No. 22-1844

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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.

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

PLAINTIFFS-APPELLANTS' REPLY IN SUPPORT OF THEIR EMERGENCY MOTION FOR ADMINISTRATIVE INJUNCTION

The District Attorney is threatening to enforce immediately an overbroad *criminal* restriction on *true* speech made in the course of a *political campaign*. The Court should protect the public's First Amendment rights to speak and hear debate

on matters of public concern by prohibiting the District Attorney from enforcing the Statute while this Court considers the important issues presented in this appeal. Unconstitutional chilling of protected speech – especially in the context of public discourse – is irreparable harm.

Plaintiffs file this Reply principally to address two of the arguments made in the District Attorney's Response in Opposition (ECF No. 12) to Plaintiffs' Emergency Motion for Administrative Injunction (ECF No. 10). Plaintiffs also emphasize that the District Attorney makes little effort to defend the merits of the district court's decision here, and that the District Attorney will not be harmed by a short administrative injunction while this Court decides whether to expedite this appeal and grant an injunction during the pendency of that appeal. That administrative injunction is necessary because the District Attorney does not deny that, absent an injunction, she imminently intends to present testimony to a grand jury. Yet the District Attorney acknowledges that her timing interests will be protected if a "decision [is] issued in time for the matter to be presented to a grand jury in September." (Opp'n at 16, ECF No. 12.) For that reason, Plaintiffs respectfully request that this Court decide their Motion for Injunction Pending Appeal (ECF No. 9) by September, and that the Court today enter an administrative injunction preserving the status quo while the Court decides whether to enjoin enforcement during the entirety of this appeal.

I. The Statute Criminalizes True Campaign Speech

The District Attorney is wrong to claim that the "Statute does not prohibit the treatment of rape kits from being debated in a political ad; it only bars someone from knowingly lying about it." (Opp'n at 15.) Lying is not an element; the Statute criminalizes *true* "derogatory reports" made "in reckless disregard of [their] truth or falsity." N.C. Gen. Stat. § 163-274(a)(9). In other words, North Carolinians can be prosecuted for deficient fact-checking when criticizing candidates for office – even when those criticisms are factually accurate. That overbreadth renders the Statute unconstitutional.

Section 163-274(a)(9) can be divided into four elements: "[1] publish or cause to be circulated [2] derogatory reports with reference to any candidate in any primary or election, [3] knowing such report to be false or in reckless disregard of its truth or falsity, [4] when such report is calculated or intended to affect the chances of such candidate for nomination or election." Only the second and third of these elements have any potential connection with falsity.

The second element does not require falsity because derogatory statements can be true. *See Swilley v. Alexander*, 629 F.2d 1018, 1022 (5th Cir. 1980) ("the derogatory information was true"); Derogatory, New Oxford American Dictionary 469 (3d ed. 2010) ("showing a critical or disrespectful attitude"); Derogatory, Webster's New International Dictionary 705 (2d ed. 1936) ("Tending to, or of the

nature of, derogation; disparaging; detracting"). The Supreme Court of North Carolina has addressed this issue when considering a challenge to N.C. Gen. Stat. § 163-274(a)(8), which was enacted with the Statute at issue here and prohibits anonymous "derogatory" charges against candidates. *See State v. Petersilie*, 432 S.E.2d 832, 838 (N.C. 1993). The *Petersilie* Court acknowledged that this prohibition "clearly does" cover "even truthful statements." *Id*. at 842.

The third element – "knowing such report to be false *or* in reckless disregard of its truth or falsity" – does not require falsity because it is disjunctive. *See United States v. Kobito*, 994 F.3d 696, 702 (4th Cir. 2021) ("The word 'or' is almost always disjunctive, that is, the words it connects are to be given separate meanings." (cleaned up)). Section 163-274(a)(9) applies to a *true* statement that is made "in reckless disregard of its truth or falsity."

To be sure, a person charged with violating § 163-274(a)(9) should be able to raise truth as a *defense*. *Cf.* N.C. Gen. Stat. § 15-168 ("Every defendant who is charged by indictment with the publication of a libel may prove on the trial for the same the truth of the facts alleged in the indictment; and if it shall appear to the satisfaction of the jury that the facts are true, the defendant shall be acquitted of the charge."). But placing the burden of showing truth on the defendant is itself a First Amendment violation. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) ("In the context of governmental restriction of speech, it has long been

established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified."); *Garrison v. State of La.*, 379 U.S. 64, 74 (1964) ("We held in *New York Times* that a public official might be allowed the civil remedy *only if he establishes that the utterance was false* and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true." (emphasis added)).

