No. 22-1844

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

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JULIETTE GRIMMETT; RALSTON LAPP GUINN MEDIA GROUP; JOSH STEIN FOR ATTORNEY GENERAL CAMPAIGN,
*Plaintiffs – Appellants*,

v.

N. LORRIN FREEMAN, in her official capacity as District Attorney for the 10th Prosecutorial District of the State of North Carolina,
*Defendant – Appellee*,

and

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; JEFF CARMON, III, in his official capacity as Member of the North Carolina State Board of Elections; STACY EGGERS, IV, in his official capacity as Member of the North Carolina State Board of Elections; TOMMY TUCKER, in his official capacity as Member of the North Carolina State Board of Elections,
*Defendants*.

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On Appeal from the United States District Court for the
Middle District of North Carolina, No.1:22-cv-00568-CCE-JLW

**PLAINTIFFS-APPELLANTS' MOTION FOR**
**INJUNCTION PENDING APPEAL**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, Juliette Grimmett, Ralston Lapp Guinn Media Group, and the Josh Stein for Attorney General Campaign hereby notify the Court that no publicly held corporation owns any of their stock, and with the exception of Ralston Lapp Guinn Media Group, they have no parent corporation. Ralston Lapp Guinn Media Group is wholly owned by Big Picture Strategy Group LLC, a privately held LLC for which no publicly held corporation owns any stock. No other publicly held corporation has a direct financial interest in the outcome of this litigation by reason of a franchise, lease, other profit-sharing agreement, insurance, or indemnity agreement.

## INTRODUCTION

Defendant-Appellee, the District Attorney for Wake County, NC ("District Attorney"), is threatening to enforce a criminal libel law in a way that curtails public debate and undermines the integrity of the democratic process in North Carolina.

By this appeal, Plaintiffs-Appellants ("Plaintiffs") ask this Court to put candidates and voters – not courts and criminal statutes – at the center of the political process. By this motion, Plaintiffs request an injunction pending appeal prohibiting the District Attorney from seeking to enforce an overbroad, poorly tailored criminal libel law while this Court decides whether enforcement of that law violates the First Amendment. Indeed, the district court acknowledged Plaintiffs "have a good argument," that there "is case law tending to support the plaintiffs' arguments that [the law] on its face violates the First Amendment," and that "two circuit courts and one state Supreme Court have held similar statutes violate the First Amendment." (ECF 35, at 3 (attached as Exhibit A).)[1]

The criminal libel law at issue ("Statute") is codified at N.C. Gen. Stat. § 163-274(a)(9). Enacted in 1931, it purports to criminalize core political speech by making it a crime for a person to publish a false "derogatory report" about a "candidate" that is intended to affect the candidate's chances for election. While protecting election integrity may well be a compelling interest, the Statute neither

[1] All references to ECF numbers are to the district court docket.

advances that interest nor includes protections to ensure that genuine political disagreements will not be elevated into criminal prosecutions. Disregarding a recommendation from the State Board of Elections that the matter be "closed" for factual and constitutional reasons, the District Attorney is imminently seeking to present to a grand jury evidence of an alleged violation of the Statute by individuals associated with the sitting Attorney General of North Carolina. The District Attorney's threatened prosecution is having a chilling effect, deterring her opponent in her current reelection campaign from criticizing her on grounds similar to the Attorney General's 2020 ad that she is seeking to criminalize.

This Court should have an opportunity to examine the important constitutional question raised here, and the rulings of its sister courts, before any criminal proceeding is commenced in violation of Plaintiffs' First Amendment rights.

## BACKGROUND

### I. The Challenged Statute.

The Statute purports to make it "unlawful" for

> any person to publish or cause to be circulated *derogatory reports* with reference to any *candidate in any primary or election*, knowing such report to be false or in reckless disregard of its truth or falsity, when such report is calculated or intended to affect the chances of such candidate for nomination or election.

N.C. Gen. Stat. § 163-274(a)(9) (emphasis added).

## II. The 2020 Election.

In 2020, "Josh Stein and Jim O'Neill ran for Attorney General of North Carolina." (Mem. Opinion & Order ("Opinion") at 3, ECF 23 (attached as Exhibit B).) Stein was (and is) the incumbent and O'Neill, the challenger, was (and is) the District Attorney of Forsyth County, NC.

