RECORD 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; JOSH STEIN; SETH DEARMIN; ERIC STERN,

***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 AT GREENSBORO

BRIEF OF APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1844 Caption: Juliette Grimmett, et al. v. N. Lorrin Freeman

Pursuant to FRAP 26.1 and Local Rule 26.1,

Juliette Grimmett
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Pressly M. Millen Date: 8/12/22

Counsel for: Appellant

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Ralston Lapp Guinn Media Group
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Big Picture Strategy Group, LLC

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Signature: /s/ Pressly M. Millen Date: 8/12/22

Counsel for: Appellant

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Josh Stein for Attorney General Campaign
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Pressly M. Millen Date: 8/12/22

Counsel for: Appellant

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Seth Dearmin
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Pressly M. Millen Date: 8/3022

Counsel for: Appellant

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Josh Stein
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Pressly M. Millen Date: 8/30/22

Counsel for: Appellant

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Eric Stern
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Pressly M. Millen Date: 8/30/22

Counsel for: Appellant

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INTRODUCTION

In the 2020 election for North Carolina Attorney General, the two candidates publicly traded accusations about a matter of public policy and public interest: the handling of untested rape kits by law enforcement officials. After numerous accusations by the challenger about the record of Attorney General Josh Stein, the Stein Campaign ran a political advertisement taking to task the challenger – a local district attorney – for ignoring the untested rape kits in his own judicial district.

Rather than engage in counterspeech from his candidate's platform (or filing a civil defamation claim), the challenger's campaign sought to enlist the police power of the state to regulate political speech. The challenger filed a complaint with the North Carolina State Board of Elections (the "Board") demanding that it investigate the political advertisement under an archaic North Carolina statute that makes it a crime to make a "derogatory report" about a candidate "knowing such report to be false or in reckless disregard of its truth or falsity." The criminal statute in question was passed in 1931 and has been virtually unused in the 91 years since.

The Board investigated the political advertisement and – after determining that the statements claimed to be false were "ambiguous" and the constitutionality of the statute problematic – closed its investigation.

Despite those conclusions by the Board, another local district attorney, the Defendant here, decided to conduct her own investigation and, after a year-long inquiry, determined to proceed to a grand jury.

After the district court denied Plaintiffs' request for a preliminary injunction prohibiting initiation of grand jury proceedings, Plaintiffs sought an injunction pending appeal. This Court granted that request, concluding that Plaintiffs are likely to succeed in their challenge to this regulation of core political speech.

The North Carolina statute at issue violates the First Amendment because it is a content-based restriction that criminalizes core political speech – statements about candidates and elections – in a manner that is overbroad in the speech that it reaches, underinclusive in the campaign speech that it allows, and not narrowly tailored to serve the government's interest using the least restrictive means. The statute cannot meet the Supreme Court's strict-scrutiny test for content-based restrictions on speech, and it should therefore be declared unconstitutional, just as other courts have declared similar statutes to be unconstitutional.

JURISDICTIONAL STATEMENT

The district court has subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs bring claims under the Constitution.

On August 9, 2022, the district court entered a Memorandum Opinion and Order denying Plaintiffs' motion for a preliminary injunction. JA419-435. The next

day, three of the Plaintiffs – Juliette Grimmett, Ralston Lapp Guinn Media Group, and the Josh Stein for Attorney General Campaign – filed a Notice of Appeal. JA436-437.

On August 22, 2022, while Plaintiffs' Motion for Injunction Pending Appeal was pending before this Court, the Defendant District Attorney (the "District Attorney") sought and obtained a "presentment" from a Wake County grand jury against Plaintiffs Josh Stein, Seth Dearmin, and Eric Stern. JA473; *see also* ECF No. 31-2. That same day, Plaintiffs amended their complaint to add Stein, Dearmin, and Stern as parties, JA454-477, and all six Plaintiffs timely filed their Amended Notice of Appeal from the Memorandum Opinion and Order, JA478-479.

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's Memorandum Opinion and Order because it denies an injunction.

ISSUE PRESENTED

Section 163-274(a)(9) of the North Carolina General Statutes proscribes certain derogatory speech intended to affect a political candidate's chances in an election. The issue presented is whether this explicit content-based restriction criminalizing core political speech violates the First Amendment.

STATEMENT OF THE CASE

A. The Challenged Statute.

Section 163-274(a)(9) (the "Statute") criminalizes a narrow category of explicitly political speech. It creates a "Class 2 misdemeanor" applicable to "[a]ny person who shall, in connection with any primary or election":

> 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).

The Statute was enacted in 1931 and has existed in virtual desuetude in the 91 years since.[1] The Statute is one of just a handful of North Carolina statutes that criminalizes a purported subset of libel. Criminal libel in North Carolina is a largely vestigial concept.[2]

Under North Carolina law, a Class 2 misdemeanor provides for both imprisonment and criminal fines. N.C. Gen. Stat. § 15A-1340.23. Because of

[1] The only reported decision reflecting enforcement of the Statute is from 1947. *State v. Pritchard*, 41 S.E.2d 287 (N.C. 1947).

[2] Apart from N.C. Gen. Stat. § 163-274(a)(9), only two North Carolina statutes appear to embody criminal libel concepts: (1) N.C. Gen. Stat. § 14-47, which makes it a misdemeanor to "secure the publication" of a "false and libelous statement" transmitted to a "newspaper or periodical," and (2) N.C. Gen. Stat. § 53C-8-10, which makes it a misdemeanor to make a false statement concerning the financial condition of a bank.

Attorney General Stein's position as a "public official," North Carolina law further provides that, "in addition to the punishment provided by law," he could "be removed from office by the judge presiding." N.C. Gen. Stat. § 163-276.

Under North Carolina's statutory regime, an array of state actors as well as any aggrieved citizen may initiate the process of prosecuting political campaign speech. These include the Board, at its own behest or that of a complaining candidate or other person.[3] Any of North Carolina's 42 elected district attorneys (either with or without the Board's concurrence) can also investigate and initiate prosecution under the Statute.[4] In addition, a special prosecutor (as sought by any registered voter or county board of elections member) may be appointed by a court if a district attorney chooses not to prosecute.[5] Finally, any citizen who feels aggrieved can initiate a prosecution. *See* N.C. Gen. Stat. §§ 15A-303, -304. Those statutes provide that *any person* can swear out a misdemeanor criminal summons or warrant for arrest issued by a non-lawyer magistrate that charges a violation of the Statute.

[3] The Board's principal authority for investigations is found in N.C. Gen. Stat. § 163-22(d).
[4] *See* N.C. Gen. Stat. § 163-278.
[5] Section 163-278 incorporates the provisions of N.C. Gen. Stat. § 163-278.28, which provides for yet *another* potential actor who may punish political speech, a "special prosecutor." N.C. Gen. Stat. § 163-278.28(b).

B. The 2020 General Election for the Office of North Carolina Attorney General and the Issue of Untested Rape Kits.

In 2020, Stein, the incumbent, and Jim O'Neill, the Forsyth County District Attorney, were the candidates for the Office of North Carolina Attorney General. JA37. As explained below, the dispute underlying this action concerns the handling of a backlog of untested rape kits in North Carolina.

1. O'Neill Makes False Accusations Against Stein Concerning Rape Kits.

After being elected Attorney General in 2017, Stein enlisted the help of the State's district attorneys, including O'Neill, to determine the number of untested kits in their prosecutorial districts. JA37. The district attorneys were asked to send a letter to each law enforcement agency in their jurisdiction, tally the results, and then notify the State Crime Lab of the number of untested rape kits. JA37. Later that year, the N.C. Department of Justice, over which Stein presides as Attorney General, commissioned a state-wide inventory of the backlog. JA37.

