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

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

The Statute is a content-based restriction on core political speech that lacks a compelling justification or narrowly tailored safeguards. It threatens to chill speech at the heart of our democratic process.

The Supreme Court has never upheld such a law, and it cannot survive First Amendment review. Yet Defendant contends that *Garrison v. Louisiana*, 379 U.S. 64 (1964), establishes that any criminal libel statute is constitutional so long as it embodies an actual-malice standard and that no further scrutiny is required. *See* Brief of Appellee ("Resp.") 15-22. That argument misreads *Garrison*, misinterprets the surrounding body of First Amendment law, and would not even justify the North Carolina Statute, which proscribes truthful derogatory speech. And under strict scrutiny, Defendant has failed to carry her burden to show how the Statute logically serves its asserted interest or why less-restrictive alternatives are inadequate.

No one welcomes false derogatory campaigning. Indeed, Plaintiffs are hostile to it and responded to derogatory campaigning here as the American political process and Constitution expect: with counterspeech so that the electorate may decide. North Carolina also provides private civil remedies for damages to personal reputation. But North Carolina's poorly tailored and outlier criminal Statute – rarely used and never effective – harms rather than helps the electoral process. Defendant's arguments to the contrary lack merit.

ARGUMENT

I. *Garrison* Does Not Decide This Case.

A. *Garrison*'s Dictum Is Not Law and Has Not Stood the Test of Time.

Garrison contains two holdings that led the Court to invalidate the application of Louisiana's criminal defamation statute to punish speech critical of public officials. First, the Court held the Louisiana statute could not be sustained on the theory it protected against the risk that defamatory speech would spark violence – an archaic and outmoded purpose of such laws. It explained that Louisiana's law was not "narrowly drawn" to "reach words tending to cause a breach of the peace" or "especially likely to lead to public disorders." *Garrison*, 379 U.S. at 70. Defendant does not claim that North Carolina's law fares any better on this score, and it does not. The Statute is clearly not tailored to prevent outbreaks of violence.

Second, *Garrison* held that no criminal punishment could be imposed for *truthful* derogatory statements about public officials' conduct of public affairs, *id.* at 72-73, and that even false statements could not be punished without meeting the *New York Times v. Sullivan*, 376 U.S. 254 (1964), actual-malice standard, 379 U.S. at 73-76. The first aspect of that holding – that truthful speech may not be punished at all – invalidates the Statute here as well. *See* Part III, *infra*. But Defendant misreads *Garrison* as holding that if an actual-malice standard *is* applied, criminal punishment under any defamation statute is constitutional with *no* further scrutiny. Resp. 15-22.

Even the district court did not go that far, JA425-426, and read in context and given subsequent Supreme Court jurisprudence, *Garrison* does not stand for that sweeping exemption from First Amendment review.

The Supreme Court has *never* upheld a criminal defamation statute as constitutional, much less one directed at reports made against political candidates. Not only did the Court invalidate the Louisiana statute, it also reserved "whether a State may provide any remedy, civil or criminal, if defamatory comment alone, however vituperative, is directed at public officials." *Garrison*, 379 U.S. at 77 n.10. In view of that reservation, *Garrison* cannot be read to establish any bright-line rules in favor of criminal libel – and certainly not one directed at candidates in elections, where First Amendment concerns are most urgent and compelling.

Defendant relies on *Garrison*'s statements about the lack of worth of "the lie, knowingly and deliberately published about a public official" and the Court's recognition that the "known lie" could be used to undermine democratic government. *Id*. at 75; *see* Resp. 16. But the Court's observation that "[t]he use of calculated falsehood . . . would put a different cast on the constitutional question" did not resolve the proper treatment of that issue. 379 U.S. at 75. Those statements did not concern any law before the Court, and so the Court had no occasion to determine whether the *New York Times* actual-malice standard was sufficient to protect the First Amendment interests at stake in public debate. Nor did the Court

consider remedies of counterspeech and civil libel or whether a selective, content-based criminal law aimed at campaign speech could survive First Amendment review. And the Court had no occasion to address the degree of tailoring that would be required before any criminal law could survive. Dictum of that kind does not constitute binding authority. *See Cent. Va. Comm. College v. Katz*, 546 U.S. 356, 363 (2006).

