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; *et al.*,

Defendants.

BRIEF OF APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO

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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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- 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: Grimmett v. Freeman

Pursuant to FRAP 26.1 and Local Rule 26.1,

N. Lorrin Freeman, in her official capacity as District Attorney for the 10th Prosecutorial District
(name of party/amicus)

---

who is Appellee, 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
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

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/ Joseph E. Zeszotarski, Jr. Date: 09/12/2022

Counsel for: Appellee

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INTRODUCTION

Plaintiffs (an elected official, his campaign, and others associated with his campaign) contend that the First Amendment gives a politician a constitutional right to knowingly lie to the public about his political opponent to gain an advantage in an election, such that a State cannot bar a politician from doing so by statute. The district court correctly rejected Plaintiffs' claim. The United States Supreme Court has made clear that state criminal laws prohibiting false and defamatory statements in political campaigns are and continue to be constitutional, where as here the statute requires proof of actual malice. The Constitution does not give politicians a "right to lie" to the public about their opponents to gain an advantage in their campaigns. The narrowly drawn North Carolina statute at issue in this case is constitutional on its face.

ISSUE PRESENTED FOR APPEAL

I. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION BASED ON THEIR CLAIM THAT NORTH CAROLINA GENERAL STATUTE SECTION 163-274(a)(9), A CRIMINAL DEFAMATION STATUTE, IS NOT CONSTITUTIONAL ON ITS FACE UNDER THE FIRST AMENDMENT?

STATEMENT OF THE CASE

Section 163-274(a)(9) of the North Carolina General Statutes (hereinafter "the Statute") makes the following a Class 2 misdemeanor criminal offense:

> 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 circulated or intended to affect the chances of such candidate for nomination or election.

The three original Plaintiffs filed this action on 21 July 2022 in the United States District Court for the Middle District of North Carolina against Defendant N. Lorrin Freeman, in her official capacity as District Attorney for the 10th Prosecutorial District of North Carolina (hereinafter "Freeman"), as well as the members of the North Carolina State Board of Elections, seeking a declaration that the Statute is facially unconstitutional. JA10.[1] Plaintiffs sought a temporary restraining order and preliminary injunction, seeking, among other things, to bar Defendant Freeman's office from taking any enforcement action under the Statute. A hearing on the TRO motion was held just

[1] The State Board of Elections defendants were dismissed shortly thereafter.

four (4) days after the complaint was filed, on 25 July 2022. The district court entered a TRO that day, pending a hearing on Plaintiff's motion for preliminary injunction.

After more thorough briefing by the parties, the district court held a hearing on the motion for preliminary injunction on 4 August 2022. JA357. On 9 August 2022, the district court issued an order denying Plaintiffs' motion for preliminary injunction and dissolving the TRO, finding that Plaintiffs were not likely to succeed on the merits of their claim that the Statute is not constitutional on its face. JA419.

On 10 August 2022, Plaintiffs filed a notice of appeal. JA436. Plaintiffs sought an injunction pending appeal in the district court, which was denied by order entered 15 August 2022. JA7. Plaintiffs then sought an injunction pending appeal in this Court, which was granted on 23 August 2022 upon Plaintiffs' consent to enter a tolling agreement as to enforcement of the Statute against them. DE-14.

Plaintiffs then filed an Amended Complaint in the district court on 29 August 2022, adding as plaintiffs Josh Stein (Attorney General of North Carolina), Seth Dearmin (Stein's chief of staff), and Eric Stern. JA454. Plaintiffs also filed an Amended Notice of Appeal. JA478.

STATEMENT OF FACTS

Plaintiffs bring this lawsuit for declaratory judgment seeking a ruling that the Statute is unconstitutional on its face as violative of the First Amendment, and further seek to enjoin the Office of the District Attorney for the 10th Prosecutorial District from presenting any matters to the grand jury relating to a political advertisement run by the Josh Stein campaign for Attorney General in August through October 2020, referenced in the Complaint and Amended Complaint (hereinafter "the Stein Political Ad").

I. The Stein Political Ad and this Lawsuit.

Plaintiff Stein was a candidate for reelection for the office of Attorney General in the November 2020 campaign. His opponent was Jim O'Neill, the elected district attorney of Forsyth County. During the period August through October 2020, his political campaign ran the Stein Political Ad, a television commercial run throughout the State in which one of the plaintiffs, a survivor of sexual assault who was also an employee of Stein's office, JA210-211, made the following statement:

> 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 [sitting] on a shelf leaving rapists on the street, I had to speak out.

JA19. Stein and others in his campaign were personally aware of the content of the Stein Political Ad. JA213.

Persons associated with O'Neill submitted a complaint to the North Carolina State Board of Elections ("NCSBE") contending that the Stein Political Ad is false. NCSBE's associate general counsel conducted a cursory investigation and in May 2021 issued a report as required by state law. JA440. Freeman recused herself and appointed a senior assistant district attorney to review the NCSBE report and the matter, who in June 2021 requested that the North Carolina State Bureau of Investigation ("NCSBI") conduct a further investigation. JA206. A copy of the NCSBE report was provided to the SBI,[2] JA206, and the SBI conducted numerous additional witness interviews not conducted by the NCSBE and reported their findings to the assistant district attorney reviewing the matter. JA206-214.

[2] Plaintiffs portray the NCSBE report as the conclusions of the Board itself, contending that "the Board issued a report." Appellants Br. 10. To be sure, this is not accurate. The NCSBE report was issued by an associate general counsel of the Board who works under the direction of the Board's executive director. JA441. There is no evidence in the record that the full Board considered this matter in any way or made any recommendation -- because it did not.

In Appellants Brief, Plaintiffs spend considerable energy arguing that the Stein Political Ad is not false, and is somehow "corrective." Appellants Br. 6-8. To the contrary, the evidence collected during the course of the criminal investigation of the Stein Political Ad tends to show that the ad is false, and that Stein and others associated with his campaign knew it was false.

II. How Sexual Assault Evidence Collection Kits ("SAECKs") Are Handled Under North Carolina Law.

The State Crime Lab is under the authority of the Attorney General, Plaintiff Stein. JA207. Freeman submitted to the district court the declaration of William Hart, a lifelong public servant and lawyer who served as the Sexual Assault Kit Initiative Site Coordinator at the State Crime Lab in 2019 until October 2020, when he resigned over concerns about the falsity of the Stein Political Ad. JA215-219. Mr. Hart's declaration outlines the evolution of how SAECKs are handled under North Carolina law. Relevant to Plaintiffs' allegations, Mr. Hart's declaration establishes (a) that a long and detailed process was developed during the period 2017 through 2020 for the handling of untested SAECKs in possession of law enforcement throughout the State, pursuant to the laws passed by the General Assembly, and (b)

that when testing of the SAECKs began after the appropriate protocols were developed, it was required that the SAECKs be submitted in batches when approved by the State Crime Lab, meaning that no law enforcement agency could submit all of their untested SAECKs at one time and could not submit them until receiving permission from the State Crime Lab. JA215-219.

Freeman also submitted to the district court the State Crime Lab's "2017 SAECK Law Enforcement Inventory Report" reflecting the results of this inventory. JA224. This report shows that a total of 1,509 untested SAECKs were in the possession of five law enforcement agencies in Forsyth County at that time. Approximately 1/3 of these 1,509 untested SAECKs were matters wherein the subject admitted the sexual encounter, meaning that the SAECKs were not eligible for submission to the State Crime Lab prior to 15 October 2018 without approved deviation from policy by the Lab. Notably, these SAECKs were in possession of the law enforcement agencies in Forsyth County, not the District Attorney's office. There is no provision in North Carolina law giving an elected district attorney authority to order a law enforcement agency to do anything.

