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Patch by Patch: North Carolina's Crazy Quilt of Campaign Finance Regulations

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Patch by Patch: North Carolina's Crazy Quilt of Campaign Finance Regulations

ABSTRACT

After more than a decade of judicial intervention and legislative reforms, North Carolina's campaign finance laws resemble a crazy quilt—a patchwork of provisions pieced together from remnants and scraps. The law is a dizzying array of proscriptions, requirements, and exceptions, sometimes based on speaker identity and sometimes based on the content or context of the political message. This quilt is what remained after the Fourth Circuit's strained and confusing decision in North Carolina Right to Life, Inc. v. Leake, decided in 2008, immediately following the Supreme Court's landmark decision in McConnell v. FEC. This Comment evaluates and summarizes North Carolina's existing campaign finance regulations, provides a critical analysis of both the state of the law and of the Fourth Circuit's decision in North Carolina Right to Life, Inc. v. Leake, and offers a suggested analytical framework for future judicial review of campaign finance regulations.

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INTRODUCTION

Modern political campaigns are dominated by political ads and the money required to produce and air them. Candidates and Political Action Committees break new fundraising records every election cycle.¹ By July 31, 2016, Hillary Clinton and Donald Trump, along with their Super PACs and party committees, raised over \$1 billion for the 2016 presidential contest.² Here in North Carolina in the same period, candidates for state and local races raised more than \$38 million.³ Independent political groups spent another \$33.1 million, with more than \$16 million spent on the gubernatorial race alone.⁴

Campaign finance regulations seek to ensure that candidates raising such large sums of money are not doing so in exchange for political favors, and if they are, that the public has sufficient information available to hold them accountable. These regulations pose a tricky balancing act for the federal and state governments. Political speech is vital to our democracy and has been the bedrock of our nation's history.⁵ Citizens expect the

1. Paul Blumenthal, *Get Ready for the Most Expensive Senate Races of All Time*, HUFFINGTON POST (Sept. 30, 2016, 4:11 AM), <https://perma.cc/A85U-4ZWQ>.

2. Anu Narayanswamy, Darla Cameron & Matea Gold, *Campaign 2016: Money Raised as of July 31*, WASH. POST (July 31, 2016), <https://perma.cc/VB3Y-TF7Q>.

3. Ctr. for Responsive Politics, *North Carolina, State Summary, 2016 Cycle*, OPENSECRETS.ORG, <https://perma.cc/A6G7-K2EW>.

4. Alex Kotch, *North Carolina's 2016 State Elections Smashed Outside Spending Records*, FACING SOUTH (Feb. 22, 2017), <https://perma.cc/T8VK-63ZE>.

5. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The Founders

believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth They knew . . . that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that

greatest freedom when they engage in political speech. But, for the last century, free-flowing political discourse has had to yield to protections against the threat of corruption. As candidates continue to appeal to anonymous donors who pour millions of dollars into state and national campaigns, the public is apt to suspect that political favors will be exchanged for those donations. When the public perceives corruption in the political process, distrust of government often follows, and that can be as damaging to our system of government as the constraint of speech.

As a result, federal and state governments have sought to carefully thread the needle—permitting the broadest free speech possible while also ensuring that campaign contributions do not result in corruption or seriously undermine the public's confidence in our electoral system. That struggle has resulted in a set of regulations and exceptions so confusing that an average citizen could easily run afoul of the law without ever intending to do so.⁶ As the Fourth Circuit noted:

It is no unfounded fear that one day the regulation of elections may resemble the Internal Revenue Code, and that impossible complexity may take root in the very area where freedom from intrusive governmental oversight should matter most.”⁷

If we have not yet reached that day, it is fast approaching.

For more than a decade, North Carolina has made piecemeal revisions to its campaign finance laws, amending, repealing, or replacing sections of the law in response to court orders.⁸ The result is a code that has lost its original purpose. It is a quilt stitched together without a pattern. The average citizen is left unsure what the law is, with his speech chilled by the threat of criminal sanction if he fails to adequately understand how to comply with the law. In its current form, North Carolina's campaign

the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

Id.

6. See *Citizens United v. FEC*, 558 U.S. 310, 335–36 (2010) (holding that the Federal Election Commission's two-part, eleven-factor balancing test amounted to a prior restraint on speech because an average speaker who desired to avoid criminal liability would need to ask the government whether his speech was regulated).

7. *N.C. Right to Life, Inc. v. Leake (NCRL III)*, 525 F.3d 274, 296 (4th Cir. 2008).

8. See Act of May 4, 1999, no. 31, 1999 N.C. Sess. Laws 34 (revising the definition of “political committee” in response to the holding in *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712–13 (4th Cir. 1999)); Act of Aug. 19, 2007, no. 391, § 3, 2007 N.C. Sess. Laws 1150, 1152 (repealing the \$3,000 rebuttable presumption that had previously been used to classify issue advocacy after the test was held unconstitutional in *N.C. Right to Life, Inc. v. Leake*, 344 F.3d 418, 430 (4th Cir. 2003)); Act of Aug. 2, 2008, no. 150, 2008 N.C. Sess. Laws 605 (titled in part as “An Act . . . to Respond to the Decision of the 4th Circuit U.S. Court of Appeals in *North Carolina Right to Life v. Leake*”).

finance regulations fail to accomplish the government's goals of encouraging political participation while limiting the possibility and perception of corruption.

This Comment will begin by providing an overview of North Carolina's campaign finance regime, explaining which individuals and organizations are subject to regulation and which types of speech are subject to regulation. It will also explain how the North Carolina Board of Elections⁹ uses disclosure reporting requirements along with civil and criminal penalties to fulfill its duty to regulate campaign finance.

Part II offers a critique of the Fourth Circuit Court of Appeals' decision in *North Carolina Right to Life, Inc. v. Leake*,¹⁰ which struck two provisions of North Carolina's campaign finance laws as facially unconstitutional. Rather than analyzing the law's ability to achieve a governmental interest without burdening constitutionally protected speech, the court subjected the law to bright-line tests that it incorrectly adopted and applied.

Part III proposes a framework for future review of challenges to campaign finance regulations. This framework suggests that the court proceed by (1) identifying the type of burden imposed by the regulation, (2) selecting the appropriate level of constitutional scrutiny, (3) determining whether the method of regulation chosen is capable of achieving that stated purpose, and (4) determining whether the law incidentally burdens protected speech that the government need not regulate in order to accomplish its purpose. Finally, the court should assess the law for vagueness under both the First and Fourteenth Amendments.

This Comment concludes by asserting that what remains of North Carolina's campaign finance regime is incapable of achieving the

9. On December 16, 2016, the Bi-Partisan Ethics, Elections and Court Reform Act was enacted and signed by outgoing Governor Pat McCrory. S. 4, 2016 Gen. Assemb., 4th Extra Sess. (N.C. 2016). The Act combined the North Carolina Board of Elections and the North Carolina Ethics Commission into a new board designated The North Carolina Bipartisan State Board of Elections and Ethics Enforcement. The incoming Governor, Roy Cooper, challenged the new act and a preliminary injunction was issued blocking all portions of the law from taking effect. *Cooper v. Berger*, No. 16 CVS 15636, 2017 WL 1433242 (N.C. Super. Ct. Jan. 6, 2017). The Act was repealed and replaced by the Bipartisan Board of Elections and Ethics Enforcement Act five months later. S. 68, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017). The portions of the Act which provided for the composition of the new board were found unconstitutional by the North Carolina Supreme Court. *Cooper v. Berger*, 809 S.E.2d 98 (N.C. 2018). The legislature again sought to combine the board and commission immediately following the court's holding. H.B. 90, 2018 Gen. Assemb., Reg. Sess. (N.C. 2018). For the sake of clarity, throughout this Article the board is referred to as the Board of Elections.