The development of the law since *Garrison* confirms why its dictum cannot be treated as a blanket endorsement of any criminal libel statute. Defendant cannot cite a single Supreme Court case in the 58 years since *Garrison* upholding a criminal defamation statute, much less reiterating the absolute rule Defendant advances or holding that criminal libel statutes escape strict scrutiny. That reading of *Garrison* would conflict with multiple subsequent precedents and the analysis they prescribe.

Defendant claims that *United States v. Alvarez*, 567 U.S. 709 (2012), reaffirmed her reading of *Garrison*. But *Alvarez* repudiates the dictum in *Garrison* concerning false statements. *Garrison* stated that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." 379 U.S. at 75. But the separate opinions forming the majority in *Alvarez* rejected that categorical statement. The government in *Alvarez* cited multiple Supreme Court decisions – including *Garrison* – to support its position that "false statements have no value and hence no First Amendment

protection." 567 U.S. at 718 (plurality opinion). But the plurality concluded that these "isolated statements" – citing *Garrison* as an example – *do not* support the "Government's submission that false statements, as a general rule, are beyond constitutional protection." *Id.* And the plurality explained why: "Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech," then "it would give government a broad censorial power unprecedented in this Court's cases." *Id.* at 723. The plurality added that the "mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Id.* The concurring opinion likewise warned that "there remains a risk of chilling that is not completely eliminated by *mens rea* requirements; a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to render him liable." *Id.* at 736 (Breyer, J., concurring).

Nor did the plurality's second citation of *Garrison* breathe life into the dictum that Defendant cites. The plurality noted that even in allowing actions for defamation or fraud, falsity alone is not enough to comply with the First Amendment. *Id.* at 719. In that context, the Court cited *Garrison*'s statement that the First Amendment precludes penalizing false defamatory statements "except the knowing or reckless falsehood." *Garrison*, 379 U.S. at 73. That general statement is true – but it does not imply that any knowing or reckless falsehood *may* be

punished. And the Court had no occasion to comment on a criminal statute aimed at the core of the political process with enormous potential to chill campaign speech and suppress speakers the government disfavors. In fact, the *Alvarez* plurality warned against distorting *New York Times* – which "limits liability even in defamation cases where the law permits recovery for tortious wrongs" – to support a broader rule permitting restrictions of speech in a "different, far greater realm of discourse and expression," explaining that "[a] rule designed to tolerate certain speech ought not blossom to become a rationale for a rule restricting it." *Alvarez*, 567 U.S. at 719-20.

Additional lines of post-*Garrison* First Amendment authority undermine reliance on its dictum. Since *Garrison*, the Court has limited the categories of speech that fall outside the First Amendment to historically recognized categories, *see United States v. Stevens*, 559 U.S. 460, 468-72 (2010) – a historical showing that Defendant makes no effort to make and that would run headlong into the judgment of history on laws like the Alien and Sedition Acts, *see New York Times*, 376 U.S. at 273-76. Further, the modern Court has emphasized that content-based statutes must face strict scrutiny, regardless of any benign justification. *See Reed v. Gilbert*, 576 U.S. 155, 163-65 (2015). And even unprotected categories of speech cannot be the basis for *additional* content-based limitations without surviving strict scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992). Given those precedents, this

Court should not, as Defendant suggests, treat *Garrison*'s dictum as a time capsule that can be opened and treated today as an exemption from normal First Amendment scrutiny.

B. Defendant's Lower-Court Authority Does Not Assist Her.

Defendant cites out-of-circuit cases upholding generic criminal defamation statutes. Resp. 19-21. In each case, the party challenging the statute assumed that a generically applicable criminal defamation statute requiring actual malice would survive under *Garrison*. Therefore, the courts in those cases were not confronted with the need to conduct a close reading of *Garrison*. In *Frese v. MacDonald*, 512 F. Supp. 3d 273 (2021), the statute was challenged only as unconstitutionally vague. Similarly, in *Phelps v. Hamilton*, 59 F.3d 1058, 1070-73 (10th Cir. 1995), the plaintiff argued only that the statute should be struck down because it *did not* include an actual-malice requirement. The court interpreted the statute to require actual malice, but it was not asked to consider whether *Garrison* left open challenges to the constitutionality of criminal libel statutes altogether. *Id.* at 1071-73; *How v. City of Baxter Springs*, 369 F. Supp. 2d 1300, 1304-05 (D. Kan. 2005) (not considering proper reading of *Garrison*).

