuperscript{112} the Second Circuit determined that JFJ could not allege racial discrimination under § 1985 (3) because JFJ contained Jews and non-Jews and could not thus be viewed as a class. Thus, this
cause of action failed.

Then, turning to the common argument against the legitimacy of an economic boycott, i.e., tortious interference with contract, the JFJ Court balanced whether the interference was justified under the circumstances of the particular case by examining the nature of the defendants' conduct, the defendants' motive, the plaintiffs' interests with which defendants interfered, the interests sought to be advanced by defendants, social interests at stake, proximity of defendants conduct to interference, and relations between the parties. n113 The Court again ruled that material issues of fact required jury determination, here to discover whether defendants' conduct stemmed from JFJ's deceptive use of traditional Jewish symbols or impermissible discriminatory reasons. The Court viewed this determination as prerequisite to ruling on whether defendants tortiously interfered with JFJ's contract. If the motive were impermissible, i.e., discriminatory, then government's interest in preventing discrimination and in preventing tortious interference with contract might permit incidental burden on defendants' expressive conduct in boycott.

Finally, the Court examined whether the State could constitutionally regulate defendants' expressive conduct. Under United States v. O'Brien, n114 states could regulate conduct if such conduct entails incidental limitation on speech, if such regulation is within government's constitutional power, "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." n115 Speech that is the very vehicle of crime is not protected, e.g., conspiracy. n116 In JFJ, the Second Circuit decided that New York statutes outlawing directly discriminatory conduct passed muster under the third O'Brien criterion, i.e., were constitutional, being no broader than necessary to further the legitimate goal of preventing discrimination.
Further, the Second Circuit ruled that the First Amendment did not bar liability for common law tortious interference with speech because common law like the discrimination statutes regulated conduct, not speech. Next, the Court turned to the general rule that the First Amendment provided no defense to persons using otherwise protected speech or expressive conduct to force or aid others in violation of a valid conduct-regulating statute. n117 Finally, referring to both Claiborne and SCTLA, the Court interpreted case law and commentary to recognize that boycott, like any expression, if designed to secure an unlawful objective, is not protected by the First Amendment. n118 In JFJ, the Court found that, unlike Claiborne, the JCRC and JFJ dispute was private conduct, not designed to achieve governmental action to vindicate legitimate rights.

In the case here, the question is whether the NAACP’s boycott and supportive expressive activity at the rest areas are designed to secure an unlawful objective or designed to petition government to vindicate legitimate rights. The NAACP’s objective is to petition, legislate, or boycott southern states like South Carolina so that they cease flying the Confederate flag over government buildings. Unlike SCTLA, the NAACP’s objective does not effect personal, financial gain; it likely costs time and money to engage in the economic boycott and supportive expression. Petitioning government is a firmly First-Amendment objective, protected by United States and South Carolina constitutions and common law. Holcomb, Coleman, and Hunt demonstrate that South Carolina’s flying the Confederate flag on the statehouse or several yards away does not create constitutional injury but patently opens a designated public forum for private speech. While there are no instances of a Southern state’s refusing to fly an opposing flag, the NAACP’s boycott and supporting expressive conduct have engaged in and prepared the way for counterspeech. Should any state now refuse pure counterspeech, i.e., flying opposing flags, having flown the Confederate flag and opened designated fora in several states, those states that refuse to provide the designated forum to opposing viewpoints
would be practicing viewpoint discrimination.

Thus, the NAACP's expressive, boycott activity has shone a national spotlight on a strategy for revealing racial discrimination and likely upcoming constitutional injury through viewpoint discrimination. Revealing viewpoint and racial discrimination impels change in both, commendable, not illegal, serving precisely the same constitutionally protected purpose as *Claiborne*’s flawed but protected boycott and the flawed but protected advertisement, “Heed Our Rising Voices,” in *New York Times v. Sullivan*. n119 While economic boycott is controversial, *Claiborne* and its briefs confirm that boycott speech celebrates American consciousness and conscience and favored expressive conduct. Using economic means to secure a constitutional objective follows the Framers and Madison in particular, the Framer who authored the First Amendment. Because insuring viewpoint and racial fairness is completely legal, if the rest areas are designated public fora, the NAACP and EURO may engage there in political debate about the Confederate flag.