10. *NCRL III*, 525 F.3d 274.

governmental interest that is purportedly the justification for its existence. Instead, the law unconstitutionally chills free speech. The resulting patchwork of regulation is so complex that an average citizen cannot understand it and, without the assistance of an attorney, could face criminal penalties for innocently violating the law through the simple act of collectively associating and advocating for a candidate.

I. NORTH CAROLINA'S CAMPAIGN FINANCE SCHEME

North Carolina's statutory scheme for regulating campaign finance restricts political speech in three primary ways. It imposes restrictions on the basis of the speaker's identity; it imposes restrictions on the basis of the content of certain messages; and it imposes disclosure requirements on certain speakers and messages. The statute uses civil and criminal penalties to enforce the law. The following sections will summarize those restrictions, requirements, and penalties.

A. *Restrictions Imposed on the Basis of Speaker Identity*

North Carolina's statutes identify seven types of speakers subject to regulation: (1) individuals,¹¹ (2) candidates,¹² (3) for-profit corporations,¹³ (4) non-profit corporations,¹⁴ (5) segregated funds created by corporations or labor unions,¹⁵ (6) political parties and their affiliated party committees,¹⁶ and (7) any other organization which has "the major purpose to support or oppose" the nomination, election, or defeat of a candidate (political action committees, colloquially known as PACs).¹⁷ The regulations impose different burdens on the different types of speakers,

11. See generally N.C. GEN. STAT. §§ 163A-1410 to -1505 (2017) ("Regulating Contributions and Expenditures in Political Campaigns"). Registered lobbyists are subject to more stringent regulations. *Id.* § 163A-1427. Discussion of the constitutionality of these restrictions is beyond the scope of this Comment; however, for a more thorough discussion on the constitutionality of these restrictions, see *N.C. Right to Life, Inc. v. Bartlett*, 3 F. Supp. 2d 675 (E.D.N.C. 1998).

12. §§ 163A-1411(9), -1475(2).

13. *Id.* §§ 163A-1411(24), -1436.

14. *Id.* § 163A-1436(h).

15. *Id.* § 163A-1436(g); see also *id.* § 163A-1436(d).

16. *Id.* §§ 163A-1411(76), -1416 to -1417.

17. *Id.* § 163A-1411(74)(d). The statute defines a political committee as "a combination of two or more individuals . . . that makes . . . contributions or expenditures and has . . . the major purpose to support or oppose the nomination or election of one or more clearly identified candidates." *Id.* § 163A-1411(74).

with some subject to very stringent regulation and others provided great latitude to raise and spend funds to further their political messages.

Individual donors may not contribute more than \$5,200 per election cycle to any candidate or political committee.¹⁸ Because the statutes treat “coordinated expenditures” (purchases that are made in concert or agreement with the candidate) as donations, individuals who collaborate with a candidate to make purchases, as opposed to direct donations, must treat those expenditures as donations subject to the contribution limit.¹⁹

For-profit corporations are prohibited from making campaign contributions,²⁰ but this does not mean they are prohibited from participating in the political process. They may encourage their employees, stockholders, or members to register and vote,²¹ and they may advocate for or against a candidate so long as the expenditure is not coordinated with the campaign.²² They may also directly support candidates by establishing “a separate segregated fund to be utilized for political purposes.”²³ The segregated fund can make contributions to candidates or other political committees and engage in electioneering.²⁴ The restrictions on corporate contributions do not apply to non-profit corporations,²⁵ which are free to make contributions to candidates and political committees, subject to the \$5,200 cap per election cycle.²⁶

The statutes also regulate political committees and require that every candidate must establish and register a “political committee” with the

18. *Id.* § 163A-1425(a). The limit is adjusted for inflation every two years. *Id.* § 163A-1425(b).

19. *Id.* § 163A-1411(20). “[C]oordinated expenditure’ means an expenditure that is made in concert or cooperation with, or at the request or suggestion of, a candidate” *Id.* The precise level of coordination required has yet to be established in North Carolina courts, but federal courts have held coordination in the context of federal campaign finance laws to mean “the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication’s: (1) contents; (2) timing; (3) location, mode, or intended audience . . . ; or (4) ‘volume.’” *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 92 (D.D.C. 1999).

20. § 163A-1436(a).

21. *Id.* § 163A-1436(d).

22. *See id.* § 163A-1436. While corporations are prohibited from making contributions, the definition of “contribution” expressly excepts independent expenditures. *Id.* § 163A-1411(13).

23. *Id.* § 163A-1436(d).

24. *Id.* The corporation may provide administrative support to its segregated fund but must report the value of that support, as well as a portion of the salary of any officer or employee who works for the segregated fund, as a contribution from the parent corporation. *Id.* § 163A-1436(g).

25. *Id.* § 163A-1436(h).

26. *Id.* § 163A-1425(a).

state.²⁷ Once registered, the political committee is subject to several special requirements. It must:

- (1) appoint a treasurer,²⁸
- (2) disclose the location and account information of all bank accounts and loans,²⁹
- (3) file periodic detailed accountings of receipts and expenditures,³⁰
- (4) abide by certain fundraising and expenditure limitations,³¹ and
- (5) not receive or solicit donations of more than \$5,200 per election from any donor.³²

Political parties, their affiliated party committees, and other committees controlled by them are exempted from many of North Carolina's campaign finance regulations.³³ Political parties are not subject to the donation cap³⁴ and can make contributions to or expenditures on behalf of candidates in unlimited amounts; they can also receive donations in unlimited amounts.³⁵ Political parties are also authorized to establish separate "headquarters building funds" to be used for the purchase and maintenance of physical office space.³⁶ Donations to the "building fund do

27. *Id.* §§ 163A-1411(74), -1418(a)(1).

28. *Id.* § 163A-1412(a).

29. *Id.* §§ 163A-1412(b)(8), -1422.

30. *See id.* § 163A-1414(a) (requiring detailed accounts current within seven days); *id.* § 163A-1418 (establishing reporting periods for various election cycles); *id.* § 163A-1422 (setting out information that must be included in periodic reports).

31. *Id.* § 163A-1425.

32. *Id.* §§ 163A-1425(a), (c). This cap is waived for the candidate and his or her spouse, who can contribute unlimited funds to the campaign. *Id.* § 163A-1425(d).

33. *Id.* § 163A-1411(76). The definition of "political committee" includes the "political party or [its] executive committee," as well as any committee controlled by it. *Id.* § 163A-1411(74)(b). This includes the state, county, and congressional district committees of each party, as well as the caucuses of each party (e.g., the Democratic Women or the Young Republicans) and the affiliated committees, (e.g., the Senate Democrats, the Republican Council of State), which are referred to collectively throughout this Comment as "political parties."

34. *Id.* § 163A-1425(h).

35. The political parties are subject to federal contribution limits. Federal Elections Campaign Act of 1971, 52 U.S.C. § 30116(a)(1)(D) (Supp. IV 2017). No person may contribute in excess of \$10,000 "to a political committee established and maintained by a State committee of a political party in any calendar year." *Id.* The parties may, however, separate their finances into a federal fund and a state fund, and the state fund may accept donations above the federal donation limit. *See* 11 C.F.R. § 106.6 (2018).