During the campaign, the candidates' records on untested rape kits were a point of contention. Stein had enlisted the help of district attorneys to determine the number of untested kits in their districts. (*Id*. at 2.) Once it became clear that there was a backlog of some 15,000 untested kits sitting on the shelves of local law enforcement, Stein secured funding and formed a working group to develop a protocol for testing all the kits, among other actions. (*Id*.)

In the months before the 2020 election, O'Neill attacked Stein on the issue of rape-kit testing. (ECF 5-1, at 3.) He accused Stein of "st[anding] on the sidelines for almost his entire term while more than 15,000 untested rape kits have sat on the shelves of the lab that Stein is responsible for, collecting dust." (*Id*.) O'Neill also declared that eliminating the backlog was his "number one priority." (*Id*.) But 1,500 of the untested rape kits were within O'Neill's district, (*id*.), where he was responsible for advising the law enforcement agencies and for "the prosecution [of crimes] on behalf of the State," N.C. Const. Art. IV, § 18(1).

To correct the record, the Stein Campaign commissioned the production of a corrective advertisement called *Survivor* that was broadcast in North Carolina in September and October 2020. (ECF 5-1, at 4; ECF 5-2, at 3.) Plaintiff-Appellant Grimmett made the following statement, distinguishing O'Neill's inaction from Stein's efforts:

> As a survivor of sexual assault that means a lot to me and when I learned that Jim O'Neill left 1,500 rape kits on a shelf leaving rapists on the streets, I had to speak out.

(Opinion at 3.)

### III. The O'Neill Campaign Complaint.

In September 2020, the "Friends of Jim O'Neill" committee filed a complaint with the N.C. State Board of Elections (NCSBE) alleging that the Stein Campaign violated the Statute. (ECF 5-1, at 4, 7-10.) In July 2021, counsel for the NCSBE reported that they had "completed [their] investigation and presented [their] findings and recommendation" to the Wake County District Attorney's Office. (*Id.*) The NCSBE recommended that the investigation be "closed" because of the "ambiguity" of the challenged statement and concerns about "unconstitutional application of the statute." (ECF 31-1, at 8.) A year later, however, the office of the Wake County District Attorney indicated that it would proceed to a grand jury concerning *Survivor*. (*See* Opinion at 4.)

**IV. This Action.**

Plaintiffs filed this action on July 21, 2022. (Opinion at 4.) Four days later, and following a contested hearing, the district court granted a temporary restraining order enjoining the district attorney from enforcing the Statute "against any person arising out of the Stein Committee's advertisement called 'Survivor.'" (*Id.*) The district court concluded that Plaintiffs were likely to succeed on the merits and that they would suffer irreparable harm as to Plaintiffs from "very soon subjecting plaintiffs" to "potential criminal prosecution for violating an overbroad criminal libel statute." (*Id.*)

On August 9, 2022, the district court issued its Opinion denying the Motion for Preliminary Injunction. The next day, Plaintiffs appealed and filed in the district court an emergency motion for injunctive relief pending appeal. Two days ago, on August 15, the district court denied Plaintiffs' motion.

**ARGUMENT**

This Court may "grant[] an injunction while an appeal is pending." Fed. R. App. P. 8(a)(1)(C). Four factors guide that decision: (1) whether the party "has made a strong showing" toward success "on the merits"; (2) whether the party "will be irreparably injured absent a[n injunction]; (3) whether an injunction "will substantially injure the other parties"; and (4) "where the public interest lies." *Nken*

*v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 786 (1987)). Those factors favor an injunction here.

## I. Plaintiffs Are Likely to Succeed on the Merits of This Appeal.

Plaintiffs make a "strong showing" on the merits, demonstrating at a minimum that their arguments are "substantial." *Hilton*, 481 U.S. at 776, 778. Indeed, the district court, in denying a stay here, recognized that Plaintiffs had "good argument[s]" "support[ed]" by caselaw "tending to support the plaintiffs' arguments" that the Statute "on its face violates the First Amendment." (*See* ECF 35, at 3.) Furthermore, as the district court recognized, "[t]wo circuit courts and one state Supreme Court have held similar statutes violate the First Amendment." (*Id.*)

The district court made at least three substantial errors: (A) failing to heed the persuasive analyses of the federal courts of appeals and state supreme courts that have uniformly found criminal content-based campaign-speech restrictions to be unconstitutional; (B) concluding that *Garrison v. Louisiana*, 379 U.S. 64 (1964), requires a different analysis; and (C) misapplying the rule (i.e., that a facial challenge can only succeed if a statute is unconstitutional in all its applications) to a facial challenge under the First Amendment, the only context in which the rule does not apply.