*Cinevision* and *Griffin* clarify that the state itself has no First Amendment right to speech. Posner cements this view in *Creeks v. Village of Westhaven*. n120 Further, Posner points out that government entities do not have the right to foment discrimination on grounds of race, which arguably South Carolina and other southern states have done. n121 Thus, where the state has opened a forum to private speech, the state has created a designated public forum. Thus, while *Wooley* supports that the state may promote its own message, *Daniels* establishes that the state may not exercise viewpoint discrimination against speech where the state has opened the forum to private speech, which the state would do if they refuse to permit counterspeech to the kind of speech for which they opened the forum. *Creek* then confirms that the state may not present its own racist views.

Thus, the question is whether NAACP’s protected economic boycott and expressive conduct

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may be regulated by South Carolina in rest areas opened for other First-Amendment purposes. 

IV The NAACP's and EURO's political speech and expressive conduct do not violate federal or state constitutional law; nor, if they imperil traffic safety, is traffic safety a compelling governmental interest sufficing to warrant a content-based restriction on political speech.

A. The NAACP's and EURO's political speech is protected under the federal constitution's First Amendment protection of freedom of speech, assembly, and petition and South Carolina's Constitutional freedom of speech, petition, and assembly.

Both the federal and South Carolina constitutions identify First-Amendment protections of speech, petition, and assembly, through the First Amendment and its South Carolina cousin, S.C. Const. Ann. Art. I, § 2, which essentially repeats the federal First-Amendment protections for speech, petition, and peaceable assembly. The NAACP boycott and expressive activity are thus protected by federal and state constitutions as well as already demonstrated in common law. The Noerr-Pennington doctrine, derived from the First Amendment's guarantee of "the right to petition the government for redress of grievances," shields from antitrust liability entities who join together to influence government action, even if they seek to restrain competition or damage competitors. n122 The doctrine applies to petitions before legislatures, administrative agencies, and courts. Davrie Maine Corp. v. Rancourt. n123 Even secondary boycott, i.e., boycott designed to involve neutral employers and businesses, if motivated by political issues, enjoys First-Amendment protection, regardless of a state's broad power to regulate and protect economic activity. n124

B. Federal law permits political speech in the information/rest areas because it encourages speech on "matters of interest to the traveling public." n125

1. Through federal law specifying that the purpose of the rest areas includes speech of interest to the traveling public, political speech is included, and thus the information/rest areas under federal
funding and guidelines, i.e., all eight rest areas in Condon's complaint, have been opened to private speech. One could argue that these rest areas by the roadside are just as much traditional fora as streets and parks, but it is not necessary. They are at minimum designated public fora, and that is enough for the NAACP to continue to speak.

2. South Carolina's interest in traffic safety is not a compelling governmental interest sufficient to justify a content-based restriction on political speech, the most highly protected form of speech, in a designated public forum like the South Carolina federally regulated information/rest areas.

In a case distinguishable from South Carolina ex rel. Charlie Condon v. NAACP & EURO, American Legion Local 7 v. Durham, the Legion argued that Durham's effort to control its bunting size was a content-based restriction on noncommercial speech and thus subject to strict scrutiny of its constitutionality, i.e., that it had to be "necessary to serve a compelling state interest." n126 Yet, while the American Legion court agreed that the ordinance restricted commercial speech more carefully than noncommercial speech (i.e., more strict regulation of flags containing commercial messages), the Court did not agree that size was a content criterion. n127 Thus, the court concluded that the Clark test for a content-neutral regulation of the time, place, and manner of speech would be valid, i.e., furthering a substantial government interest, narrowly tailored to advance the interest, and leaving open ample alternative channels. See Clark v. Committee for Creative Nonviolence. n128 Durham argued that restricting the size of the American Legion flag furthered its interest in maintaining community appearance, traffic safety, eliminating visual clutter, and preserving property values.