36. N.C. GEN. STAT. § 163A-1438.

not constitute contributions or expenditures” and therefore are not subject to any contribution regulations, including the ban on corporate giving.³⁷

Finally, the statutes regulate a “catch-all” category of political speakers: those who engage in electoral advocacy but are not controlled by candidates or political parties—PACs. Understanding this category of regulated speakers requires a more detailed breakdown of the definition of “political committee.”

The statute defines “political committee” as any combination of two or more people, business entities, or organizations “that makes . . . contributions or expenditures and has . . . the major purpose to support or oppose the nomination or election of one or more clearly identified candidates.”³⁸ “Contribution” and “expenditure” are defined to include anything of value given to, or made in coordination with, a candidate, political committee, or political party “to support or oppose the nomination or election of one or more clearly identified candidates.”³⁹ The phrase “to support or oppose” is a term of art, which appears throughout the statutory scheme.⁴⁰ The statute provides a list of particular words and phrases that show “an individual or other entity acted ‘to support or oppose the nomination or election of one or more clearly identified candidates.’”⁴¹

In short, a “political committee” is a combination of individuals or entities whose major purpose is to either: (1) make contributions to candidates or political committees, (2) make expenditures that are coordinated with a candidate or political committee, or (3) engage in electoral advocacy by communicating messages to the public that, in

37. *Id.* The statute provides that if the party (1) establishes a “separate segregated bank account,” (2) informs donors that funds will be used exclusively for the headquarters building, and (3) ensures all donations are designated for the building fund, its receipts and expenses are not deemed “contributions” or “expenditures.” *Id.* §§ 163A-1438(2)–(3). Notwithstanding that exemption, the party is required to report donations to and spending by the building fund to the Board of Elections. *Id.* § 163A-1438(5).

38. *Id.* § 163A-1411(74). The statute also provides that a candidate who serves as his own treasurer, and is therefore a committee of one, is still subject to regulation as a “political committee.” *Id.*

39. *Id.* § 163A-1411(13), (51). The definition of “expenditure” includes a slight variation from the language used to define “contribution.” That definition encompasses “anything of value . . . to support or oppose the nomination, election, or passage of one or more clearly identified candidates, or ballot measure.” *Id.* § 163A-1411(51).

40. *See id.* §§ 163A-1410 to -1505.

41. *Id.* § 163A-1429(a). The list is an adaptation of the list originally supplied by the Supreme Court in its landmark decision, *Buckley v. Valeo*, and includes “vote for,” “reelect,” “support,” “vote against,” “defeat,” etc. *Id.*; *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam).

express terms, advocate for the election or defeat of a candidate.⁴² Classification as a political committee subjects the organization to each of the requirements enumerated above for candidates' political committees and means that all financial information will become public record, including the names, addresses, occupations, and employers of all supporters.⁴³

The statutes provide an exception for a special subset of these committees, called independent expenditure political committees, because they "do[] not . . . make contributions, directly or indirectly, to candidates or to political committees that make contributions to candidates."⁴⁴ These special committees must adhere to all of the reporting and disclosure requirements for other political committees but are exempt from campaign contribution limits.⁴⁵ In exchange for giving up the right to make contributions to candidates or coordinate their expenditures with candidates, they can raise funds in unlimited amounts from individuals, non-profit corporations, or political parties.

An example may be helpful in illustrating the difference in the two types of political committees. Imagine a group of neighbors who want to work together to support Ben Franklin in his run for the North Carolina Senate. They could form a PAC: Citizens for Ben. This PAC would be regulated as a political committee, and the neighbors would have to comply with all of the provisions of Article 22A of the North Carolina General Statutes. If they tell Ben they plan to mail flyers that say "Vote for Ben!" to all of the scientists in his district, the money spent on the flyers would be treated as a donation to Ben because his knowledge of the mailer has value to him. It was coordinated. He now knows that he can shift campaign funds away from contacting the scientists in his district and can use those resources in other areas. This "coordinated expenditure" would have to be reported by Ben as an in-kind donation from the PAC. Because it is considered a donation, it is subject to the \$5,200 contribution limitation, meaning the PAC would have to spend less than \$5,200 to design, print and mail the flyer. If, however, the neighbors send the mailer without consulting Ben, the same flyer is treated as an "independent expenditure," which is by definition not a donation and therefore not subject to the

42. §§ 163A-1411(74), -1429. To satisfy this prong, the communication *must* include one of the words or phrases listed in section 163A-1429.

43. *See id.* §§ 163A-1412, -1414, -1425.

44. *Id.* § 163A-1425(j); *see also id.* § 163A-1411(13) (exempting independent expenditures from the definition of contribution); *id.* § 163A-1411(53) (defining independent expenditure). An expenditure is "independent" if it is made without coordinating with the candidate, generally without his or her direction or input. *Id.*

45. *Id.* § 163A-1425(j).

contribution limit. If the neighbors decide at the outset to never collaborate with Ben or make any donations to candidates, their PAC is an “independent expenditure political action committee”—a Super PAC—that can raise and spend unlimited money for their effort.

To recap, candidates may not accept more than \$5,200 from a single donor in a given election cycle and cannot accept donations from for-profit corporations. Political parties may solicit and accept unlimited donations from individuals but may only solicit or accept contributions from for-profit corporations if those funds are used solely for a “building fund.” While for-profit corporations may not contribute to candidates or PACs (other than political party building funds), they may establish segregated funds to do so and may provide administrative support and staff to the segregated fund. Non-profit corporations may make contributions to candidates and other political committees. Any other group whose “major purpose” is expressly advocating for the election or defeat of a candidate must register as a political committee and comport with all attendant regulatory requirements, including the limitation on contributions. If a political committee certifies that it will not make contributions to candidates, it is exempt from the contribution limits and may raise unlimited funds from its donors.

B. Restrictions Imposed on the Basis of Message Content

North Carolina also imposes restrictions based on the content of political messages.⁴⁶ Political communications can be classified along a spectrum, with “express advocacy” at one end, “issue advocacy” at the other, and the “functional equivalent” of express advocacy occupying some amount of space in the middle.⁴⁷ Messages that clearly call for a vote for or against a particular candidate are express advocacy, while those that seek to inform or persuade the public about a particular policy are issue advocacy.⁴⁸

Early regulatory schemes classified express advocacy as those messages that used certain “magic words.” The list was first formulated in the landmark *Buckley v. Valeo* decision and included words like “vote for,”

46. See *id.* §§ 163A-1410 to -1505.

47. See *McConnell v. FEC*, 540 U.S. 93, 126 (2003) (explaining how the sharp distinction between express and issue advocacy led to the rise of communications that eschewed the use of “magic words” while still advocating the election or defeat of a candidate), *overruled in part on other grounds by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

48. *Id.*

“support,” “vote against,” or “defeat.”⁴⁹ The use of such a finite list made it easy for political advertisers to disguise their express advocacy as issue advocacy and thereby avoid regulation.⁵⁰ Courts have come to refer to ads that skirt regulation by avoiding the listed magic words as the functional equivalent of express advocacy.⁵¹

For instance, the Citizens for Ben PAC might purchase advertising space on a billboard that says “Vote for Ben!” That message would be a clear example of express advocacy. A billboard that read “Ben supports fewer restrictions on kites” would lie at the other end of the spectrum and be categorized as issue advocacy. While the speaker might intend to support Ben by appealing to kiting enthusiasts, the objective purpose is to inform the public about Ben’s position on kiting restrictions. But, what if the PAC ran a television ad the week before the election that showed Ben braving a storm, kite in hand, while a voiceover proclaims “Ben Franklin, the only candidate willing to brave storms to make our state better”? The language of the ad avoids the magic words but is clearly intended to support the candidate. In North Carolina, this ad would only be subject to regulation if it qualifies as an “electioneering communication”—North Carolina’s analogue for the functional equivalent of express advocacy.⁵²

A message is an electioneering communication under North Carolina’s statute only if it:

- (1) does not contain express advocacy;⁵³
- (2) is a broadcast, cable or satellite communication, mass mailing, or telephone bank;⁵⁴

49. *Buckley v. Valeo*, 424 U.S. 1, 44, n.52 (1976) (per curiam). The *Buckley* Court narrowed the application of a federal statute such that it would only apply “to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Id.* These were quickly adopted in both federal and state law as a clear means of regulating campaign messages. See *McConnell*, 540 U.S. at 126–29.