Thus, relevant to Plaintiffs' claims, (a) all untested SAECKs were in possession of law enforcement officers, not any district attorney; and (b) any untested SAECKs in law enforcement possession could not just be submitted wholesale to the State Crime Lab or contracted labs for testing, but rather had to be submitted in batches according to the developed protocol and upon approval of the State Crime Lab (which was under the control and authority of Plaintiff Stein).

III. The SBI Investigation Revealing the Falsity of the Stein Political Ad.

As noted *supra*, in June 2021 a criminal investigation was initiated by the NCSBI, at the request of the prosecutor assigned by Freeman to review this matter, into the Stein Political Ad. Freeman submitted to the district court the declaration of William Marsh, a special agent of the NCSBI. The declaration outlines the information that was gathered during the course of the criminal investigation of the Stein Political Ad. JA206-214.

As described in the declaration, the criminal investigation produced evidence tending to show (a) that Stein and others in his campaign were aware of the content of the Stein Political Ad, and approved of same; (b) that the Stein Political Ad was false, because an

elected district attorney does not possess any untested SAECKs in North Carolina and could not submit all untested SAECKs to the State Crime Lab at one time, because of the protocol for submission in batches that had been put in place by the State Crime Lab itself; (c) Stein and others in his campaign knew of and/or were recklessly indifferent to that falsity, given their positions as lawyers and elected officials intricately involved in the legislation creating the SAECK initiative and protocol; and (d) the Stein Political Ad was derogatory toward his political opponent and was intended to affect the chances of that political opponent in an election. JA206-214.

IV. The Presentment of the Investigation to the Grand Jury.

Given this substantial evidence of violation of the Statute by Stein and others, the prosecutor handling the investigation determined the appropriate course of action to be the submission of a presentment pursuant to N.C.G.S. §7A-271 and §15A-628 to the grand jury, to permit the citizens of Wake County through the grand jury to determine whether or not criminal charges would be appropriate against any person associated with the Stein Political Ad. The prosecutor handling the matter voluntarily discussed his intentions with counsel for Stein,

as a matter of courtesy and professionalism. This action was filed shortly thereafter in July 2022.[3]

SUMMARY OF ARGUMENT

Plaintiffs argue that a North Carolina criminal statute, barring false derogatory reports about political candidates intended to affect election results and made with actual malice, is facially unconstitutional under the First Amendment. The district court correctly rejected Plaintiffs' position, addressing each argument made by Plaintiffs and holding that (a) under United States Supreme Court precedent reaffirmed just a few years ago, criminal defamation statutes like the one at issue here are not violative of the First Amendment where they have an actual malice element; and (b) the statute at issue here is narrowly tailored to achieve compelling state interests and therefore passes a "strict scrutiny" analysis, and is very different than

[3] After the district court denied Plaintiffs' motion for preliminary injunction, and also denied Plaintiffs' motion for an injunction pending appeal, the grand jury in Wake County considered this matter and on 22 August 2022 issued a presentment, directing the Office of the District Attorney to bring indictments to it for its consideration against Plaintiffs Stein, Dearmin, and Stern for violation of the Statute. This has not occurred, given this Court's order on 23 August 2022 granting an injunction pending appeal conditioned on Plaintiffs' entry into a tolling agreement.

the statutes at issue in the cases relied on by Plaintiffs. The district court did not abuse its discretion in so concluding.

Putting Plaintiffs' factual hyperbole aside, nothing they raise on appeal is new law or argument that contradicts the district court's sound reasoning. To the contrary, each of the points advanced by Plaintiffs -- the alleged overbreadth, underinclusiveness, and lack of narrow tailoring of the Statute -- are no basis to invalidate a statute that "has a plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). The statute, read as a whole, regulates only materially false and defamatory speech. This type of speech has long been recognized as not protected by the First Amendment, even in the political context.

A plaintiff asserting a facial constitutional challenge to a statute must meet a "particularly demanding standard" and "must establish that no set of circumstances exists under which an act would be valid." *Fusaro v. Howard*, 19 F.4th 357, 373 (4th Cir. 2021) (citations and quotations omitted). Plaintiffs' argument rests on conjuring up possible scenarios where, in their view, the statute at issue could be unconstitutional. The district court correctly rejected this approach.

The statute at issue affects a category of speech -- false and defamatory political speech made with actual malice -- that is not protected by the First Amendment. The statute is narrowly tailored to address compelling state interests. For those reasons, the statute should be found facially constitutional.

STANDARD OF REVIEW

A district court's denial of a motion for preliminary injunction is reviewed by this Court for abuse of discretion; in conducting this review, the district court's factual findings are reviewed for clear error and its legal conclusions de novo. *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 172 (4th Cir. 2019).

A preliminary injunction is an "extraordinary remedy" involving the exercise of a very far-reaching power that is only to be employed in limited circumstances. *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, the party seeking relief must establish: "(1) that [it] is likely to succeed on the merits, (2) that [it] is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest." *Winter*, 555

U.S. at 20. "[A] clear showing" of likelihood of success on the merits and irreparable harm is required in addition to satisfying the other required factors before a preliminary injunction may be entered. *Capital Associated Industries, Inc. v. Cooper*, 129 F. Supp.3d 281, 288 (M.D.N.C. 2015).

A plaintiff asserting a facial challenge to the constitutionality of a statute "must establish that no set of circumstances exists under which [the] act would be valid." *Fusaro v. Howard*, 19 F.4th 357, 373 (4th Cir. 2021). "This is a particularly demanding standard and is the 'most difficult challenge to mount successfully.'" *Id.* (*quoting United States v. Salerno*, 481 U.S. 739, 745 (1987). Facial challenges are "disfavored" because, among other things, they "often rest on speculation." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008).

ARGUMENT

I. The District Court Correctly Determined That Plaintiffs Are Not Likely to Succeed on the Merits, Because the Statute Regulates False, Defamatory Speech Made with Actual Malice and Therefore Regulates Speech Not Protected by the First Amendment.

The district court denied Plaintiffs' motion for preliminary injunction on the grounds that Plaintiffs were not likely to succeed on the merits of their claim that the Statute is not constitutional on its face. Specifically, the district court first noted that the Statute is a "subset" of "criminal libel laws," and the decision of the United States Supreme Court in *Garrison v. Louisiana*, 379 U.S. 64 (1964) "is still good law, and it squarely says that criminal libel statutes prohibiting false defamatory statements made with actual malice do not violate the First Amendment." JA424-425.

Next, the district court determined that because the Statute "is directed specifically at political speech in the context of an election, it is not enough that the statute passes muster under *Garrison*." JA426. The district court then examined the Statute using the factors used by courts when conducting a strict scrutiny analysis of a statute for constitutionality, and concluded (a) that the Statute is narrowly tailored to achieve a compelling state interest, JA426-432, and (b) that the caselaw relied upon by Plaintiffs was inapposite because the Statute regulated only defamatory speech, unlike the broader state statutes at issue in the cases relied upon by Plaintiffs. JA432-435. The district

court therefore concluded that the Statute is constitutional on its face, and that Plaintiffs' claim that the Statute is not constitutional is not likely to succeed on the merits. JA435. As explained herein, the district court did not abuse its discretion in so finding.

A. Criminal Defamation Statutes Barring False and Defamatory Speech Made with Actual Malice Are Constitutional and Not Violative of the First Amendment Under *Garrison* and *Alvarez*.

