UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Civil Action No. 5:99-CV-798-BO(3)

NORTH CAROLINA RIGHT TO LIFE, INC., et al., Plaintiffs, v. LARRY LEAKE, et al., Defendants,	**MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT Fed. R.Civ. P. 56**

NATURE OF THE CASE

This action is the sequel to litigation commenced in 1996, which resulted in the declaration by this Court and the United States Court of Appeals for the Fourth Circuit that several significant provisions of the North Carolina campaign finance laws were unconstitutional. *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), *cert. denied,* 528 U.S. 1153, 120 S. Ct. 1156, 145 L. Ed. 2d 1069 (2000) ("*NCRL I*"). The 1999 North Carolina General Assembly promptly responded by adopting four pieces of legislation that amended, deleted or added campaign finance statutes. This legislation was the product of much study and debate by legislators and lobbyists, including those representing the interests of North Carolina Right to Life, Inc. ("NCRL") and a host of others. *See* Baddour Affidavit, ¶¶3-6 (JA 128-29). Immediately after the legislation was adopted, NCRL and its related state PACs brought this action on November 30, 1999. They challenged the constitutionality under the First Amendment of N.C. GEN. STAT. §§ 163-278.6(14) (defines the term "political committee"), 163-278.13 (limits contributions to candidates and political committees to $4,000 per primary or general election), and 163-278.14A(a)(2) (establishes means of proving that

a communication constitutes electoral advocacy triggering disclosure and other requirements). This Court ruled in an unpublished judgment entered on October 24, 2001, and amended (again unpublished) on August 8, 2002, that N.C. GEN. STAT. § 163-278.14A(a)(2) was unconstitutionally overbroad, that the contribution limits in N.C. GEN. STAT. § 163-278.13 could not be constitutionally applied to North Carolina Right to Life Committee Fund for Independent Political Expenditures (NCRL-FIPE) "and other political committees that only make independent expenditures," and that N.C. GEN. STAT. § 163-278.6(14) is unconstitutional only to the extent that it incorporates the test of electoral advocacy in N.C. GEN. STAT.§ 163-278.14A(a)(2). This Court upheld the statutory rebuttable presumption used in determining whether a major purpose of an entity may be to support or oppose candidates in N.C. GEN. STAT. § 163-278.6(14).

The Fourth Circuit Court of Appeals affirmed in part and reversed in part, concluding that N.C. GEN. STAT. § 163-278.14A(a)(2) was unconstitutionally vague and overbroad under "a bright-line test for determining whether communications may constitutionally be regulated as electoral advocacy." *North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418, 424 (4th Cir. 2003) ("*NCRL II*") (citing *Buckley v. Valeo*, 424 U.S. 1, 43 (1976)). Judge Michael dissented, reasoning that the first sentence of the statute should be upheld as "an explicative definition of express advocacy that passes muster under" *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986) (*MCFL*) and *Buckley v. Valeo*, 424 U.S. 1 (1976), but agreeing that the second sentence of the statute should be stricken. 344 F.3d at 436-37 (Michael, J. dissenting). The Fourth Circuit also found the rebuttable presumption in N.C. GEN. STAT. § 163-278.6(14) was vague and overbroad under the First Amendment. 344 F.3d at 429. It also concluded that the contribution limit of $4,000 per election is substantially overbroad and may not be constitutionally applied to a political

committee formed by NCRL with the stated intent to make only independent expenditures. *Id.* at 434.

Defendants petitioned the Supreme Court for discretionary review, and on April 26, 2004, the Court granted the petition, vacated the decision of the Fourth Circuit, and remanded the matter for further consideration in light of *McConnell v. FEC*, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003). __ U.S. __, 124 S. Ct. 2065, 158 L. Ed. 2d 617 (2004). The Fourth Circuit did not vacate the opinion of this Court, but after considering the memoranda of the parties, remanded the case to it on September 7, 2004, for further consideration in light of *McConnell*. Under the scheduling order of this Court, as revised on January 27, 2005, dispositive motions and new or supplemental affidavits are due on February 28, 2004.

