UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:99-CV-798-BO(3)

(Civil) **NORTH CAROLINA RIGHT TO LIFE, INC., et al.,,** *Plaintiffs,* *v.* **LARRY LEAKE, et al.,** *Defendants.*	**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Rule 56, Fed. R. Civ. P.

Plaintiffs North Carolina Right to Life, Inc. (NCRL), North Carolina Right to Life Political Action Committee (NCRLPAC) and North Carolina Right to Life Committee Fund for Independent Political Expenditures (NCRLC-FIPE), by counsel, respectfully move for summary judgment pursuant to FED. R. CIV. P. 56, on the grounds that there are no issues of material fact and Plaintiffs are entitled to judgment as a matter of law. In support of their motion, Plaintiffs state as follows:

1. Contemporaneous with the instant motion, Plaintiffs have filed their memorandum in support thereof. In their memorandum, Plaintiffs request this Court to declare N.C. G.S. §§ 163-278.6(14), 163-278.14A(a)(2), and 163-278.13 unconstitutional on their face and as applied and permanently enjoin their enforcement.

2. There are no issues of material fact and as demonstrated in their Memorandum in Support of their Motion for Summary Judgment Plaintiffs are entitled to judgment as a matter of law.

WHEREFORE, Plaintiffs respectfully request that the Court grant the Plaintiffs' motion for summary judgment and declare N.C. G.S. §§ 163-278.6(14), 163-278.14A(a)(2), and 163-278.13 unconstitutional on their face and as applied and permanently enjoin their enforcement.

Plaintiffs' Renewed Motion for Summary Judgment

Dated: February 25, 2005.

Respectfully submitted,

BOPP, COLESON & BOSTROM

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the above document, along with the aforementioned attachments, have been served on the following by United States mail.

James Smith, Special Deputy Attorney General
Susan Nichols, Assistant Attorney General
Alec Peters, Assistant Attorney General
State of North Carolina, Dept. of Justice
P.O. Box 629
Raleigh, NC 27602-0629

on this 28 day of ~~January~~ February, 2005.

~~B. Chad Bungard~~

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:99-CV-798-BO(3)

(Civil) **NORTH CAROLINA RIGHT TO LIFE, INC., et al.,,** *Plaintiffs,* *v.* **LARRY LEAKE, et al.,** *Defendants.*	**ORDER**

Plaintiffs North Carolina Right to Life, Inc., (NCRL), North Carolina Right to Life Political Action Committee (NCRLPAC) and North Carolina Right to Life Committee Fund for Independent Political Expenditures (NCRLC-FIPE) having filed their Motion for Oral Argument on their Motion for Summary Judgment and the Court being duly advised in the premises hereby GRANTS said Motion.

IT IS HEREBY ORDERED that Plaintiffs' Motion for Oral Argument is hereby GRANTED.

Said Oral argument to be heard at _____ a.m./p.m. on the _____ day of _____, 2005.

Dated: this ___ day of _____, 2005.

_____
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:99-CV-798-BO(3)

(Civil) **NORTH CAROLINA RIGHT TO LIFE, INC., et al.,,** *Plaintiffs,* *v.* **LARRY LEAKE, et al.,** *Defendants.*	**PLAINTIFFS' MOTION FOR ORAL ARGUMENT** Local Rule 4.09

MOTION FOR ORAL ARGUMENT

Plaintiffs North Carolina Right to Life, Inc., (NCRL), North Carolina Right to Life Political Action Committee (NCRLPAC) and North Carolina Right to Life Committee Fund for Independent Political Expenditures (NCRLC-FIPE) submits their Motion for Oral Argument. In support Plaintiffs state the following:

1. This matter is a civil action for declaratory and injunctive relief arising under the Constitution of the United States.

2. Plaintiffs claim that North Carolina General Statutes §§ 163-278.6(14), 163-278.14A(a)(2), and 163-278.13 violate the First and Fourteenth Amendments to the United States Constitution.

3. Based on the complexity of the issues, oral argument would be helpful to the Court.

WHEREFORE, Plaintiffs pray this Court to grant their Motion for Oral Argument pursuant to Local Rule 4.09.

Dated: this 28 day of February, 2005.

Respectfully submitted,

BOPP, COLESON & BOSTROM

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MOTION FOR ORAL ARGUMENT

CERTIFICATE OF SERVICE

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~~B. Chad Bungard~~
Paul Stam Jr

MOTION FOR ORAL ARGUMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:99-CV-798-BO(3)

(Civil) NORTH CAROLINA RIGHT TO LIFE, INC., et al.,, *Plaintiffs,* *v.* LARRY LEAKE, et al., *Defendants.*	**AFFIDAVIT OF BARBARA HOLT IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I, Barbara Holt, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am Barbara Holt, President of North Carolina Right to Life, Inc. ("NCRL"). I am over eighteen years of age and my statements herein are based on personal knowledge.

2. I am ultimately responsible for all aspects of the day-to-day operations of NCRTL. The information set forth below is based on my personal knowledge.

3. NCRL is a multi-purpose organization. NCRL's involvement with political speech is only a small part of what it does.

4. NCRL engages in activities to educate about the dangers of abortion, infanticide, assisted suicide and euthanasia.

5. NCRL helps with referrals to crisis pregnancy centers, otherwise provides counseling to women in crisis pregnancy situations, and produces and distributes literature describing available

services and facts about pregnancy and childbirth.

6. NCRL produces literature and educates the public regarding assisted suicide and euthanasia.

7. NCRL organizes and develops chapters to help with activities at the grassroots level, providing support by helping them plan and execute projects and meetings.

8. NCRL publishes a newsletter and executive summaries to inform our membership and other interested parties of developments in pro-life issues.

9. NCRL holds rallies or workshops where members and the public are invited to hear speakers who speak on convincing others of the pro-life message and other topics that further the aim of promoting respect and protection of the unborn and protection from assisted suicide and euthanasia.

10. NCRL coordinates and provides speakers to respond to requests from schools, churches and civic organizations. NCRL writes opinion editorials and letters to the editor from a pro-life perspective.

11. NCRL works to encourage legislation that furthers respect and protection for life– before birth through natural death. To do this, NCRL works with legislators, seeking to convince them and /or encourage them to sponsor or support legislation that protects life.

12. If NCRL were made to report as a political committee, it would create administrative burdens. The additional organizational and reporting would require time and resources that are now used for NCRL's educational and policy purposes. NCRL would have to do less of its educational and other activities if it were to report as a political committee.

13. If NCRL were prosecuted for failing to file a report or to pay civil fines for late filing of reports, it would be especially damaging because the costs would come from funds for its educational activities and because NCRL's donors are especially likely to see such prosecutions as negative reflections on NCRL's reputation.

14. If NCRL were made to report as a political committee, it would be forced to divulge the name, address and the principal occupation of every contributor making a contribution of over $100. This would have an adverse effect on donors and donations to NCRL.

15. Many donors give only with express assurance that their names or other personal information will not be made known.

16. If NCRL were to be forced to make reports as a political committee, it would warn potential donors that if their donation exceeded $100, their personal information would be reported to the State. As a consequence, many donors would refrain from giving or give less than $100.

17. Most donors to NCRL do not wish to have their names, addresses and occupations known to the State or the public. They consider their giving to be a personal matter and/or a matter of conscience. They would not donate if their names would be known to the State or to the public.

18. NCRL has separate organizations to which donors give who wish to support activities associated with a political committee. Donors to NCRL do not give for purposes that are commonly associated with political committee activities. If NCRL were to report them as donors for activities commonly associated with political committees, it would upset or anger them and it would be inaccurate and misleading.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 25, 2005.

Barbara Holt

Barbara Holt
President
North Carolina Right to Life, Inc..