Yet South Carolina's effort to restrict NAACP's and EURO's political speech in an information/rest area is not content-neutral. In fact, South Carolina's complaint specifically points to
prevention of speech that causes "controversy." n129 Thus, regulation suitable for content-neutral speech does not apply in the instant case.

In a case shedding more light on this case, City of Cincinnati v. Discovery Network, Inc., n130 the Supreme Court examined Cincinnati's ordinance prohibiting distribution of commercial handbills on public property. The City had offered "safety and attractive appearance of its streets and sidewalks" as the rationale for its ordinance proscribing commercial speech. n131 Cincinnati had removed commercial newsracks from public sidewalks while allowing noncommercial distribution. Even though commercial speech did not enjoy the constitutional protections of noncommercial speech, requiring only a substantial governmental interest, the Supreme Court struck down the ordinance because there was "no relationship whatsoever to the particular interests that the city ha[d] asserted" and the ordinance's action barring the newsracks. n132 Yet, as the American Legion court noted, these interests were sufficient to satisfy the "substantial government interest" prong of Clark. n133 The second prong, narrow tailoring, merely required that the substantial government interest would be "achieved less effectively absent the regulation." n134 A time/place/manner restriction is not narrowly tailored if a substantial portion of its speech burden did not advance the goal, there of aesthetics and traffic safety. n135 Restricting flag size did generally advance aesthetics and traffic safety. Last, the American Legion court applied the third prong of Clark to examine whether the Durham ordinance left open ample alternative channels through a liberal special-permit process, finding that the ordinance satisfied Clark's third prong. Thus, the regulation did advance a substantial government interest in a reasonably well-tailored fashion through leaving open ample alternative channels of communication. n136

In this case, perhaps traffic safety could be viewed as a "substantial governmental interest," which would suffice for the kind of commercial speech regulated in the federal highway statutes and
regulations. However, regulating political speech requires compelling governmental interest, not substantial interest. Aesthetics and traffic safety are not compelling state interests sufficient to justify a content-based restriction on highly protected political speech. Further, the NAACP boycott and information/rest-area activity, like EURO's rest-area activity, implicate not only political speech but associational freedom. Even by itself, associational freedom is a First-Amendment freedom that that can only be regulated for compelling governmental interest. *Dallas v. Stanglin* n137; *see also City of Chicago v. Morales*. n138 Added to the protections afforded to political speech, the protections afforded political associational freedom absolutely require compelling governmental interest to regulate.

3. **Further, South Carolina's attempts to enlist judicial action through declaratory judgment to restrict all controversial, thus including all political, speech in the information/rest area. Such broad restrictions are unconstitutional and fail narrow tailoring.**

In a case persuasive on the unconstitutionality of broad speech restrictions for areas attached to highways, *Faustin v. Denver*, n139 the district court examined whether Denver could "consistently and uniformly prohibit all speech activities on all highway overpass walkways throughout Denver, regardless of the content of the message." Because the ordinance vested too much discretion in government officials and failed to articulate standards of enforcement, the district court voided the ordinance as unconstitutional for vagueness.