Beyond that, each of these cases upheld the constitutionality only of *generic* criminal defamation statutes. None of the statutes directly targeted campaign speech. *See Frese*, 512 F. Supp. 3d 273; *Phelps*, 59 F.3d at 1070-73; *How*, 369 F.

Supp. 2d at 1304-05. Those cases thus do not support the North Carolina Statute. Perhaps *Frese* and *Phelps* were wrongly decided and no criminal libel statute could be upheld under the First Amendment. But this Court need not reach that issue. All it must do is conclude that a content-based criminal law specifically targeted at political speech is subject to strict scrutiny analysis (which it fails).

II. The Statute Does Not Survive Strict Scrutiny.

Reed holds that all content-based restrictions on speech must be reviewed under strict scrutiny. And content-based restrictions on political and campaign speech are no exception. *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) (*SBAL*); *see also* Opening Br. 17-19.

Defendant claims that strict scrutiny "is not necessary under *Garrison*" and distinguishes the cited cases as not "involv[ing] examination of a criminal defamation statute." Resp. 34. But as discussed, that argument is unsupported by *Garrison* and in any event inconsistent with *R.A.V.*, which rejected the argument that First Amendment scrutiny is inapplicable to *further* content-based restrictions within an otherwise unprotected category. As the Supreme Court explained in *R.A.V.*, even in areas where the Court has permitted certain restrictions on speech because of constitutionally proscribable content (*e.g.*, defamation), the Supreme Court has never held that "they may be made the vehicles for content discrimination unrelated

to their distinctively proscribable content." 505 U.S. at 383-84. Therefore, "the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 384. Accordingly, there is no basis for declining to apply strict scrutiny to the content-based law at issue here. The Statute, like all "[c]ontent-based laws," is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163.

A. The Statute's Underinclusiveness Defeats a Claim That It Serves a Compelling State Interest.

When articulating North Carolina's compelling state interest, Defendant relies exclusively on the State's interests in preventing "fraud" in elections and "preserving the integrity of the election process." Resp. 37, 42, 48. But Defendant cannot meet her burden solely by citing the dictum from *Garrison*, which discussed the potential danger for a political system arising from calculated falsehoods. *See* 379 U.S. at 75. Analysis of whether a statute serves an asserted interest must examine *how* it purportedly serves that interest. Both the Supreme Court and this Court have struck down statutes as "underinclusive" when the government claims one interest but "covers too little speech," leaving "appreciable damage to the government's interest unprohibited." *Am. Ass'n of Pol. Consultants, Inc. v. FCC*, 923 F.3d 159, 167 (4th Cir. 2019) (*AAPC*), *aff'd sub nom. Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140

S. Ct. 2335 (2022); *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. v. White*, 536 U.S. 765, 779-80 (2002); *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994).

Plaintiffs have argued that the Statute is underinclusive to accomplish the governmental interests articulated by the district court in "preventing fraud in elections" and "protecting citizens from defamation" because the Statute does nothing to protect the electorate from laudatory fraud, *see* Opening Br. 30-31, it fails to address lies addressed to the political process itself, *see id.* 31-32, and it protects only the reputations of those running for office (those *most* capable of defending themselves), *see id.* 32-36.

Defendant is silent in response to these arguments, but claims (wrongly) that considerations of underinclusiveness have been "rejected by the Supreme Court and this Court." Resp. 44. Yet Defendant fails to address recent Supreme Court and Fourth Circuit authorities on which Plaintiffs relied in their Opening Brief (at 28-36). Further, Defendant relies on the Supreme Court's decision in *Williams Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015), as if it eliminates any concerns about underinclusiveness simply because it states that the First Amendment "imposes no freestanding 'underinclusiveness limitation.'" That is far from enough. As

Williams-Yulee recognized (and Defendant concedes, *see* Resp. 42), underinclusiveness "can raise doubts about whether the government is in fact pursuing the interest it invokes" and can "also reveal that a law does not actually advance a compelling interest." 575 U.S. at 448-49.