After the study concluded, the Department of Justice issued a Report indicating a statewide backlog of some 15,000 untested rape kits. JA37. Stein thereafter secured authorization from the North Carolina General Assembly for and created a rape-kit tracking system and a working group to develop a protocol for testing the as-yet untested kits, as well as all rape kits going forward. JA37-38. Stein also secured $4 million in additional funding to accelerate the outsourcing of old

rape kits for testing. JA37-38. Stein and his team then drafted the "Survivor Act," enacted in 2019, which secured state funding to further outsource testing and instituted requirements so that no backlog would develop in the future. JA38.

Notwithstanding Stein's work, O'Neill (then a candidate to be Stein's opponent) issued a campaign statement on October 7, 2019, claiming that Stein "has stood 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." JA38. He repeated those charges on at least two reported occasions. JA38. As the Department of Justice Report stated, however, the untested rape kits were not in the State Crime Lab but instead at local law enforcement agencies across the state. JA38. The backlog included more than 1,500 untested rape kits – 10% of the entire state's backlog – within Forsyth County, O'Neill's prosecutorial district. JA38.

O'Neill also made campaign statements regarding his own putative work on the subject of rape kits. For example, in September 2019, he issued a statement condemning Stein and stating that O'Neill had "been fighting & trying to give a voice to these victims for the last 23 y[ea]rs while [Stein] gave a 23 sec[ond] press conference." JA38. O'Neill also declared that eliminating the backlog was his "number one priority." JA38.

2. The Stein Campaign's Corrective Advertisement – *Survivor*.

To answer O'Neill's false and derogatory accusations and to provide the electorate with accurate information about the rape-kit issue, the Stein Campaign publicly challenged those accusations with speech of its own. The Campaign created *Survivor*, a corrective political advertisement, in the summer of 2020. JA50-51.

Plaintiff Ralston Lapp Guinn Media Group ("Ralston Lapp") produced that advertisement. JA51. Plaintiff Grimmett appeared in the political advertisement and made the following statement, drawing the contrast between Stein's efforts to address the untested rape kits and O'Neill's failure to engage in similar efforts within his own jurisdiction:

> 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.

JA51. Before producing *Survivor*, Ralston Lapp and the Stein Campaign had all the statements made in the political advertisement, including those of Grimmett, fact-checked by an outside firm specializing in confirming the accuracy of claims in political advertising. JA51.

Survivor was ultimately broadcast on various television stations throughout North Carolina during September and October 2020. JA39.

C. The O'Neill Campaign Seeks a Criminal Investigation into *Survivor*.

On September 29, 2020, with the election just five weeks away, an attorney for the "Friends of Jim O'Neill" campaign committee filed a complaint with the Board alleging that the Stein Campaign and Stein, by running the *Survivor* advertisement, violated the Statute. JA42-45. They claimed that O'Neill, "who is the elected District Attorney for Forsyth County, has never in his career left 'rape kits sitting on a shelf'" because he was "never in the chain of custody as it relates to rape kits." JA43.

The O'Neill complaint stated that, "[t]o protect the integrity of future elections, the O'Neill Committee requests the Board of Elections investigate these allegations and find probable cause to refer this Complaint to the Wake County District Attorney for further action." JA45.

D. The Investigation by the Board.

Stein prevailed in the general election, and months later, in March 2021, Board investigators told Grimmett that they were seeking information concerning the political advertisement. JA39. In March 2021, Board investigators interviewed Grimmett. JA40. Later that same month, the same investigators interviewed Plaintiff Dearmin, the Attorney General's chief of staff. JA40.

On July 14, 2021, Board counsel reported to Stein Campaign counsel that they had "completed our investigation and presented our findings and recommendation" to the Wake County District Attorney's Office. JA40.

Unknown to Plaintiffs until after they filed this action, the Board, on May 28, 2021, had issued a Final Report. *See* JA441-447. That Report acknowledged Dearmin's contention that the purpose of *Survivor* was "to refute prior false claims publicly made and repeated by Jim O'Neill from 2019-2020"; the Report included O'Neill's inaccurate statements about Stein on the issue of untested rape kits. JA443, JA446. The Final Report also noted the Stein Campaign's rationale for its advertisement, which was based on O'Neill's duties as district attorney under the North Carolina Constitution. Section 18(1) of Article IV of the N.C. Constitution provides that a district attorney "shall advise the officers of justice in his district [and] be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district." *See* JA445. The Final Report noted that "O'Neill in his capacity and authority as the elected DA[] could have inquired and acted to assist in eliminating those remaining untested kits in his district in the interest of justice," and that, "[i]f this interpretation is adopted, the falsity of Stein's claim is arguably ambiguous and therefore inconclusive." JA445.

The Board Report ultimately found that the issue of falsity was ambiguous and it was therefore "inconclusive to determine a clear violation of N.C.G.S. § 163-

274(a)(9) occurred." JA447. "Additionally, the [Board] [was] concerned that if a violation is found, this might be an unconstitutional application of the statute." JA447. "Due to the foregoing findings in this report, the [Board] recommend[ed] that this investigation be closed." JA447.

E. The Investigation by the State Bureau of Investigation.

Despite the Board's findings and conclusions, the District Attorney moved forward with her own investigation. Over the next six months, through the end of 2021, SBI agents conducted an exhaustive series of interviews into virtually every aspect of the political advertisement's creation, production, execution, and content. JA40.

Throughout early 2022, the District Attorney's office communicated nothing of substance to Plaintiffs regarding the investigation. JA309. Upon learning in July 2022 that the District Attorney intended to move forward with a grand jury, JA309-310, this action was filed.

F. The Current Proceedings.

The Complaint here was filed by the original Plaintiffs, Grimmett, Ralston Lapp, and the Stein Campaign, along with a motion for a temporary restraining order and preliminary injunction, on July 21, 2022. JA10-35. The original Defendants were the District Attorney and the members of the Board in their official capacities. JA10.

On July 25, 2022, the district court held a hearing on the motion for a temporary restraining order. *See* JA103. The District Attorney's counsel indicated her intention to move forward with a grand jury in connection with the *Survivor* political advertisement that very afternoon if not enjoined. JA146. The Board's counsel stated that its investigation relating to *Survivor* was complete and that it intended to take no further action. JA134. (Based on that representation, Plaintiffs voluntarily dismissed the Board Defendants. JA5.)

After the July 25 hearing, the district court granted the motion for a temporary restraining order and enjoined prosecution against any person for a violation of N.C. Gen. Stat. § 163-274(a)(9) relating to *Survivor*. JA5.

On August 4, 2022, the district court conducted a hearing on the motion for a preliminary injunction. JA357. On August 9, 2022, the court entered a Memorandum Order and Opinion denying Plaintiffs' preliminary injunction motion and vacating the earlier-granted TRO. JA419-435. The district court concluded that Plaintiffs were unlikely to succeed on the merits of their First Amendment challenge, even though the Statute criminalizes core political speech in connection with elections, and even though it discriminates on the basis of content by proscribing only derogatory (but not, say, laudatory) political speech. JA435.

The following day, August 10, 2022, Plaintiffs Grimmett, Ralston Lapp, and the Stein Campaign filed a Notice of Appeal of the preliminary injunction denial. JA436-37.

On August 17, 2022, those same Plaintiffs filed a Motion for Injunction Pending Appeal with this Court. ECF No. 10. This Court issued an Order requiring the District Attorney to respond to that motion by Thursday, August 18, 2022. ECF No. 11.