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
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No. 5:99-CV-798-BO(3)

(Civil)

NORTH CAROLINA RIGHT TO LIFE, INC., et al.,,

Plaintiffs,

v.

LARRY LEAKE, et al.,

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Plaintiffs North Carolina Right to Life, Inc. (NCRL), North Carolina Right to Life Political Action Committee (NCRLPAC) and North Carolina Right to Life Committee Fund for Independent Political Expenditures (NCRLC-FIPE) submit this memorandum in support of their Motion for Summary Judgment.[1] Fed. R. Civ. P. 56.

NATURE OF THE CASE

This is a civil action for declaratory and injunctive relief arising under the Constitution of the

[1]The Fourth Circuit remanded this case to this Court without vacating its judgment. Thus, Plaintiffs respectfully submit that this Court's holding in its Order dated October 24, 2001 (Civil Docket document no. 79), as amended by this Court's Order dated August 8, 2002 (Civil Docket document no.99) remains authoritative. Plaintiffs further submit that the Fourth Circuit's opinion in this case, supporting the judgment vacated by the Supreme Court, remains persuasive authority. Finally, Plaintiffs submit that all pleadings, motions and memoranda in support thereof, depositions, affidavits and all other materials filed in this case suffice and prevail in questions of fact, Fed. R. Civ. P. 56(c), and that, where applicable, they represent Plaintiffs' views of the law and its application to the facts, except as Plaintiffs augment those facts and/or views of the law in their briefing and arguments, especially as to the effect on this litigation of *McConnell v. FEC*, 540 U.S. 93 (2003).

United States. Plaintiffs claim that North Carolina General Statutes §§ 163-278.6(14), 163-278.14A(a)(2), and 163-278.13 violate the First and Fourteenth Amendments. Section 163-278.6(14) violates the major purpose test, infringing the free speech and associational rights of individuals and organizations by deeming organizations like NCRL a "political committee" without regard to its major purpose, which subjects it to the burdensome record keeping, registration and reporting requirements of §§ 163-278.7-9, 11. Sections 163-278.6(14) and 163-278.14A(a)(2) are unconstitutionally overbroad and §§ 163-278.6(14) and 163-278.14A are void for vagueness. Section 163-278.6(14) is unconstitutionally vague and subjects an entity to the same registration and reporting requirements noted above "based on an arbitrary level of spending that bears no relation to the idiosyncracies of the entity." *North Carolina Right to Life Inc. v. Leake*, 344 F.3d 418, 430 (4th Cir. 2003) ("*NCRL*") *vacated and remanded for further consideration* 124 S. Ct. 2065 (2004). The "rebuttable presumption" of 163-278.6(14) blurs the constitutionally-required distinction between groups for whom the burdens of political committee organization and reporting are warranted and those for whom it is not. Section 163-278.13, which limits contributions to political committees to $4,000, is also unconstitutional as applied to NCRLC-FIPE which is organized solely for the purpose of making independent expenditures.

Facts

Plaintiff NCRL is a non-profit, membership corporation, incorporated in North Carolina, with local chapters throughout the State. Verified Complaint (V.C.) ¶ 10. NCRL is exempt from federal income tax under § 501(c)(4) of the Internal Revenue Code. V.C. ¶ 20. NCRL's major purpose, as its articles of incorporation make clear, is not the nomination or election of candidates, but rather to educate North Carolinians regarding pro-life issues. *Id.*; Articles Of Incorporation, **EX.** B. to Pls' Mem. Supp. S.J., Civil Docket doc. no. 69; *see also Holt Dep.* (May 25,2000) ["*Holt Dep. I*"] at 25-26; Holt Dep. I. **EX.** C to Pls' Mem. Supp. S.J., Civil Docket doc. no. 69. For fiscal year November 1999-October 2000

NCRL's disbursements totaled $94,300.26. North Carolina Right to Life, Inc.'s Income and Expense Report, November 1999 - October 2000, **EX D** to Pls' Mem. Supp. S.J., Civil Docket document no. 69. NCRLPAC is an internal political committee established by NCRL. V.C. ¶ 11.

Plaintiff NCRLC-FIPE is an internal political action committee established by NCRL. V.C. ¶ 12. Its sole purpose is to make independent expenditures and it may not make monetary or in-kind contributions to candidates. *Id.*

During a previous "election cycle," which is defined in N.C.G.S. § 163-278.6(7c), NCRL made direct contributions to state office candidates. V.C. ¶ 31. During the "election cycle" January 1, 1999 to December 31, 2000, NCRL was ready, willing and able to make direct contributions to state office candidates, and/or spend money on communications that in explicit words or by express terms advocate the election or defeat of clearly identified state office candidates. NCRL wanted to make these disbursements in an amount that exceeded $3,000 but totaled no more than 20 percent of its disbursements. V.C. ¶ 32. However, because N.C. G.S. § 163-278.6(14) remained enforceable, NCRL did not make such contributions or independent expenditures because it did not want to be forced to suffer the burdens required of a PAC, pursuant to N.C.G.S. §§ 163-278.7, -.8, -.9, -.11, and did not want to be subject to the consequent penalties for failing to comply with those requirements. *Id.*

NCRL has also previously spent money on communications to the general public that discussed state office candidates and their positions or record on issues, but which did not in explicit words or by express terms advocate the election or defeat of these clearly identified candidates. V.C. ¶ 33; Pls' Mem. Supp. S.J. **Ex H**, Civil Docket document no. 69. During the 1999-2000 "election cycle," NCRL was ready, willing and able to spend money on communications to the general public that discuss state office candidates and their positions or record on issues, but which do not in explicit words or by express terms advocate the election or defeat of clearly identified candidates. V.C. ¶ 34. However, it was possible that

under the terms of N.C. G.S. § 163-278.14A(a)(2), the Board may have found such communications to be advocating the nomination, election or defeat" of candidates in the election. Thus, because N.C. G.S. § 163-278.14A(a)(2) remained enforceable, NCRL did not engage in such issue advocacy because it did not want to be forced to suffer the burdens required of a PAC, pursuant to N.C.G.S. §§ 163-278.7, -.8, -.9, -.11., and did not want to be subject to the consequent penalties for failing to comply to those requirements. V.C. ¶ 34.

To further its purpose, in the future, NCRL would like to make communications to the general public that discuss state office candidates and their position and record on issues, but do not contain express or explicit words that advocate the election or defeat of a candidate. *Holt Declaration* ¶ 7 **EX. G** to Pls. Mem. Supp. S.J., Civil Docket document no. 69. However, NCRL will not make such communications as long as N.C. G.S. § 163-278.14A(a)(2) remains enforceable because they may be deemed "communications that support or oppose the nomination or election of one or more clearly identified candidates" and consequently NCRL may be deemed a political committee and subject to requirements imposed upon on political committees. *Id.*

North Carolina G.S. § 163-278.13 prohibits a political committee from accepting or soliciting any contribution in excess of four thousand dollars ($4,000). NCRLC-FIPE has been organized by NCRL for the sole purpose of accepting contributions to be used to fund communications independent of candidates, including expenditures endorsing or expressly advocating the nomination, election or defeat of clearly identified candidates who are associated with NCRL. V.C. ¶¶ 12, 41; *see also* Redacted Executive Committee Meeting Minutes, **EX I** to Pls.' Mem. Supp. S.J., Civil Docket document no. 69. NCRLC-FIPE provides the structure whereby persons who are like-minded may associate together by pooling their resources to fund speech that is independent from a candidate and his campaign. V.C. ¶ 42. Because it cannot make direct monetary or in-kind contributions to candidates, NCRLC-FIPE does not

present the risk of *quid pro quo* corruption or its appearance that arises from entities that can and do make direct monetary or in-kind contributions to candidates.