### A. The District Court Failed to Distinguish the Persuasive Authorities That Have Uniformly Found Similar Criminal Campaign-Restrictions to Be Unconstitutional.

While the challenged statement – "O'Neill left 1,500 rape kits on a shelf" – is true, it would be entitled to First Amendment protection even if it were false. In *United States v. Alvarez*, 567 U.S. 709 (2012), the Supreme Court considered the constitutionality of the so-called Stolen Valor Act, which made it a crime to falsely claim receipt of military medals. In holding the law unconstitutional, the plurality rejected a categorical rule advanced by the government that "false statements receive no First Amendment protection." *Id*. at 719. "[E]xacting scrutiny is required" when "content-based speech regulation is in question" because "[s]tatutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment." *Id*. at 715.

As a result, "the Constitution demands that content-based restrictions on speech be *presumed invalid* and that the Government bear the burden of showing their constitutionality." *Id*. at 716-17 (emphasis added) (cleaned up). The plurality explained that there is "no general exception to the First Amendment for false statements," *id*. at 718, because "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation," *id*.

The Court ultimately held that the law was unconstitutional because the government had "not shown, and cannot show, why counterspeech would not suffice

to achieve its interest," *id*. at 726, or that in seeking "to regulate protected speech," the challenged restriction was the "least restrictive means among available, effective alternatives," *id*. at 729.

After *Alvarez*, courts must apply strict scrutiny to content-based First Amendment challenges, recognizing that even false speech is entitled to protection. That strict scrutiny is required is all the more clear in the context of core political speech, where the First Amendment's protection is at its zenith. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995). "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs," including "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982).

The *Brown* Court recognized both state interests claimed to be implicated here: "protecting the political process from distortions caused by untrue and inaccurate speech" and the "somewhat different" state "interest in protecting individuals from defamatory falsehoods." *Id*. at 61. In both cases, "the principles underlying the First Amendment remain paramount" and the "preferred First Amendment remedy" is "more speech, not enforced silence." *Id*. (cleaned up).

Thus, in *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016), the Sixth Circuit considered Ohio laws nearly identical to the Statute at issue here. The Ohio statutes made it a crime to "[p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate." Ohio R.C. § 3517.21(B)(10). The Sixth Circuit struck down the Ohio laws as "content-based restrictions that burden core protected political speech and [which] are not narrowly tailored to achieve the state's interest." 814 F.3d at 469.

In so holding, the Sixth Circuit held that "Ohio's political false-statements laws target speech at the core of First Amendment protections – political speech" and were therefore subject to strict scrutiny. *Id*. at 473. That standard rendered the law "presumptively unconstitutional" such that it could only survive if it both (1) served "a compelling state interest" and (2) was "narrowly tailored to achieve that interest." *Id*. The Sixth Circuit found that the law met the first test by "protecting voters from confusion and undue influence, and ensuring that an individual's right to vote is not undermined by fraud in the election process." *Id*. (cleaned up). The law, however, failed the second test.

The Sixth Circuit found that there was "no guarantee the administrative or criminal proceedings will conclude before the election or within time for the

candidate's campaign to recover from any false information that was disseminated." *Id*. at 474. The frivolous complaint issue arose from the fact that potential complainants were not restricted "to state officials who are constrained by explicit guidelines or ethical obligations," but could be made by "political opponents." *Id*. The failure of the statute to facially exclude non-material falsehoods rendered the statute "not narrowly tailored to preserve fair elections." *Id*. at 475. The court also found fault in the statute's application "not only to the speaker of the false statement" but also potentially to "commercial intermediaries." *Id*. Finally, the Sixth Circuit found the law "both over-inclusive and underinclusive," because it could damage an accused campaign while failing to timely penalize an offender. *Id*.