In fact, because the relationship between South Carolina's request for permitting, interpretation of federal highway law, and its banning of all political speech and association in the information/rest areas are so tenuous, a court might easily view South Carolina's complaint as pretextual because racist. *See Creek* (in which Posner argued that Westhaven's requirement of a permit before development by an African American was disingenuous and racist). n140
In a highly related case, tying together overbreadth and associational freedom, *City of Chicago v. Morales*, n141 the Supreme Court examined the constitutional validity of a broadly written city ordinance that encompassed a great deal of harmless behavior and hampered First-Amendment-protected freedom of association, even without a political-speech or political-association component. In that case, the Court had reviewed whether an ordinance that permitted any officer to order to disperse any person he reasonably believed to be a gang member loitering in a public place if the loiterer's purpose was not apparent to the officer. As the Court indicated, the freedom to loiter is part of "liberty." n142 Further, because the ordinance failed to give the ordinary citizen notice when he committed the forbidden rather than the permitted, the ordinance was impermissibly vague and lacked sufficient minimal standards to guide law-enforcement officers, including any standard by which police could judge whether an individual had an apparent purpose. Thus, the Chicago ordinance delegated too much discretion to the police in every application and was constitutionally void for overbreadth. Further, the Court examined whether the ordinance hampered the First-Amendment freedom of assembly of non-gang members and criminalized status rather than conduct. n143

In *Morales*, the ordinance even appeared to have had a positive effect on safety because the gang-related homicide rate dropped 26% after its passage. Thus, the ordinance apparently served an arguably compelling governmental interest. But the Court voided the law because it inhibited the exercise of First-Amendment rights because the impermissible applications of the law were substantial when "judged in relation to the statute's legitimate sweep." *Broadrick v. Oklahoma*. n144 Further, the Court pointed that it could also void a law, even if it did not reach a substantial amount of constitutionally protected conduct, if its impermissible vagueness failed to establish standards for the police and public sufficient to guard against the arbitrary deprivation of liberty interests. *Kolender v. Lawson*. n145 In fact, the Court compared the Chicago ordinance as indistinguishable from the law.
Because the constitutional sins of the sweeping ordinance were too great and Chicago had many reasonable alternatives to combat the "very real threat posed by gang intimidation and violence," the Court struck down the ordinance. \(^{147}\)

*Morales* has implicated only one First-Amendment principle, associational freedom in the non-political context. On the other hand, South Carolina attempts to restrict broadly three federal and three state First-Amendment freedoms, i.e., the NAACP's and EURO's political speech and political associational activities in support of petitioning South Carolina. South Carolina breathtakingly fails narrow tailoring. The Court struck the *Morales* ordinance for vagueness, for permitting unfettered discretion by police (and other officials). The South Carolina sign in the information/area specifically prohibits meetings or other "group" activities and commercial use. While traffic safety may permit prohibiting commercial speech (the type that the federal statute carefully outlines and for which it provides procedural safeguards), no such guidelines appear for prohibiting other First-Amendment freedoms requiring stronger scrutiny. The complaint attempts to disperse completely brown people (and whites there to argue with their points), vocally but peacefully "loitering," without guidelines for when such dispersal may occur, i.e., without notice. Even setting aside certain areas where such expressive conduct and political speech may occur has not been tried, nor has setting aside certain spaces or times at particular areas.

The lack of such narrower restrictions on First-Amendment rights demonstrate that South Carolina has not failed to tailor narrowly. Rather, the state has blatantly tried to sweep First-Amendment embarrassment under an unconstitutional rug. The casual observer might wonder if, whenever a brown face appeared, South Carolina might feel the need to disperse picnickers, those in quiet but political discussion, or those brown people who "loitered" in great enough numbers to "intimidate" or cause "controversy." Patently, South Carolina's efforts to keep brown people and their
political opponents out of the information/rest areas are all too similar to the anti-gang ordinance in Morales, saved from brutally obvious racism by the happy inclusion of the EURO speakers and associates.

Whether or not ample alternative means of political, associational, or petition freedom exist for the NAACP, to assess the final Clark prong, South Carolina has already opened one designated forum for EURO that the NAACP has yet to enjoy, i.e., the flagpole on the South Carolina statehouse. Other southern states, i.e., Mississippi, Alabama, and Georgia, having opened designated public fora similarly, may examine whether the NAACP may be restricted from the use of such designated fora in their states. The NAACP should continue to exercise its well-founded First-Amendment right to boycott, assemble, and petition every southern state with a designated forum for the Confederate flag and also petition for the southern flying of the Black Power and rainbow flags. Plainly, South Carolina has not demonstrated a compelling governmental interest sufficient to justify the constitutional injury South Carolina has already imposed on the NAACP by its broad effort to restrict three federal and three state First-Amendment freedoms.