If it were lawful to do so, NCRLC-FIPE would have solicited contributions in excess of four thousand dollars ($4,000), to be used exclusively to fund communications independent of a candidate's campaign during the year 2000 primary and general elections. V.C. ¶ 43. However, NCRLC-FIPE did not and will not solicit contributions in excess of four thousand dollars because of the criminal penalty that could be imposed if it were to solicit them, unless the limit is struck down. V.C. ¶ 44.

The aforementioned statutes and requirements at issue and the civil and criminal penalties attaching for noncompliance, place NCRL, NCRLPAC and NCRLC-FIPE in the dilemma of having to choose between foregoing their constitutional rights or subjecting themselves to prosecution. V.C. ¶ 45. Thus, since the Plaintiffs will forego their constitutional rights in order to avoid the burdensome requirements and enforcement consequences, Plaintiffs will have no adequate remedy at law and will suffer irreparable harm if the statutes at issue are not enjoined. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Standard of Review

"Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Motor Club of Am. Ins. Co. v. Hanifi*, 145 F.3d 170, 174 (4th Cir. 1998) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). In this case, there is no material fact in dispute, and under Supreme Court and Fourth Circuit precedent, Plaintiffs are entitled to judgment as a matter of law.

Argument

I. Section 163-278.6(14) Is Unconstitutional on its Face and as Applied to Plaintiff NCRL.

A. The Major Purpose Test Distinguishes Those Groups Whose Candidate Advocacy Justifies Greater Regulation and Oversight.

The major purpose test plays an important role in campaign finance law. It allows comprehensive regulation of organizations that exist to promote candidates and whose entire operations are therefore inherently political, while protecting from the burdens of comprehensive regulation those organizations that exist principally for other purposes. The burdens of comprehensive regulation are impermissible for these organizations because they deter and chill fully protected political speech (the majority of their activities) while the government's interests support regulation only to the extent of their electoral advocacy.

The Supreme Court first announced this test, and the important distinction it is designed to make, in *Buckley* when it allowed the federal government to compel disclosure of all expenditures by political committees whose "major purpose . . . is the nomination or election of a candidate." 424 U.S. at 79. Regardless of the content of specific communications, all of such an organization's expenditures "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id.* In contrast, expenditures by other groups could be regulated only with regard to the specific "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 79-80.

This distinction between expenditure-specific and organization-wide regulations was again illustrated in *Federal Elections Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*") which involved a non-profit educational organization whose "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." 479 U.S.

at 253 n.6. ("*MCFL*")[2] The Court in *MCFL* found that the "additional regulations [of registering and reporting as a PAC] may create a disincentive for such organizations to engage in political speech."*MCFL*, 479 U.S. at 254.

Like the federal schemes reviewed in *Buckley* and *MCFL*, North Carolina's statutes also impose comprehensive organization-based burdens on organizations deemed to be political committees. A political committee "is required to appoint a treasurer, file a statement of organization, maintain detailed accounts of all contributions received and expenditures made, and file periodic statements with the State Board of Elections." *NCRL*, 344 F.3d at 423-424. Political committee status also triggers limits on the size of contributions that an organization may accept. § 163-278.13(b). *See also* V.C. at 32; *Declaration of Barbara Holt* ("*Holt Decl.*") at ¶¶ 12-17 **Ex. A.** (testifying as to the effects of regulation as a political committee on the organization and public perception).

B. The Burdens of PAC Regulation Are Not Justified When An Organization's Major Purpose is Not Candidate Advocacy.

The *MCFL* Court concluded that the panoply of regulation attaching to political committee status was too burdensome for an issue advocacy organization such as MCFL, even with respect to its expenditures for express advocacy, where the government's interest in regulation is greater. *MCFL*, 479 U.S. at 265-66. Thus, MCFL could be required only to disclose the amounts spent on express advocacy and the amount contributed for that purpose. *Id.* at 262. The Court noted that should the organization's

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[2]NCRL's central organizational purpose is issue advocacy and education, but it would like to engage in limited activities on behalf of political candidates. *See* V.C. at ¶32 (Plaintiffs here wished to make direct contributions to state office candidates, and/or spend money on communications that in explicit words or by express terms advocate the election or defeat of clearly identified state office candidates in an amount that exceeded $3,000 in a single election cycle but totaled no more than 20 percent of its disbursements). But, here, as in *MCFL*, the specter of registering and reporting as a political committee deters NCRL from making limited contributions or expenditures for express advocacy.

"independent spending"[3] become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262. In that event, "it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns." *Id.* at 263. *MCFL* thus reiterated and clarified the rule that it is the characteristics of the organization, *i.e.* its major purpose, as established in its organic documents, or by examining its spending to see if independent expenditures (or contributions) had become the organization's major purpose, that determine whether it may be subjected to comprehensive PAC regulation.[4] Or, as the Fourth Circuit's put it with reference to § 163-278.6(14):

> Any attempt to define statutorily the major purpose test cannot define the test according to the effect some arbitrary level of spending has on a given election. Such a standard poses the threat of subsuming within its presumption entities that have as their "central organizational purpose . . . issue advocacy, although [they] occasionally engage[] in activities on behalf of political candidates." *MCFL*, 479 U.S. at 252 n.6. Rather, the test must be based on the nature and overall activities of the entity itself. . . . This is accomplished not by simply tabulating an entity's contributions and expenditures, although that is an important factor, but by examining an entity's stated purpose, which is typically reflected in its articles of incorporation, and the extent of entity's activities and funding devoted to pure issue advocacy versus electoral advocacy.

NCRL, 344 F.3d at 430[5]. Section 163-278.6(14) is a facial affront to the major purpose test announced in

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[3]The "independent spending" referenced is for express advocacy. *Id.* at 249.

[4]Nothing in *McConnell* supports a change in this analysis. First, the Court in *McConnell* did not overturn or even criticize the major purpose analysis of *Buckley* or *MCFL*. In the federal scheme, the sponsors of BCRA did not seek to include the somewhat broader "electioneering communications" in the definition of expenditure, contribution, or political committee. Thus, in the federal statutes, the functional definitions remain as *Buckley* and *MCFL* found them, and no other activities, such as "electioneering communications" or "federal election activities" may be considered in determining whether an organizations's major purpose is the nomination or election of candidates. Nor should the survival of "electioneering communications" in those contexts be read to encourage broader tests elsewhere. The Court described electioneering communications as "the functional equivalent"of express advocacy, *McConnell*, 540 U.S. at 206, indicating that express advocacy is still the standard, and based functional equivalency on substantial record evidence. *Id.* at 193. Finally, regulation of electioneering communications was only facially approved, and its breadth will likely be curbed as the inevitable "as applied" challenges are mounted.

[5]The 4th Circuit noted that the Supreme Court in *MCFL* also considered the organization's "legislative and public demonstration activities, how it raised its finances, and its publications" before

Buckley and *MCFL* because it incurs the burdens properly imposed only upon political committees on organizations who only incidentally engage in electoral advocacy.

Alternatively, it is unconstitutional as applied to NCRL. Neither NCRL's organic documents, *see* V.C. ¶¶ 5, 12; *Holt Dep. I* at 25-26, 28, or its very limited proposed spending for independent expenditures or contributions to candidates describe its major purpose as the nomination or election of a candidate, and the State thus has no interest in comprehensively burdening NCRL's expression by regulating its activities as though they were aimed at the nomination or election of a candidate.

C. North Carolina's Scheme Is Not Narrowly Tailored to Any Informational Interest.

In *Buckley*, the Supreme Court recognized that government may have an "informational interest" in requiring disclosure of expenditures "to shed the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported because it takes the form of independent expenditures or of contributions to an individual or group not itself required to report the names of its contributors." 424 U.S. at 81. But presuming on the basis of a flat amount of spending is not narrowly tailored to any informational interest and in fact runs counter to it.