As an initial matter, Plaintiffs' position fails to acknowledge the starting point of the district court's analysis -- that criminal defamation statutes (like the Statute) have always been (and continue to be) constitutional under the First Amendment, and further compelling state interests.

In *Garrison*, the United States Supreme Court directly addressed the constitutionality of a criminal defamation statute in the context of political speech. The *Garrison* court held that such statutes are constitutional so long as (a) they regulate false defamatory speech and (b) they require proof of actual malice under the standard set out in *New York Times v. Sullivan*, 376 U.S. 254 (1964). *Garrison*, 379 U.S. at 73-76. The *Garrison* court based this holding on the serious dangers

and societal harms that can result from knowingly false political speech:

> Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration.
>
> ***
>
> That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.

Garrison, 379 U.S. at 75. *Garrison* continues to be good law today.

Plaintiffs attempt to minimize this language as "dicta," claiming that *Garrison* only "arguably held open the possibility that a generic criminal libel law could be facially valid if it required proof of actual malice" under *Sullivan*. Appellants Br. 22. This attempt is understandable, given that *Garrison* directly undercuts Plaintiffs' claims. But this position simply ignores the plain language set out above, directly from the Supreme Court's opinion. And the vitality of

Garrison's holding is confirmed by examination of how recent courts have treated *Garrison*.

First, nothing in *United States v. Alvarez*, 567 U.S. 709 (2012), cited by Plaintiffs supports their position. To the contrary, *Alvarez* reaffirms *Garrison*'s holding and the constitutionality of the Statute. *Alvarez* did not involve political speech -- instead it involved a First Amendment challenge to a criminal conviction under the Stolen Valor Act, 18 U.S.C. §704(b), which states: "Whoever, with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a decoration or medal described in subsection (c)(2) or (d) shall be fined under this title, imprisoned for not more than one year, or both."

The Supreme Court found the statute unconstitutional under the First Amendment and reversed the conviction. Beginning with the principle that "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar to the bar", 567 U.S. at 717 (citations and quotations omitted), a plurality of the Court

rejected the Government's position that all "false statements have no value and hence no First Amendment protection." 567 U.S. at 718.

But in so holding, the *Alvarez* plurality specifically identified "defamation" as one of the "traditional categories of expression" subject to allowable content-based restrictions. 567 U.S. at 717. And citing *Garrison* with approval, the *Alvarez* plurality also specifically identified the knowledge element in a defamation claim necessary to comply with the First Amendment as being the *Sullivan* actual malice standard:

> Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood. *See [New York Times v.] Sullivan, supra*, at 280, 84 S.Ct. 710 (prohibiting recovery of damages for a defamatory falsehood made about a public official unless the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not"); *see also Garrison [v. Louisiana], supra*, at 73, 85 S.Ct. 209 ["[E]ven when the utterance is false, the great principles of the Constitution which secure freedom of expression … preclude attaching adverse consequences to any except the knowing or reckless falsehood"); *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 620, 123 S.Ct. 1829, 155 L.Ed.2d 793 (2003) ("False statement alone does not subject a fundraiser to fraud liability").

567 U.S. at 719.

Nothing in *Alvarez* invalidates or undercuts *Garrison*. Rather, *Alvarez* makes clear that (1) not all false speech is constitutionally protected, and (2) defamatory speech made with knowledge of its falsity continues to not be protected by the First Amendment. *Alvarez* also took no constitutional issue with statutes prohibiting false statements that "protect the integrity of Government processes, quite apart from merely restricting false speech." *Alvarez*, 567 U.S. at 721. As the district court found, "[a]n election is a government process of the most fundamental kind." JA429. *Alvarez* in no way assists the Plaintiffs' claims as to the Statute.

Second, recent courts have relied directly on *Garrison* to affirm the constitutionality of criminal defamation statutes that incorporate the *Sullivan* actual malice requirement against facial First Amendment challenges. For example, in *Frese v. MacDonald*, 512 F.Supp.3d 273 (D.N.H. 2021), the District of New Hampshire addressed a facial First Amendment challenge to the New Hampshire criminal defamation statute. The plaintiff contended that the law "violated the First Amendment for criminalizing false and defamatory speech or, in the alternative, for criminalizing false speech criticizing public officials."

512 F.Supp.3d at 285. The district court upheld the statute over this facial First Amendment challenge and found *Garrison* completely controlling:

> Under Garrison, the State may impose criminal sanctions against false and defamatory speech made with actual malice without violating the First Amendment. As such, Frese's allegation that the criminal defamation statute unlawfully criminalizes any and all false, defamatory speech fails to state a First Amendment claim upon which relief can be granted.

Id.

Other federal courts have likewise rejected facial First Amendment challenges to state and local criminal defamation statutes, where the statute contains a knowledge of falsity element compliant with *Garrison*. *See Phelps v. Hamilton*, 59 F.3d 1058, 1070-73 (10th Cir. 1995); *How v. City of Baxter Springs*, 369 F.Supp.2d 1300, 1304-05 (D. Kan. 2005). All of these holdings are grounded in the longstanding principle that defamatory speech, made with knowledge of its falsity, falls into one of the traditional categories of speech not protected by the First Amendment. *Alvarez*, 567 U.S. at 717.

Each of these cases relies directly on *Garrison* to uphold the constitutionality of the criminal defamation statute at issue against a

facial First Amendment challenge. *Frese*, 512 F.Supp.3d at 285; *Phelps*, 59 F.3d at 1070-73; *How*, 369 F.Supp.2d at 1304-05 (relying on *Phelps).* This confirms that *Garrison*'s holding that criminal defamation statutes are constitutional so long as they incorporate an actual malice requirement is not the "dicta" claimed by Plaintiffs. Yet Plaintiffs make no attempt to distinguish (or even mention) these cases rejecting facial First Amendment challenges to state and local criminal defamation statutes in their arguments.

Garrison makes clear that the fact that political speech may be involved does not change the analysis. Defamatory speech is defamatory speech, political or not, and therefore is one of the "traditional categories of expression" not protected by the First Amendment so long as the statute regulating it incorporates an actual malice requirement.[4] The district court correctly concluded that *Garrison* "says that criminal libel statutes prohibiting false defamatory

[4] Notably, the decision in *Frese* is currently on appeal to the First Circuit, and in that appeal the plaintiff acknowledges the continued vitality of *Garrison* and concedes that *Garrison* is controlling law on the issue of facial constitutionality of the criminal defamation statute. *Frese v. Formella*, First Circuit Court of Appeals No. 21-1068, Appellants Brief filed 5/7/2021 at 49.

statements made with actual malice do not violate the First Amendment." JA425.

B. The Statute Prohibits Only False Derogatory Speech -- Not Truthful Speech Made In Reckless Disregard of its Truth as Now Claimed by Plaintiffs.

Attempting to avoid the problem that *Garrison* creates for their claim, Plaintiffs make a new argument on appeal -- that the Statute is not really a criminal defamation statute and is "overbroad" by purportedly prohibiting truthful derogatory statements made "in reckless disregard of their truth" in additional to false derogatory statements. Appellant Br. 24-28.[5] Plaintiffs' reading of the Statute fails on both the Statute's text and the law.

1. Plaintiffs' Proposed Reading of the Statute Ignores the Entirety of its Text and Violates Elementary Rules of Statutory Construction.

Plaintiffs argue that the term "derogatory" in the Statute does not necessarily mean "false" under North Carolina law and can include truthful statements, citing *State v. Petersilie*, 432 S.E.2d 832 (N.C.

[5] Plaintiffs did not make this argument in the district court. The district court found: "The parties implicitly acknowledge that the statute targets only false statements about verifiable facts in elections." JA431.