Both the District Attorney and the district court seek to rewrite § 163-274(a)(9) to include a falsity element. As the district court characterized the Statute, "[p]ublication or circulation of 'derogatory reports' is only criminal if the defamatory report *is false* and is published or circulated with knowledge it is false or in reckless disregard for its truth or its falsity." *Grimmett v. Circosta*, No. 1:22-CV-568, 2022 WL 3212325, at *4 (M.D.N.C. Aug. 9, 2022) (emphasis added). But that "is false" language is found nowhere in the statutory text. And while the "North Carolina Supreme Court interprets statutes in ways that avoid constitutional problems," *id*. at *id*. at *3 n.2, this "interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature," *United States v. Lindberg*, 39 F.4th 151, 169 (4th Cir. 2022) (quoting *Salinas v. United States*, 522 U.S. 52, 59–60 (1997)). The North Carolina Supreme Court has "long distinguished between liberal construction of statutes and impermissible judicial legislation or the act of a court in ingrafting upon a law something that has been omitted, which it believes

ought to have been embraced.'" *Johnson v. S. Indus. Constructors, Inc.*, 495 S.E.2d 356, 359–60 (N.C. 1998) (cleaned up).

Here, the district court rewrote § 163-274(a)(9) by conflating "derogatory" with "false [and] defamatory." *Grimmett*, 2022 WL 3212325, at *3 n.2 ("The Court understands a 'derogatory report' to encompass false defamatory speech about a candidate and nothing more."). The district court is right that "North Carolina case law regularly uses the word 'derogatory' in defamation cases," *id.*, but not because derogatory is shorthand for false and defamatory. North Carolina courts explain that speech is "actionable" as defamation if it is "false" and "derogatory." *Badame v. Lampke*, 89 S.E.2d 466, 468 (N.C. 1955). In other words, defamatory speech is necessarily derogatory, but derogatory reports are not necessarily false or defamatory. Even "truthful statements" can be derogatory. *Petersilie*, 432 S.E.2d at 842. And a statute that criminalizes truthful criticism of candidates for office is repugnant to the First Amendment. This Court recently held that "enforcement of [a] non-disparagement clause [involving alleged police misconduct] was contrary to the citizenry's First Amendment interest in limiting the government's ability to target and remove speech critical of the government from the public discourse" because, among other reasons, "one of the interests at the heart of the First Amendment is 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Overbey v. Mayor of*

Baltimore, 930 F.3d 215, 223–25 (4th Cir. 2019) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Section 163-274(a)(9) is unconstitutional and its enforcement should be immediately enjoined because the "threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech – especially when the overbroad statute imposes criminal sanctions" – violating individuals' First Amendment rights and depriving society of the "uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). "Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech." *Id.*

II. The Balance of Equities Favors an Injunction Pending Appeal

The District Attorney also claims that in balancing the equities between the parties, it is the District Attorney's "injury" that is "paramount" here, because an injunction pending appeal would "effectively bar" the District Attorney "from enforcing the statute as to the Stein Political Ad." (Opp'n at 16.) The Court should not credit this argument because any injury is self-inflicted and curable.

First, to be sure, the District Attorney cannot be forced to accept a tolling agreement, but her refusal means that any statute of limitations risk is a self-inflicted injury, not one to be balanced against the irreparable harm to Plaintiffs. *Cf. State v. Biden*, 10 F.4th 538, 558 (5th Cir. 2021) ("The self-inflicted nature of the

government's asserted harm severely undermines its claim for equitable relief." (cleaned up)); *Second City Music, Inc. v. City of Chicago, Ill.*, 333 F.3d 846, 850 (7th Cir. 2003) ("Injury caused by failure to secure a readily available [alternative to an injunction] is self-inflicted, and self-inflicted wounds are not irreparable injury.").

Plaintiffs have offered to "enter into a time-limited tolling agreement in order to allow the Fourth Circuit to rule in this matter." (Mot. Injunction Pending Appeal at 23, ECF No. 9-1.) While the District Attorney blithely complains that this proposal is one that is "only on [Plaintiffs'] terms," (Opp'n at 17–18), the District Attorney does not identify any terms that *would be acceptable*. Instead, it appears the District Attorney's position is that she should be able to run out the clock on this federal court action, and that the Fourth Circuit should stand by and let the district court's decision stand without an opportunity for judicial review of a claim that has prevailed on closely analogous facts in two other circuits.