Williams-Yulee held that a law of limited scope – banning campaign solicitations by elected judges – was not fatally underinclusive because it "aim[ed] squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates." *Id.* at 449. Defendant makes no similar attempt to defend the Statute's limited scope here, and any attempt would fail. North Carolina has no sound reason for prohibiting false *derogatory* reports about a candidate while leaving a candidate's false *laudatory* reports unaddressed. Each has equal potential to lead the electorate astray. Nor does the State have a basis for singling out false claims about a candidate to protect election integrity while leaving unpunished lies about issues in referenda – or corrosive lies about voting procedure, ballot counting, or election results. And the State has no justification to threaten criminal punishment of derogatory speech about a *candidate* and not similarly protect an *ordinary citizen*. Shifting, incomplete, or incoherent explanations for the scope of a state law regulating certain speech cannot satisfy strict scrutiny. *AAPC*, 923 F.3d at 167; *Cahaly*, 796 F.3d at 405-06. The underinclusive prohibition leaves open the possibility that the real governmental

interest is perhaps not to protect election integrity, but to protect the private interests of candidates who are most able to defend themselves – a type of criminal weapon that is particularly susceptible to government abuse by serving the interests of favored candidates and punishing disfavored opponents.[1] *See Alvarez*, 567 U.S. at 737 (Breyer, J., concurring) (highlighting risk that "in the political arena" statutes punishing falsity could be applied "subtly but selectively to speakers that the Government does not like").

B. Defendant Offers No Evidence That the State Considered Less Restrictive Alternatives or That Less Restrictive Alternatives Are Insufficient.

Defendant fails to grapple with the requirement – explicitly discussed in Plaintiffs' Opening Brief (at 37) – that the government's "burden of proving narrow tailoring" requires it "to *prove* that it actually *tried* other methods to address the problem." *Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015) (emphasis in

[1] Defendant is not helped by district court decisions upholding narrower statutes or laws serving distinct interests. *See* Resp. 40; *see also Myers v. Thompson*, 192 F. Supp. 3d 1129 (D. Mont. 2016) (upholding *non-criminal* rules governing judicial and attorney conduct prohibiting false campaign speech to protect judicial integrity); *Linert v. MacDonald*, 901 N.W.2d 664 (Minn. 2017) (upholding statute prohibiting a "false claim stating or implying that a candidate . . . has the support or endorsement of a major political party" where the narrow subject matter of the statute "ensure[d] that the statute does not target broad categories of speech"); *Make Liberty Win v. Cegavske*, 570 F. Supp. 3d 936 (D. Nev. 2021) (upholding law barring non-incumbents from using the word "re-elect," where narrow scope of the law did not "give Nevada carte blanche authority to nitpick political candidates on debatable issues").

original). She must therefore show that the State "seriously undertook to address the problem with less intrusive tools readily available to it." *Billups v. City of Charleston, S.C.*, 961 F.3d 673, 688 (4th Cir. 2020) (quotation marks omitted). This requirement has special salience in the election context where a government's "claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 228 (1989) (quotation marks omitted).

Defendant has done nothing to carry her burden or allay that skepticism. Rather than shoulder her burden, Defendant invokes the doctrine that the State is "presumed to understand the legal significance" of changes in the law upon later recodification. Resp. 27. But she identifies no evidence the General Assembly tried or even considered other methods to address the problem of derogatory candidate reports in any of the "multiple times" that the Statute "has been considered, amended, and recodified by the North Carolina Legislature" since "its inception." *Id*. And Defendant's failure to adduce evidence that two less restrictive alternatives to criminalizing speech – counterspeech and civil libel – were tried or found insufficient dooms her efforts to establish the Statute's constitutionality.

1. Defendant Offers No Evidence That Counterspeech Is Insufficient.

Defendant's stunningly broad contention that "counterspeech is ineffective in the election context" rests on the district court's claim that the prohibited speech is "made during a time when false and malicious defamatory statements ha[ve] the potential to gather momentum with little time for the often slower-to-surface factual counterspeech to be effective." Resp. 46 (quoting JA430). That statement is based not on evidence but surmise. The district court's citation to Justice Brandeis's concurring opinion in *Whitney v. California*, 274 U.S. 357, 377 (1927), JA430, which Defendant echoes, Resp. 46, does not support the proposition and, indeed, has nothing to say about elections or their timing.

Whitney concerned a prosecution under California's Criminal Syndicalism Act for speech allegedly intending to "overthrow" the government "by unlawful means." 274 U.S. at 371, *overruled by Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("*Whitney* has been thoroughly discredited by later decisions"). The "stirring concurrence" of Justice Brandeis, joined by Justice Holmes, in *Whitney* is generally viewed as the beginning of "[c]ounterspeech's longstanding service in American free speech jurisprudence." G.S. Hans, *Changing Counterspeech*, 69 Clev. St. L. Rev. 749, 752 (2021). That concurrence in no way supports the proposition that counterspeech is "slower-to-surface" or can be deemed ineffective based on casual observations of the time between the speech sought to be restrained and

counterspeech. Rather, the concurrence contended that "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion" and that "[o]nly an emergency can justify repression." 274 U.S. at 377. For that reason, it is "always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it." *Id*.