STATEMENT OF THE FACTS

The procedural and factual history of this case is set forth in the earlier opinion of this Court, October 24, 2001 Order at 2-3, and at the opinion of the United States Court of Appeals for the Fourth Circuit. *NCRL II*, 344 F.3d at 420-22. The subsequent order of the Supreme Court vacating and remanding the case to the Fourth Circuit was entered on April 26, 2004, and is reported at ___ U.S. ___, 124 S. Ct. 2065, 158 L. Ed. 2d 617 (2004). The matter was remanded by the Fourth Circuit to this Court for reconsideration in light of *McConnell* by order of August 12, 2004.

ARGUMENT

I. N.C. GEN. STAT. § 163-278.14A(a)(2) IS CONSTITUTIONAL FOLLOWING THE *McCONNELL* COURT'S REJECTION OF A BRIGHT LINE TEST FOR REVIEWING SIMILAR PROVISIONS IN THE FEDERAL ELECTION CAMPAIGN ACT .

The Fourth Circuit struck the provisions of N.C. GEN. STAT. § 163-278.14A(a)(2) that provide a means for determining whether a communication constitutes electoral advocacy on the grounds that

> [t]his court has "steadfastly adhered to the bright-line 'express advocacy' test from *Buckley*," *Perry* [*v. Bartlett*], 231 F.3d [155, 160 (4th Cir. 2000)], and has ruled repeatedly that communications cannot be subject to campaign finance restrictions unless they use "explicit words of candidate advocacy." [*FEC v. Christian Action Network*, 110 F.3d 1049, 1051 (4th Cir. 1997) (*CAN II)*]. We have described this circuit's reading of the express advocacy limitation of *Buckley* and *MCFL* as narrow and strict and limited to "'communications that literally include words which in and of themselves advocate the election or defeat of a candidate.'" [*Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 391 (4th Cir. 2001)] (quoting *CAN II*, 110 F.3d at 1051). To be faithful to the bright-line standard articulated by the Supreme Court, any inquiry into whether a communication supports or opposes the election of a particular candidate must focus only on the actual words of advocacy.

344 F.3d at 426-27. This Court also employed the "bright-line" "express advocacy" test used in these cases.

The Supreme Court has now explicitly disavowed adherence to a bright-line test. *McConnell* definitively rejected the argument that "Congress cannot constitutionally require disclosure of, or regulate expenditures for, 'electioneering communications' without making an exception for those 'communications' that do not meet *Buckley's* definition of express advocacy." 540 U.S. at 190, 124 S. Ct. at 687, 157 L. Ed. 2d at 578. The Court stated "our decisions in *Buckley* and *MCFL* were specific to the statutory language before us; they in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech." *Id.* at 192,

124 S. Ct. at 688, 157 L. Ed. 2d at 579. The Court recognized the need to avoid an approach that rigidly construes a statute without regard to the reality that a legislature may be addressing, stating that the distinction between express and "so-called" issue advocacy does not aid "the legislative effort to combat real or apparent corruption." *Id.* at 194, 124 S. Ct. at 689, 157 L. Ed. 2d at 579. Most pertinent to the issue here, the Court found that Congress could act to regulate an electioneering communication that did not contain the "magic words" of express advocacy because "the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad" and "*Buckley*'s magic-words requirement is functionally meaningless." *Id.* Instead, noted the Court, "the express advocacy limitation . . . was the product of statutory interpretation rather than a constitutional command," necessary "to avoid problems of vagueness and overbreadth[;] we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line." *Id.* at 192, 124 S. Ct. at 688, 157 L. Ed. 2d at 579. Thus, the distinction between issue and express advocacy was not intended as a means of determining vagueness or overbreadth, but rather was a statute-specific construction employed to "avoid problems of vagueness and overbreadth." *Id.*

Section 163-278.14A(a) of the North Carolina General Statutes sets forth the "means, but not necessarily the exclusive or conclusive means, of proving that an individual or other entity acted 'to support or oppose the nomination or election of one or more clearly identified candidates.'" The first subdivision of § 163-278.14A(a) provides examples of words or phrases much like the "magic words" of *Buckley*. *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976). This Court held that subdivision (a) (1) "mirrors the 'express advocacy' test . . . set forth in *Buckley*, [which] has since been vigorously applied by the Fourth Circuit." Oct. 24, 2001 Order at 4. Then, this Court characterized

the subdivision as "an entirely independent, and constitutionally-sound standard by which to determine what constitutes 'express advocacy.'" Aug. 5, 2002 Order at 5.