On Monday, August 22, 2022, while the Motion for Injunction Pending Appeal was before this Court, the District Attorney sought and obtained a "presentment" from a Wake County grand jury against Stein, Dearmin, and Stern. JA473; *see also* ECF No. 31-2. A presentment under N.C. Gen. Stat. § 15A-641(c) is a preparatory step that district attorneys use to charge misdemeanors by indictment.[6]

The day after the District Attorney obtained the presentment, on August 23, 2022, this Court granted the injunction pending appeal, holding that the Plaintiffs had made a strong showing that they were likely to succeed on the merits of their First Amendment challenge because the Statute regulates "core political speech" where First Amendment concerns are at their "zenith," and the Statute must therefore

[6] A presentment, however, "does not institute criminal proceedings against any person." N.C. Gen. Stat. § 15A-641(c)

be subject to careful constitutional examination. ECF No. 14, at 3 (quoting *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 186-87 (1999)). Judge Rushing dissented. *Id.* at 6-7. Thereafter, on August 29, Plaintiffs filed an Amended Complaint adding Stein, Dearmin, and Stern as Plaintiffs, JA454-477, and all Plaintiffs filed an Amended Notice of Appeal to ensure that all Plaintiffs are parties to this appeal, JA478-479.

SUMMARY OF ARGUMENT

The district court abused its discretion by denying Plaintiffs' motion for a preliminary injunction. The District Attorney cannot show, as she must, that the Statute – which imposes content-based criminal restrictions on campaign speech – survives strict scrutiny.

The Statute is both overbroad and underinclusive. It criminalizes *true* derogatory statements about a candidate. It allows *false* statements praising that same candidate. And it does nothing to prevent candidates from lying about anything besides another candidate. A candidate could thus be prosecuted for criticizing her opponent's deficient record, while remaining free to inflate her own credentials and to make other false claims such as the election process is biased.

The Statute is also poorly tailored to any governmental interest. The District Attorney bears the burden of showing why criminal penalties are necessary to achieve a compelling interest, but she has not demonstrated that North Carolina

considered or tried other alternatives. In particular, the District Attorney cannot show why counter-speech – the ordinary remedy for false or harsh campaign speech – or civil libel would be insufficient to protect the government's interests. And even if the District Attorney could somehow show that criminal penalties are necessary, she cannot explain why the North Carolina criminal campaign-speech regime, which lacks a process for screening frivolous complaints, is tailored to any compelling interest.

The ongoing criminalization of core political speech here should have led the district court to enjoin any enforcement of the Statute. First Amendment violations are irreparable, and the balance of equities and public interest both favor the protection of constitutional rights. This Court should reverse.

STANDARD OF REVIEW

This Court "review[s] a district court's denial of a preliminary injunction for abuse of discretion, reviewing factual findings for clear error and legal conclusions de novo." *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330, 339 (4th Cir. 2021) (en banc). "A court abuses its discretion in denying preliminary injunctive relief when it rests its decision on a clearly erroneous finding of a material fact, or misapprehends the law with respect to underlying issues in litigation." *Id.* (cleaned up) (quoting *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 171 (4th Cir. 2019)).

In general, the party seeking a preliminary injunction "must show that (i) it is likely to succeed on the merits, (ii) it is likely to suffer irreparable harm without preliminary injunctive relief, (iii) the balance of the equities tips in its favor, and (iv) injunctive relief is in the public interest." *Fleet Feet, Inc. v. NIKE, Inc.*, 986 F.3d 458, 462 (4th Cir. 2021). But in "First Amendment cases[,] the initial burden is flipped," *Greater Philadelphia Chamber of Com. v. City of Philadelphia*, 949 F.3d 116, 133 (3d Cir. 2020), because "the burdens at the preliminary injunction stage track the burdens at trial," *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). At trial, the "government bears the burden of proving that the law is constitutional," and so Plaintiffs "must be deemed likely to prevail if the government fails to show the constitutionality of the law." *Greater Philadelphia Chamber of Com.*, 949 F.3d at 133 (internal quotation marks omitted); *see also Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) ("As the Government bears the burden of proof on the ultimate question of [the challenged statute's] constitutionality, respondents must be deemed likely to prevail unless the Government has shown that respondents' proposed less restrictive alternatives are less effective than [the statute].").

ARGUMENT

I. Because the District Attorney Is Unlikely to Demonstrate That the Statute Survives Strict Scrutiny, Plaintiffs Are Likely to Succeed on the Merits.

A. Strict Scrutiny Applies Because the Statute Is a Content-Based Restriction That Discriminates Against Core Political Speech.

The Statute is specifically directed at content, and at the content of political speech in particular – and not just any political speech, but political speech that is intended to affect an election, and only "derogatory" political speech at that. The Statute is therefore subject to strict scrutiny as a content-based restriction on protected speech. *See Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016).

In *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), the Supreme Court clarified the level of scrutiny courts should apply to content-based restrictions on speech, abrogating this Circuit's "previous formulation for analyzing content neutrality." *Cent. Radio Co. Inc. v. City of Norfolk*, 811 F.3d 625, 632 (4th Cir. 2016). *Reed* made clear that the "crucial first step" in the analysis is determining whether a law is, on its face, "content neutral" or "content based." 576 U.S. at 165. A "law that is content based on its face is subject to strict scrutiny," full stop. *Id.* That is true regardless of whether it discriminates based on viewpoint within that subject matter. *Id.* at 168-69. Under *Reed*, "regulations that discriminate based on 'the topic discussed or the idea or message expressed' . . . are content based." *City of Austin,*

Texas v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1474 (2022) (quoting *Reed*, 576 U.S. at 171). And strict scrutiny equally applies when the "purpose or justification" for a law are related "to the suppression of free expression." *Reed*, 576 U.S. at 166 (citation omitted).

Political speech is at "the core of the protection afforded by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1996); *see also Susan B. Anthony List*, 814 F.3d at 473. And the "First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (citation omitted); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010). The "political campaign" is "at the heart of American constitutional democracy" and the "free exchange of ideas provides special vitality" to the political process. *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). Accordingly, "debate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges." *Republican Party of Minn. v. White*, 536 U.S. 765, 781-82 (2002) (cleaned up). The Statute – which imposes criminal liability for campaign speech – can survive constitutional challenge only if the District Attorney can meet her burden under the familiar, and stringent, requirements of strict scrutiny.

Even before *Reed*, two other circuits applied strict scrutiny to similar criminal laws restricting campaign speech. *See Susan B. Anthony List*, 814 F.3d at 473; *281 Care Comm. v. Arneson*, 766 F.3d 774, 783-84 (8th Cir. 2014). And this Court has applied strict scrutiny post-*Reed* to content-based regulations that target political speech. *See, e.g.*, *Cahaly*, 796 F.3d 399 (holding anti-robocall statute was content-based regulation because it "applies to calls with a consumer or political message but does not reach calls made for any other purpose").

The District Attorney has argued that the government may avoid strict scrutiny because "false defamatory speech published with actual malice is not entitled to First Amendment protection" at all. JA425. While the district court purported to reject the District Attorney's categorical approach, *see* JA426, it is difficult to discern exactly what level of scrutiny that court applied. It never expressly stated it was applying strict scrutiny, or any other form of scrutiny. Instead, the district court assumed that some "more exacting level of scrutiny" should apply because the Statute is directed at political speech, JA420, but it ultimately concluded that the Statute "withstands scrutiny *appropriate* for restrictions on false defamatory political speech," JA423 (emphasis added), without describing what "appropriate" means.

Whatever the district court intended, there is no basis for treating the speech at issue here as categorically exempt from the protections of the First Amendment or the demanding requirements of strict scrutiny that apply to content-based restrictions on speech.