Defendant has made no showing – here or below – that the Statute represses speech to address an "emergency." Here, for instance, O'Neill, the complaining candidate, understood that any redress under the Statute could only "protect the integrity of *future* elections." JA45 (emphasis added). Defendant's own leisurely prosecutorial approach, by failing to move forward for 22 months after the political advertisement at issue, confirms there is no "emergency" like that envisaged by Justice Brandeis.

Since Justices Brandeis and Holmes raised counterspeech as the preferred constitutional course, counterspeech has become a guiding constitutional principle. For example, in *Brown v. Hartlage*, 456 U.S. 45, 61 (1982), the Supreme Court recognized that "[i]n a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent." "The preferred First Amendment remedy," it explained, "of 'more speech, not

enforced silence,' thus has special force." *Id.* (quoting *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring)).

Later, in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 361 (2010), the Court rejected "[a]n outright ban on corporate political speech during the critical preelection period" as a "permissible remedy" for potential improper influence, emphasizing that "it is our law and our tradition that more speech, not less, is the governing rule." Two years later, the opinions forming the majority in *Alvarez* emphasized the preferred remedy of counterspeech. The plurality faulted the government for failing to show "why counterspeech would not suffice to achieve its interest," 567 U.S. at 726, observing that "[t]he remedy for speech that is false is speech that is true," *id*. at 727. Justice Breyer's concurrence similarly noted that in the political field, "more accurate information will normally counteract the lie." *Id.* at 738.

This Court too has recognized counterspeech as the appropriate First Amendment remedy. In *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 305 (4th Cir. 2008), this Court invalidated restrictions on political speech, holding that the "appropriate legislative response" to the speech sought to be restricted was "to appeal to the electorate with effective counter-speech." *Id*. And, as the Eighth Circuit held in considering the criminalization of political speech, "[t]here is no reason to presume that counterspeech would not suffice to achieve the interests

advanced [by the state] and [counterspeech] is a less restrictive means, certainly, to achieve the same end goal." *281 Care Committee v. Arneson*, 766 F.3d 774, 793 (8th Cir. 2014). Yet Defendant seeks just such an unmerited presumption against counterspeech.

Technological developments since *Whitney* only amplify the power of truthful counterspeech. *See Ashcroft v. ACLU*, 542 U.S. 656, 671 (2004) (describing the need for consideration of "technological developments important to the First Amendment analysis"). In 1927, counterspeech was limited primarily to print media, proprietarily controlled and slow by today's standards. Today, the available outlets for counterspeech, their costs, and the speed with which they can be invoked have never been more powerful. As early as 1997, the Supreme Court recognized "the vast democratic forums of the Internet," noting that it could not be considered a "'scarce' expressive commodity" because it "provides relatively unlimited, low-cost capacity for communication of all kinds." *Reno v. ACLU*, 521 U.S. 844, 868, 870 (1997). And while technological change means that "any person" can become a "town crier with a voice that resonates farther than it could from any soapbox," *id.*, a candidate's reach is further still, particularly in the era of social media. *See Leake*, 525 F.3d at 305 (recognizing legislators generally "are not without their bully pulpit").

In *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971), the Supreme Court held that the "conduct of campaigns for political office" is the arena in which the constitutional guarantee of free speech "has its fullest and most urgent application." In that context, a "candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent . . . attempts to demonstrate the contrary." *Id*. at 274. Yet that is what is happening here. O'Neill first claimed a "spotless record" on rape kits. *See* JA38. Upon being called out, he changed his tune, claiming that he was powerless to do anything about those kits. The Statute – which purports to permit a criminal prosecution here and would chill campaign counterspeech – is out of step with First Amendment jurisprudence and should be ruled unconstitutional on its face.