It is not narrowly tailored because less restrictive means, an independent expenditure report, will satisfactorily advance that interest. *MCFL*, 479 U.S. at 262; *see also id.* at 266 (O'Connor, J. concurring in part and concurring in the judgment) (FECA's organizational requirements "do not further the government's informational interest in campaign disclosure").[6] Moreover, the $3,000 presumption is logically disconnected from the informational interest and will invariably mislead the public with inaccurate information.

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determining its major purpose." *NCRL*, 344 F.3d at 430 n.4.

[6]Here, the informational interest in requiring disclosure related to express advocacy expenditures made by organizations that are not deemed political committees is served by N.C.G.S. § 163-278.12.

The wide disclosure North Carolina requires of "political committees"[7] serves the informational interest described in *Buckley* when applied to organizations whose major purpose is political. But when applied to a multi-purpose organization, in which political advocacy is a very small part, *see, e.g. Holt Decl.* ¶¶ 3-11, requiring people to be disclosed no matter the purpose for which they gave or the activity for which their contribution was actually used is logically disconnected from the state's informational interest in disclosure of "unambiguously campaign related" spending. *Buckley*, 424 U.S. at 81.

An arbitrary presumption will misinform the voter by logically disconnecting what is being disclosed and the motivation behind and actual use of the contribution. For example, an organization might spend $3,000 on express advocacy or contributions and $100,000 on issue oriented education and thus be forced to register and report as a PAC. Thus, while 97% of that organization's contributions are spent on issue-oriented education, all of the organization's donors who gave more than $100 will be reported as having given to a PAC. The public will thus be led to believe that all of these donors contributed for the "major purpose" of electoral advocacy. This is so even if the vast majority of contributors do not even support the electoral advocacy activities of the organization. In effect, the statute presumes that all donors who give more than $100 to an entity that spends more than $3,000 on independent expenditures or contributions gave for those purposes, when in fact, those donors actually gave for educational or charitable purposes.

In addition, being labeled as donors to overtly political causes may, not surprisingly, upset donors, and deter them from associating with entities who spend more than $3,000 in contributions or independent expenditures. For example, donors give to NCRL to fund education about the dangers of abortion, infanticide, assisted suicide and euthanasia, *Holt Decl.* at ¶ 4, to support its interaction with crisis pregnancy centers, *id.* at ¶ 5, to learn how to intelligently discuss pro-life issues, *id.* at ¶ 9, and they

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[7]A political committee must report, *inter alia*, the name, address, and occupation of each donor who gives more than $100. N.C.G.S. §§ 163-278.8, 163-278.11.

may give to help persuade legislators to pass laws that protect the unborn. *Id.* at ¶ 11. NCRL's spending of $3,001 for a contribution or an independent expenditure means that every donor who gave more than $100 must be reported as contributing to a political committee, when in fact, they did not fund those activities, and they had no reason to think that they were funding such activities. Thus, there is no real or presumptive reason to disclose these donors, and they may have even been assured that their names would not be disclosed.[8] Aside from the deterring effect of such unwarranted exposure, *Holt Decl.* at ¶¶ 14-17, the donors have interests in anonymity and association that such exposure infringes upon. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

D. Presumptions That Deter the Exercise of First Amendment Rights Are Themselves Unconstitutional.

North Carolina forces the organization to prove that they "were not a major part of the activities of the organization during the election cycle." § 163-278.6(14). Although the presumption is rebuttable and the state claims to retain the burden of proof, the Supreme Court noted that such a presumption violates the First Amendment when used to blur a constitutionally-mandated distinction because it "permits the jury to convict in every case[ ] in which defendants exercise their constitutional right not to put on a defense." *Virginia v. Black*, 538 U.S. 343, 365 (2003). At a minimum, such a presumption "makes it more likely" that the offense will be established "regardless of the particular facts of the case." *Id.* The Supreme Court has also struck down similar presumptions because they subjected persons

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[8] An organization may not know that its activities will subject its donors to disclosure and thus might find itself in this position. The organization may not plan independent expenditures or contributions but decide to make them months after receiving donations. Because the "context prong" of the definition of expenditure is vague and overbroad, it cannot know for sure whether its expenditures will "qualify" it as a political committee. Or it may make more than $3,000 in contributions and expenditures and fail to rebut the presumption that it is a political committee because there is no standard terms or criteria to which it might appeal to convince the state.
Even if NCRL should warn potential donors that if their donation exceeded $100, their personal information would be reported to the State, *Holt Decl.* at ¶ 16, those donors will be deterred from giving for education or any other purpose because they may be wrongly reported as giving for political purposes or they may wish to remain anonymous in any event.

exercising First Amendment rights to potential litigation where they would "bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder." *Riley v. National Federation of the Blind,* 487 U.S. 781, 794 (1988). Such a scheme "must necessarily chill speech in direct contravention of the First Amendment's dictates," *id.*, and "creates an unacceptable risk of the suppression of ideas . . . because of the possibility that a State will prosecute–and potentially convict–somebody engaged only in lawful political speech at the core of what the First Amendment is designed to protect." *Black,* 538 U.S. at 365 (quoting *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965 n.13, (1984)).

Entities that exceed North Carolina's monetary threshold will be subject to proceedings in which they must "rebut" the presumption, bearing the additional burdens of that defense, and the appreciable risk of a mistaken adverse determination. *NCRL*, 344 F.3d at 432. And a determination of an electoral major purpose "will consequently lead to regulation as a political committee and thereby subject an entity to costly disclosure and reporting requirements." *Id.* Thus, the "only alternative available to entities unwilling to expose themselves to these costs . . . is to not engage in political speech above the level proscribed by the State." *Id.*

E. This Definition Is Also Unconstitutionally Vague and Overbroad Because it Is Not Based On an Organization's Principal Purpose.

Section 163-278.6(14) also raises serious vagueness problems. While the Supreme Court has always spoken of "*the* major purpose," Buckley, 424 U.S. at 79 (emphasis added), or a groups' "primary objective," *MCFL,* 479 U.S. at 263, North Carolina's statute speaks of "*a* major purpose" and provides for showing that electoral activities were not a "major part." The former descriptions look at the organization's foremost or principal objective while the latter suggests only significance. Hence, the statute deliberately avoids providing a concrete standard for determining what is or is not a major purpose of an organization. Even if an organization were to prove that its $3,001 electoral expenditure was dwarfed by the $10 million it spent on educational ads, there is nothing in this statute to preclude a

finding that the $3,001 nonetheless comprised "a major part" of its activities. Indeed, such a finding would logically follow from the statute's focus on the potential impact on campaigns rather than the overall character of the entity speaking. The monetary trigger renders the statute overbroad because it fails to "account for the overall activities of an entity and may be used as evidence of an entity's major purpose." NCRL, 344 F.3d at 433. Such ambiguity fails to provide potential speakers with security to speak without fear of being subjected to comprehensive and restrictive regulations. The only safe means of avoiding potential enforcement is by limiting expenditures and contributions to less than $3,000, but such ambiguity renders the statute unconstitutionally vague. *See Buckley*, 424 U.S. at 41.

F. A $3,000 Threshold Is Too Low and Would Ensnare Even the Organization Found Not to Be a Political Committee in MCFL.

Finally, even if an organization' major purpose could be measured by some level of flat monetary threshold, such a threshold would need to be far higher than the $3,000 set by North Carolina. In *MCFL*, the organization at issue spent $9,812.76 to print and distribute an express advocacy communication, yet it was "undisputed on this record" that the organization in question did not have the "major purpose of . . . the nomination or election of a candidate." *MCFL*, 479 U.S. at 244, 249, 252 n.6. Of course, the impact of spending was far greater when it was made in 1978 than it would be today. Thus, a presumption of major purpose cannot be supported by a mere $3,000 expenditure.