4. South Carolina may not charge the NAACP or EURO for the state's law-enforcement assignments.

Policing is a police power of the state, and its funding is a state, not individual, responsibility. Because "rights of political association are fragile enough," Claiborne limits derivative liability to protect freedom of association and prohibits adding "the additional threat of destruction by lawsuit." In Morales, the Supreme Court cemented the notion that guilt by association is not a constitutionally valid doctrine. Thus, South Carolina may not impose associational liability on the NAACP or its members, especially for exercising constitutionally protected rights, by charging them for police protection the state chooses to provide. South Carolina may not destroy the NAACP
economically in retaliation for the NAACP's First-Amendment-protected economic boycott of South Carolina.

5. Traffic safety interlocks with information-sharing. Indeed, contrary to South Carolina's complaint, Congress viewed these interests as coordinating and placed both purposes in federal statutes.

As noted earlier, a rousing political debate is just the tonic for highway hypnosis. Nevertheless, assuming arguendo that the NAACP's and EURO's first-Amendment expressive activities imperil traffic safety, even the decrease in homicide rate could not save Morales' ordinance from being voided because it caused constitutional injury to the brown and other people whose associational freedom it restricted. Even a genuine, proven rather than speculative, increase in traffic accidents cannot save South Carolina's broad infringement on NAACP's associational, speech, and petition freedoms.
Footnotes


n2 Robert J. Bein, Stained Flags: Public Symbols and Equal Protection, 28 Seton Hall L. Rev. 897.

n3 South Carolina ex rel. Charlie Condon v. NAACP and EURO, C/A No. 02-CP-46-628 (3/18/02), 1-8.

n4 See, e.g. 23 C.F.R. §§ 752.3 (a) & (c), 752.7 (a).

n5 23 C.F.R. §120; see also § 625.4(i), mislabeled (a)(1) in complaint.


n7 Id. at 607.


n10 Id. at 410.

n11 Id. at 607.


n13 Id. at 803.


n16 Id. at 529.

n17 Id.

n18 Id. at 530.

n19 430 U.S. 705, 711, 97 S.Ct. 1428, 1434 (1977) (holding that the state could not inflict criminal penalties on individuals who covered up license plate mottos), cited in Coleman, at 530.

n20 319 U.S. 624, 640, 63 S.Ct. 1178, 1187 (1943) (prohibiting forced flag salute and pledge).
n21 *Id.* at 632, 63 S.Ct. at 1183, cited in *Coleman*, at 530.

n22 891 F.2d 1555, 1566 (11th Cir. 1990).

n23 *Id.* at 1565.

n24 891 F.2d at 1566.

n25 *Id.* at 1565.

n26 *Id.*; see also *Sons of Confederate Veterans v. Holcomb*, 129 F.Supp. 2d 941, 944 (2000) (First Amendment protects citizen speech rights from government and does not apply to government speech).

n27 *Id.* at 1566.

n28 745 F.2d 560, 575 (9th Cir. 1984).


n30 At 1566.


n32 At 1566.


n34 *Id.* at 943.

n35 At 715, cited in *Holcomb*, at 944.

n36 *Id.* at 946.


n38 954 F.Supp. 1099, 1102 (D.Md. 1997) (denying Maryland the ability to deny access to its specialty plates by the Sons).


n40 515 U.S. 819, 829, 115 S.Ct. 2510 (1995) (though the state may make content-based choices when the state is the speaker).

n41 *Id.* at 946-947.
n42 473 U.S. 788, 802, 105 S. Ct. 3439, 3451 (1985); see also Perry, 460 U.S. at 45.

n43 460 U.S. at 45.