Second, even without tolling, the District Attorney's timing concerns can be addressed by expediting the appeal. In her response, the District Attorney ignored Plaintiffs' request to expedite the appeal, failing to oppose or even comment on it, while acknowledging that any statute of limitations will not expire for another seven weeks, until "early October 2022." (Opp'n at 16.) Accordingly, it is unnecessary to accept the District Attorney's position that it is simply too late for this Court to consider the important constitutional questions presented here.

Third, the attempt to blame Plaintiffs for any timing issues created by the statute of limitations is disingenuous. The District Attorney claims that the "record below establishes" that Plaintiffs "waited until just days before the grand jury presentment to file this lawsuit." (*Id*. at 18.) That is false. In fact, the district court reached no such conclusion. And the record below establishes the opposite. To the extent the events underlying this case have been marked by delays, those delays lie with the District Attorney. As set forth in detail in the briefing and declaration filed below, (*see* Dist. Ct. ECF Nos. 20 at 13-17; 22-1), these delays included repetitive investigations by two separate governmental agencies – the Board of Elections and the State Bureau of Investigation (SBI) – a months-long delay of a final report from the SBI, and months of deliberations by the District Attorney before finally settling on a course of action. Throughout this process, Plaintiffs cooperated fully in the investigation.

Importantly, the District Attorney did not decide to move forward with a presentment to the grand jury until July 7, 2022. (Dist. Ct. ECF No. 22-1 ¶ 18.) Within a week, Plaintiffs' counsel sought to schedule a meeting with the senior prosecutor to discuss a number of issues related to the grand jury's review of a presentment and, on July 15, 2022, the senior prosecutor agreed to a meeting on July 19, 2022. (*Id*. ¶ 19.) At that meeting, Plaintiffs offered to seek a declaratory judgment on the issue of the constitutionality of the Statute before the initiation of

any grand jury review, as well as a tolling agreement. (*Id.*) The very next day, on July 20, 2022, the senior prosecutor informed Plaintiffs that the District Attorney would not agree to this proposal but instead insisted on proceeding to the grand jury on Monday, July 25, 2022. (*Id.* ¶ 22.) This action was filed the very next day, on July 21, 2022, less than 24 hours after that discussion. (*Id.* ¶ 23.)

While the District Attorney claims that Plaintiffs were aware of "a criminal investigation and the *possibility* of criminal charges since August 2021," (Opp'n at 18 (emphasis added)), Plaintiffs had no indication in the many months that Plaintiffs had been in discussions with the District Attorney's office that the District Attorney actually intended to proceed with this unconstitutional prosecution. Plaintiffs had been in early and continuous communication with the District Attorney, cooperating in the investigation, requesting updates, and explaining why the Statute is unconstitutional (*see generally* Dist. Ct. ECF No. 22-2) – conduct that furthers the equitable "goal of voluntary resolution of disputes without the need for litigation." *Rebel Debutante LLC v. Forsythe Cosm. Grp., Ltd.*, 799 F. Supp. 2d 558, 580 (M.D.N.C. 2011). If Plaintiffs had sued during those discussions, that lawsuit would – appropriately – have faced standing and ripeness concerns. Indeed, Plaintiffs now know that the Board of Elections recommended in May 2021 that "this investigation be closed" because of, among other things, "concern[] that if a violation is found, this might be an unconstitutional application of the statute." (Dist. Ct. ECF No. 31-

1, at 8.) But once the District Attorney revealed her intent to seek the grand jury's review, Plaintiffs promptly offered a tolling agreement to avoid the need for emergency injunctive relief and then sued within 24 hours of the District Attorney's rejection of that offer.

CONCLUSION

The Court should (1) immediately issue an administrative injunction barring the District Attorney from taking any step to enforce N.C. Gen. Stat. § 163-274(a)(9) until Plaintiffs' pending Motion for Injunction Pending Appeal is resolved; (2) expedite this appeal; and (3) extend the injunction for the rest of this appeal.

Dated: August 19, 2022

Respectfully submitted,

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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 2,362 words.

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Dated: August 19, 2022

/s/ Pressly M. Millen
Pressly M. Millen

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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 19, 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 19, 2022

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