II. The Context Prong of N.C.G.S. § 163-278.14A is Overbroad and Void for Vagueness.

In both *Buckley* and *McConnell*, the Supreme Court recognized that definitions triggering political speech regulation must "avoid problems of vagueness and overbreadth." *McConnell*, 540 U.S. at 192. The context prong N.C.G.S. § 163-278.14 is vague and overbroad under the *Buckley* or the *McConnell* analyses.

A. *McConnell* Reiterates that Regulations of Political Speech Cannot be Vague.

In *McConnell*, the Court characterized the principal problem addressed in *Buckley* as vagueness.

Vagueness is impermissible in restrictions of First Amendment activity because such laws "may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to steer far wider of the unlawful zone.'" *Buckley*, 424 U.S. at 41 n. 48 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)). In addressing the constitutional use of such phrases as "relative to," *Buckley*, 424 U.S. at 41, "advocating the election or defeat," *id.* at 42, "for the purpose of . . . influencing," *id.* at 78, or "in connection with any election," *MCFL.*, 479 U.S. at 248-249, the Supreme Court found that constitutional deficiencies of vagueness "can be avoided only by reading [the statute] as limited to communications that include explicit words of advocacy." *Buckley*, 424 U.S. at 43, 80; *see also MCFL*, 479 U.S. at 238. The resulting express advocacy test has been a reliable, bright-line rule widely used by courts as a tool to overcome vagueness and overbreadth for nearly three decades and is woven into the fabric of the law.

B. The Express Advocacy Test Remains a Viable Means of Curing Vagueness and Overbreadth.

In *McConnell*, however, vagueness was not an issue because the statutory reach was defined by an elaborate but clear series of standards which raised only questions of overbreadth. 540 U.S. at 192. This new decision thereby approved the new federal statute as a constitutionally acceptable alternative to *Buckley's* express advocacy test, but did not alter *Buckley's* approach to vagueness. As the Sixth and Ninth Circuits have since explained, *McConnell* "left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest." *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004); *see also ACLU of Nevada v. Heller*, 378 F.3d 979, 985 (9th Cir.2004) (noting the same in comparing the challenged statute to express advocacy). And *McConnell* "in no way alters the basic principle that the government may not regulate a broader class of speech than is necessary to achieve its significant

interest." *Anderson*, 356 F.3d at 665; *Heller*, 378 F.3d at 985.

C. A Regulation of Speech is Overbroad Unless Its Regulation is Narrowly Tailored to the Same Interests Supporting the Regulation of Express Advocacy.

Together, *Buckley* and *McConnell* require generally that laws restricting free association and speech that border on vagueness or overbreadth continue to be reviewed for constitutionality under the traditional strict scrutiny standard, i.e., they must be "narrowly tailored to a compelling state interest." *McConnell*, 540 U.S. at 204-5. There are two valid choices for the regulation of campaign finance expenditures: the express advocacy test or a somewhat broader content delineation is possible if the excessive scope is narrowed to the "functional equivalent of express advocacy" through clearly defined requirements for timing, media, and audience. *Id.* at 205. But "functional equivalence" is no talisman excusing overbroad regulations from scrutiny. It must be proved by substantial evidence that the targeted First Amendment conduct is equally susceptible to regulation based on the same justifications underpinning the express advocacy test. *Id.* at 192-93, 207-08. The Court noted in *McConnell* that the definition of electioneering communication is not "overbroad,"

> *to the extent that* the issue ads broadcast during the [blackout periods] are the *functional equivalent* of express advocacy. The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect.

Id. at 206 (emphasis added).[9] In other words, the definition of electioneering communication was not

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[9] The "intent" and "effect" language used by the *McConnell* majority in justifying the "electioneering communication" ban cannot be used as a substitute for compelling interests identified by the Supreme Court. *Id.* In these two sentences, the phrases "functional equivalent" and "intended to influence . . . and have that effect" are used as parallel thoughts and the latter must be understood in light of the former (which the Court said had been proven in this case).

Government cannot simply regulate any speech that might have the intent or effect of influencing elections for at least four reasons. First, *Buckley* expressly rejected any statutory formulation that relied on intent or effect, 424 U.S. 1, 43 (1976), and *McConnell* notes that it is consistent with *Buckley*. Second, the language quoted in *McConnell* couples the "intent" and "effect" language with its "functional equivalent" finding, so that the two may not be conceptually uncoupled. Third, a restriction on anything with the intent or effect of influencing elections would not be narrowly tailored and would be substantially overbroad because it would sweep in, inter alia, endorsements and appearances with a

overbroad if the same interests that support regulating express advocacy support regulating "electioneering communications," and electioneering communications had been shown by substantial evidence to be the functional equivalent of express advocacy, so their regulation was supported by the same interests.

Anderson demonstrates the proper analysis in the wake of *McConnell's* treatment of electioneering communications. First, is the statute vague? If so, then if the statute is reasonably susceptible to a saving construction, apply the express advocacy gloss to cure the vagueness. Second, is it overbroad, i.e, does it reach beyond express advocacy or an already proven functional equivalent? If so, then examine whether the government has provided substantial evidence to prove that it is a functional equivalent that is narrowly tailored to advance the proper compelling interests.

D. North Carolina's Context Prong is Unconstitutionally Vague and Overbroad

North Carolina's statutory definition codified in §163-278.14A(a) attempts what may be called a *Buckley*-plus approach. Its first subsection codifies *Buckley's* express advocacy test by providing a comprehensive list of the types of campaign speech that plainly and necessarily expressly advocate the election or defeat of a candidate. Plaintiffs do not challenge this first section, but they do challenge the statute's context prong, subsection (2), which seeks to regulate additional communications according to how the general public may perceive their "essential nature." This determination, in turn, is to be made by weighing a series of contextual factors according to a "reasonable person" standard of interpretation. This definition essentially erases the bright line of the express advocacy test by reaching beyond to encompass whatever communications can be viewed as triggering the state's interest. Such a determination necessarily considers the "intent or effect," criteria expressly rejected by *Buckley*. 424 U.S. at 43.

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candidate by celebrities from entertainment, business, and politics as well as news stories, commentaries, and editorials. Fourth, "for the purpose of influencing" language, for which this formulation would be equivalent, already contains a necessary express advocacy gloss attached because it is vague. *Buckley*, 424 U.S. at 80. James Bopp, Jr. & Richard E. Coleson, *The First Amendment Is Still Not a Loophole: Examining McConnell's Exception to Buckley's General Rule Protecting Issue Advocacy*, 31 N. KY L. REV. 307 n.96

This approach differs dramatically from the "electioneering communication" upheld in *McConnell*. In that case, the federal statute utilized a clear content delineation which was then narrowed by a series of clearly-defined contextual limitations: the provision would apply only to "1) a broadcast 2) clearly identifying a candidate for federal office, 3) aired within a specific time period, and 4) targeted to an identifiable audience of at least 50,000 viewers or listeners." *McConnell*, 540 at 194. As the Supreme Court noted, "[t]hese components are both easily understood and objectively determinable," so that "the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here." *Id.* In sum, the statute sets up a series of clearly-defined parameters within which communications can be made without the threat of regulation.