Section 163-278.14A(a)(2) provides a second means for determining whether the purpose of a particular communication is "to support or oppose the nomination or election of one or more clearly identified candidates." Specifically, this section codified the less restrictive formulation used by the Supreme Court in *MCFL*, 479 U.S. 238 (1986). The statute provides:

> Evidence of financial sponsorship of communications whose essential nature expresses electoral advocacy to the general public and goes beyond a mere discussion of public issues in that they direct voters to take some action to nominate, elect, or defeat a candidate in an election. If the course of action is unclear, contextual factors such as the language of the communication as a whole, the timing of the communication in relation to events of the day, the distribution of the communication to a significant number of registered voters for that candidate's election, and the cost of the communication may be considered in determining whether the action urged could only be interpreted by a reasonable person as advocating the nomination, election, or defeat of that candidate in that election.

N.C. GEN. STAT. § 163-278.14A(a)(2).

Prior to the *McConnell* opinion, the Fourth Circuit and this Court found fault with this second means for determining the purpose of electoral advocacy, which allows consideration of contextual factors *if* the action exhorted in the communication to the general public is unclear.[1] *NCRL II,* 344 F.3d at 425. As Judge Michaels pointed out in his dissent, however, the first sentence of the provision "is an explicative definition of express advocacy that passes muster" under [*MCFL* and *Buckley*]. The second sentence uses contextual factors strikingly similar to the ones Congress used

[1] The test used in North Carolina's campaign finance laws remains whether the purpose of a communication is "to support or oppose the nomination or election of one or more clearly identified candidates." N.C. GEN. STAT. § 163-278.14A(a)(2) (2003). Application of the second sentence of § 163-278.14A(a)(2) occurs only when a communication directs voters to take some electoral action, but the exact action advocated is not clear.

in defining an "electioneering communication" in Section 434(f)(3)(A)(I) of the Federal Elections Campaign Act. 2 U.S.C.A. § 434 (f)(3)(A)(I) (Supp. 2003). That definition, upheld in *McConnell*, establishes disclosure requirements and prohibitions on corporate and union funding for communications that are "broadcast," and "refer to a clearly identified candidate," made within a certain time period before a primary or general election, and "targeted to the relevant electorate." *Id.* In *McConnell*, the Supreme Court found communications defined by these factors to be properly subject to regulation, thus expressly upholding a statutory framework similar to N.C. GEN. STAT. § 163-278.14A(a)(2).

Finally, the use of the test that the "action urged could only be interpreted by a reasonable person as advocating the nomination, election or defeat of that candidate in that election"does not render the statute infirm. Such "reasonable person" or "ordinary observer" objective tests are used in other standards under the First Amendment. *See, e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573, 599-600 (1989) (display of Christmas creche); *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14, 90 S. Ct. 1537, 1542, 26 L. Ed. 2d 6, 15 (1970) (libel).

With respect to a challenge for vagueness, it is worth noting that the typical vagueness inquiry must be undertaken from the standpoint of a reasonable person. A candidate or political committee should have no difficulty in determining whether an advertisement it intends to run, in the context in which it chooses to run it, could only reasonably be understood as a clear exhortation to elect or defeat a candidate. Courts are particularly reluctant to invalidate a law for vagueness as a result of a challenge to the law on its face. *See, e.g., National Endowment for the Arts v. Finley*, 524 U.S. 569, 580, 588-590, 118 S. Ct. 2168, 2175, 2179-2180, 141 L. Ed. 2d 500, 511-12, 517-18 (1998). By definition, if there is a reasonable dispute over the *application* of the statute to a given

communication, it means that the communication is susceptible to more than one interpretation, not that the standard itself is vague. If a communication is subject to more than one interpretation, then N.C. GEN. STAT. § 163-278.14(a)(2) would not apply. Thus, this statute should not be found to be unconstitutionally void for vagueness.