1993). And because "a statute that criminalizes truthful criticism of candidates for offices violates the Constitution," Plaintiffs claim that the Statute is therefore not constitutional. Appellants Br. 26. Plaintiffs' misguided and misleading "logic" in this regard should be rejected.

In *Petersilie*, the North Carolina Supreme Court found a different subsection of the statute at issue in this case (N.C.G.S. §163-274(8))[6] barring certain anonymous political speech constitutional under the First Amendment, and in doing so found that the subsection at issue barred truthful statements that were "derogatory." But that subsection is very different than the Statute, both in its text and in its purpose.

Plaintiffs fail to note that the subsection at issue in *Petersilie* does not contain the key modifying text present in the Statute -- that the "derogatory report" must be made "knowing such report to be false or in reckless disregard of its truth or falsity." N.C.G.S. §163-274(a)(9) (emphasis added). This phrase is not present in the subsection at issue

[6] The subsection at issue in *Petersilie* makes it illegal "[f]or any person to publish in a newspaper or pamphlet or otherwise, any charge derogatory to any candidate or calculated to affect the candidate's chances of nomination or election, unless such publication be signed by the party giving publicity to and being responsible for such charge." N.C.G.S. §163-274(8).

in *Petersilie*. For this reason alone, Plaintiffs' reliance on the subsection in *Petersilie* is misguided.

In interpreting a statute, "[w]ords and phrases of a statute may not be interpreted out of context, but individual expressions must be construed as part of the composite whole and must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." *State v. Rawls*, 700 S.E.2d 112, 119 (N.C. App. 2010). The legislature's inclusion of this modifier to the term "derogatory reports" adds an element to the Statute not present in the subsection at issue in *Petersilie* -- the well-known *Sullivan* standard of actual malice.

The only reason that the legislature would include this modifier on the term "derogatory report" would be to impose a falsity element on that term -- otherwise the modifying phrase "knowing such report to be false or in reckless disregard of its truth or falsity" would be rendered superfluous and would not be necessary. *State v. Coffey*, 444 S.E.2d 431, 434 (1994) (statute should not be interpreted in a manner that renders its terms superfluous). In other words, had the legislature intended the Statute to regulate both false and true derogatory reports,

it would not have needed to include the actual malice standard at all -- knowledge of truth or falsity would not be relevant, as in the subsection at issue in *Petersilie*. When "construed as part of the composite whole" as required by law, *Rawls*, 700 S.E.2d at 219, the Statute's text criminalizes only false derogatory reports.

This reading is also entirely consistent with the Statute's purpose. The "primary task" of a court interpreting a statute "is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Electric Supply Co. v. Swain Elec. Co., Inc.*, 403 S.E.2d 291, 294 (N.C. 1991). As found by the district court, the Statute serves the compelling state interests of "preventing fraud and libel in elections", JA428, and "preserving the integrity of [their] election process." JA429 *citing Mcintyre v. Ohio Elections Comm.*, 514 U.S. 334, 349 (1995) and *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). To achieve this purpose, the Statute has to necessarily be directed toward false derogatory information -- true information cannot cause fraud, or affect the integrity of the electoral process in any way.

The Statute therefore bars knowingly false and derogatory reports about political candidates being made in an effort to affect a political

campaign -- by modifying the term "derogatory reports" with the actual malice requirement. It can hardly be said that the Legislature, in creating a statute that has the purpose of preventing "fraud and libel" and preserving "integrity" in the electoral process, would consider true statements made in "reckless disregard" of their truth to be a danger -- whatever such statements may be. *See In re Hardy*, 240 S.E.2d 367, 372 (N.C. 1978) ("statutes should be given a construction which, when practically applied, will tend to suppress the evil which the Legislature intended to prevent").[7]

Reading the Statute to criminalize only false derogatory reports is also consistent with the principle that when passing or amending a statute, "it is presumed the Legislature acted with full knowledge of prior and existing law" and that "when a term has obtained long-standing legal significance, we presume the legislature intended such

[7] Plaintiffs argue that "federal courts are without power to adopt a narrowing construction of a state statute unless such a construction is *reasonable and readily apparent*." Appellant Br. 27-28 (emphasis in original) *citing Toghill v. Clarke*, 877 F.3d 547, 556 (4th Cir. 2017). Of course, to the extent a "narrowing" construction is considered necessary here, it is more than readily apparent -- as explained herein. Moreover, Plaintiffs' position contradicts "the well-established principle that statutes will be construed to avoid constitutional difficulties." *Frisby v. Schultz*, 487 U.S. 474, 483 (1988).

significance to attach to its use of that term, absent indication to the contrary." *Dare County Bd. of Education v. Sakaria*, 492 S.E.2d 369, 371 (N.C. App. 1997). The legislative history to the Statute shows that Section 163-274 has been considered, amended, and recodified by the North Carolina Legislature multiple times since its inception; a new subsection was added to Section 163-274(a) as recently as 2013. *See* North Carolina Session Law 2013-381, §14.1 (2013).

The legislature is presumed to understand the legal significance of the actual malice standard from *Sullivan* in considering and amending the relevant statutory scheme. The legislature is likewise presumed to understand that a criminal libel statute cannot bar truthful political speech under *Garrison*. Yet in its repeated consideration of the statutory scheme involving the Statute, the legislature has left the language of the Statute unchanged -- because we can presume that the legislature understands the Statute to bar only <u>false</u> derogatory reports by including the *Sullivan* standard.

"Derogatory reports" may not be limited to "false" reports in some statutes that do not incorporate a *Sullivan* actual malice requirement; but "derogatory reports" certainly means "false" reports when modified

by language in the Statute requiring that the "derogatory reports" be made with the well-known *Sullivan* actual malice standard. This standard arises from defamation law -- and to be defamatory, a statement must be false, not true. *See, e.g. Boyce & Isley, PLLC v. Cooper*, 568 S.E.2d 893, 898 (N.C.App. 2002) (defamation includes "false words imputing to a merchant or business man conduct derogatory to his character"). A fair reading of the entirety of the Statute can only mean that the Statute regulates false derogatory reports.

It is for all of these reasons that the district court quite properly understood the term "derogatory report" in the context of the Statute to "encompass false defamatory speech about a candidate and nothing more." JA424 (emphasis added). This is further confirmed by the fact that the North Carolina Supreme Court, in affirming a defendant's conviction under the Statute, relied in part on the grounds that "[t]he jury found that [the derogatory reports] were false." *State v. Prichard*, 41 S.E.2d 287, 287 (N.C. 1947). The North Carolina Supreme Court would not have done so if falsity of the derogatory reports was not an element of the offense. North Carolina law dictates that the Statute

can be read to prohibit only false and derogatory reports, made with actual malice.

2. Plaintiffs' Proposed Reading of the Statute Would Lead to Absurd Results.

Next, Plaintiffs seek to avoid this commonsense result by arguing that the phrase "knowing such report to be false or in reckless disregard of its truth or falsity" means that the Statute can be satisfied "by showing that a defendant made a *true,* derogatory comment in reckless disregard of its truth." (Appellant Br. 27). This position, with all respect, would lead to absurd results contrary to established rules of statutory construction.

To accept Plaintiff's reading of the Statute, one must disregard the words "knowing such report to be false" that lie directly in front of the phrase "or in reckless disregard of its truth or falsity" -- does Plaintiff contend that the Statute prohibits false statements that are made either knowingly or in reckless disregard of their falsity, but only true statements made in reckless disregard of their truth (and not true statements known to be true)? Plaintiffs' reading of the Statute would necessarily exempt knowingly true statements from the Statute's reach, but include true statements made in "reckless disregard of their truth."