Given the Court's heavy emphasis on the extensive detail and consequent lack of vagueness in the "electioneering communication" definition that made it equivalent in specificity to the express advocacy test, *McConnell* offers no warrant to employ less specificity in drafting any proposed exception to the general rule of *Buckley*, *MCFL*, and *McConnell* protecting issue advocacy with the express advocacy test.[10] North Carolina implicitly recognizes the vagueness now present in 163-278.14A(a) and its legislature is fully capable of drafting narrowly tailored, clearly-defined post-*McConnell* definitions. Section 163-278.90(2) (2004) defines an "electioneering communication" as:

> any mass mailing or telephone bank that has all the following characteristics:
> a) Refers to a clearly identified candidate for a statewide office or General Assembly, b)

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[10] The *McConnell* Court rejected a vagueness challenge to a portion of the definition of "federal election activity," ie., "a public communication that refers to a clearly identified candidate for Federal office . . . and that *promotes or supports* a candidate for that office, or *attacks or opposes* a candidate for that office." 2 U.S.C.A. § 431(20)(A)(iii) (2003) (emphasis added). But this support/oppose definition is not suitable for general application to restrictions on issue advocacy because it was given in special contexts and because the test does not come close to the level of specificity the Supreme Court approved in connection with the "electioneering communication" definition. These "special contexts" warranted a lower vagueness standard because of the political, and politically sophisticated, nature of the speaker. See *McConnell*, 540 US. at 170 (citing *Buckley*, 424 U.S. at 79 (holding that a general provision requiring a political committee to report all its expenditures was not vague because political committee expenditures "are, by definition, campaign related.")).

> is made within one of the following time periods: (1) 60 days before a general or (2) special election for the office sought by the candidate, or 30 days before a primary election or a convention of a political party that has authority to nominate a candidate for the office sought by the candidate, and c) is targeted to the relevant electorate.

Like the "electioneering communication" definition in *McConnell*, this statute is clearly defined so that a potential speaker will know the parameters of permitted speech. The specificity of the statutory language in this section underscores the lack thereof in the context prong.

E. The Context Prong Hinges Regulation on the Effect of Speech on a Hypothetical Hearer and Consideration of Ambiguous Factors.

The context prong of 163-278.14A(a) provides little safety to those wishing to discuss contemporary political issues, relying on how a communication would be perceived by the general public or by a reasonable person despite the Supreme Court's warning that such criteria "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion . . . . It compels the speaker to hedge and trim." *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

Although the context prong considers many of the same types of factors as the federal "electioneering communication," it fails to define when or how these factors might apply. For example, the federal statute and N.C.G.S. § 163-278.90(2) set a specific time frame for its application: 60 days before a general election or 30 days before a primary. *McConnell*, 540 U.S. at 189. A speaker can avoid regulation by simply timing his ad to run 61 days before the election. In contrast, the context prong provides no concrete time limit, but looks broadly to "the timing of the communication in relation to events of the day." Though this may include proximity to an election, there is nothing to prevent enforcement against communications made 61, 120, or even 500 days before an election, and also nothing to require enforcement against communications made a week before election day. Perhaps a mailing that touts a

candidate's tax proposals will be viewed as electoral in nature if sent when the candidate kicks off his campaign a year before the election, but not electoral if sent a few weeks before the election while the proposal is pending in the legislature. Or perhaps the proximity to the election will control so that only the second mailing would be viewed as electoral. Or perhaps both will be electoral, or neither of them- a speaker can only guess.

Similarly, a communication that reaches fewer than 50,000 persons in the candidate's district is off limits to the federal regulation, *id.* at 190, but North Carolina's context prong balances whether it is distributed to a "significant number of registered voters." Gen. Stat. N.C. § 163-278.14A(a)(2). Is 20,000 voters a significant number? Is 1,000? 100? Does it matter if the communication is also distributed outside the district? The statute again does not clearly answer these critical questions. Moreover, none of these factors are mandatory but are simply among those that "may be considered," so even communications with insignificant distribution to the candidate's constituents might still trigger regulation based upon other factors. This is in sharp contrast to § 163-278.90, where, like the statute in *McConnell*, "electioneering communication" is clearly and narrowly defined so that a potential speaker can know the parameters of permissible speech. Thus, the lack of specificity in the context prong renders it unconstitutionally vague and overbroad.

F. Partial Severance of the Context Prong Does not Cure its Vagueness and Overbreadth.

Nor do these problems permit the retention of the first sentence of the context prong. Although this approach would take out some of the more vague aspects of this statute, the first sentence still raises ambiguous questions about when a communication's "essential nature expresses electoral advocacy to the general public" and what is meant by "directs voters to take some action to nominate, elect, or defeat a candidate in an election." To look outside the document or the words of the communication itself is to depend on hearers' interpretation, while this Circuit holds that regulation is allowable "'only if it [is]

limited to expenditures for communications that literally include *words which in and of themselves* advocate the election or defeat of a candidate.'" *NCRL* 344 F.3d at 425 n.2 (quoting *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 391 (4th Cir. 2001) ("*VSHL*") (quoting *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir. 1997))).

As Chairman Leake admitted during an investigation into communications funded by the Republican Governor's Association during the 2004 election for governor, "I think the issue is whether the average North Carolinian viewing that ad would conclude that that's an effort to impact the governor's race." Hearing Before the North Carolina Board of Elections In the Matter of State Capitol Media Project (October 7, 2004) This inquiry "'shifts the focus of the express advocacy determination away from the words themselves to the overall impression of the hypothetical, reasonable listener or viewer,' which is precisely what *Buckley* and its progeny were designed to prohibit." *NCRL*, 344 F.3d 418, 427 (quoting *VSHL*, 263 F.3d at 391-92. "In no event can the distinction between 'express advocacy' and 'issue advocacy' depend on the understanding of the audience." *Id.* Thus, the Board's focus on the conclusions of the "average North Carolinian" about the "essential nature" of an advertisement is an unconstitutionally vague and overbroad application of the express advocacy statute.

The problem is similar to one already addressed by the Supreme Court in rejecting an "advocating the election or defeat" test. *Buckley*, 424 U.S. at 42. Because "the distinction between discussion of issues and candidates may often dissolve in practical application," the Court held that sufficient clarity in this definition could only be achieved if the statute's scope was "limited to communications that include explicit words of advocacy." *Id.* at 43.

Here as well, many communications that do not contain explicit words of advocacy will be susceptible to interpretation either as an issue discussion or as candidate advocacy. For example, does a plea to "stop Governor Smith from raising taxes" advocate that the hearers vote against Governor Smith,

join an anti-tax rally, or call their legislators?

This first sentence of subsection (2) cannot be saved by a narrowing construction because the only one available, i.e., explicit words of advocacy, is already codified in subsection (1). This first provision already provides an exhaustive list of phrases that may constitute explicit words of advocacy. § 163-278.14A(a)(1). It incorporates all of the examples provided by the Supreme Court in *Buckley*, 424 U.S. at 44 n. 52, plus the two-step "vote pro-life, Smith is pro-life" advocacy described in *MCFL*, 479 U.S. at 249. It then adds a third category of campaign slogans such as "Smith's the One." Notably, this list is prefaced by "phrases such as," so that other forms of explicit advocacy like "Smith for North Carolina" or "Send Smith packing on November 8" would be covered by this section even though they are not specifically listed.

Because express advocacy is already regulated by subsection (1), the only communications that might be subject to regulation only by subsection (2) are necessarily those that do not contain explicit words of advocacy and whose meanings are therefore subject to uncertain interpretation. Hence, any effort to construe this section in a way that avoids vagueness would necessarily render it redundant with subsection (1). Thus, subsection (2) is designed to cover more than is subsection (1) and therefore attempts to regulate a broader class of speech than is constitutionally permissible. *North Carolina v. Coffey*, 444 S.E.2d 431, 417-18 (N.C. 1994) (statutes are not interpreted so as to render any words superfluous).