The District Attorney cannot rightly contend that the Statute regulates speech outside the First Amendment by proscribing only false statements. For one thing, the Statute also proscribes truthful statements (a point addressed below). And, at any rate, there is no "general exception to the First Amendment for false statements." *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (plurality opinion) ("[S]ome false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."). *Alvarez* struck down the Stolen Valor Act, which made it a crime to make a false statement about one's own military honors. In doing so, it rejected the government's argument "that false statements receive no First Amendment protection." *Id.*; *see id.* at 730 (Breyer, J., concurring) (same). The plurality applied "exacting scrutiny" to the Stolen Valor Act because it reflected a "content-based

restriction[] on protected speech," *id.* at 724, but it did so before *Reed* clarified that strict scrutiny is the proper test to be applied to content-based restrictions.[7]

Further, unlike *Alvarez*, which concerned only false claims about personal military honors, the Statute at issue involves a content-based restriction on core *political speech*, speech that has historically received the "highest level of review under strict scrutiny." *Susan B. Anthony List*, 814 F.3d at 473. As the Eighth Circuit recognized in *281 Care Committee*, "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); *see also Citizens United*, 558 U.S. at 340 (holding that laws that "burden political speech" are at least "subject to strict scrutiny" and that there might even be a bright-line rule "that political speech simply cannot be banned or restricted"). Accordingly, the Statute is subject to strict scrutiny.

[7] While the concurrence applied "intermediate scrutiny" in *Alvarez*, it emphasized that the regulation at issue concerned "false statements about easily verifiable facts" that did not concern "philosophy, religion, history" and "the like" that often warrant the application of strict scrutiny. 567 U.S. at 731-32. Here, by contrast, the Statute proscribes campaign advocacy. And "because the speech at issue occupies the core of the protection afforded by the First Amendment," the Court should, as the Sixth and Eighth Circuits have done when evaluating similar laws, "apply strict scrutiny to legislation attempting to regulate it." *281 Care Committee*, 766 F.3d at 784.

Because the Statute facially discriminates on the basis of content involving political speech, the district court erred by treating the *dicta* in *Garrison v. Louisiana*, 379 U.S. 64 (1964), as "controlling Supreme Court authority," JA450; *see also* JA424-425. *Garrison* arguably held open the possibility that a generic criminal libel law could be facially valid if it required proof of actual malice under the standards of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), but *Garrison* struck down the specific criminal libel statute at issue there, which lacked those protections. That *some* generic criminal libel statute might be constitutional does not mean that North Carolina's political criminal libel statute necessarily passes constitutional muster. "[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *New York Times*, 376 U.S. at 269.

Even in the limited areas where the Supreme Court has permitted restrictions on speech "because of their constitutionally proscribable content (obscenity, defamation, etc.)," it has never held that "they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (emphasis omitted). Thus, "the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* The "power to proscribe" speech "on the basis of *one* content element" (*e.g.*, defamation or libel) "does not

entail the power to proscribe it on the basis of other content elements" (*e.g.*, targeting political or campaign speech). *Id.* at 386; *see also id.* at 388 ("[The government] may not prohibit . . . only that obscenity which includes offensive *political* messages."). That principle applies here: even insofar as it reaches false speech, the Statute must be subjected to strict scrutiny because it regulates core political speech and, by targeting only derogatory speech about candidates for public office, it facially discriminates based on the content of the speech.

B. The District Attorney Cannot Meet the Burden of Establishing the Constitutionality of the Statute.

Content-based laws such as the Statute "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. "Moreover, the restriction cannot be overinclusive by 'unnecessarily circumscrib[ing] protected expression,'" *Cahaly*, 796 F.3d at 405 (alteration in original) (quoting *Republican Party of Minnesota*, 536 U.S. at 775), "or underinclusive by 'leav[ing] appreciable damage to [the government's] interest unprohibited,'" *id*. (alterations in original) (quoting *Reed*, 576 U.S. at 172).

Here, the District Attorney cannot meet her burden to establish the Statute's constitutionality under strict scrutiny for at least three reasons: (1) the Statute is overinclusive (and facially overbroad) by sweeping in plainly protected expression (*i.e.*, true speech); (2) the Statute is underinclusive in multiple ways, and therefore,

not addressed to any compelling state interest, and (3) the Statute is not narrowly tailored to address any particular compelling state interest.

1. The Statute, by Prohibiting Truthful Statements, Is Overbroad.

The Statute is unconstitutionally overbroad because it criminalizes *true* campaign speech even though "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison*, 379 U.S. at 74. The Statute's coverage of truthful speech renders it unconstitutional because, especially when speech is on a matter of public concern, "there is *no sound principle* which can make [a person] liable" for "publish[ing] the truth, and no more." *Id.* at 73 (emphasis added) (quoting *State v. Burnham*, 9 N.H. 34, 42 (1837)). And those unconstitutional applications are substantial in relation to any arguably valid applications (if such even exist). *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003).

The Statute does not require the government to prove falsity. The Statute makes 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).

The district court understood "derogatory" to require falsity, *see* JA424 ("The Court understands a 'derogatory report' to encompass false defamatory speech about a candidate and nothing more."), but that understanding contradicts the statutory text and North Carolina law. As a motions panel of this Court correctly noted in granting the injunction pending appeal, the "ordinary meaning of 'derogatory' is '[l]essening in good repute; detracting from estimation; disparaging.'" ECF No. 14, at 3 n.1 (alteration in original) (quoting *Derogatory*, The Practical Standard Dictionary of the English Language (1936)); *accord Derogatory*, Webster's New International Dictionary 705 (2d ed. 1936) ("Tending to, or of the nature of, derogation; disparaging; detracting").

More importantly, the Supreme Court of North Carolina has acknowledged that a prohibition on certain "derogatory" statements found in N.C. Gen. Stat. § 163-274(a)(8) "clearly does" cover "even truthful statements." *State v. Petersilie*, 432 S.E.2d 832, 842 (N.C. 1993). This construction of "derogatory" is entitled to particular deference because §§ 163-274(a)(8) and (a)(9) were enacted as part of the same act and use the same "derogatory" language. *See* 1931 N.C. Sess. Laws 442; *see also Campbell v. First Baptist Church of City of Durham*, 259 S.E.2d 558, 563 (N.C. 1979) ("Ordinarily it is reasonable to presume that words used in one place in the statute have the same meaning in every other place in the statute.").

To be sure, "North Carolina case law regularly uses the word 'derogatory' in defamation cases," JA424, but not because derogatory is shorthand for false. 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. Even "truthful statements" can be derogatory. *Petersilie*, 432 S.E.2d at 842. And a statute that criminalizes truthful criticism of candidates for office violates the Constitution. "The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" *Garrison*, 379 U.S. at 75 (quoting *New York Times*, 376 U.S. at 270).

The district court relied on "derogatory" to supply the missing falsity element because nothing else in the Statute could fill that void. The N.C. General Assembly included a scienter requirement that partially tracks portions of the actual malice standard ultimately adopted by the U.S. Supreme Court – "knowing such report to be false *or* in reckless disregard of its truth or falsity," N.C. Gen. Stat. § 163-274(a)(9) (emphasis added) – but this requirement does not require falsity because it is disjunctive. *See United States v. Kobito*, 994 F.3d 696, 702 (4th Cir. 2021).

The Statute lays out two alternative paths for satisfying the scienter element: making a statement knowing it to be false, in which case the statement itself would almost certainly be false; or making a statement in reckless disregard of its truth or falsity, in which case the "reckless" statement could be either true or false. The government could thus carry its burden by showing that a defendant made a *true*, derogatory comment in reckless disregard of its truth.[8] That potential is unconstitutional because "permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm *through falsehood*," makes it a "hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded." *Garrison*, 379 U.S. at 73 (emphasis added) (internal quotation marks omitted).

The Statute's coverage of truthful derogatory speech thus renders it unconstitutionally overbroad. And that defect cannot be remedied through judicial amendment. While the district court is right that the "North Carolina Supreme Court interprets statutes in ways that avoid constitutional problems," JA424, "federal courts are *without* power to adopt a narrowing construction of a state statute unless

[8] It is irrelevant whether the defendant could establish truth as a *defense*, *see* N.C. Gen. Stat. § 15-168 (providing for affirmative defense of "truth of the facts alleged in the indictment"), because placing the burden of showing truth on the defendant is itself a First Amendment violation, *see Phila. 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.").

such a construction is *reasonable and readily apparent*," *Toghill v. Clarke*, 877 F.3d 547, 556 (4th Cir. 2017) (quoting *Boos v. Barry*, 485 U.S. 312, 330 (1988)). Federal courts "will not rewrite a state law to conform it to constitutional requirements," *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988), and substantial rewriting would be required here (even assuming that a constitutional law is possible).