50. *McConnell*, 540 U.S. at 126–29.

51. *Id.*; see e.g., *Vt. Right to Life Comm. v. Sorrell*, 758 F.3d 118, 132 (2d Cir. 2014) (explaining that disclosure requirements need not “be limited to speech that is the functional equivalent of express advocacy” (quoting *Citizens United*, 558 U.S. at 369)); *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 68 (1st Cir. 2011) (discussing *McConnell*’s functional equivalent test).

52. N.C. GEN. STAT. § 163A-1411(41) (2017).

53. *Id.* § 163A-1411(43)(b). “[C]ommunication[s] that constitute[] an expenditure or independent expenditure” are specifically exempted from the definition. *Id.*

54. *Id.* § 163A-1411(41). The definition identifies four modes of communication: radio, television, mass mailings, and telephone banks. *Id.* The enumeration of certain modes of communication necessarily precludes its application to others—*expressio unius est exclusio alterius*. Consequently, Internet communications are left wholly unregulated

- (3) which refers to a clearly identified candidate;⁵⁵
- (4) is transmitted during the specified time period;⁵⁶
- (5) is received by the requisite number of people or households;⁵⁷ and
- (6) does not fall within the list of enumerated exceptions.⁵⁸

So, if the Citizens for Ben PAC were to run its ad on local television the week before the election, it would be regulated as an electioneering communication if it reached at least 7,500 people, despite the fact that it is not express advocacy and is not coordinated with the campaign. That same ad appearing on television in August would not be subject to regulation.

A message that is not an “electioneering communication” is regulated only if it contains words of express advocacy. When the production or distribution of such an ad is coordinated with a candidate, it is treated as a contribution to the candidate and is subject to contribution limits.⁵⁹ If the communication contains express advocacy but is not coordinated with the candidate, it is an “independent expenditure” and is not subject to contribution limits.⁶⁰ Any political message that does not contain express

during the electioneering window. *Id.* § 163A-1429(b)(3). In fact, the word “Internet” only appears one time in the entire chapter, in an exception to the definition of express advocacy—“a communication shall not be subject to regulation . . . if it: . . . [i]s distributed . . . through the Internet.” *Id.* The definition also fails to include billboard and print media advertising and further expressly excludes telephone banks when calls are made by volunteers. *Id.* § 163A-1411(93).

55. *Id.* § 163A-1411(41)(a).

56. *Id.* § 163A-1411(41)(b).

57. *Id.* § 163A-1411(41). Advertisements for candidates for statewide office made by broadcast, cable, or satellite transmission must be received by at least 50,000 individuals to meet the requirement. *Id.* Ads distributed by mass mailing or telephone bank for candidates for statewide office must be received by 20,000 households. *Id.* Advertisements for candidates for local office transmitted by broadcast, cable, or satellite must be received by at least 7,500 individuals, or 2,500 households if distributed by mass mailing or telephone bank. *Id.*

58. *Id.* § 163A-1411(43). The statute exempts the following:

1. News, commentary, or editorials distributed by a broadcasting station not owned by a political party, political committee or candidate;
2. Printed news stories;
3. Debates and promotions of debates;
4. Ads calling on the public to lobby a representative to support or oppose specific legislation pending before the general assembly while it is in session;
5. Commercial ads that do not mention the election and do not take a position on a candidate’s character; and
6. Public opinion polls.

Id.

59. *Id.* § 163A-1411(20); *see supra* text accompanying note 19.

60. § 163A-1411(53).

advocacy and is not an “electioneering communication” is not subject to regulation or disclosure, even if coordinated with a candidate or political committee.⁶¹

C. *Disclosure Requirements Imposed on Certain Speakers*

The purposes of North Carolina’s campaign finance statutes are accomplished in large part through the reporting requirements. All political committees are required to file periodic reports with the Board of Elections.⁶² These reports must include detailed information about each receipt and expenditure.⁶³ The statute also imposes disclosure requirements for anyone who makes independent expenditures that exceed \$100⁶⁴ or

61. 30 N.C. Reg. 721 (Oct. 1, 2015) (advisory opinion of Kim Strach, Executive Director of the North Carolina State Board of Elections). The Executive Director of North Carolina’s State Board of Elections confirmed that entities other than political committees can coordinate issue advocacy with candidates, provided that those communications do not constitute electioneering communications. *Id.* “[P]ayments for those communications cannot be deemed ‘coordinated expenditures’ or ‘contributions.’” *Id.* at 722. Because the request for the opinion was limited to organizations that are not political committees, the opinion was also limited. *Id.* There is, however, no reason to believe the same opinion would not apply to political committees or individuals when they engage in activity that constitutes only the coordination of issue advocacy. *Id.*; see also Tom Bullock, *Open the Floodgates? NC Political Candidates, Outside Groups Can Coordinate*, WFAE (Nov. 27, 2015), <https://perma.cc/R9FL-2377>.

62. § 163A-1418. The frequency of reports varies depending on whether the filing is done in the year of the general election or in the year of the municipal elections. *Id.* Certain candidates are required to file reports with County Boards of Election rather than the State Board of Elections. *Id.* §§ 163A-1495 to -1500. Candidates for certain offices who certify they will not raise or spend more than \$1,000 are exempt from reporting requirements. *Id.* § 163A-1421. The statute further provides that “[t]he exemption . . . applies to political party committees and affiliated party committees under the same terms as for candidates.” *Id.* § 163A-1421(b).

63. *Id.* § 163A-1422(a). The statute requires that the report identify the name, address, profession, and employer of each contributor, as well as the date and amount of the donation. *Id.* § 163A-1422(a)(1). Additionally, the report must include the name and address of the payee and purpose of each expenditure, as well as the amount and date that the expense was paid or incurred. *Id.* § 163A-1422(a)(2). For donations under fifty dollars, there is no requirement to disclose the name, address, and occupation of the donor. *Id.* § 163A-1422(b).

64. *Id.* § 163A-1423(a). The report is due within thirty days of the date it surpasses the \$100 threshold or ten days before the election, whichever first occurs. *Id.* § 163A-1423(d). Once the initial report is filed, subsequent reports must be filed according to the schedule for political committees. *Id.* § 163A-1423(e). Expenditures of more than \$5,000 made between the last required filing and election day must be disclosed within forty-eight hours. *Id.*

spends more than \$5,000 for the production or airing of electioneering communications.⁶⁵

Electioneering communication reports must include significantly more information than independent expenditures reports.⁶⁶ The electioneering communication report must, in addition to disclosing the amount paid and to whom, disclose the filer's principal place of business and identify who incurred the expense, who directs the activities of the filer, and who keeps the books and accounts.⁶⁷ Additionally, the disclosure must include the name of any candidate(s) identified in the communication and the election to which it pertains.⁶⁸ Finally, it must identify anyone who donated more than \$1,000 to further the electioneering communication.⁶⁹

Whether a particular expenditure must be disclosed depends on the identity of the purchaser, the content of the message, and whether that message is coordinated with a candidate or political committee. The following table helps summarize these different reporting requirements for expenditures by different speakers for various types of messages:

65. *Id.* § 163A-1424.