North Carolina's attempt to reach beyond explicit words of advocacy sets an ambiguous standard that must be struck down as unconstitutionally vague and overbroad. If the state legislature wishes to regulate communications that are "the functional equivalent of express advocacy," *McConnell*, 540 U.S. at 205, the Supreme Court's recent decision and N.C.G.S. § 163-278.90 provide a roadmap showing how narrow and well-defined boundaries can be used to achieve this purpose. However, its current attempt

does not follow this approach and thus this Court should strike it down.

III. North Carolina's Limit on Contributions to PACs Is Unconstitutional As Applied to PACs That Make Only Independent Expenditures.

The Court in *McConnell* made clear that the contribution/expenditure dichotomy is alive and well, and the chief prism through which the regulation of campaign finances is viewed. The principles it applied in the challenge to Title I's attempt at routing the use of funding not yet regulated under the FECA ("nonfederal funds") were "the same principles articulated in *Buckley* and its progeny that regulations of contributions to candidates, parties, and political committees are subject to less rigorous scrutiny than direct restraints on speech." *McConnell* 540 U.S. at 136 n.39; *see also id.* at 138 n.40.[11] If government seeks to constitutionally limit the rights of political speech and association inherent in contributions, it "must show concrete evidence that a particular type of financial transaction is corrupting or gives rise to the appearance of corruption and that the chosen means of regulation are closely drawn to address that real or apparent corruption." *McConnell*, 540 U.S. at 185, n.72.

A. Independent Expenditures Are Fundamentally Different From Contributions.

Independent expenditures are afforded special protection because they are direct restrictions on

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[11] Review of contribution limits is "less rigorous" because contribution limits normally do not "'in any way infringe the contributor's freedom to discuss candidates and issues.'" *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387 (1999) ("*Shrink Missouri*") (quoting *Buckley*, 424 U.S. at 20-21). Contributions are not "direct restraints on speech" because their "communicative value . . . inheres mainly in their ability to facilitate the speech of their recipients." *McConnell*, 540 U.S. at 135. In short, normally, "limiting contributions [leaves] communication significantly unimpaired." *Id.* Yet contribution limits seriously burden speech when they "'preven[t] candidates and political committees from amassing the resources necessary for effective advocacy.'" *Id.* (quoting *Buckley*, 424 U.S. at 21). Limiting the size of contributions to IEPACs significantly impairs the speech of both IEPACs and their contributors.

Contribution limits "bear 'more heavily on the associational right than on freedom to speak,'" *McConnell*, 540 U.S. at 135(quoting *Shrink Missouri* 528 U.S. at 388), "since contributions serve 'to affiliate a person with a candidate' and 'enabl[e] like-minded persons to pool their resources.'" *Id.* (quoting *Buckley*, 424 U.S. at 22). The Court has noted that limits generally leave sufficient avenues open to contributors to express their association and allow associations sufficient funding for effective advocacy. *Id.* at 136. Limiting contributions to IEPACs burdens both of these aspects of association without sufficient cause.

core political speech and "the functional consequences" of wholly independent expenditures give no cause for government to impinge on them. *McConnell*, 540 U.S. at 221. Limits on independent expenditures "'impose far greater restraints on the freedom of speech and association' than do limits on contributions and coordinated expenditures." *Id.* (quoting *Buckley*, 424 U.S. at 44). Yet limiting them "'fail[s] to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process.'" *Id.* (quoting *Buckley*, 424 U.S. at 47-48). Limiting independent expenditures is not supported by this interest because the "functional consequences" of expenditures for political speech made independently of candidates do not provide roots for the reality or appearance of corruption in the electoral process. *Id.* at 221-22. "Independent expenditures 'are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate's point of view'" *Id.* at 221 (quoting *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 446 (2001) ("*Colorado Rep. II*")).[12] And because, by careful statutory definition,[13] independent expenditures lack "prearrangement and coordination . . . with the candidate or his agent," the value of the expenditure to the candidate is undermined, and any nexus between spender and candidate that could give rise to the danger "'that expenditures will be given as a quid pro quo for improper commitments from the candi-

[12]The portions of *McConnell* cited here were occasioned by BCRA provisions that considered something less than an agreement as sufficient to consider an expenditure coordinated and thus as regulable a direct contribution. 540 U.S. at 221 ("We are not persuaded that the presence of an agreement marks the dividing line between expenditures that are coordinated--and therefore may be regulated as indirect contributions--and expenditures that truly are independent."). The discussion that followed demonstrated that the regulability of expenditures never depended on a formal agreement with a candidate. *Id.* at 221-22 ("Congress has always treated expenditures made 'at the request or suggestion of' a candidate as coordinated"; "An agreement has never been required to support a finding of coordination with a candidate under § 315(a)(7)(B)(i), which refers to expenditures made 'in cooperation, consultation, or concer[t] with, or at the request or suggestion of' a candidate."). Thus, the Court was not expanding the category of regulable expenditures, but pointing out that not requiring a formal agreement to coordinate them with a candidate does not itself leave a regulation overbroad or vague.

[13] IEPACs make only expenditures for political speech independent of any candidate. N.C.G.S. § 163-278.6(9a).

date'" is precluded. *Id.* (quoting *Buckley*, 424 U.S. at 47).

North Carolina's limit on contributions, when applied to IEPACs, unduly burdens the association rights of contributors, seriously burdens speech, and is not closely drawn to any interest in averting real or apparent corruption.

B. Contribution Limits that Affect Only Independent Expenditures Impose Greater Burdens on Association and Speech Than Other Contribution Limits.

As noted above, "a contribution limit involving even '"significant interference"' with associational rights is nevertheless valid if it satisfies the 'lesser demand' of being '"closely drawn"' to match a '"sufficiently important interest."'" *McConnell*, at 136 (quoting *Beaumont*, 539 U.S. 146, 162 (2003) (in turn quoting *Shrink Missouri*, 528 U.S. at 387- 388). But the burdens on the rights of association and speech from applying a contribution limit to IEPACs are greater than that from contribution limits *per se*. Treating such a limit the same as a limit on contributions to candidates or to PACs that make contributions or coordinated expenditures ignores fundamental constitutional principles protecting political speech and association as recited in *McConnell*.

"[T]he basic premise . . . in setting First Amendment standards for reviewing political financial restrictions [is that] the level of scrutiny is based on the importance of the 'political activity at issue' to effective speech or political association." *FEC v. Beaumont*, 539 U.S. 146, 161 (2003). The different effects on effective speech or association of contribution limits and independent expenditures is accounted for in the difference in their level of scrutiny. Contribution limits are afforded lesser scrutiny because their effects on association and speech are limited. *McConnell* at 135. Thus, "restrictions on political contributions have been . . . subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression." *Id.*

But when measures have the same effect on speech and association, they should stand or fall together, regardless of their nomination. While this does not *necessarily* entail subjecting a contribution

limit to strict scrutiny – "a contribution limit that carries an additional burden on association "does not independently occasion strict scrutiny," *McConnell*, at 141, "the associational burdens imposed by a particular piece of campaign-finance regulation may at times be so severe as to warrant strict scrutiny." *McConnell* at 141 n.43. But in any event, the Court's position on this in no way "suggest[s] that the alleged associational burdens imposed on parties by [a statute] have no place in the First Amendment analysis," but only that, generally, courts "account for them in the application, rather than the choice, of the appropriate level of scrutiny." *Id.* at 141. Limiting contributions to IEPACs imposes greater burdens on association and speech than do limits on contributions to candidates or other PACs, yet no sufficiently important interest supports even the normal burdens of a contribution limit when those contributions only fund independent expenditures.