2. Defendant Offers No Evidence That Civil Libel Is Not an Effective Less Restrictive Alternative.

Defendant acknowledges, as she must, the availability of civil libel to protect reputational interests of candidates and makes no effort to justify the Statute as protecting reputations. For good reason: this Court has recognized civil libel as a preferred narrower alternative to restricting speech. *Rossignol v. Voorhar*, 316 F.3d 516, 528 (4th Cir. 2003) ("If defendants believed [plaintiff's] attacks to be scurrilous, their remedy was . . . to initiate a defamation action."). Defendant offers no evidence why civil remedies fall short or why the Statute's incremental criminal penalty serves a compelling state interest. Her failure to make that showing confirms

the lack of narrow tailoring the First Amendment demands. Indeed, Defendant's principal authority, *Garrison*, recognized the "preference for the civil remedy" of libel which "had substantially eroded the breach of the peace justification for criminal libel laws." 379 U.S. at 69.

3. The Experience of Other States Undermines Any Valid State Interest in a Criminal Prohibition.

Plaintiffs' Opening Brief (at 43) noted that Defendant had not offered evidence that any other states advanced compelling interests through criminalizing false political speech. Thereafter, the Duke First Amendment Clinic's Amicus Brief (at 20 n.2) referenced a recent scholarly article that determined that "[o]nly sixteen states have statutes that prohibit false statements about a candidate for public office." David S. Ardia & Evan Ringel, *First Amendment Limits on State Laws Targeting Election Misinformation*, 20 First Amend. L. Rev. 291, 301 & n.39 (2022) (collecting statutory references). Defendant's brief made no effort to muster evidence from those other states.

In fact, of the 16 states with statutes prohibiting false statements about candidates, five – Alaska, California, Montana, Oregon, and Washington – appear to provide only for civil remedies. *See* Table of State Laws Regulating Political Speech on page 28, *infra*. Two others limit their scope to false statements about "withdrawal" of a candidate, Haw. Rev. Stat. § 19-3(6), and a candidate's "private life," Miss. Code § 23-15-875.

Of the eight remaining states (not including North Carolina) with criminal statutes specifically prohibiting false statements about candidates, most appear to reside in the same state of desuetude as the North Carolina Statute. Plaintiffs have uncovered no reported cases in which a person has been convicted of violating those statutes.[2] The 75-year-old North Carolina case, *State v. Pritchard*, 41 S.E.2d 847 (N.C. 1947), appears to be the only case of a successful prosecution under a criminal statute prohibiting false statements about political candidates.

Thus, the national survey indicates that more than 40 states satisfactorily maintain electoral integrity without criminal libel statutes like North Carolina's. The handful of states that have such statutes, like North Carolina, rarely, if ever, invoke them for their presumed purpose. If, as Defendant contends, such statutes are necessary, one would expect them to be ubiquitous and, in any event, more regularly invoked in the handful of states that have them. Yet Defendant can provide no such empirical evidence from North Carolina's fellow laboratories of democracy.

This dearth of examples critically undermines Defendant's defense of the Statute's narrow tailoring. *See Landmark Comm'ns, Inc. v. Virginia*, 435 U.S. 829, 841 (1978) (striking down Virginia statute criminalizing publication of confidential

[2] In *Sharkey v. Fla. Elections Comm'n*, 90 So. 3d 937, 938 (Fla. Dist. Ct. App. 2012), an administrative law judge found an individual liable for making false statements accusing a candidate of "wasting taxpayer money on boondoggles during his tenure on the Fire Commission." An appellate court reversed, however, holding the statement was not made with actual malice.

information regarding judicial inquiry commission proceedings where only two states provided criminal sanctions for such disclosure and 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"); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 105 (1979) (striking down statute criminalizing disclosure of names of juvenile offenders where "all but a handful" of states had "found other ways of accomplishing the objective" without criminalizing speech).[3]

III. The Statute Is Unconstitutionally Overbroad Because It Prohibits *True* Speech Critical of Candidates.

The district court construed the Statute to reach only "*false* defamatory statements" because it understood "'derogatory report' to encompass false defamatory speech about a candidate and nothing more." JA424 & n.2 (emphasis added). This construction of the word "derogatory" was error. The district court cited no authority limiting the word "derogatory" to false statements. And Defendant makes no effort to defend that construction, likely because the North

[3] Defendant's assertion that the Statute is narrowly tailored because a speaker charged under it receives all the procedural protections available in a misdemeanor prosecution, *see* Resp. 51-52, fails to recognize that the Statute restricts speech at the heart of the First Amendment, and therefore requires *additional* procedural protections – absent here, *see* Opening Br. 43-51 – to be constitutionally adequate. *See SBAL*, 814 F.3d at 474; *281 Care Comm.*, 766 F.3d at 790.