Under North Carolina law, a statute must be interpreted "to avoid the creation of absurd results." *Bryant v. Bowers*, 641 S.E.2d 855, 857 (N.C.App. 2007); *see also Estate of Jacobs v. State*, 775 S.E.2d 873, 877 (N.C.App. 2015) (declining to interpret statute in a manner rendering the statute's provisions "nonsensical").[8] Plaintiffs' tortured reading of the Statute would plainly do so here.

3. Plaintiffs' Proposed Reading of the Statute, Even If Accepted, Does Not Render the Statute Overbroad.

The district court correctly notes that "the North Carolina Supreme Court interprets statutes in ways that avoid constitutional problems." JA424 *citing State v. Hilton*, 862 S.E.2d 806, 812 (N.C. 2021). But even if Plaintiffs' efforts to contrive some reading of the Statute as regulating truthful statements made in reckless disregard of their truth could be accepted, it still would not render the Statute overbroad and unconstitutional.

A statute that limits speech can be invalidated on overbreadth grounds only where "it prohibits a substantial amount of protected

[8] Of course, this does not even address the issue of how one could even make a true statement in "reckless disregard" of its truth -- if something is true, how can one act "recklessly" as to its truth? Plaintiffs do not even attempt to explain how this could occur.

speech ... we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 185, 292 (2008) (emphasis in original). It can hardly be said that there is a danger that the Statute could be applied in a "substantial" way to truthful derogatory statements made in reckless disregard of their truth -- in whatever hypothetical universe such statements may exist -- "relative to the statute's plainly legitimate sweep" of regulating knowingly false or recklessly false derogatory statements. *Williams*, 553 U.S. at 292. The focus of the Statute is plain -- to prevent the societal harm inflicted by knowingly false defamatory statements about a political candidate intended to affect the election.

Considering this purpose, Plaintiffs' arguments about "true derogatory statements" made in "reckless disregard of their truth" can hardly be cast as being some substantial part of the Statute's sweep -- and Plaintiffs provide no argument as to how they could be. In any event, as the district court notes, any improper attempt to regulate truthful speech in some other case could be challenged under an as applied challenge to the Statute. JA434-435.

"In determining whether a law is facially valid, [a court] must be careful not to go beyond the statute's facial requirements and speculate about "hypothetical" or "imaginary" cases." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50 (2008); *see also United States v. Raines*, 362 U.S. 17, 22 (1960) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined"). Plaintiffs' efforts to contrive an unconstitutional element into the Statute ask the Court to do just that, and should be rejected. As correctly found by the district court, the Statute prohibits only false derogatory statements made knowing they were false or made in reckless disregard of their truth or falsity. Accordingly, Plaintiffs' overbreadth argument fails. The Statute is a constitutionally valid criminal defamation statute.

C. Because the Statute is a Criminal Defamation Statute That Incorporates an Actual Malice Requirement, It Does Not Violate the First Amendment and is Valid on its Face Under *Garrison* and *Alvarez*.

Having established that the Statute is a criminal defamation statute with an actual malice requirement prohibiting materially false and derogatory statements intended to affect a political campaign, the

Statute is constitutional and does not violate the First Amendment under *Garrison*. Freeman argued below, and argues here, that this is the end of the inquiry as to a facial constitutional challenge, and no further strict scrutiny (or any other) analysis is necessary. In short, *Garrison* says that false defamatory speech (even false defamatory speech relating to politics) is outside the purview of the First Amendment, so long as the statute regulating the defamation has an actual malice requirement.

The district court found that because political speech is involved, further analysis of the Statute is necessary, and went on to conduct a strict scrutiny analysis of the Statute. JA425-35. It is not clear under the law whether any such further analysis is necessary. Recent courts upholding criminal defamation statutes against facial First Amendment challenges have not engaged in any type of strict scrutiny analysis, instead finding *Garrison* controlling and dispositive of the issue by classifying defamatory speech as speech outside of First Amendment protection. *Frese*, 512 F.Supp.3d at 285 ("Under *Garrison*, the State may impose criminal sanctions against false and defamatory speech made with actual malice without violating the First Amendment");

Phelps, 59 F.3d at 1072-73 (finding Kansas criminal defamation statute facially constitutional under *Garrison*). These courts take the position taken by Freeman here -- that statutes prohibiting false and defamatory speech made with actual malice govern conduct that is outside the First Amendment under *Garrison*.

Plaintiffs, relying primarily on *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), argue that the Statute is a "content-based restriction on protected speech" and therefore is subject to strict scrutiny review. Appellant Br. 17-22. But neither *Reed* nor any of the other cases cited by Plaintiff involve examination of a criminal defamation statute. *See, e.g., Reed*, 576 U.S. at 159-61 (applying First Amendment to a town's sign code); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (applying First Amendment to city "Bias-Motivated Crime Ordinance" that prohibits display of certain symbols); *City of Austin, Texas v. Reagan National Advertising of Austin, LLC*, 142 S.Ct. 1464 (2022) (applying First Amendment to city sign ordinance regulating advertisements). Even the cases cited by Plaintiff that involve political speech deal with restrictions on all false political speech of a certain category -- not just false defamatory speech. *See Susan B. Anthony List v. Driehaus*, 814

F.3d 466 (6th Cir. 2016); *281 Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014) (examining Minnesota statute barring certain false statements about ballot initiatives); *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015) (examining anti-robocall statute). This broader application necessitates strict scrutiny review.[9] And *Alvarez* is of no aid to Plaintiffs -- *Alvarez* cites *Garrison* with approval in discussing defamation's categorization as one of the "traditional areas of expression" permissibly subject to content-based restriction. *Alvarez*, 567 U.S. at 719.

Plaintiffs cite to no case examining the constitutionality of a criminal defamation statute that applies a strict scrutiny review to the Statute. Freeman respectfully submits that such a review is not necessary under *Garrison*, where, as here, the criminal defamation statute incorporates an actual malice requirement. *Frese*, 512 F.Supp.3d at 285; *Phelps*, 59 F.3d at 1072-73. The Statute does not

[9] *Driehaus*, for example, specifically notes that "Ohio's laws reach not only defamatory and fraudulent remarks, but *all* false speech regarding a political candidate, even that which may not be … defamatory or libelous" in determining a strict scrutiny examination is necessary. *Driehaus*, 814 F.3d at 473.

regulate speech protected by the First Amendment, and Plaintiffs' facial challenge fails.

D. To the Extent That Strict Scrutiny Analysis Applies, the District Court Correctly Determined That the Statute Satisfies Any Strict Scrutiny Analysis.

To the extent that this Court finds a strict scrutiny analysis necessary, the district court correctly rejected the various challenges raised by Plaintiffs and repeated in this appeal. Plaintiffs' position repeatedly fails to acknowledge the basic tenet that "a facial challenge must fail where the statute has a plainly legitimate sweep." *Washington State Grange*, 552 U.S. at 449.

Plaintiffs first claim that it "is difficult to discern exactly what level of scrutiny the [district] court applied." Appellant Br. 19. But it is not -- the district court plainly applied the strict scrutiny test of *Reed*, finding that "a significant State interest and narrow tailoring appropriate to that interest are required", JA427, and then concluding that the Statute was narrowly tailored to serve compelling state interests. JA428-431. The district court then addressed and rejected all of the strict scrutiny points raised by Plaintiffs. JA431-35. This is all that *Reed* requires. *Reed*, 576 U.S. at 171 (strict scrutiny review

requires examination of whether "the restriction furthers a compelling interest and is narrowly tailored to achieve that interest"). Plaintiffs agree that even under their reading the law, the Statute is constitutional if is "narrowly tailored to serve compelling state interests." Appellants Br. 23.