In *281 Care Committee v. Arneson*, 766 F.3d 774 (8th Cir. 2014), the Eighth Circuit found a similar Minnesota law unconstitutional on nearly identical grounds, finding that "a credible threat of prosecution" led to an impermissible chilling of political speech. *Id*. at 781. The following year, the Supreme Judicial Court of Massachusetts struck down that State's cognate law using a strict-scrutiny analysis and rejecting the State's "attempt to shoehorn [the challenged law] into the exception for defamatory speech." *Commonwealth v. Lucas*, 472 Mass. 387, 395 (2015).

Thus, until the decision here, no court, post-*Alvarez*, had found a cognate content-based criminal campaign restriction to be constitutional.

The district court's Opinion was particularly critical of the Sixth Circuit's decision in *Susan B. Anthony List*. It characterized the Sixth Circuit's reasoning as "more like a means to bureaucratically undermine" Supreme Court holdings permitting regulation of defamatory speech "by making it impossible for a state to constitutionally regulate false and malicious lies about a candidate made during a campaign." (Opinion at 15.)

The district court also rejected *Susan B. Anthony List* for two additional reasons. First, according to the district court, "the Sixth Circuit would require at least two means of tailoring that appear mutually exclusive," *i.e.*, "quick action during the lead up to an election" and "multiple safeguards and procedural" protections in place "before such quick action could be taken." (*Id*. at 15 & n.6.) Second, the district court accused the Sixth Circuit of going "beyond the statute's facial requirements [to] speculate about hypothetical or imaginary cases." (*Id*. at 15 (cleaned up).)

In truth, the facts of this very case demonstrate the lack of narrow tailoring in North Carolina. The originating complaint came from the political committee of Stein's "political opponent," O'Neill. That complaint recognized that its timing meant that any redress could only conclude *after* the 2020 election. For that reason, it called on the NCSBE to undertake its investigation "[t]o protect the integrity of *future* elections." (ECF 5-1, at 10 (emphasis added).) In other words, the

complaining party recognized that the only utility of a prosecution under the Statute would be its future *in terrorem* effect in chilling similar speech. The timing problems inherent in the North Carolina statutory regime are patent, given that the District Attorney waited until nearly two years after the election to seek to bring charges related to *Survivor*.

The district court's observation concerning a timely resolution and procedural safeguards fails to account for the fact that North Carolina has provided hardly any procedural safeguards for the Statute. (Opinion at 15.) Thus, it has only the same minimal-to-non-existent safeguards as every other North Carolina misdemeanor. The district court identifies these so-called "institutional protections from prosecutorial abuse" as (i) the *post-hoc* "electoral consequences to prosecutors who bring them," (ii) the prospect of later "civil suits for malicious prosecution," and (iii) the availability of "courts" – presumably state courts after federal courts stand aside – "to curb overzealous application of the statute." (*Id*. at 16.)

The paltriness of those "protections" is clear when compared to the robust regime of procedural protections found constitutionally *insufficient* by the Sixth Circuit in *Susan B. Anthony List*. In Ohio, "there [wa]s a three-step process to be convicted of the crime of making a political false statement," 814 F.3d at 469-70, but the Sixth Circuit found even those procedural protections deficient.

Again, the facts here – not some "imaginary hypothetical" – demonstrate the deficiencies of the North Carolina regime. As discussed above, the O'Neill Campaign sought an investigation, finding of probable cause, and referral to the District Attorney by the NCSBE. (ECF 5.1, at 10.) The NCSBE, we now know, recommended closing the investigation. (ECF 31-1, at 8.) Yet the District Attorney determined to move forward with her own investigation and now prosecution. Unlike the three-step filter through which a complaint in Ohio had to traverse before a referral to a prosecutor – which was *still found insufficient by the Sixth Circuit*, 814 F.3d at 474 – North Carolina law allows many potential enforcers of the Statute. It places investigatory and prosecutorial authority in the NCSBE, any one of 42 elected district attorneys, and even a potential "special prosecutor." *See* N.C. Gen. Stat. §§ 163-22(d), 163-278, 163-278.28. Even more problematic is that, under North Carolina law, *any person* can simply swear out a misdemeanor charge regarding violation of the Statute and obtain a criminal summons or even warrant for arrest as issued by a non-lawyer magistrate. *See id*. §§ 15A-303, -304.