66. *See id.* § 163A-1424(a).

67. *Id.* §§ 163A-1424(a)(1)–(3).

68. *Id.* § 163A-1424(a)(4).

69. *Id.* § 163A-1424(a)(5).

	Express Advocacy		Issue Advocacy	
	<i>Coordinated</i>	<i>Independent</i>	<i>Coordinated</i>	<i>Electioneering Communication</i>
<i>Non-political speakers</i>	Reported as donation	One-time disclosure report	Unreported	One-time disclosure
<i>Party</i>	Reported as donation		Required periodic filing	Required periodic filing
<i>Candidate</i>	Reported as donation		Required periodic filing	Required periodic filing
<i>Non-Major Purpose PAC</i>	Reported as donation	One-time disclosure report	Unreported	One-time disclosure
<i>Major-Purpose PAC</i>	Reported as donation	Required periodic filing	Required periodic filing	Required periodic filing
<i>Super PAC</i>	Prohibited	Required periodic filing	Unreported	Required periodic filing

These disclosures are accomplished through a dizzying array of forms.⁷⁰ A complete periodic disclosure filing can sometimes comprise nearly a dozen separate forms. The cover sheet has its own form.⁷¹ The reconciliation page is a separate form.⁷² Contributions from individuals are

70. *Required NC Campaign Reporting Forms*, N.C. ST. BOARD OF ELECTIONS & ETHICS ENFORCEMENT, <https://perma.cc/ESD2-TP27>. Forms are available in both PDF and Microsoft Word format. *See id.* Notably, the forms do not make use of either software's ability to incorporate mathematical functions to eliminate the risk of human mathematical errors. As an example of a reporting form that does make use of such mathematical functions, see Form AOC-E-506, created by the Administrative Office of the Courts for use in estate accountings. *Account*, AOC, <https://perma.cc/Y8TF-BDYF>.

71. *Disclosure Report Cover*, N.C. ST. BOARD OF ELECTIONS, <https://perma.cc/WMD5-J7XE>.

72. *Detailed Summary*, N.C. ST. BOARD OF ELECTIONS, <https://perma.cc/P37K-U26S>.

reported on a different form than contributions from another campaign committee, as are contributions from political parties.⁷³ In-kind contributions are reported separately from cash contributions.⁷⁴ Loans obtained, repaid, and forgiven each require separate forms.⁷⁵ Every form must be independently totaled and reconciled by hand. It is possible to submit a report whose receipts and expenditures do not balance with the committee's reported cash on hand.⁷⁶ No verifying information is required unless the committee is selected for an audit. All of this complexity in reporting serves to undermine the government's efforts to ensure that its campaign finance laws are being followed and that voters are being provided with accurate information about the funding of campaigns.

The efficacy of this disclosure system is further undermined by the fact that it is decentralized. Candidates for local races file their reports with county boards of election rather than with the State Board of Elections, meaning that there are 101 separate repositories of campaign finance data in the state.⁷⁷ What's more, there is no vertical integration of that data. Campaign finance reports filed at the county level stay there.⁷⁸ The data is not forwarded to the State Board of Elections to be included in its existing, searchable database. The result is that a voter who wants access to the complete campaign contribution information for a given PAC or individual would need to separately search all 101 repositories—a cumbersome process that virtually prevents the free flow of information that the law seeks to put in the hands of the electorate.

73. *Contributions from Individuals*, N.C. ST. BOARD OF ELECTIONS, <https://perma.cc/R6QJ-EPL9>; *Contributions from Political Party Committees*, N.C. ST. BOARD OF ELECTIONS, <https://perma.cc/CK5C-5KZQ>; *Contributions from Other Political Committees*, N.C. ST. BOARD OF ELECTIONS, <https://perma.cc/T889-KUWC>.

74. *In-Kind Contributions*, N.C. ST. BOARD OF ELECTIONS, <https://perma.cc/BX4E-M7Z8>.

75. *Loan Proceeds*, N.C. ST. BOARD OF ELECTIONS, <https://perma.cc/F25M-YR33>; *Loan Repayments*, N.C. ST. BOARD OF ELECTIONS, <https://perma.cc/6F36-M7YL>; *Forgiven Loans*, N.C. ST. BOARD OF ELECTIONS, <https://perma.cc/P48M-UQ3E>.

76. See *supra* note 70 for a discussion of the lack of mathematical functions in the State Board of Election's computerized forms.

77. See N.C. GEN. STAT. §§ 163A-1495 to -1500 (2017); see also *supra* text accompanying note 62 discussing the disclosure and filing requirements for candidates for local offices.

78. See, e.g., Bd. of Elections, *Campaign Finance Reports*, WAKEGOV, <http://www.wakegov.com/elections/candidates/pages/reports.aspx> [<https://perma.cc/E9ZE-6CB2>] (last updated Jan. 19, 2018).

D. *The Danger of Noncompliance*

Compliance with the statutory and regulatory framework is compelled under penalty of both civil and criminal punishment. Any filing submitted late or without required information is subject to fines of \$250 per day, up to a total of \$10,000.⁷⁹ The board is also authorized to assess civil penalties against any person who accepts a contribution or makes an expenditure in violation of the law.⁸⁰ Before assessing such a penalty, the board is required to “notify and consult with the district attorney” about possible criminal prosecution for the violation.⁸¹

Intentional violations of benign provisions of the scheme are punishable as Class 2 misdemeanors, while offenses that more directly impede the ability of the Board of Elections to trace the flow of money are punishable as felonies.⁸² So, intentionally failing to appoint a treasurer or report the closure of the campaign committee is a Class 2 misdemeanor.⁸³ Knowingly reporting false information to the Board of Elections is a Class I felony,⁸⁴ as is intentionally accepting anonymous contributions or contributions from for-profit corporations.⁸⁵

These intentional or knowing violations of the law are appropriately punished with criminal sanctions. But, can the same be said of violations that are neither intentional nor knowing? The statute provides that the Board of Elections “*shall* report” any violation to the appropriate district attorney who “*shall* prosecute” the violation.⁸⁶ The statute does not appear to provide for the exercise of discretion on the part of the Board of Elections or the district attorney, and there is no *mens rea* requirement.⁸⁷

The product of this incredibly intricate system, stitched together by legislators, regulators, and the courts, is not an electoral system free from the influence of big donors; it is an electoral system that silences everyday

79. § 160A-1451(a). The statute provides for civil penalties in the amount of \$250 per day for statewide races or \$50 per day for any other race. *Id.* The Board of Elections is given the authority to “waive a late penalty if it determines there is good cause for the waiver.” *Id.*

80. *Id.* § 160A-1451(b).

81. *Id.* § 160A-1451(f).

82. *Id.* §§ 160A-1445(a)–(c).

83. *Id.* § 160A-1445(a).

84. *Id.* § 160A-1445(b).

85. *Id.* § 160A-1445(c).