This, of course, is exactly what the district court found. The district court first correctly noted that the Statute serves compelling state interests. The Supreme Court has held that states have a compelling interest in preventing "fraud and libel" in an election. *McIntyre*, 514 U.S. at 349. Likewise, states "indisputably" have a compelling interest in "preserving the integrity of [their] election process." *Eu*, 489 U.S. at 231. *Garrison* itself notes the strong societal interests in preventing knowingly false political speech. *Garrison*, 379 U.S. at 75 ("For the use of the known lie is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected"). The district court relied on all of these points to correctly conclude that the Statute addressed a compelling state interest.

The district court also correctly concluded that the Statute is "narrowly tailored to meet these interests." JA429. The district court set out a bullet-point list of reasons why, JA429-31, and then addressed and rejected the reasons proffered by Plaintiffs for why they claimed the Statute did not meet the strict scrutiny test. JA431-35. Plaintiffs recycle many of the same arguments and caselaw here.

1. The Political Speech Cases Relied on by Plaintiffs Do Not Apply in the Defamation Context.

As they did in the district court, Plaintiffs base their facial First Amendment challenge to the Statute on a group of cases wherein state laws restricting false statements relating to political speech were held violative of the First Amendment -- *Driehaus*, 814 F.3d 466 (6th Cir. 2016); *Arneson*, 766 F.3d 774 (8th Cir. 2014); *Commonwealth v. Lucas*, 34 N.E.3d 1242 (Mass. 2015) and *Rickert v. State*, 168 P.3d 826 (Wash. 2007). The district court readily distinguished these cases:

> But §163-274(a)(9) has a further limitation; it includes a requirement that the speech be defamatory. As each of the courts recognized when invalidating the laws at issue, those laws did not have this limitation and criminalized all false statements intended to influence elections. *See Susan B. Anthony List*, 814 F.3d at 473; *Lucas*, 34 N.E.3d at 1249-50; *Rickert*, 168 P.3d at 828-29; *218 Care Comm. v. Arneson*, 638 F.3d 621, 634-36 (8th Cir. 2011) (*281 Care Comm. I*)

> (distinguishing between knowingly false campaign speech and defamatory speech and directing the application of heightened scrutiny on remand); *281 Care Comm. II*, 766 F.3d at 785 (applying strict scrutiny and invalidating the Minnesota law). Section 163-274(a)(9) thus applies more narrowly than each of the laws held to be unconstitutional. This additional requirement moves the restricted speech back into a "historic and traditional category of expression" long recognized as subject to appropriate content-based restrictions. *Alvarez*, 567 U.S. at 717-18; *see also Garrison*, 379 U.S. at 74-75.

JA432-433. Plaintiffs make no effort to quarrel with the district court's conclusion in this regard. Instead, Plaintiffs do not address the point, asserting that "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." Appellants Br. 51. But as the district court correctly found, by regulating only defamatory speech, the Statute is very different from -- and much narrower than -- the statutes at issue in the cases relied by Plaintiffs. For that reason, the four cases offered by Plaintiffs do not apply to an examination of the Statute.

Nor is strict scrutiny the impossible standard that Plaintiffs paint it to be based upon these cases. One need only examine other cases not cited by Plaintiffs to understand why. Plaintiffs do not address or

mention the post-*Alvarez* cases wherein courts reject facial First Amendment challenges to regulations affecting political speech despite applying a strict scrutiny review to the regulation. *Linert v. MacDonald*, 901 N.W.2d 664, 667-70 (Minn. App. 2017) (applying strict scrutiny standard and rejecting facial First Amendment challenge to state statute prohibiting person or candidate from knowingly making a false statement that the candidate has the support of a major political party); *Myers v. Thompson*, 192 F.Supp.3d 1129, 1138-42 (D. Mt. 2016) (applying strict scrutiny standard and rejecting facial challenge to state bar rule prohibiting false statements relating to judges and judicial elections).[10]

These cases show that strict scrutiny review is not an impossible standard. And all of the statutes at issue in these cases apply broadly to all knowing false statements about the political subject at issue. The Statute here is instead narrowly tailored to regulate only knowingly false statements that are "derogatory" and intended to affect the

[10] Another court rejected a facial First Amendment challenge to a statute regulating political speech on the grounds that *Alvarez* made clear that false speech is not protected by the First Amendment when made "for the purpose of material gain" or "material advantage," or the speech inflicts a "legally cognizable harm." *Make Liberty Win v. Cegavske*, 570 F.Supp.3d 936, 941-42 (D. Nev. 2021).

candidate's electoral chances. The political speech cases relied on by Plaintiff do not support the result Plaintiffs seek, as correctly determined by the district court.

2. Plaintiffs' New "Underinclusiveness" Arguments Do Not Invalidate the Statute.

Switching horses on appeal, Plaintiffs now focus their challenge to the Statute on "underinclusiveness" grounds. Plaintiffs claim that the Statute does not meet the strict scrutiny test by being "underinclusive" in that (a) it prohibits only false derogatory reports, "but not false laudatory reports"; (b) it prohibits only candidate-related derogatory reports, but "not false reports on other subjects"; and (c) its prohibitions "are untethered from the Government's interest in criminalizing libelous speech." Appellants Br. 30-32.

Plaintiffs grossly overstate the "underinclusiveness" standard. As an initial matter, it is clear that "the First Amendment imposes no freestanding 'underinclusiveness limitation'." *Williams-Yulee v. Florida State Bar*, 575 U.S. 433, 449 (2015) (*citing R.A.V.*, 505 U.S. at 387). In fact, "[i]t is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech." *Williams-Yulee*, 575 U.S. at 448. Rather, the Supreme Court has noted

underinclusiveness can be a "red flag" typically in only two particular circumstances:

> We have recognized, however, that underinclusiveness can raise doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint. … Underinclusiveness can also reveal that a law does not actually advance a compelling interest.

Id. at 448-49 (citations and quotations omitted).

No such concerns can be raised as to the Statute. By barring knowingly false derogatory reports about a candidate intended to affect an election, the Statute directly addresses the compelling state interests on which it is based -- preventing "fraud and libel" in elections, *McIntyre*, 514 U.S. at 349, and "preserving the integrity of [their] election process." *Eu*, 489 U.S. at 231. The Statute does not differentiate between speakers or viewpoints -- it bars all knowingly false derogatory statements about candidates intended to affect an election.[11]

[11] As part of their continued efforts to incorrectly paint all of *Garrison* as dicta, Plaintiffs make an underinclusiveness argument implicating *Garrison* and contending that *Garrison* only permits criminal libel claims "to 'reach words tending to cause a breach of the peace' … or 'to reach speech, such as group vilification' that is 'especially likely to lead to public disorders.'" Appellant Br. 33. But Plaintiffs fail to

The Statute also "actually advance[s], " *Williams-Yulee*, 575 U.S. at 448, that compelling interest. The Statute is the North Carolina legislature's effort to prevent knowingly false derogatory statements being made about a candidate, intended to affect that candidate's electoral chances -- no other North Carolina statute covers this conduct. As such, it is "actually necessary," *Alvarez*, 567 U.S. at 725, to achieve the compelling state interest in protecting against fraud and libel in elections.[12] Furthermore, the fact that the Statute contains "a specific intent requirement -- that false claims be *knowingly* made -- ensures" that the Statute is narrowly tailored to achieve North Carolina's compelling goal. *Linert*, 901 N.W.2d at 668-69 (applying strict scrutiny

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acknowledge that, later in the opinion, the *Garrison* court directly addresses the societal interests served by criminal libel statutes, in holding that "the use of the known lie as a tool [for political ends] is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." *Id.* at 75. These societal interests underpinning *Garrison* are nowhere mentioned in Plaintiffs' underinclusiveness discussion.