The district court, besides disregarding the issues of timing and lack of procedural protections, failed to address the other problems identified by the Sixth Circuit in the Ohio law: the Statute's application to non-material statements, its application to commercial intermediaries, and its over-inclusiveness and under-inclusiveness. 814 F.3d at 474.

The district court's attempt to dismiss all the Sixth Circuit's concerns as those of an appellate court engaged with imaginary hypotheticals is undermined by the fact that many of the concerns raised by the Sixth Circuit were first raised by the Supreme Court in its earlier opinion in the same case. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014). The Supreme Court reversed the Sixth Circuit's earlier affirmance of dismissal of the case on standing and ripeness grounds. *See id.* at 168. The Court's standing analysis identified multiple problems with the Ohio statute, including that it "allows 'any person' with knowledge of the purported violation to file a complaint," unconstrained "by explicit guidelines or ethical obligations" and that the Ohio Elections Commission "has no system for weeding out frivolous complaints." *Id.* at 164. The Supreme Court also recognized the overarching issue that the Ohio proceedings were "backed by the additional threat of criminal prosecution." *Id.* at 166. Many issues that the district court identified as efforts by the Sixth Circuit "to bureaucratically undermine the holdings in *Garrison*," (Opinion at 15), originated with the Supreme Court in the first instance. Each of those problematic issues is present in the North Carolina Statute.

Given that the prospective prosecution here arises out of a dispute concerning "governmental affairs,' *Brown*, 456 U.S. at 52, concerning how rape-kit testing "should be operated," *id.*, in North Carolina, the district court's blithe dismissal of counterspeech – the preferred and always less restrictive alternative – is particularly

troubling. (Opinion at 12 (noting that the Statute's prohibition "is limited to false defamatory and malicious statements made during a time when false and malicious defamatory statements has [*sic*] the potential to gather momentum with little time for the often slower-to-surface factual counterspeech to be effective").) That the district court's sole authority for that proposition is a concurring opinion in *Whitney v. California*, 274 U.S. 357, 377 (1927), a decision later overruled by *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), underscores the tenuousness of the district court's approach.

Indeed, the Supreme Court's plurality decision in *Alvarez* makes it clear that counterspeech is the preferred alternative. 567 U.S. at 726 ("[t]he Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest"). The district court's dismissive treatment of counterspeech is especially deficient because it fails to recognize that "if counterspeech does not suffice" given the timing issues, the "remedies" provided by the Statute are likewise insufficient. *281 Care Committee*, 766 F.3d at 794. In fact, a successful prosecution under the Statute could, as a practical matter, only occur well after the election sought to be "protected" by the Statute. Implicit in the district court's reasoning, therefore, is the recognition that the Statute is only more efficacious than counterspeech if it serves to chill core protected speech through "enforced silence." *See Brown*, 456 at 61.

### B. The Supreme Court's Decision in *Garrison v. Louisiana* Does Not Command a Different Result.

The district court emphasized the Statute's requirement that the speech at issue be not only "false," but "*derogatory*." (Opinion at 13-14.) By doing so, the district court sought to shoehorn the Statute into the category of generic criminal libel laws arguably endorsed by the Supreme Court's *dicta* in *Garrison v. Louisiana*, 379 U.S. 64 (1964). (Opinion at 6-7 ("*Garrison* is still good law, and it squarely says that criminal libel statutes prohibiting false defamatory statements made with actual malice do not violate the First Amendment.").) But that observation adds nothing to the strict scrutiny analysis here.

The government may well, as an abstract matter, have a compelling state interest in regulating false speech in the context of political campaigns to "preserve[] the integrity of its elections" and to ensure that the right to vote is "not undermined by fraud in the election process." *Susan B. Anthony List*, 814 F.3d at 473. But in the concrete context of a criminal statute regulating election speech, the lack of tailoring and potential for chilling campaign speech casts doubt on the strength of the actual interest supporting this law. *See 281 Care Committee*, 766 F.3d at 787 ("Today we need not determine whether, on these facts, preserving fair and honest elections and preventing fraud on the electorate comprise a compelling state interest because the narrow tailoring that must juxtapose that interest is absent here."). In any event, under strict scrutiny a compelling state interest is only half the inquiry. It

is for lack of *narrow tailoring* that other statutes, like North Carolina's, have fallen short of the First Amendment, not because they failed to account for the interests in regulating false speech. This poor tailoring is all the more problematic in context of criminal penalties, which have the inherent risk of chilling more speech than do less draconian regulatory or civil remedies.