86. *Id.* §§ 160A-1445(d)–(e) (emphasis added). If the district attorney has not initiated a prosecution within forty-five days, any voter in the district may petition the court for appointment of a special prosecutor to investigate and prosecute the allegation. *Id.* § 160A-1446(b).

87. *See id.* § 160A-1445.

citizens who are unwilling to risk criminal punishment to participate in a system they do not fully understand, while leaving them without adequate information about the origins of campaign cash flowing through the state.

II. *NORTH CAROLINA RIGHT TO LIFE, INC. V. LEAKE*: DEFICIENCIES IN THE FOURTH CIRCUIT'S ANALYSIS

As written, North Carolina's campaign finance laws impose significant burdens on political speech without accomplishing the government's goals of limiting corruption and preventing circumvention of the laws. Both the statutes and the disclosure system need to be pulled into the twenty-first century. When such changes are made, they are likely to face legal challenges. Unfortunately, the legal framework established by the Fourth Circuit Court of Appeals' decision in *North Carolina Right to Life, Inc. v. Leake (NCRL III)*⁸⁸ is fraught with errors that would inhibit an effective judicial review.

A. *The Challenges Brought by North Carolina Right to Life, Inc.*

The sweeping decision was handed down by the Fourth Circuit after a non-profit organization and its affiliated PACs brought facial and as-applied challenges to a number of North Carolina's campaign finance statutes.⁸⁹ The organizations argued they should not come within the ambit of the law because their activities were not regulable.⁹⁰

North Carolina Right to Life, Inc. (NCRL) asserted that it was not a political committee and challenged the definition of "political committee" on two bases. First, it alleged the definition was vague because it incorporated a subjective test that employed contextual factors open to a broad range of interpretations.⁹¹ Second, NCRL alleged the definition was overbroad and would impose regulations on "organizations not primarily focused on nominating and electing political candidates"⁹² because the definition applied to organizations that had electioneering as "a major purpose" rather than as "the major purpose."⁹³ The court agreed and held both provisions facially unconstitutional.⁹⁴

88. *NCRL III*, 525 F.3d 274 (4th Cir. 2008).

89. *Id.* at 278–79.

90. *Id.*

91. *Id.* at 281.

92. *Id.* at 279.

93. *Id.* at 286–87.

94. *Id.* at 308.

The court's analysis was flawed. It failed to identify any sufficiently important governmental interest, articulate a standard of review, or analyze the burdens on unregulated speech. It chose instead to read the Supreme Court's narrowing constructions of federal statutes as bright-line tests to be applied to all campaign finance regulations.⁹⁵ Judge Michael's dissenting opinion was sharply critical of this approach and correctly noted that the court employed the tests without properly balancing the burden imposed by the law against the strength of the government's interest.⁹⁶

B. Failure to Articulate the Standard of Scrutiny

Departing from the familiar structure of constitutional analysis, the court did not begin by identifying the burden imposed by the regulation on free speech—whether the definition was used to restrict expenditures or contributions or to require disclosures. Because it did not begin by identifying the burden, it also failed to articulate the applicable standard of scrutiny. This failure set the court on a course that avoided the typical balancing of the government's interest and the burden on speech and instead proceeded with application of bright-line tests.

A proper review would have begun by identifying that the definition of “political committee” imposed both disclosure requirements (compelling the speaker to divulge information that would otherwise be kept private) and contribution limits (which constrain expressive association). The former is subject to exacting judicial scrutiny while the latter is subject to heightened scrutiny.⁹⁷ While the court agreed that the state had an

95. *Id.* at 282–83 (stating tests for the constitutional boundary of legislation in the realm of campaign finance).

96. *Id.* at 316 (Michael, J., dissenting) (criticizing the majority's adoption of “test[s] without . . . a proper overbreadth analysis [which] considers the burden on First Amendment rights as balanced against the strength of the governmental interest”). The majority responded, “According to the dissent, the burdens imposed on political speech and the state's interests may vary by the type of regulation. . . . The dissent would thus have us uphold [the law] in full and wait to consider the constitutionality of each of its applications in an as-applied fashion.” *Id.* at 299–300 (majority opinion). The majority mischaracterized the dissent's position, which was that the court “must examine the degree to which the regulation burdens First Amendment rights and evaluate whether the governmental interests are sufficient to justify that burden.” *Id.* at 310 (Michael, J., dissenting).

97. *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010). “Disclaimer and disclosure requirements may burden the ability to speak, but they ‘impose no ceiling on campaign-related activities’ and ‘do not prevent anyone from speaking.’” *Id.* at 366 (internal citation omitted) (first quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam); then quoting *McConnell v. FEC*, 540 U.S. 93, 201 (2003), *overruled in part on other grounds by Citizens United*, 558 U.S. 310). The requirements are therefore subject “to ‘exacting scrutiny,’ which requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently

“important governmental interest” in “limit[ing] the actuality and appearance of corruption,” it did not take the next step to determine whether the statutes were either closely drawn to achieve that interest or at least bore a substantial relation to it.⁹⁸ The result following the opinion was considerable confusion as to what level of scrutiny should be applied in such cases within the circuit.⁹⁹

The court should have framed the questions at issue as: (1) whether the definition of political committee, when used to impose contribution limits, was closely drawn to achieve the substantially important governmental interest of preventing corruption or the appearance of corruption, and (2) whether the definition, when used only to determine who must register and file disclosures, bore a substantial relation to the government’s interest in providing information to the electorate and preventing the circumvention of the law.

The court’s overbreadth and vagueness analysis should then have been framed within that context. Rather than proceeding through this type of constitutional analysis, the court favored application of bright-line tests when reviewing the statute’s definition of express advocacy and its use of a “major purpose” test.

C. *Erroneously Applying a Bright-Line Test to the Definition of Express Advocacy*

Classification as a “political committee” under the law was premised on an organization engaging in express advocacy.¹⁰⁰ Consequently, the court began by reviewing the state’s attempt to define express advocacy through the use of contextual factors.¹⁰¹ The definition at the time provided that when a communication’s “essential nature” was unclear, regulators could consider contextual factors like the language, timing, distribution, and cost of the ad to determine “whether the action urged could only be

important’ governmental interest.” *Id.* at 366–67 (citing *Buckley*, 424 U.S. at 64, 66). “When the Government burdens the right to contribute, we apply heightened scrutiny,” which is met when the government demonstrates that the statute is “‘closely drawn’ to match a ‘sufficiently important interest.’” *McConnell*, 540 U.S. at 231–32 (quoting *FEC v. Beaumont*, 539 U.S. 146, 162 (2003)).

98. *NCRL III*, 525 F.3d at 281 (alteration in original) (quoting *Buckley*, 424 U.S. at 26).

99. Hillary Kies, Note, *Preston v. Leake: Applying the Appropriate Standard of Review to North Carolina’s Campaign Contributions Ban*, 47 WAKE FOREST L. REV. 875, 886–87 (2012).

100. N.C. GEN. STAT. § 163-278.14A (2007) (amended and transferred to § 163A-1429 (2017)); see *supra* discussion in Section I.B.