[12] In this sense, the Statute contrasts directly with the statute found infirm in *McIntyre*, wherein the Supreme Court found the Ohio law barring anonymous leaflets unconstitutional and not narrowly tailored to the important state interest of preventing "fraud and libel" in elections because Ohio had other statutes that directly protected that interest and therefore the anonymous leaflet statute was not the State's "principal weapon against fraud." *McIntyre*, 514 U.S. at 350.

and upholding state statute regulating political speech over First Amendment challenge, finding intent requirement to eliminate constitutional concerns).

The gist of Plaintiffs' argument as to underinclusiveness is that to constitutionally do what the Statute does, it must also do much more -- also bar false laudatory statements about by a candidate about himself or herself, and also bar false statements about other election-related subjects. Appellants Br. 30-32. But this approach has been directly rejected by the Supreme Court and this Court. In *Williams-Yulee*, the Supreme Court rejected an "underinclusiveness" challenge to a state judicial canon that prohibits judicial candidates from personally soliciting campaign funds, and held:

> A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws -- even under strict scrutiny -- that conceivably could have restricted even greater amounts of speech in service of their stated interests. *Burson*, 504 U.S. at 207, 112 S.Ct. 1846; *see McConnell*, 540 U.S. at 207-08, 124 S.Ct. 619; *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 511-12, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (plurality opinion); *Buckley*, 424 U.S. at 105, 96 S.Ct. 612.

Williams-Yulee, 575 U.S. at 449 (emphasis added).

This Court, in rejecting an underinclusiveness challenge to a federal telemarketing regulation, likewise rejected a plaintiff's efforts to require the legislature to address at one time all aspects of the vice being addressed:

> We have no warrant to prevent the government from addressing a problem one step at a time. And, if we were to strike down these regulations as underinclusive, we could well provoke legislatures to pass broader regulations that would prove far more damaging to free speech. We thus need not prevent the government from confronting problems incrementally; to do so would ignore the warning that the government is not required to make progress on every front before it can make progress on any front.

National Federation of the Blind v. F.T.C., 420 F.3d 331, 349 (4th Cir. 2005) (citations and quotations omitted). There is no requirement that an otherwise constitutional statute regulating speech "do it all." Yet that is exactly what Plaintiffs ask this Court to require.

Plaintiffs' new "underinclusiveness" arguments ask too much. The law does not require what Plaintiffs ask this Court to impose on the Statute. Plaintiffs' challenge on this ground should be rejected.

3. The Statute Is Narrowly Tailored to Achieve Compelling State Interests.

Despite the district court's detailed analysis explaining how and why the Statute is narrowly tailored to address compelling state

interests, JA429-432, Plaintiffs again pursue the same points previously raised in the district court. Specifically, Plaintiffs contend that the Statute is not narrowly tailored because of the availability of purported "alternative narrower measures" of "counterspeech and civil libel." Appellants Br. 38. Neither of these alternatives supports invalidation of the Statute.

a. Counterspeech Considerations Do Not Invalidate the Statute.

First, as to counterspeech, the district court specifically noted that counterspeech is ineffective in the election context, because the Statute governs defamatory speech "made during a time when false and malicious defamatory statements has the potential to gather momentum with little time for the often slower-to-surface factual counterspeech to be effective." JA430 *citing Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (recognizing counterspeech effective only "if there is time … through discussion [to counteract] the falsehood and fallacies") (emphasis added); *Alvarez*, 567 U.S. at 727-28 (citing *Whitney* concurrence with approval). Other courts have likewise rejected the notion that counterspeech is effective in the political arena. *Myers*, 192 F.Supp.3d at 1140-41 (D. Mt. 2016)

(rejecting counterspeech as effective where false statements affected judicial elections).

Plaintiffs complain that the district court's rejection of counterspeech "is particularly problematic here since statutes restricting campaign speech have virtually no prospect of resolving a claim before an election." Appellants Br. 40. But Plaintiffs overlook the fact that the compelling state interests served by the Statute include preventing "fraud and libel" in elections, *McIntyre*, 514 U.S. at 349, and "preserving the integrity of [their] election process." *Eu*, 489 U.S. at 231. These interests are always served by application of the Statute to knowingly false derogatory statements about a candidate intended to affect an election -- whether that application occurs before or after the election. This is because these interests are served any time that an offender is penalized. Plaintiffs offer no authority or explanation of how this interest is somehow lessened if the Statute is enforced after the election occurs.[13] Appellants Br. 40. Plaintiffs' counterspeech position

[13] This claim is also inconsistent with Plaintiffs' reliance on civil libel remedies. If, as claimed by Plaintiffs, the Statute is not an effective remedy for false campaign speech because "statutes restricting campaign speech have virtually no prospect of resolving a claim before

does not warrant finding the Statute unconstitutional under the First Amendment.

b. The Availability of Civil Libel Remedies for Private Individuals Does Not Invalidate the Statute.

Second, Plaintiffs contend that the availability of civil libel as a remedy likewise supports a finding of lack of narrow tailoring. Again, this position fails to account for the compelling state interests served by the Statute. The Statute is not in place to protect only individual interests -- it is in place to protect the societal interests of preventing fraud in elections, and preserving the integrity of elections. *McIntyre*, 514 U.S. at 349; *Eu*, 489 U.S. at 231. As such, a civil libel lawsuit brought by an individual party does not address these societal interests -- it protects only the individual.

This distinction is highlighted by the case relied on by Plaintiffs -- *Lind v. Grimmer*, 30 F.3d 1115 (9th Cir. 1994). In discussing *Lind*, Plaintiffs explain that the government interest at issue in that case is "the government's purported interest in protecting candidates from unmerited charges." Appellants Br. 41. This is an individual interest --

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an election," Appellants Br. 40, then how is a civil libel claim that would take years to litigate in civil court a better alternative?

that of the particular candidate being protected from unmerited charges. In contrast, the Statute promotes and protects societal interests -- the opposite of the individual interests at issue in *Lind*. As such, *Lind* itself explains why civil libel is not an effective alternative to the Statute, and Plaintiffs' argument is this regard has no merit.[14]

c. The List of Plaintiff's Concerns Based on *Susan B. Anthony List v. Driehaus* Does Not Invalidate the Statute.

Finally, Plaintiffs rely again on the list of issues raised in reliance on the Sixth Circuit's decision in *Driehaus* and rejected by the district court. Appellants Br. 44-51. The district court listed a series of reasons why the Sixth Circuit factors did not apply to invalidate the Statute, including:

(1) "the list of factors reads more like a means to bureaucratically undermine the holdings in [*Garrison* and *New York Times*] by making it impossible for a state to

[14] Plaintiffs also cite several Supreme Court cases from the 1960s and 1970s in support of a policy argument that "the government also has no basis for using criminal sanctions at all in this context." Appellants Br. 42. While it is understandable, being subjects of a criminal investigation, that Plaintiffs would make this policy argument, there is no legal basis for it. *Garrison* is good law, untouched by any of the cases cited by Plaintiffs, and permits enforcement of the Statute for the reasons explained herein and by the district court.

constitutionally regulate false and malicious lies about a candidate made during a campaign" JA433;

(2) "the Sixth Circuit would require at least two means of tailoring that appear mutually exclusive" JA433;

(3) "the Sixth Circuit's approach disregards the Supreme Court's caution [in *Washington State Grange*, 552 U.S. at 449-50] that 'a facial challenge must fail where the statute plainly has legitimate sweep' and that courts must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases'" JA433;

(4) that "the tailoring issues [discussed in *Driehaus*] stemmed in part from the Ohio law's broader sweep, which included all false non-material statements intended to influence an election" and the Statute "prohibits false defamatory speech about candidates, not false speech about a candidate generally" and therefore "is, on its face, more narrowly tailored" JA434;

(5) any misuse of the Statute to prosecute political opponents is subject to institutional protections preventing such abuses JA 434; and

(6) the availability of as applied challenges to the Statute "to curb overzealous application of the statute to particular speech if that application would violate the First Amendment." JA434-435.