For the same reason, it was error for the district court to treat as "controlling Supreme Court authority" (ECF 35, at 3) the *Garrison dicta* that arguably upheld generic criminal libel laws in principle. That there may be some criminal libel statutes that would survive strict scrutiny does not change the analysis here, much less exempt the Statute from strict scrutiny altogether.

Furthermore, *Garrison* had nothing to do with core political speech. As the court in *281 Care Committee* put it, "although *Alvarez* dealt with a regulation proscribing false speech, it did not deal with legislation regulating false *political* speech." 766 F.3d at 783 (emphasis in original). "This distinction makes all the difference and is entirely the reason why *Alvarez* is not the ground upon which we tread." *Id*.

### C. The District Court Misapplied the *Salerno* Rule.

The district court's analysis was also infected by the mistaken assumption that the rule recognized in *United States v. Salerno*, 481 U.S. 739 (1987) applies here. (*See* Opinion at 5-6.) That rule requires a plaintiff asserting a facial challenge

to "establish that no set of circumstances exists under which the [challenged] Act would be valid." *Salerno*, 481 U.S. at 745. But it does not apply in the First Amendment context. Under the First Amendment, a law is invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (cleaned up). Accordingly, even if there were circumstances where the Statute could be constitutionally applied, that would be insufficient to save the statute from facial challenge.

## II. The Remaining Factors Favor an Injunction Pending Appeal.

The analysis of the remaining three factors is straightforward in this First Amendment context. "Because there is a likely constitutional violation, the irreparable harm factor is satisfied." *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021) (en banc). "Likewise, the balance of the equities favors preliminary relief because '[this Court's] precedent counsels that a state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional.'" *Id.* (quoting *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 191 (4th Cir. 2013) (en banc)). "Finally, it is well-established that the public interest favors protecting constitutional rights." *Id.*

### A. Constitutional Violations Are Irreparable.

As the district court found in its order denying a preliminary injunction, "the allegations and evidence show a threat of imminent prosecution sufficient to potentially chill First Amendment rights and to establish injury-in-fact." (ECF 35, at 4 n.3.) This finding should have ended the irreparable-harm inquiry because the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The "threatened injury in this case" – a criminal prosecution based on campaign speech – is a "'direct penalization, as opposed to incidental inhibition' of First Amendment rights, thus making it the sort that could not be remedied absent an injunction." *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011) (quoting *Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir. 1989)).

The district court was wrong to hold in its injunction-pending-appeal Order that the "potential for state prosecution is not likely to result in irreparable harm" because "[m]ore than the mere threat of criminal action is required." (ECF 35, at 3-4.) While it is "not certain that a grand jury will find probable cause for charging any of these plaintiffs," *id*. at 3, First Amendment injury does not require "an actual arrest, prosecution, or other enforcement action," *Susan B. Anthony List*, 573 U.S. at 158. And that First Amendment injury establishes irreparable harm because, "in the

context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is inseparably linked to the likelihood of success on the merits of plaintiff's First Amendment claim." *Centro Tepeyac*, 722 F.3d at 190.

To be sure, any person charged with violating the Statute could "raise [their] constitutional defenses in state court." (ECF 35, at 3.) But "Plaintiffs need not wait to be arrested under the challenged sections of the Act before they can assert a constitutional claim." *United States v. South Carolina*, 720 F.3d 518, 528 (4th Cir. 2013). Their First Amendment rights were injured once they had a "fear of prosecution [that] was not imaginary or wholly speculative," *Susan B. Anthony List*, 573 U.S. at 160 (cleaned up).

The facts here show why. Through her actions, the District Attorney is raising the threat of criminal enforcement against anyone who publicly argues that a district attorney is responsible for failing to lead to test old rape kits in their jurisdictions. Even now, that threat is suppressing political speech about an issue of substantial public concern: the efforts elected leaders are making to protect survivors. Absent that threat, the District Attorney's opponent in the general election would publicize his understanding "that the state-wide Report which inventoried untested rape kits indicated that only two jurisdictions had a greater backlog of untested rape kits than Forsyth County, with Wake County, Ms. Freeman's jurisdiction having the most,"

because this backlog "is a matter of tremendous importance to voters in Wake County." (Decl. Jeffrey Dobson ¶¶ 4-5 (attached as Exhibit C).)