101. *NCRL III*, 525 F.3d at 283. North Carolina’s “context prong” allowed for a communication to be evaluated in light of its timing, content, reach, and cost. *Id.* at 283–84.

interpreted by a reasonable person as advocating the nomination, election, or defeat of that candidate.”¹⁰²

The court held that the statute was facially unconstitutional not because it was overbroad in light of the government’s interests but because it did not match *exactly* the FEC’s definition of “electioneering communication.”¹⁰³ That definition had recently been upheld by the Supreme Court in *FEC v. Wisconsin Right to Life, Inc. (WRTL II)*.¹⁰⁴ The *WRTL II* Court considered an as-applied challenge to a federal regulation that prohibited corporations from producing electioneering communications.¹⁰⁵ The plaintiffs in that case had run a television ad that urged voters to “[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster” of several judicial nominees.¹⁰⁶ The ad was aired within thirty days of the election and therefore fell within the ambit of a federal law that regulated “electioneering communications.”¹⁰⁷ The Court determined that the purpose of the statute was to regulate communications that were the functional equivalent of express advocacy, those that were “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”¹⁰⁸ The Court held that the ads produced by the plaintiff were not the “functional equivalent of express advocacy” within the meaning of the statute and that the statute had been improperly applied to those communications.¹⁰⁹

In reaching this conclusion, the Court, in dicta, stressed that while courts may consider background information “to put an ad in context,” they should avoid using “contextual factors” in the judicial inquiry to ensure that such challenges do not “become an excuse for discovery or a broader inquiry.”¹¹⁰ The Court was not suggesting that it would be unconstitutional

102. § 163-278.14A(a)(2) (2007).

103. *NCRL III*, 525 F.3d at 290.

104. *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 551 U.S. 449 (2007).

105. *Id.* at 455–56.

106. *Id.* at 458–59.

107. *Id.* at 460.

108. *Id.* at 469–70.

109. *Id.* at 470. The Court determined that the ads were issue ads, not express advocacy or its functional equivalent, because they “focus[ed] on a legislative issue, t[ook] a position on the issue, exhort[ed] the public to adopt that position, and urge[d] the public to contact public officials with respect to the matter” but “d[id] not mention an election, candidacy, political party, or challenger” or “take a position on a candidate’s character, qualifications, or fitness for office.” *Id.*

110. *Id.* at 473–74. The Court indicated it would be permissible for courts to consider, for instance, whether the ad “describes a legislative issue” currently being or likely to soon be considered by the legislature. *Id.* at 474 (quoting *Wis. Right to Life, Inc. v. FEC (WRTL I)*, 466 F. Supp. 2d 195, 207 (D.D.C. 2006)). However, the Court indicated that, when

for legislatures to define the functional equivalent of express advocacy using such factors. Rather, courts asked to determine whether an ad constituted the functional equivalent of express advocacy should avoid imposing such factors because consideration of such factors was unnecessary in light of the regulation's very clear definition.¹¹¹

The Fourth Circuit relied on the *WRTL II* decision and articulated a new two-pronged test for determining whether a communication was the "functional equivalent of express advocacy," notwithstanding the legislature's own definition. The court held that the state may regulate communications as the functional equivalent of express advocacy only if such communications: (1) "qualify as an 'electioneering communication,' defined by the Bipartisan Campaign Reform Act of 2002 ('BCRA') as a 'broadcast, cable, or satellite communication' that refers to a 'clearly identified candidate' within sixty days of a general election or thirty days of a primary election,"¹¹² and (2) are "only . . . susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."¹¹³

The court applied its newly articulated test and struck North Carolina's definition as vague and overbroad on its face because it relied on contextual factors and did not exactly match the definition laid out in the federal regulations.¹¹⁴

This interpretation—that a statutory functional equivalent test must not contain subjective factors—is at odds with other courts that have upheld the use of contextual factors in similar statutory tests, and in some cases even supplied them.¹¹⁵ For instance, the Vermont Supreme Court upheld that state's expansive definition of electioneering communications by supplying a narrowing construction that allowed consideration of

considering an as-applied challenge, the inquiry should not revolve around other contextual factors such as the amount of money spent on the production of an ad, the number of times the ad was aired, or specific dates on which it was aired because such inquiry would lead to more protracted litigation. *Id.* at 473–74.

111. *Id.*

112. *NCRL III*, 525 F.3d 274, 282 (4th Cir. 2008) (internal citation omitted) (citing *WRTL II*, 551 U.S. at 474 n.7). The court interpreted the footnote as "stating that a communication must meet the 'brightline requirements' of the [federal regulation's] definition of 'electioneering communication' to be regulable as the 'functional equivalent of express advocacy.'" *Id.* (quoting *WRTL II*, 551 U.S. at 474 n.7).

113. *Id.* (quoting *WRTL II*, 551 U.S. at 469–70).

114. *Id.* at 284–85.

115. *Vt. Right to Life Comm. v. Sorrell*, 758 F.3d 118, 135, 139 (2d Cir. 2014) (adopting the narrowing construction supplied by the Vermont Supreme Court and upholding the definition against vagueness and overbreadth challenges).

contextual factors almost identical to those struck down in *NCRL III*.¹¹⁶ The Vermont court held that “the objective observer should look to multiple factors: for example, the timing . . . , the images used . . . , the tone . . . , the audience to which the advertisement is targeted, and the prominence of the issue(s) discussed.”¹¹⁷ If the conclusion of the objective observer is “that the purpose of an advertisement is to influence voters to vote yes or no on a candidate,” the communication is constitutionally regulable as the functional equivalent of express advocacy.¹¹⁸ The Seventh Circuit Court of Appeals similarly upheld a provision of Illinois’s campaign finance regulations specifically *because* it was limited by the same five criteria: medium, cost, timing, distribution, and content.¹¹⁹

The dissent in *NCRL III* rightly noted that the language of *WRTL II* was not intended to create a bright-line test to which all such regulations must conform.¹²⁰ Rather, it affirmed the application of a regulation that set out sufficiently precise boundaries to achieve the government’s interest without burdening speech that did not need to be regulated to achieve that interest.¹²¹ The *WRTL II* Court did not articulate a constitutional standard beyond which the government dare not regulate. Rather, it reaffirmed that the government’s definition was sufficiently precise to withstand strict scrutiny when applied to express advocacy or its functional equivalent.¹²² The court then applied the definition to determine that the plaintiff’s ads were neither express advocacy nor its functional equivalent and that the regulation had been improperly applied to those “issue” ads.¹²³ The result was that the application of the law was found unconstitutional, not that the law itself was unconstitutional.¹²⁴ And the Court certainly did not go so far as to say that the federal regulation was the *only* constitutional means of regulating ads that are the functional equivalent of express advocacy.

Application of this new bright-line standard in the Fourth Circuit was unwieldy for the district courts. Only three years later in a similar

116. *State v. Green Mountain Future*, 86 A.3d 981, 998 (Vt. 2013).

117. *Id.*

118. *Id.*

119. *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 485 (7th Cir. 2012); *see also Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015) (holding that failure to include a temporal limit or exclude print media did not render a statute unconstitutionally overbroad).

120. *NCRL III*, 525 F.3d 274, 323 (4th Cir. 2008) (Michael, J., dissenting).

121. *Id.* at 316 (Michael, J., dissenting) (“The majority clearly err[ed] by mandating the elements of [the federal law], which [was] simply an *example* of a clear and sufficiently tailored statute, as an essential part of any campaign regulation.”).

122. *WRTL II*, 551 U.S. 449, 465 (2007).

123. *Id.* at 481.

124. *Id.*

challenge, the Fourth Circuit abandoned the test it had articulated in *NCRL III*, holding that a state may regulate any communication that “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”¹²⁵

The court also overturned a district court decision the following year where that court had applied exactly the test articulated in *NCRL III*.¹²⁶ But the damage to North Carolina’s campaign finance regulations had already been done. Using the *WRTL II* decision as a bright-line test steered the court away from a proper constitutional analysis and struck what was likely a perfectly legitimate regulation of the functional equivalent of express advocacy.