The district court should have enjoined prosecution under the Statute 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." *Hicks*, 539 U.S. at 119. "Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech." *Id*.

2. The Statute's Under-Inclusiveness Further Renders It Unconstitutional.

To survive strict scrutiny, the government must not only establish that the speech restriction will "advance a sufficiently important governmental objective," it must also avoid the "infirmity" of "underinclusiveness." *Am. Ass'n of Pol. Consultants Inc. v. FCC*, 923 F.3d 159, 167 (4th Cir. 2019) (quoting *Reed*, 576 U.S. at 172), *aff'd sub nom.*, 140 S. Ct. 2335 (2020). An "underinclusive" restriction is "one that covers too little speech," thereby leaving "appreciable damage to the

government's interest unprohibited." *Id.* (citing *Cahaly*, 796 F.3d at 405); *see also Reed*, 576 U.S. at 172. Such a law "cannot be regarded as protecting an interest of the highest order" because the underinclusiveness of the chosen remedy undermines the government's claimed interest. *See Republican Party of Minn.*, 536 U.S. at 779-80; *see also City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (noting that underinclusiveness "diminish[es] the credibility of the government's rationale for restricting speech"). "A law's underinclusiveness – its failure to cover significant tracts of conduct implicating the law's animating and putatively compelling interest – can raise with it the inference that the government's claimed interest isn't actually so compelling." *Yellowbear v. Lampert*, 741 F.3d 48, 60 (10th Cir. 2014). Accordingly, an "underinclusive restriction [] fails a strict scrutiny review." *Am. Ass'n of Pol. Consultants*, 923 F.3d at 167.

The Statute is fatally underinclusive for two reasons. The district court (and the District Attorney) identified two governmental interests that, according to the district court, "cannot be questioned": (1) preventing fraud in elections, and (2) a "historical interest in protecting citizens from defamation." JA428. Even if those are generally compelling governmental interests, the Statute fails as "hopelessly underinclusive." *Reed*, 576 U.S. at 171.

a. The Statute's Prohibition of Only "Derogatory" Reports, but Not False Laudatory Reports, Renders It Underinclusive.

Even if the Statute were construed to prohibit only false "derogatory" statements about a candidate, it is woefully underinclusive to serve the interest of preventing fraud in elections: The Statute does nothing to prevent candidates from defrauding the electorate by telling *positive* lies about *themselves*. While the government has an interest in "protecting elections from being undermined by 'those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool,'" JA432 (quoting *Garrison*, 379 U.S. at 75), the Statute is not tailored to that interest because it permits a broad category of deliberate lies: those that reflect positively on a candidate. This one-sided regulation creates an asymmetrical debate about candidate qualifications, putting a thumb on the scale for candidates who tell self-aggrandizing lies. *Cf. Chaker v. Crogan*, 428 F.3d 1215, 1228 (9th Cir. 2005) (striking down a statute on First Amendment grounds that singled out for prosecution false speech *critical* of a peace officer's conduct but did not similarly subject to prosecution knowingly false speech *supportive* of a peace officer's conduct).

Here, the District Attorney seeks to prosecute Plaintiffs for allegedly false claims concerning O'Neill's responsibility for testing rape kits in Forsyth County, but the Statute would not apply if O'Neill made knowingly false claims regarding

his own work to further rape kit testing. Yet both categories of speech – speech that is critical of a candidate and speech that supports a candidate – present the same threat to the truth-seeking process in elections. This failure to address laudatory false statements in elections renders the Statute underinclusive.

The Supreme Court of Washington raised similar concerns in *Rickert v. State*, 168 P.3d 826 (Wash. 2007), when striking down a statute analogous to the one here. The Washington court held that the statute was unconstitutional because it did "not apply to many statements that pose an equal threat to the State's alleged interest in protecting elections," including "all statements made by a candidate (or his supporters) about himself." *Id.* at 831. "Basically, a candidate is free to lie about himself, while an opponent will be sanctioned." *Id.* As here, the state could provide no compelling reason why a candidate would be less likely to deceive the electorate on matters concerning himself and thus compromise the integrity of the elections process. *Id.* Therefore, the Statute failed strict scrutiny.

b. The Statute's Prohibition of Only Candidate-Related "Derogatory" Reports, but Not False Reports on Other Subjects, Renders It Underinclusive.

The Statute is also underinclusive because it fails to extend to knowingly false claims addressed to the political process itself, applying only to derogatory comments regarding a "candidate." The concern for many regarding elections today is the so-called "Big Lie," contending, without evidence, that elections are "stolen,"

planting seeds of doubt about whether citizens' votes count, cynically undermining faith in the electoral process, and even leading to violence. *See*, *e.g.*, *Thompson v. Trump*, 20 F.4th 10, 36 (D.C. Cir. 2021) (describing months-long allegations regarding "a stolen election"); *Smartmatic USA Corp. v. Herring Networks, Inc.*, -- F. Supp. 3d --, No. 1:21-CV-02900 (CJN), 2022 WL 2208913, at *2 (D.D.C. June 21, 2022) (civil defamation action concerning allegations of "stolen election"). Yet the Statute does nothing to address lies such as these because they are not a "derogatory report" concerning any specific "candidate." That underinclusiveness undermines the District Attorney's claim that the Statute serves a *compelling* election-integrity interest, and the Statute thus fails strict scrutiny.

c. The Statute's Prohibitions, Limited to Candidates for Office, Are Untethered from the Government's Interest in Criminalizing Libelous Speech.

The district court offered an additional interest underlying the Statute – the government's "historical interest in protecting citizens from defamation," JA428 – but the Statute is fatally underinclusive to serve that interest too. The Statute is not directed to protecting the reputations of all citizens; it protects *only* the reputations of those who have decided to run for office.

The district court's reliance on *Garrison* for a reputation-protection rationale is misplaced and demonstrates why the Statute is not narrowly tailored to the only compelling interest that a criminal libel statute might serve, namely preventing

disorder or civil unrest. JA428. Specifically, *Garrison* indicated that a criminal libel statute *might* be constitutional *if* it were "narrowly drawn" to "reach words tending to cause a breach of the peace" (*i.e.*, directed at the actual historical interests underlying criminal libel statutes), or "to reach speech, such as group vilification" that is "especially likely to lead to public disorders." *Garrison*, 379 U.S. at 71. But the Statute does not require proof that the derogatory speech about a candidate was calculated to give rise to violence or a breach of the public peace, and no such rationale for the Statute is plausible.

In contemporary society, "the rule of law is generally accepted as a substitute for private physical measures," and it "can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation." *Id.* at 68. Therefore, the Supreme Court did not endorse, even in *dicta* as the district court suggested, that under *Garrison*, the state could make "all false defamatory statements made with actual malice a crime." JA428. Instead, in addition to holding that any valid criminal libel statute would at least need to incorporate the *New York Times* standard, the Supreme Court also held that any constitutional criminal libel statute aimed at protecting reputations would *also* have to be "narrowly drawn" to "reach words tending to cause a breach of the peace" (*i.e.*, directed at the actual historical interests underlying criminal libel statutes), or "designed to reach speech, such as group vilification" that is "especially likely to lead to public disorders." *Garrison*, 379

U.S. at 70 (citation omitted). Because the Louisiana statute at issue in *Garrison* was not limited to "speech calculated to cause breaches of the peace" (in addition to failing to incorporate the *New York Times* standard), the Supreme Court found the statute not sufficiently "narrowly drawn." *Id.* "It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security." *Id*. at 69-70.