Likewise, the statute should not be found to be unconstitutionally overbroad. The test for overbreadth is "whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, *reh'g denied*, 465 U.S. 950, 102 S. Ct. 2023, 72 L. Ed. 2d 476 (1982). The Fourth Circuit reiterated this test in striking down an overbreadth challenge in *American Life League*. *American Life League v. Reno*, 47 F.3d 642, 652-53 (4th Cir.) (*quoting Houston v. Hill*, 482 U.S. 451, 458, 107 S. Ct. 2502, 2508, 96 L. Ed. 2d 398, 410 (1987) ("As for overbreadth, 'only a statute that is substantially overbroad may be invalidated on its face.'")), *cert. denied*, 516 U.S. 809, 116 S. Ct. 55, 133 L. Ed. 2d 19 (1995). As the Fifth Circuit stated in *Committee in Solidarity with People of El Salvador v. FBI*, 770 F.2d 468, 475 (5th Cir. 1985), courts "need not refute any and every theoretical case which might constitute an impermissible application of the statute." When faced with a challenge to a statute for overbreadth, courts are obliged to construe the statute to avoid constitutional infirmities if that is possible. *Id.* at 473. "Application of the overbreadth doctrine . . . is, manifestly, strong medicine. It has been employed by the Supreme Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

As noted recently by the Fourth Circuit, "[t]he Supreme Court has consistently endorsed as-applied rulings in reviewing the constitutionality of [the Federal Elections Campaign Act] and analogous state statutes." *Beaumont v. FEC*, 278 F.3d 261, 278 (4th Cir. 2002), *rev'd on other grounds*, 539 U.S. 146, 123 S. Ct. 2200, 156 L. Ed. 2d 179 (2003). For these reasons, it is now clear that plaintiffs' facial challenge to N.C. GEN. STAT. § 163-278.14A(a)(2) should not be sustained and that summary judgment should be entered for defendants.

II. THIS COURT'S INITIAL HOLDING THAT THE STATUTORY REBUTTABLE PRESUMPTION SET OUT IN N.C. GEN. STAT. § 163-278.6(14) IS CONSTITUTIONALLY VALID SHOULD BE CONFIRMED.

The General Assembly of North Carolina, in rewriting its definition of a political committee after *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) ("*NCRL I*"), *cert. denied*, 528 U.S. 1153, 120 S. Ct. 1156, 145 L. Ed. 2d 1069 (2000), drew upon the special expertise of its members to provide specificity in N.C. GEN. STAT. § 163-278.6(14) to guide candidates, corporations, political parties and others on what constitutes a political committee. The legislature, based on its expertise with local and state elections in North Carolina, determined that the expenditure of $3,000 on electoral advocacy by an entity supports a rebuttable presumption that electioneering activity is a major purpose of the organization. The legislature established a monetary threshold that would subject some entities to campaign reporting requirements, just as did Congress in enacting BCRA. *See, e.g.*, *McConnell*, 540 U.S. 171-72, 124 S. Ct. at 676-77, 157 L. Ed. 2d at 566 (requirement upheld that segregated funds and individuals who spend more than $10,000 in a year on electioneering communications file disclosure reports).

This Court initially rejected plaintiffs' argument that the statute was vague and overbroad, and the Fourth Circuit characterized the argument as presenting a "close question." 344 F.3d at 429.

> The standard represents a reasonable application of the Supreme Court's conclusion that an organization whose 'independent spending [has] become so extensive that [its] major purpose may be regarded as campaign activity' may be classified as a 'political committee,' and indeed, may be properly subject to the regulations attending such classification.

(JA 240 n.1) (quoting *MCFL*, 479 U.S. at 262). The major purpose presumption is not conclusive because under N.C. GEN. STAT. § 163-278.34A the State always bears the "burden of proving that an organization has as its major purpose the support or defeat of a candidate." Moreover, both the Fourth Circuit and this Court rejected the narrow construction of the major purpose test proposed by plaintiffs, noting the absurdity that under plaintiffs' argument "an entity with a $3 million budget that expends as much as $1.4 million advocating the election or defeat of a particular candidate would not qualify as a political committee under NCRL's interpretation." 344 F.3d at 429 n.3; Aug. 5, 2002 Order at 6, n.1.

The State has presented substantial evidence that when all elections in North Carolina – local and statewide – are taken into account, $3,000 is indeed a significant threshold, and respondents have failed to offer any evidence refuting this. (Baddour Dep. p. 40, line 21 - p. 41, line 1 (Ex. Vol. I)) (*See also*, *e.g.*, Hall Dep. pp. 104-05 (Ex. Vol. II) and Ex. 46 pp. 9-11 (Ex. Vol. IV) ("Based on my review of spending by political committees and the cost of advertising in North Carolina, I believe the $3,000 level is a generous threshold for the spender."); Southerland Dep. p. 38 (Ex. Vol. II) and Ex. 33 ¶¶ 8-10 (Ex. Vol. III))

The General Assembly chose not to establish a given percentage of total spending as an automatic basis for determining whether an entity is a political committee. (Baddour Dep. p. 42, line 7 - p. 43, line 16; p. 51, lines 16-17 (Ex. Vol. I)) The decision of this Court in *McConnell* teaches

that considerable deference should be accorded legislative decisions in an area in which legislators have special expertise.