JA433-435. Nothing in the points raised on appeal by Plaintiffs affect this sound reasoning.

Plaintiffs first argue that the Statute improperly "lacks a screening process" to "screen out frivolous complaints." Appellants Br. 44-45. Plaintiffs take particular issue with the fact that a criminal prosecution under North Carolina law can be instituted in a number of ways, including by sworn complaint by private citizen to a magistrate. Appellant Br. 5, 45-46. But Plaintiffs provide no explanation for why the statutory process applicable to every criminal charge brought against every North Carolina citizen should not apply to them as well.

Under established North Carolina law, misdemeanor violations like the type at issue in the Statute can be brought by citation (issued

by a law enforcement officer), by warrant or criminal summons (issued by a judicial officer after a finding of probable cause based on the sworn testimony of a citizen or law enforcement officer) or by presentment to the grand jury (whereby citizens in the grand jury would make a finding of probable cause). This procedure applies to all North Carolina citizens -- including Plaintiffs -- and to all misdemeanor crimes.

Only upon a finding of probable cause by a judicial official or a grand jury may a criminal charge proceed. This standard applies across North Carolina to all citizens, and Plaintiffs offer no basis for special treatment. Given this statutory process, North Carolina law does not "provide[] frivolous complainants an audience" or "require[] purported violators to respond to a potentially frivolous complaint" like the Ohio law does, that was the basis for the Sixth Circuit's concerns in *Driehaus*. *See Driehaus*, 814 F.3d at 474. *Driehaus* is plainly distinguishable on this basis.

Plaintiff next contends that the Statute lacks "a materiality requirement." Appellants Br. 46. But the Statute criminalizes only knowingly false "derogatory reports" that are "calculated or intended to affect the chances" of the candidate that is the subject of the

statements. This final requirement -- that the derogatory statement about the candidate be "calculated or intended to affect the chances" of that candidate in the election, is the materiality requirement in North Carolina law that the Sixth Circuit found lacking in the Ohio law. While Plaintiffs provide several hypothetical scenarios where they claim the Statute could purportedly be applied in an infirm manner, Appellants Br. 47, this again violates the well-established principle that a statute cannot be declared facially invalid based on speculation "about 'hypothetical' or 'imaginary' cases." *Washington State Grange*, 552 U.S. at 450. And as the district court correctly determined, as applied constitutional challenges are available to address any claimed outlier application of the Statute. JA434-435.

Next, Plaintiffs contend that the Statute is not narrowly tailored because it could purportedly be applied to "commercial intermediaries." Appellants Br. 48. But Plaintiffs fail to acknowledge that a commercial intermediary could only be prosecuted if it knew or was recklessly indifferent to the falsity of the political speech at issue --which is very unlikely given its position. In any event, as with the issue of materiality, "a facial challenge must fail where the statute has a plainly

legitimate sweep." *Washington State Grange*, 552 U.S. at 449. When applied to candidates or employees of a political campaign, the Statute avoids this issue entirely. *Driehaus* is distinguishable on this basis.

Next, Plaintiffs claim that the Statute is not narrowly tailored because of a "timing problem." Appellants Br. 49. But as discussed *supra*, given the nature of the interests underlying the Statute, it is difficult to understand how those compelling state interests could be minimized simply because the prosecution occurs after, rather than before, the affected election. Plaintiffs offer no explanation how this could be the case. Appellants Br. 40. This compelling state interest is served any time that an offender is penalized.[15]

Finally, Plaintiffs raise again the overbreadth and underinclusiveness concerns previously discussed. None of these concerns invalidate the Statute, as discussed herein.

* * *

[15] Notably, the *Driehaus* court cites to no precedent from the United States Supreme Court (or elsewhere) for its "timing" requirement. This likely in part underlies the district court's conclusion that the Sixth Circuit's "list of factors reads more like a means to bureaucratically undermine the holdings in [*Garrison* and *New York Times*]." JA433.

In sum, even applying the strict scrutiny analysis requested by Plaintiffs, the Statute is constitutional on its face. The district court did not abuse its discretion in denying the motion for preliminary injunction on the grounds that Plaintiffs failed to show a likelihood of success on the merits.

II. The Remaining Factors for Consideration Counsel Against Issuance of a Preliminary Injunction.

The remaining factors for consideration do not support issuance of a preliminary injunction.

A. Plaintiffs Cannot Establish Irreparable Harm.

As correctly found by the district court in addressing Plaintiffs' attempt to obtain an injunction pending appeal, Plaintiffs cannot establish irreparable harm. JA450-451. The law is clear that that facing a criminal charge is not "irreparable harm" as that term is used in equity. The "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term." *Younger v. Harris*, 401 U.S. 37, 46 (1971). Rather, the harm "must be one that cannot be eliminated by his defense against a single criminal prosecution." *Id.; see also Beal v. Missouri Pacific R.R. Corp.*, 312 U.S.

45, (1941); *Gilliam v. Foster*, 75 F.3d 881, 904 (4th Cir. 1996) ("[O]rdinarily irreparable harm cannot be shown simply because a defendant will be subject to a single criminal prosecution in which he must raise any constitutional claims he wishes as a defense to his conviction").

Thus, the prospect of facing criminal indictment is not irreparable harm. And if the grand jury were to return an indictment for violation of the Statute against any person, that person would have the opportunity to litigate the constitutionality of the Statute in that criminal case. *See, e.g. Petersilie*, 432 S.E.2d at 837-38 (N.C. 1993).

Plaintiffs claim that "[i]t 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." Appellant Br. 53. But Plaintiffs are entitled to no special treatment, simply because of their office as "a politician." To the contrary, the rule of law established above applies to all citizens, and the rule of law establishes that "cost, anxiety, and inconvenience" of defending against criminal prosecution is not "considered 'irreparable' in the special legal sense of that term."

Younger, 401 U.S. at 46. Plaintiffs cannot establish irreparable harm, as necessary for issuance of a preliminary injunction.

B. The Balance of Equities and Public Interest Weigh Against Issuance of a Preliminary Injunction.

Finally, both the balance of equities and the public interest weigh against reversal of the district court's order. The public interest is served by denial of the preliminary injunction. During an election campaign, "false statements, if credited, may have serious adverse consequences for the public at large" and therefore a state has a compelling interest in preventing "fraud and libel" in an election. *McIntyre,* 514 U.S. at 349. Plaintiffs' efforts to enjoin Defendant Freeman's office from doing its work and duty in presenting the matters relating to the Stein Political Ad to the grand jury directly conflicts with this strong public interest. The public interest weighs against issuance of a preliminary injunction. The district court did not abuse its discretion in denying the motion for preliminary injunction.

CONCLUSION

For the reasons set out herein, the order of the district court denying Plaintiffs' motion for preliminary injunction should be affirmed.

This the 11th day of October, 2022.

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DATED: 11 October 2022

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing BRIEF through the electronic service function of the Court's electronic filing website, as follows:

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