In the same way here, the North Carolina Statute applies to "derogatory" speech regarding a candidate in any primary or election, when "calculated or intended to affect" the outcome of an election. It does not require the speech to be likely to produce violence or a breach of the peace. Accordingly, the Statute is not sufficiently tailored even to fall within the *dicta* in *Garrison*.

Nevertheless, even if it were so limited, the Statute, unlike a general criminal libel statute directed to protecting all citizens (and to averting any resulting breach of the peace or violence), *only* protects the reputations of those who have decided to run for office. The district court treated this underinclusiveness as merely "criminalizing" a "subset of criminal libel" and claimed the state's "historical interest in protecting citizens from defamation" does not disappear because the citizen is a candidate for political office. JA428. But this turns the First Amendment

on its head by protecting candidates for government office from critical speech – through state-enforced criminal penalties – while leaving any regular citizen without similar state protection for their reputations. And worse still, the disparate protection suppresses political speech about candidates in a campaign, which is entitled to the greatest First Amendment protection. *See Republican Party of Minn.*, 536 U.S. at 781 ("[T]he notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head.").

By extending the protections of criminal libel solely to "candidates," the government undermines any reputation-protection interest. "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974). Those, too, are the same persons who, by virtue of "decid[ing] to seek governmental office must accept certain necessary consequences of that involvement in public affairs" and run "the risk of closer public scrutiny than might otherwise be the case." *Id.* Certainly with respect to speech regarding candidates for office, "it is our law and our tradition that more speech, not less, is the governing rule." *Citizens United*, 558 U.S. at 361; *see also Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) ("Criticism of government is at the very center of the

constitutionally protected area of free discussion."); *New York Times*, 376 U.S. at 291 (noting no court "of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence" (internal quotation marks omitted)).

The district court, in seeking to justify North Carolina's narrowing of the application of criminal libel law (to whatever extent it is constitutional) to the election-specific context, pointed back to the "additional compelling interest in preventing fraud and libel in elections," referring to language from *Garrison* recognizing the danger of lies as a tool to undermine "the premises of democratic government." JA429 (citing *Garrison*, 379 U.S. at 75). But that concern is tied to the interest in preventing intentional lies from distorting an election, not to the second interest the district court identified in addressing defamation of reputation. As discussed, to the extent the government is relying on an interest in preventing deception of the electorate, the Statute fails strict scrutiny because it is grossly underinclusive – by targeting some, but not even most, of the knowingly false speech that could influence the outcome of an election.

3. The Government Cannot Carry Its Burden of Showing That the Statute Is Narrowly Tailored.

a. The Government Cannot Demonstrate the Unavailability of Less Restrictive Means.

To prove that a restriction is narrowly tailored, the government is required to present evidence demonstrating why less restrictive alternatives would not serve its interest. *See Reynolds v. Middleton*, 779 F.3d 222, 230 (4th Cir. 2015). In *Reynolds*, this Court held, following the Supreme Court's decision in *McCullen v. Coakley*, 573 U.S. 464 (2014), that "the burden of proving narrow tailoring requires the [government] to *prove* that it actually *tried* other methods to address the problem." 779 F.3d at 231 (emphasis in original). This Court also quoted the operative language from *McCullen*: "Given the vital First Amendment interests at stake, it is not enough for [the government] simply to say that other approaches have not worked." *Id*. (alteration in original) (quoting *McCullen*, 573 U.S. at 496). "Instead," this Court held, "the government must *show* [ ] that it seriously undertook to address the problem with less intrusive tools readily available to it,' and must '*demonstrate* that [such] alternative measures . . . would fail to achieve the government's interests, not simply that the chosen route is easier.'" *Id*. at 231-32 (emphases and alterations in original) (citation omitted) (quoting *McCullen*, 573 U.S. at 494-95).

The District Attorney's burden is particularly formidable here because the Statute was enacted in 1931 and immediately entered into a 91-year period of virtual

desuetude. There appears to be no record of consideration by North Carolina of less intrusive tools. *See Billups v. City of Charleston*, 961 F.3d 673, 687 (4th Cir. 2020) (government "failed to meet its burden to produce evidence that it actually tried or considered less-speech-restrictive alternatives"). Nor can the District Attorney point – as potential substitute evidence – to a record of measured and successful application of the Statute.

There are, however, at least two alternative narrower measures recognized by this Court: counterspeech and civil libel. *See Rossignol v. Voorhar*, 316 F.3d 516, 528 (4th Cir. 2003) ("If defendants believed [plaintiff's] attacks to be scurrilous, their remedy was either to undertake their own response or to initiate a defamation action.").

In *Alvarez*, the plurality reasoned that counterspeech was the preferred alternative to burdening First Amendment interests. "The remedy for speech that is false is speech that is true." 567 U.S. at 728 (plurality). "The First Amendment itself ensures the right to respond to speech we do not like," and suppression of speech by the government can make exposure of falsity more difficult, not less so." *Id.*; *see also Gertz*, 418 U.S. at 344 ("The first remedy of any victim of defamation is self-help – using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.").

As in *Alvarez*, the District Attorney has "not shown, and cannot show, why counterspeech would not suffice to achieve its interest" or that in seeking "to regulate protected speech," the Statute was the "least restrictive means among available, effective alternatives." *Alvarez*, 567 U.S. at 726. In *Commonwealth v. Lucas*, 34 N.E.3d 1242 (Mass. 2015), the court, in striking down a Massachusetts campaign-speech statute, noted the lamentable historical record, dating back to the Sedition Act of 1798, of "[g]overnmental efforts to supplant political counterspeech with the specter of incarceration," holding instead that the "solution is counterspeech." *Id*. at 1253. This Court too has warned against attempts to "resurrect the discredited concept of a criminal libel, which was broadly invoked in seventeenth and eighteenth century England to silence adverse comment on public personages." *Rossignol*, 316 F.3d at 524-25.

The Eighth Circuit too, in considering a similar campaign-speech statute, ultimately concluded that, "[e]specially as to political speech, counterspeech is the tried and true buffer and elixir," and "[t]here is no reason to presume that counterspeech would not suffice to achieve the interests advanced and is a less restrictive means, certainly, to achieve the same end goal." *281 Care Committee*, 766 F.3d at 793.

The district court, however, engaged in just such an unmerited presumption in its rejection of counterspeech as potentially insufficient given the timing of

elections. It held that false statements have "the potential to gather momentum with little time for the often slower-to-surface factual counterspeech to be effective." JA430. That presumption, however, is particularly problematic here since statutes restricting campaign speech have virtually no prospect of resolving a claim before an election. *See Susan B. Anthony List*, 814 F.3d at 474 (recognizing that an "ultimate decision on the merits will be deferred until after the relevant election").

In addition to counterspeech, civil libel also provides a less restrictive alternative to criminalizing political speech. Unlike its minimal criminal libel statutory regime, North Carolina has a robust civil libel law with potential applicability to defamatory political speech. Indeed, the opponent of North Carolina's previous attorney general (now its governor) engaged in a long-running civil libel case concerning an allegedly defamatory advertisement aired during the 2000 general election. *See Boyce & Isley, PLLC v. Cooper*, 710 S.E.2d 309 (N.C. Ct. App. 2011). Over the course of those proceedings, the North Carolina Court of Appeals explicitly rejected an argument that "plaintiffs cannot succeed on their claim for defamation because they are public figures, and because defendants published their statements in the course of a political campaign." *Boyce & Isley, PLLC v. Cooper*, 568 S.E.2d 893, 900 (N.C. Ct. App. 2002) (reversing trial court's dismissal).

O'Neill's lawyer – in an October 2020 cease-and-desist letter to Grimmett – recognized the existence of the civil remedy, claiming that her statement constituted "legally actionable defamation." JA47. Yet O'Neill took no steps to avail himself of the obviously available remedy, preferring to use the resources and power of the state under the Statute's criminal scheme. *See* JA42-45.