> The less rigorous standard of review we have applied to contribution limits (*Buckley*'s "closely drawn" scrutiny) shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise. It also provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.

540 U.S. at 137, 124 S. Ct. at 656-57, 157 L. Ed. 2d at 544. While the *McConnell* Court obviously is reviewing federal legislation and discussing deference to Congress, it relies heavily throughout its opinion on *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), a case addressing the constitutionality of Missouri's laws and necessarily deference to that state's legislative judgments. Summary judgment, then, should be entered for defendants on plaintiffs' challenge to N.C. GEN. STAT. § 163-278.6(14).

III. A CONTRIBUTION LIMIT OF $4,000 PER ELECTION MAY BE CONSTITUTIONALLY APPLIED TO NCRL-FIPE.

Plaintiffs contend that NCRL-FIPE is a political committee formed by a non-profit corporation – NCRL – to make only independent expenditures in support of or opposition to candidates and not to make contributions directly to candidates. This Court and the Fourth Circuit initially ruled that contribution limits of $4,000 per election may not be applied to NCRL-FIPE as they are for contributions to other political committees. However, *McConnell* teaches that there is no place for a strong presumption against the constitutionality of contribution limits.

First, in addition to other evidence, the State has offered instances in which entities named "Farmers for Fairness" and "Citizens for Truth in Elections" ran independent "issue advocacy" campaigns opposing candidates in North Carolina elections. Because these campaigns did not use

"express advocacy," this Court did not believe the evidence could be properly considered in determining whether the contribution limit promoted important governmental interests. October 24, 2001 Order at 19-20. The Fourth Circuit affirmed. *NCRL II*, 344 F.3d at 434. When viewed under the standards articulated by *McConnell*, however, this evidence is compelling, and the fact that the examples offered were gleaned from so-called "issue advocacy" is seen as patently irrelevant. *McConnell* rejected both a narrow definition of corruption or the appearance of corruption and the view that there was any meaningful difference between advertisements that used magic words and "so-called issue ads [that] eschewed the use of magic words." 540 U.S. at 126, 124 S. Ct. at 650, 157 L. Ed. 2d at 537. Thus, under McConnell, it can now be seen that evidence offered by the State was indeed quite relevant in evaluating the basis for the challenged statute.

Second, both this Court and the Fourth Circuit in their earlier decisions in this case relied on interpretations of pertinent precedents that were interpreted differently in *McConnell*. For example, the Fourth Circuit relied on Justice Blackmun's concurrence in *California Med. Ass'n v. FEC*, 453 U.S. 182 (1981), in concluding that political committees that make only independent expenditures should be treated differently from ones that made contributions to candidates. 344 F.3d at 434. In footnote 48 of the *McConnell* decision, however, the Supreme Court rejected the argument that limits on contributions to multi-candidate political committees had been justified in *Cal-Med* only "as a means of preventing individuals from using parties and political committees as pass-throughs" to circumvent limits on contributions to candidates. 540 U. S. at 152, 124 S. Ct. at 665 n.48, 157 L. Ed. 2d at 554. The Supreme Court noted, *id*., that the limits at issue in *Cal-Med* also restricted

> the source and amount of funds available to engage in express advocacy and numerous other non-coordinated expenditures [such as independent expenditures]. If indeed the First Amendment prohibited Congress from regulating contributions to

> fund the latter, the otherwise-easy-to-remedy exploitation of parties as pass-throughs (*e.g.*, a strict limit on donations that could be used to fund candidate contributions) would have provided insufficient justification for such overbroad legislation.

Thus, *McConnell* establishes that the First Amendment does not prohibit appropriate regulation of independent expenditure political committees.