n44 Id. at 46.

n45 473 U. S. at 802.


n47 38 C.F.R. § 1.218(a).

n48 Id. at 821.

n49 473 U. S. at 808; see also Rosenberger, 515 U. S. at 833.

n50 505 U.S. at 392, cited in Griffin, at 824.

n51 885 F.Supp. at 1569.


n54 Id. at 478, 83.

n55 See Mississippi Div. of Sons of Confederate Veterans v. Mississippi of NAACP Branches, 774 So. 2d 388, 390, 2000 Miss. LEXIS 105, 106 (2000) (also finding no constitutional injury from flying the Confederate flag included in the Mississippi flag).

n56 See Holcomb, 473 U. S. at 946-947; see also Daniels v. Harrison County Bd. of Supervisors, 722 So.2d 136 (Miss. 1998)( flying the Confederate flag is a political matter, the remedy for which lies within the legislative process).


n63 Id. at 972.

n64 Id. at 973.

n65 Id. at 973; see also Central Hudson Gas & Elec. Corp. v. Public Serv. commission, 447 U.S. 557, 564, 100 S.Ct. 2343 (1980).

n66 Id. at 974.

n67 §752.3, (a) and (c).


n70 (a) and (f).

n71 (f).

n72 23 C.F.R. §752.7(a).

n73 23 C.F.R. §752.7 (d).

n74 (a).

n75 § 131 (i).


n79 See also 23 U.S.C.S. § 109 (requiring rulemaking process to restrict federal funds for highways).

n80 Mike Jones, Flag Flap: Georgia Makes the Right Decision, TULSA WORLD, Feb. 4, 2001, at 3.


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n84 458 U.S. 886 (1986), cited in SCTLA, at 419.

n85 At 426.

n86 Id. at 915.

n87 Id. at 912, cited in SCTLA, at 426.

n88 Sidney Watson, Race, Ethnicity, and Quality of Care: Inequalities and Incentives, 27 AM. J.L. & MED. 203, 205 (2001).


n90 Watson, at 206-08.

n91 Lloyd Cutler et al., Brief for Petitioners, NAACP v. Claiborne, No 81-202 (2/5/82).

n92 Id. at 915; see also Brief, at n42.

n93 Id. at 907-912.

n94 At 926.

n95 At 918.

n96 At 916.

n97 Id. at 927.

n98 Id. at 918.

n99 Id. at 918.

n100 Id. at 919.

n101 Id. at 921.
See SCTLA; see also Lam v. Ngo, 91 Cal. App. 4th 832, 835, 111 Cal. Rptr. 2d 582, 584 (2001) (where the court applied Claiborne to demonstrators protesting a video store's flying the North Vietnamese flag and found the protest unprotected because violent).

Section 8 (9-10).

Id. at 6 (17).

244 F.3d 1007, 1014, 2001 U.S. App. LEXIS 4974 (9th Cir. 2000).


Id.

Id. at 290.

Id. at 291.

Id.


Restatement (Second) of Torts § 767, cited in JFJ, at 292.


Id. at 377.

Id. at 296.


Id. at 297.


80 F.3d 186, 192-93, 1996 U.S.App. LEXIS 4916 (7th Cir. 1996).

Id. at 193.

Noerr, at 135-38; see also United Mine Workers v. Pennington, 381 U.S. 657, 670, 85 S.Ct. 1585 (1965).
1123 216 F.3d 143, 147, 2000 U.S. App. LEXIS 14546 (1st Cir. 2000).


1125 See §II, at 16-18 supra.

1126 Perry, at 45, cited in American Legion, at 607.

1127 Id. at 607.


1129 Id. at 6.


1131 Id.


1133 American Legion, at 610.

1134 Ward, at 798-99.

1135 Id. at 799.

1136 Id. at 611.


1142 Id.

1143 Id. at 50.


n146 Id. at 90.

n147 Morales, at 67.


n149 At 82.