Carolina Supreme Court foreclosed any such argument in *State v. Petersilie*, 432 S.E.2d 832, 842 (N.C. 1993).

Even with the district court's limiting construction, the Statute violates the First Amendment for the reasons given above. But without it, the Statute's application to truthful speech creates an additional flaw: the Statute is fatally overinclusive and overbroad. Opening Br. 23-24. The First Amendment prohibits criminalizing truthful campaign speech. *See Garrison*, 379 U.S. at 74 ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned."). Yet, without the limiting construction, every person who truthfully criticizes a candidate risks prosecution based on allegations that they spoke recklessly.

Even assuming a compelling interest in prohibiting false political speech, the "lack of tailoring to [that goal] is categorical – present in every case" – because, under the Statute's plain text, a prosecutor in *every* case can elect the lighter burden of proving that a derogatory statement was made with reckless disregard for the truth. *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021). This Court should reject the district court's atextual construction and hold that the Statute "is not so limited but is instead substantially overbroad, and therefore invalid under the First Amendment." *Stevens*, 559 U.S. at 482.

1. Defendant does not defend the district court's derogatory-means-false reasoning. Defendant instead adopts a new argument on appeal,[4] claiming that the falsity limitation is found in the Statute's scienter element. That element confines the Statute's reach to reports made "knowing such report to be false or in reckless disregard of its truth or falsity." N.C. Gen. Stat. § 163-274(a)(9). According to Defendant, 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." Resp. 24.

This argument suffers from two flaws. First, the scienter element is not superfluous: it describes the necessary state of mind to convict. Otherwise, the Statute would impose strict liability. Second, Defendant claims that the scienter element must be read to require falsity, but she cannot explain why. She does not deny that "or" is disjunctive here, so the question is whether both halves of the phrase – (1) "knowing such report to be false" and (2) "in reckless disregard of its truth or

[4] Contrary to Defendant's argument, *see* Resp. 22, Plaintiffs have consistently maintained that derogatory does not mean false or even defamatory. As Plaintiffs' counsel put it before the district court, "There is not any sense in which the word 'derogatory' can be made to be equivalent to 'defamatory.'" JA385. Plaintiffs explained that a "dictionary defines derogatory as disparaging, belittling, tending to detract or diminish," and they argued "that's all it connotes, generic negativity." JA385-386. And in any event, the "first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Stevens*, 559 U.S. at 474 (quotation marks omitted).

falsity" – require falsity. N.C. Gen. Stat. § 163-274(a)(9). The second alternative clearly does not, and Defendant makes no textual argument otherwise.

Instead, Defendant urges this Court to "presume that the legislature understands the Statute to bar only false derogatory reports by including the *Sullivan* standard." Resp. 27. But construing the Statute to include that standard would not help Defendant here. The actual-malice standard adopted in *Sullivan* limits a public official's ability to recover "damages for a defamatory *falsehood* relating to his official conduct." 376 U.S. at 279-80 (emphasis added). The Statute omits that first, critical step: requiring falsity. Neither Defendant nor the district court has identified a "reasonable and readily apparent" construction of the statutory text that would supply that missing element. *Boos v. Barry*, 485 U.S. 312, 330 (1988). Defendant would rewrite the Statute to require falsity even though doing so "would constitute a serious invasion of the legislative domain." *United States v. Simms*, 914 F.3d 229, 251 (4th Cir. 2019) (quoting *Stevens*, 559 U.S. at 481). The text is clear: it criminalizes derogatory reports, not, as Defendant repeatedly claims, "false and derogatory reports." Resp. 29.

The result is that reckless disregard for the statement's truth is an alternative to proving knowing falsity. The chilling effect of such a law – and its deep intrusion on political speech – is manifest. Consider a person who believed in 1972 that President Nixon had a role in covering up the Watergate break-in. If she published

a *true* report about Nixon's involvement, she could be prosecuted under the Statute as long as a district attorney claimed that she harbored doubts about the story's truth. *Cf. Desmond v. News & Observer Publ'g Co.*, 846 S.E.2d 647, 678 (N.C. 2020) ("actual malice refers *solely* to a defendant's *subjective* concern for the truth or falsity of a publication" (emphasis added)). The Statute thus prohibits a class of political speech based on the speaker's state of mind, using the threat of criminal sanctions to silence those who would truthfully criticize a political candidate.