C. Limiting Contributions for Independent Expenditures Imposes Additional Burdens on Association and Speech.

In North Carolina, when individuals make independent expenditures in concert, their contributions to the collective effort are limited, while individuals, acting alone, may make unlimited independent expenditures[14]. Associations are subject to the burdens of contribution limits while individuals seeking to exercise the same constitutional right are not. Interference with associational rights is greater because pooling resources, itself an exercise of association, subjects would-be speakers to limits on their speech. Limiting "individuals wishing to band together to advance their views . . . , while placing none on individuals acting alone, is clearly a restraint on the right of association." *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 296 (1981). *See also FEC v. National Conservative PAC*, 470 U.S. 480, 494 (1985) ("*NCPAC*") (diminishing First Amendment protection

[14]If two would-be speakers each have $5,000 for independent expenditures, but wish to combine resources with each other to amplify or more effectively promote their speech, they will each be limited to $4,000 in their efforts. Their combined resources will then be limited to less than they would be had each acted alone. By choosing to associate, they will be limited in their exercise of speech.

because of PACs' "form of organization" would violate freedom of association).

This effect also impedes the right of speech in a way that ordinary contribution limits do not. "The Court has acknowledged the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues" because "[e]ffective advocacy of both public and private points of view . . . is undeniably enhanced by group association." *Citizens Against Rent Control*, 454 U.S. at 295. Burdening association by limiting collective independent expenditures thus weakens an important support for free speech. By allowing a contributor to speak less because he chooses to associate with others to enhance effective advocacy, the limit encourages less effective advocacy. The net effect of limiting association through limits on contributions to IEPACs is to deter the more effective means of advocacy.

Because IEPACs like NCRL-FIPE uses their contributions only to make independent expenditures, limiting those contributions cannot but affect independent expenditures and the political speech that they, by definition, entail. *See North Carolina Right to Life, Inc. v. Leake*, 108 F.Supp. 2d 498, 514 n.17 (E.D. N.C. 2000) (N.C.G.S. § 163-278.13 acts as a de facto expenditure limit for IEPACs such as NCRL-FIPE).

D. Applying the Contribution Limit to IEPACs Imposes a Cost on the Exercise of a Constitutional Right.

By choosing to exercise a right to association for political advocacy, an individual is forced to limit their exercise of the right to express that political advocacy. A similar situation was created by certain provisions at issue in *McConnell*. Under new FECA § 315(d)(4), political parties were forced to choose between making independent expenditures for express advocacy and spending more than $5,000 in coordinated expenditures. Even after noting that the category of prohibited independent expenditures was very small, the Court announced that "to survive constitutional scrutiny, a provision that has such consequences must be supported by a meaningful governmental interest." *McConnell* at 217. Finding

insufficient support, the Court affirmed the District Court's judgment invalidating the provision.

North Carolina forces a contributor to choose between funding political speech and associating with others with a similar purpose to enhance that advocacy. On their own, they may pay as much as they will to get their message out. But if they choose to associate with others, they may contribute only $4,000 to the cause. As the Court pointed out *McConnell*, "that is a significant cost to impose on the exercise of a constitutional right." 540 U.S. at 216.

E. There is No Justification For Limiting Contributions to IEPACs that Do Not Contribute to Candidates.

As noted above, *McConnell* re-affirmed the basis for distinguishing independent expenditures from contributions. Part of that basis, the lack of a nexus between spender and candidate and the likelihood that the funded speech will be repetitive or counterproductive, also means that there is no reason to see or imagine corruption in an independent expenditure. The Court reiterated that it had "repeatedly . . . struck down limitations on expenditures 'made totally independently of the candidate and his campaign,'" 540 U.S. at 221 (quoting *Buckley*, 424 U.S. at 47), because of the effect of such limits on free expression and the lack of potential for corruption. Because of the diminished potential for corruption when moneys are spent independently by third parties, the anti-corruption rationale for contribution limits evaporates. *Id.* The Court has held that even political parties' expenditures do not raise the specter of corrupting candidates where there is no nexus. *Colorado Republican Fed. Campaign Committee v. FEC*, 518 U.S. 604, 616 (1996) ("*Colorado Rep. I*") (independent expenditures of parties, like those of PACs, pose little danger for potential corruption).

There are two ways that expenditures can raise an interest in averting corruption. One is when the expenditure is coordinated with the candidate. North Carolina already treats coordinated expenditures as indirect contributions. *Id.* at 163-278.6(6b). By definition, the expenditures at issue here are done "without consultation or coordination with a candidate or agent of a candidate." N.C.G.S. 163-278.6(9a).

While *McConnell* reminds us that, in a federal election, a formal agreement is not necessary for an expenditure to be considered coordinated, 540 U.S. at 221, it does not provide new grounds for finding independent expenditures to be corrupting.[15] Even when a candidate's political party makes expenditures to advocate his election, absent record evidence to the contrary, such expenditures present no "special corruption problem." *Colorado Rep. I*, 518 U.S. at 618. And moreover, contributions to independent speakers are even less dangerous than independent speech itself: "an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor." *Id.* at 617.

F. Political Committees Lack the Close Relationship to Candidates that Justified Regulation of Political Parties and Their Candidates in *McConnell.*

IEPACs like NCRL-FIPE that are unaffiliated with candidates pose little threat to the anti-corruption interest from circumventing otherwise valid limits. On its face, such a scenario is logistically difficult to imagine. If a PAC only makes independent expenditures, a contribution to the PAC can circumvent contribution limits only if independent expenditures closely approximate contributions. Yet the Supreme Court reiterated in *McConnell* that the fundamental difference between independent expenditures and contributions is of constitutional import. But even if circumvention can be said to flow from affinity between the independent speaker and a candidate, the IEPAC is a poor suspect.

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[15]The Court in *McConnell* notes that expenditures made with a "wink or nod" might be as useful to a candidate as a contribution, and for that reason, Congress has long considered expenditures made "at the request or suggestion of"a candidate to be coordinated and thus treated as contributions. 540 U.S. at 221. At the same time, the decisions in *Colorado Republican I* and *NCPAC* mean that expenditures by parties or PACs, when truly independent, give no more rise to an interest in averting corruption than any other expenditures. Thus, it is the independence of an expenditure, rather than its source or the content of the communication it funds that is the important part of the "functional consequences"that the Court considered in *McConnell* to be responsible for the "special protection" afforded independent expenditures. *Id.* If an expenditure is independent, it is not subject to treatment as a contribution simply because it lauds a candidate or is paid for by an entity with ties to the candidate.

In *McConnell*, the federal restrictions on state candidates was predicated and justified by the close relationship between a political party and its candidates. 540 U.S. at 185. Such parties and candidates "enjoy a special relationship and unity of interest" which places parties "in a unique position . . . to serve as 'agents for spending on behalf of those who seek to produce obligated officeholders.'" *Id.* at 145 (quoting *Colorado Rep. II*, 533 U.S. at 452). But the Court sharply distinguished the "real-world differences between political parties and interest groups," explaining that "[i]nterest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses." *Id.* at 188. In contrast, "[p]olitical parties have influence and power in the legislature that vastly exceeds that of any interest group. It is hardly surprising . . . that parties in turn have special access to and relationships with federal officeholders." *Id.* There is some plausibility to the scenario that a political party with close influence over both federal and state candidates could facilitate circumvention of the federal candidate's contribution limit by funneling funds to a state candidate who would use them to finance an ad campaign to aid his partisan compatriot. Of course, the close relationship between party and candidate also diminishes the risk of counterproductive ads and increases the likelihood that the expenditure will be welcomed and rewarded by the candidate. But where, as here, the independent expenditures are made by entities completed untethered to candidates, the danger of circumvention is much less plausible.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this court to grant their Motion for Summary Judgment, and to declare N.C. G.S. § 163-278.6(14), 163-278.14A(a)(2), and 163-278.13 unconstitutional on their face and as applied and permanently enjoin their enforcement.

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Respectfully submitted,

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