Third, *McConnell* reiterates that great deference should be shown to legislative decisions designed to inhibit circumvention of contribution limits by prohibiting donations to political committees other than those directly controlled by a candidate. For example, the Supreme Court upheld section 323(f) of BCRA, which restricts soft money contributions to state and local candidates for "public communications," defined in 2 U.S.C.A. § 301(20)(A)(iii) as "a 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.'" *McConnell*, 540 U.S. at 184, 124 S. Ct. at 683, 157 L. Ed. 2d at 573. The Supreme Court rejected the argument that such contributions "do not corrupt or appear to corrupt *federal* candidates," reasoning that "state and local candidates and officeholders will become the next conduits for the soft-money funding of sham issue advertising" and Congress has a "strong interest in preventing circumvention of otherwise valid contribution limits." *Id.* at 185, 124 S. Ct. at 684, 157 L. Ed. 2d at 574 (emphasis added). Presumably, some of the contributions to these state and local candidates would be used to pay for advertisements that would be independent expenditures; nevertheless, the *McConnell* decision found § 323(f) to be constitutional.

Therefore, this Court must determine whether NCRL-FIPE is sufficiently "independent" of NCRL and its other political committees to prevent circumvention of the contribution limits to which its other political committees are subject. NCRL-FIPE is part of a multi-faceted political structure

adopted by NCRL. The non-profit corporation itself has the right to make contributions and expenditures to candidates, parties and political committees under N.C. GEN. STAT. § 163-278.19(f) (statute written to implement the ruling in *NCRL I*, 168 F.3d at 705). In addition, NCRL is also the parent entity for a longstanding state political committee and for a separate federal political committee. Both of these political committees have made contributions to state and federal candidates. NCRL-FIPE was formed by NCRL "for the sole purpose of making independent expenditures in North Carolina state elections in order to further the goals and purposes of North Carolina Right to Life, Inc." (Compl., Ex. E) The parent corporation and its three political committees have a history of relying on the same persons to serve as PAC Director, President and Treasurer. (Deposition Exhibit 86) Given the interwoven relationships of these entities, it defies common sense to state that the expenditures made by NCRL-FIPE will be sufficiently independent of the contributions made by NCRL and its other political committees to view any expenditures it makes as independent of the contributions. *See McConnell*, 540 U.S. at 153, 124 S. Ct. at 666, 157 L. Ed. 2d at 554 ("Congress is not required . . . to view conduct in isolation from its context."). As noted by Robert H. Hall, co-director for research and programs at Democracy North Carolina, in his second declaration, NCRL-FIPE

> can be defined in almost any way its creators desire, although to claim that it is independent from, or in no way coordinated with, other NCRL entities with which it is affiliated defies logic and common sense. It doesn't exist in a vacuum, even in theory; it is tied to an organization with an advocacy agenda on a specific issue that also sponsors a committee making direct political donations in coordination with candidates.

Second Declaration of Robert H. Hall, ¶ 3 (filed contemporaneously herewith). *See also* Declaration of Thomas E. Mann, ¶¶ 8-18 (discussing the interwoven relationships between large 527 committees in federal elections in 2004) (filed contemporaneously herewith).

The record in this case establishes the sound basis the North Carolina General Assembly had for imposing a $4,000 per election contribution limit, which would apply to entities such as NCRL-FIPE just as to other political committees. The record is silent as to any factual reason that this contribution limit cannot be applied to NCRL-FIPE. Summary judgment should therefore be entered for defendants on plaintiffs' challenge to N.C. GEN. STAT. § 163-278.13.

CONCLUSION

For the foregoing reasons, summary judgment should be awarded to defendants.

Respectfully submitted, this the 28th day of February, 2005.

ROY COOPER
Attorney General

_____
Susan K. Nichols
Special Deputy Attorney General
N.C. State Bar No. 9904
snichols@ncdoj.com

_____
Alexander McC. Peters
Special Deputy Attorney General
N.C. State Bar No. 13654
apeters@ncdoj.com
North Carolina Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763
Counsel for Defendants

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** in the above titled action upon all other parties to this cause by:

[ ] Hand delivering a copy hereof to each said party or to the attorney thereof;

[ ] Transmitting a copy hereof to each said party via facsimile transmittal; or

[x] Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

Paul Stam, Jr.
STAM, FORDHAM & DANCHI, P.A.
106 Holleman Street
P.0. Box 1600
Apex, NC 27502-1600

Local Counsel for Plaintiffs

James Bopp, Jr.
Jeffrey Gallant
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510

Lead Counsel for Plaintiffs

This, the 28th day of February, 2005.

_____
Alexander McC. Peters
Special Deputy Attorney General