The existence of a civil remedy undermines any contention that the Statute is narrowly tailored: The District Attorney cannot show that the Statute's addition of criminal sanctions for speech would deter speakers who would otherwise subject themselves to civil liability in making knowingly false or reckless statements about candidates. In *Lind v. Grimmer*, 30 F.3d 1115 (9th Cir. 1994), for example, the Ninth Circuit struck down a statute criminalizing disclosure of information concerning campaign-spending investigations, rejecting the government's purported interest in protecting candidates from unmerited charges because the state "ha[d] not shown that the victim will be without civil tort remedies," *id*. at 1120. In the specific context of campaign-speech restrictions, the Washington Supreme Court recognized in *Rickert* "a legitimate, and at times compelling, interest in compensating private individuals for wrongful injury to reputation," but it found that interest could not "justify a government-enforced censorship scheme" like the Washington campaign-speech statute. 168 P.3d at 830. That statute could only "protect candidates from

criticism," which is not a compelling interest, yet "it has no mechanism for compensation for damage to reputations." *Id*.

Beyond those specific alternatives, the government also has no basis for using criminal sanctions at all in this context. As the Supreme Court stated in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), a "criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms," *id*. at 486. The Court acted on that observation in *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978), in which it considered a Virginia statute that made it a crime to publish confidential information regarding proceedings before a judicial-inquiry commission. The Court held that because the "publication Virginia seeks to punish under its statute lies near the core of the First Amendment," the state's "interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech." *Id*. at 838. The Court found that Virginia "offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined." *Id*. at 841; *see also Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 105 (1979) (striking down a West Virginia statute criminalizing disclosure of names of juvenile offenders, noting "[a]lthough every state has asserted a similar interest, all

but a handful have found other ways of accomplishing the objective" without criminalizing speech).

The District Attorney has failed to explain why North Carolina can vindicate its interests here only through criminalizing core political speech. Nor has she offered any evidence that other states – each of whom has similar interests – have advanced those interests by criminalizing speech. As discussed below, moreover, at least four states that have sought to do so – Massachusetts, Minnesota, Ohio, and Washington – have all seen their cognate statutes declared unconstitutional over the course of the last 15 years.

In sum, the District Attorney has not made the required showing that North Carolina considered less restrictive alternatives or that those alternatives would be ineffective to serve its interests.

b. Multiple Features of the Statute Are Insufficiently Narrowly Tailored.

Even if one assumes that *some* criminal libel statute could be valid, the Statute itself is not narrowly tailored. Tellingly, each of the four cases that have considered state statutory campaign-speech restrictions during this century have found them to be unconstitutional on the grounds that the statutes were not narrowly tailored to meet a compelling state interest. *See Susan B. Anthony List*, 814 F.3d at 474-76; *281 Care Committee*, 766 F.3d at 787-96; *Lucas*, 34 N.E.3d 1257; *Rickert*, 168 P.3d at 829-32. The narrow-tailoring analyses in these cases illustrate the challenges in

finding a narrowly tailored means of regulating core political speech – a challenge that the Statute fails.

As the district court noted, the most extensive narrow-tailoring analysis concerning a state campaign-speech restriction is the Sixth Circuit's opinion in *Susan B. Anthony List*. 814 F.3d at 474. In that case, the Sixth Circuit considered an Ohio law similar to the Statute here (as well as a companion Ohio law concerning statements about voting records) aiming to protect the same interests identified by the District Attorney. *See id*. at 469-70. The Sixth Circuit ultimately struck down the Ohio laws as "content-based restrictions that burden core protected political speech and [that] are not narrowly tailored to achieve the state's interest." *Id*. at 469.

i. The Statute's Lack of a Screening Process.

In *Susan B. Anthony List*, the Sixth Circuit found that the Ohio statutes failed the narrow-tailoring test because "Ohio fails to screen out frivolous complaints prior to a probable cause hearing." 814 F.3d at 474. That concern was first flagged by the Supreme Court in its earlier decision in the case which found – in a 9-0 decision – that the case was ripe for adjudication. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014). The Supreme Court stated that "[b]ecause the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents." *Id*. (quoted by *Susan B. Anthony List*, 814 F.3d at

474). Instead, the Supreme Court recognized, one of the Ohio statutes "allows 'any person' with knowledge of the purported violation to file a complaint." *Id*. The Eighth Circuit too, in finding insufficient procedural protections in the Minnesota statute in *281 Care Committee*, also found it problematic that "anyone can lodge a claim" under the statute. 766 F.3d at 778; *see also Lucas*, 34 N.E.3d at 1256 (noting concern that "anyone may file an application for a criminal complaint" under the Massachusetts campaign-speech restriction law). "Anyone can lodge a claim" under North Carolina's Statute, including as here, Stein's "political opponent." JA42-45.

The haphazard approach in Ohio also led to concerns that there was "no process for screening out frivolous complaints or complaints that, on their face, only complain of non-actionable statements, such as opinions." *Susan B. Anthony List*, 814 F.3d at 470, 474. That issue, too, is present here. Indeed, even the district court recognized, without expressing an opinion, that application of the Statute "to the arguably metaphorical speech here" might be unconstitutional. JA435. North Carolina, like Ohio, has no process for screening such complaints.

Despite substantial protections in the Ohio procedures designed to result in referral to a prosecutor only after a formal determination of probable cause at two stages, the second time "by clear and convincing evidence," the Sixth Circuit still found the procedural protections deficient. *Susan B. Anthony List*, 814 F.3d at 474. As the court put it, the "process of designating a panel, permitting parties to engage

in motion practice, and having a panel conduct a probable cause review for plainly frivolous or non-actionable complaints is not narrowly tailored to preserve fair elections." *Id*. at 475.

North Carolina has none of those protections. Instead of setting up a unified screening process in an effort to protect against improper prosecutions, as Ohio's regime did, North Carolina's process *multiplies* those opportunities, providing the potential for the Board, any of North Carolina's 42 district attorneys, a special prosecutor, or even any citizen to initiate the process. And, as shown in this very case, a determination by the Board that an "investigation be closed," JA447, can simply be countermanded by a district attorney. That manifest lack of procedural safeguards against harassment and multiple bites at the apple renders the Statute insufficiently narrowly tailored.

ii. The Statute's Lack of a Materiality Requirement.

Another narrow-tailoring failure identified by the Sixth Circuit was the Ohio statutes' application "to *all* false statements, including non-material statements." *Susan B. Anthony List*, 814 F.3d at 475 (emphasis in original). In the context of a law incorporating the *New York Times* actual malice standard, the Supreme Court has stressed that materiality is essential to establish that a statement was indeed false because "'[m]inor inaccuracies do not amount to falsity,'" and "the "falsity must be 'material.'" *Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 247 (2014)

(alteration in original) (citing *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 517 (1991)). If a derogatory statement is not material, then it cannot be a type of false statement that would influence voters and thus impair election integrity. Yet the lack of a materiality requirement in the Ohio statutes – and this Statute – means that a person engaging in political campaign speech could be prosecuted based on an immaterial statement.

There is no requirement that a report under the Statute actually be capable of affecting an election, only that it was intended to affect the chances of a candidate's election. That formulation leads to the problem identified by the Sixth Circuit that "influencing an election by lying about a political candidate's shoe size or vote on whether to continue a congressional debate is just as actionable as lying about a candidate's party affiliation or vote on an important policy issue." *Susan B. Anthony List*, 814 F.3d at 475.