2. The Statute's application to truthful speech renders it facially unconstitutional. Its prohibition on a subset of true political speech contradicts the First Amendment's purpose: "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). And by allowing a prosecution to proceed based solely on allegations about the speaker's state of mind, it gives the government "far more leeway to act as censors than is consistent with the protection of the First and Fourteenth Amendments in the setting of a political campaign." *Monitor Patriot*, 401 U.S. at 275.

This flaw infects the entire Statute. A prosecutor has every incentive to charge the easier-to-prove offense of a reckless derogatory statement, saving herself the trouble of proving falsity. The chilling effect of such a law makes it unconstitutionally overbroad because the threat of such a prosecution is present in

every case. *See Bonta*, 141 S. Ct. at 2387. Accordingly, the Statute is, under the plain meaning of its text, unconstitutionally overbroad.

IV. The Other Injunction Factors Are Satisfied.

Defendant does not dispute that it has been the rule since at least 1978 that "[v]iolations of [F]irst [A]mendment rights constitute per se irreparable injury." *In re Murphy-Brown, LLC*, 907 F.3d 788, 796 (4th Cir. 2018) (quoting *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978)). For that reason, this Court has recognized both that "[p]arties need not endure repeated and irreparable abridgments of their First Amendment rights," and the "public need not suffer the prolonged deprivation of robust discussion on an issue that affect[s] so many in the community so tangibly." *Id*. Thus, in *Murphy-Brown*, the Court held that "[l]ike *all First Amendment infringements*, the gag order's harms are 'per se irreparable' injuries." *Id*. at 801 (emphasis added); *see also Ross v. Meese*, 818 F.2d 1132, 1135 (1987) (finding irreparable injury in unconstitutional search even though no property was removed under the defective warrant).

Once likelihood of success and irreparable harm are established in a case asserting constitutional violations, the balance of hardships and public interest factors are readily established. *See Centro Tepeyec v. Montgomery Cnty.*, 722 F.3d 184, 191 (4th Cir. 2013) (en banc). While Defendant cites the risk that "false statements, if credited" during a campaign could have "serious adverse

consequences," Resp. 57, any such risk may be addressed by more speech, not, as a motions panel of this Court recognized, "by the sudden reanimation of a criminal libel law" "dormant for nearly a century" that "might well . . . chill[]" campaign speech, thereby "harming the public's interest in robust campaigns." ECF No. 14, at 4; *see also* Opening Br. 54-55.

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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TABLE OF STATE LAWS REGULATING POLITICAL SPEECH

State	Citation	Criminal (Y/N)	Scope
Alaska	Alaska Stat. § 15.13.095	N	False statements in polling or organized calling.
California	Cal. Elec. Code §§ 20010 & 20500	N	Deceptive audio or visual material; civil libel.
Colorado	Colo. Rev. Stat. § 1-13-109	Y	False statements about a candidate.
Florida	Fla. Stat. § 104.271	Y	False statements about a candidate.
Hawaii	Haw. Rev. Stat. § 19-3(6)	Y	False statement concerning "withdrawal" of a candidate.
Louisiana	La. Stat. § 18:1463	Y	False statements about a candidate or proposition.
Mississippi	Miss. Code § 23-15-875	Y	False statements about the "private life" of a candidate.
Montana	Mont. Code § 13-37-131	N	False statement about voting record.
North Carolina	N.C. Gen. Stat. § 163-274(a)(9)	Y	Derogatory reports about a candidate.
North Dakota	N.D. Cent. Code § 16.1-10-04	Y	Untrue, deceptive, or misleading statements in political advertising.
Oregon	Or. Rev. Stat. § 260.532	N	False statements about a candidate.
Tennessee	Tenn. Code § 2-19-142	Y	False statements about a candidate.
Utah	Utah Code § 20A-11-1103	Y	False statements about a candidate.
Washington	Wash. Rev. Code § 42.17A.335	N	False statements about a candidate.
West Virginia	W. Va. Code § 3-8-11(c)	Y	False statements about a candidate.
Wisconsin	Wis. Stat. § 12.05	Y	False statements about a candidate.

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Dated: November 1, 2022

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 1st day of November, 2022, I caused this Reply Brief of Appellants 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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