If the candidate currently running against Forsyth County District Attorney O'Neill similarly believes that the handling of rape-kit testing is a subject of interest to the voters given that the Forsyth County District Attorney has an obligation to advise law enforcement agencies, she would be understandably reluctant to raise the issue because she knows that O'Neill made a criminal complaint on this issue, and that District Attorney Freeman disregarded the NCSBE's recommendation to close the investigation of that complaint due to factual and constitutional concerns. The District Attorney's "effort to prosecute individuals associated with the 2020 advertisement related to untested rape kits" is making North Carolina candidates "reluctant" to engage in public debate about untested kits. (*Id*. ¶ 5.)

Plaintiffs believe that the voters are entitled to know the facts about untested kits in North Carolina. Indeed, the District Attorney's threat to use the Statute to suppress debate on this topic is itself an issue of public concern. Plaintiffs are facing the prospect of criminal charges for sharing a survivor's reaction when she "learned that Jim O'Neill left 1,500 rape kits on a shelf." The threat of future prosecution chills their and others' ability to communicate this important topic to the public.

The ongoing suppression of political debate in North Carolina injures more than just Plaintiffs' constitutional rights; it undermines the public's ability to become

informed as they decide which district attorneys to elect. This continuing abridgement of political speech presents the archetypical injury justifying an immediate injunction.

### B. The Balance of Equities and Public Interest Favor Protecting Constitutional Rights.

The third and fourth injunction factors merge here because the government is the opposing party. *See Miranda v. Garland*, 34 F.4th 338, 365 (4th Cir. 2022) (citing *Nken*, 556 U.S. at 435). The First Amendment violation establishes both. *See Centro Tepeyac*, 722 F.3d 184 at 191. A "state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (cleaned up). And "upholding constitutional rights serves the public interest." *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003).

This analysis is not altered by the district court's observation that "there is a looming [two-year] statute of limitations." (ECF 35, at 5; *see also* Opinion at 23 (Survivor last broadcast in October 2020).) Any injury associated with this looming deadline is self-imposed and non-cognizable. It is self-imposed because the NCSBE completed its investigation by July 2021. And it is non-cognizable because there has never been a public interest in enforcing an unconstitutional restriction on speech.

In any event, Plaintiffs eliminate any potential prejudice to the District Attorney by seeking expedited consideration in this Court and by noting that any injunction pending appeal could be conditioned on tolling agreements. As Plaintiffs wrote to the district court, "Plaintiffs and their affiliates would be willing to enter into a time-limited tolling agreement in order to allow the Fourth Circuit to rule in this matter." (ECF 25, at 2 n.1.) While these tolling agreements are unnecessary – this Court may resolve the appeal by October 2022, and the District Attorney's lack of diligence in pursuing unconstitutional charges does not insulate those charges from injunctive relief – requiring them would provide a means for this Court to address the District Attorney's concerns if the Court deems them worthy.

## CONCLUSION

The Court should enter an injunction barring the District Attorney from taking any step to enforce N.C. Gen. Stat. § 163-274(a)(9) while this appeal is pending.

Dated: August 17, 2022

Respectfully submitted,

/s/ Pressly M. Millen

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*Attorneys for Plaintiffs-Appellants Juliette Grimmett, Ralston Lapp Guinn Media Group, and the Josh Stein for Attorney General Campaign*

## LOCAL RULE 27(a) STATEMENT

Pursuant to Local Rule 27(a), counsel for all parties have been informed of the intended filing of this Motion. The District Attorney has not consented to the relief requested herein and the District Attorney's counsel indicated an intent to seek to respond.

## CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,199 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman.

Dated: August 17, 2022

/s/ Pressly M. Millen
Pressly M. Millen

*Attorneys for Plaintiffs-Appellants Juliette Grimmett, Ralston Lapp Guinn Media Group, and the Josh Stein for Attorney General Campaign*

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system on August 17, 2022. I also certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 17, 2022

/s/ Pressly M. Millen
Pressly M. Millen

*Attorneys for Plaintiffs-Appellants Juliette Grimmett, Ralston Lapp Guinn Media Group, and the Josh Stein for Attorney General Campaign*