Here, for example, the statement at issue could be that there were "1,500 rape kits" untested when the actual number was 1,509, or that those rape kits were "on a shelf" instead of, say, in a cabinet or vault. *Cf.* JA48 (asserting that there "is no shelf . . . over which Mr. O'Neill has ever had control where 1500 rape kits were located"). As with the Ohio statutes, the failure to include a materiality standard on the face of the Statute renders it not narrowly tailored. A statute "[p]enalizing non-material

statements . . . is not narrowly tailored to preserve fair elections." *Susan B. Anthony List*, 814 F.3d at 475.

iii. The Problem of the Statute's Potential Application to Commercial Intermediaries.

The Sixth Circuit found that the Ohio laws, by applying "not only to the speaker of the false statement" but also "to anyone who advertises, 'post[s], publish[es], circulate[s], distribute[s], or otherwise disseminate[s]' false political speech," including "commercial intermediaries," were "not narrowly tailored to preserve fair elections." *Susan B. Anthony List*, 814 F.3d at 474-75 (alterations in original). By expanding the universe of persons who can be punished for core political speech beyond just the speaker, it creates too wide a range of potential targets for prosecution.

The North Carolina Statute, which applies not only to any person who may "publish" a derogatory report, but also to persons who "cause to be circulated" such a report, also lacks narrow tailoring in that regard. N.C. Gen. Stat. § 163-274(a)(9). The Statute could be used to prosecute a television or radio station, newspaper, or printer of a mailer who was, in the Sixth Circuit's words, "simply the messenger," as opposed to the principal speaker. *Susan B. Anthony List*, 814 F.3d at 475; *see also Landmark Commc'ns*, 435 U.S. at 830 (striking down statute that subjected "persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before a state judicial review commission").

iv. The Statute's Timing Problem.

The Sixth Circuit also found that the timing of the process under Ohio law failed to serve the compelling state interest of promoting fair elections. *Susan B. Anthony List*, 814 F.3d at 474. The court noted that the Ohio process, while potentially providing for some expedition, could provide "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.* "Indeed," the court observed, "candidates filing complaints against their political opponents count on the fact that 'an ultimate decision on the merits will be deferred until *after the relevant election*.'" *Id*. (citations omitted and emphasis added) (quoting *Susan B. Anthony List*, 573 U.S. at 165); *see also Lucas*, 34 N.E.3d at 1256 (recognizing problems associated with "the compressed time frame of an election").

In this case, it was only in July 2022, after two sets of investigations concluding 20 months after the 2020 general election, that a determination was made to go forward with a prosecution. JA422. A prosecution on that schedule, of course, can do nothing to "prevent[] fraud . . . in elections," JA428, to "protect[] the integrity of elections," JA430, or to "protect[] elections from being undermined," JA432, all articulations by the district court of the government's interest here. At most, the threat of future criminal prosecutions could chill political speech, but that is not a

proper purpose. Use of the criminal laws to dampen the vigorous advocacy that characterizes political campaigns is highly detrimental to the democratic process.

In addition, as the Sixth Circuit recognized, "in many cases, 'a preelection probable-cause finding . . . itself may be viewed [by the electorate] as a sanction by the State,' that 'triggers "profound" political damage, even before a final [Commission] adjudication.'" *Susan B. Anthony List*, 814 F.3d at 474 (alterations in original) (citation omitted) (quoting *Susan B. Anthony List*, 573 U.S. at 165). For these reasons, the Sixth Circuit concluded that the "timing of Ohio's process is not narrowly tailored to promote fair elections." *Id.* The same is true of the North Carolina Statute.

v. The Problem of the Statute's Over- and Under-Inclusivity.

The Sixth Circuit also found that the Ohio laws, like the Statute, "do not pass constitutional muster because they are not narrowly tailored in their . . . over-inclusiveness and under-inclusiveness." *Susan B. Anthony List*, 814 F.3d at 474. As noted above, the Statute criminalizes *true* statements that are critical of a candidate while permitting *false* statements about any other subject. The Statute thus sweeps in more speech than necessary even though "courts have consistently erred on the side of permitting more political speech than less." *Id.* at 476. And the Statute "cannot be regarded as protecting an interest of the highest order, and thus as

justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id*. at 475 (quoting *Reed*, 576 U.S. at 172).

* * *

In summary, the Statute fails the narrow tailoring test for the same reasons as the Massachusetts, Minnesota, Ohio, and Washington criminal campaign-speech restrictions struck down in the last 15 years.

II. The Remaining Factors Favor an Injunction.

In this First Amendment context, the analysis of the remaining three factors is straightforward. "Because there is a likely constitutional violation, the irreparable harm factor is satisfied." *Leaders of a Beautiful Struggle*, 2 F.4th at 346. "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 an injunction pending appeal, "the allegations and evidence show a threat of imminent prosecution sufficient to potentially chill First Amendment rights and to establish injury-in-fact." JA451.

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) (plurality opinion).

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) (internal quotation marks omitted). "[D]irect retaliation by the state for having exercised First Amendment freedoms in the past is particularly proscribed by the First Amendment" because if First Amendment rights are "not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future." *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983). That chilling of political speech is evident here for Plaintiffs, who are all regularly involved in political speech or political advocacy. For example, Ralston Lapp – the producer of *Survivor* – has indicated that criminal prosecution would require it to "reconsider" whether it would even "continue to work with North Carolina campaigns and candidates." JA52.

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." JA450-451. While it is "not certain that a grand jury will find probable cause for charging any of these plaintiffs," JA450, 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 (internal quotation marks omitted).

It is too cavalier to say that a citizen – particularly a politician – must simply wait until after indictment, endure a criminal prosecution, and then take up the opportunity to vindicate his First Amendment rights. By that time, the irreparable damage to one's reputation is long done – imposing a penalty for having exercised one's right to free speech. A "wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased." *In re Fried*, 161 F.2d 453, 458 (2d Cir. 1947). The simple truth is that "[f]requently, the public remembers the accusation, and still suspects guilt, even after an acquittal." *Id.* at 458-59 Accordingly, Plaintiffs face irreparable harm, and chilling of their speech, if criminal prosecution of the Statute is not enjoined.

Last, the District Attorney has not asserted, and cannot assert, that this Court should abstain under the holding in *Younger v. Harris*, 401 U.S. 37 (1971) that "federal courts should not stay or enjoin pending state court criminal prosecutions except in special circumstances." *United States v. South Carolina*, 720 F.3d 518, 526-27 (4th Cir. 2013). Where, as here, "there is no ongoing state judicial proceeding," "*Younger* abstention is inapplicable." *Id.* at 527. Therefore, "*Younger* does *not* bar the granting of federal injunctive relief when a state criminal prosecution is expected and imminent." *Id.*

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 v. Holder*, 556 U.S. 418, 435 (2009)). The First Amendment violation establishes both. *See Centro Tepeyac*, 722 F.3d 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). That is particularly true here, where candidates "running for office in North Carolina might well be chilled in their campaign speech by the sudden reanimation of a criminal libel law that has been dormant for nearly a

century – harming the public's interest in robust campaigns." ECF No. 14, at 4. It is "our law and our tradition that more speech, not less, is the governing rule," *Citizens United*, 558 U.S. at 361, and that the general remedy for even "falsehoods and fallacies" "is more speech, not enforced silence," *Linmark Assocs. v. Willingboro Twp.*, 431 U.S. 85, 97 (1977).

This analysis is not altered by the district court's now moot observation that "there is a looming [two-year] statute of limitations." JA452 (*Survivor* last broadcast in October 2020). Plaintiffs have agreed to enter a tolling agreement, thereby addressing the District Attorney's concerns that her power to prosecute would be jeopardized if she were ultimately to prevail here. In any event, the harm to the government is non-cognizable because there has never been a public interest in enforcing an unconstitutional restriction on speech.

CONCLUSION

The Court should reverse the denial of the motion for preliminary injunction and rule that the Statute is unconstitutional on its face.

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Dated: September 20, 2022

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 20th day of September, 2022, I caused this Brief of Appellants and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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