D. *Erroneously Applying Buckley’s “Major Purpose” Language as a Test*

The court also erred when it applied the language of *Buckley v. Valeo*¹²⁷ to North Carolina’s “major purpose” test. NCRL asserted that the definition of “political committee” was unconstitutionally overbroad because it subjected organizations to regulation even when express advocacy was among several “major purposes” rather than the *sole* major purpose.¹²⁸ NCRL argued that *Buckley* permitted only “the regulation of entities that have *the* major purpose of supporting or opposing a candidate.”¹²⁹

The court agreed and interpreted *Buckley* as mandating that campaign finance laws could reach “only entities ‘under the control of a candidate or *the* major purpose of which is the nomination or election of a candidate.’”¹³⁰ But this interpretation was in error. The *Buckley* Court

125. *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 551 (4th Cir. 2012) (quoting *WRTL II*, 551 U.S. at 470) (reversing a lower court decision that applied the *NCRL III* test to hold an FEC regulation unconstitutionally vague and overbroad).

126. *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 281 (4th Cir. 2013) (reversing the Southern District of West Virginia, which held West Virginia’s definition of express advocacy was unconstitutionally overbroad because it failed the *NCRL III* test, and instead applying the “appeal to vote” test). The district court in *Tennant* held that, under the “appeal to vote” test, a statute would come “within the confines of the BCRA’s ‘electioneering communication’ definition” and “survive vagueness challenges only when [it] reach[ed] communications that (1) are disseminated via cable, broadcast, or satellite; (2) refer to a clearly identified candidate; (3) are disseminated within certain time periods before an election; and (4) are directed at the relevant electorate.” *Id.* at 280.

127. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

128. *NCRL III*, 525 F.3d 282, 287–88 (4th Cir. 2008).

129. *Id.* at 287.

130. *Id.*

only narrowed the scope of the federal regulation before it.¹³¹ It did not hold that the Constitution erected a boundary there. Rather, it held that the federal law's definition of "political committee" only needed to encompass those "major purpose" organizations to fulfill the purposes of the law.¹³²

When Vermont Right to Life Committee attempted to make the same argument in a challenge to Vermont's campaign finance law, it was soundly rejected by the Second Circuit, which stated: "When the *Buckley* Court construed the relevant federal statute to reach only groups having 'the major purpose' of electing a candidate, it was drawing a statutory line. It was not holding that the Constitution forbade any regulations from going further."¹³³ Much like its application of a bright-line test to the definition of express advocacy, the application of *Buckley* as a bright-line test allowed the court to skip over the significant and meaningful constitutional analysis it should have undertaken.

E. Failure to Distinguish Fourteenth Amendment Vagueness

Finally, the court failed to analyze the separate vagueness issues raised under the First and Fourteenth Amendments, instead lumping them together in one "overbreadth and vagueness" analysis.¹³⁴ When a statute is challenged for overbreadth under the First Amendment and for vagueness under both the First and Fourteenth Amendments, the three doctrines are sometimes applied together to determine whether protected speech is "chilled"; that is, whether an average person, faced with a potentially sweeping, difficult-to-interpret statute, which *may* be applied against him,

131. *Buckley*, 424 U.S. at 79–80.

132. *Id.*

133. *Vt. Right to Life Comm. v. Sorrell*, 758 F.3d 118, 136 (2d Cir. 2014) (internal citation omitted). The Fourth and Tenth Circuits are the only two circuit courts to decide otherwise in the wake of *McConnell*, perhaps because the sweeping decision, issued by a fractured Supreme Court, fundamentally changed the understanding of the *Buckley* holding. Compare *Yamada v. Snipes*, 786 F.3d 1182, 1200 (9th Cir. 2015) (upholding a Hawaiian statute that applied to any organization with "the purpose" of influencing an election), *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 487–88 (7th Cir. 2012) (declining to strike Illinois statute which did not include "the major purpose" test), and *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011) (upholding a statute which regulated "non-major purpose" organizations which spent or received more than \$5,000 per year for the purpose of influencing an election), with *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677–78 (10th Cir. 2010) (invalidating New Mexico's disclosure law because it regulated beyond the bounds of the "major purpose" test).

134. *NCRL III*, 525 F.3d at 283–84 (holding contextual factors were "clearly 'susceptible' to multiple interpretations" and "provide[d] neither fair warning to speakers . . . nor sufficient direction to regulators as to what constitute[d] political speech").

might simply choose not to speak.¹³⁵ But the combined analysis, as undertaken by the *NCRL* court, leads to confusion. It is difficult to determine which doctrine was really at the heart of the statute's constitutional infirmity.

North Carolina's definition of express advocacy was an attempt to avoid invalidation under the Fourteenth Amendment's vagueness doctrine. The statute employed the phrase "to support or oppose the nomination or election" to delineate when a thing of value is a "contribution" or "expenditure" within the ambit of the statute.¹³⁶ It could simply have left the statute at that, allowing the reader to interpret what "to support or oppose" might mean, but it went further, providing a definition of evidence that would indicate an expenditure was indeed made to support or oppose a candidate. It did so by incorporating a modified version of *Buckley's* magic-words test and employing an alternative, context-based test.¹³⁷

The Supreme Court, faced with interpreting a similar definition in *McConnell v. FEC*, held that words such as "support," "oppose," "promote," and "attack" are sufficiently clear, are not vague, and need no further explication for the statute to be valid.¹³⁸ It is difficult to reconcile the Fourth Circuit's assertion that the legislature's extra step of providing clarifying language somehow made the phrase "to support or oppose" more vague than the phrases considered by the Supreme Court in *McConnell*. Perhaps it is because the court decided, without articulating, that those words were vague under the First Amendment, not the Fourteenth. The court decided not that the words themselves were ambiguous and capable of multiple understandings or definitions but that they allowed for a regulator to exercise an impermissible level of discretion in determining when the statute should be applied and when it should not.¹³⁹

135. *Madigan*, 697 F.3d at 479 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975)) (reasoning that even in the context of a First Amendment challenge, "the potential chilling effect on protected expression must be both 'real and substantial' to invalidate a statute as void for vagueness in a facial challenge").

136. N.C. GEN. STAT. §§ 163A-1411, -1429 (2017); see *supra* discussion accompanying notes 39–41.

137. § 163-278.14A (2007) (amended and transferred to § 163A-1429 (2017)).

138. *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). Other districts interpreting similar provisions following *McConnell* have upheld statutes against vagueness challenges. See *Yamada*, 786 F.3d at 1193–94; *Vt. Right to Life Comm.*, 758 F.3d at 128–30; *Ctr. for Individual Freedom v. Tennant*, 706 F.3d 270, 286–87 (4th Cir. 2013); *Madigan*, 697 F.3d at 485–86; *McKee*, 649 F.3d at 64.

139. *NCRL III*, 525 F.3d at 283.

F. The Need to Abandon the Precedent

At the time of the NCRL challenge, North Carolina's statute had a clear definition used to distinguish entities engaged in electoral advocacy from entities engaged in issue advocacy.¹⁴⁰ The statute employed a two-prong test that captured entities engaged in express advocacy as well as those who might resort to the functional equivalent of express advocacy to skirt the law.¹⁴¹ In its review of the statute, the Fourth Circuit failed to follow a proper constitutional analysis.¹⁴² It did not articulate the standard of scrutiny.¹⁴³ It improperly adopted the federal government's definition of "electioneering communication" as a judicial test.¹⁴⁴ It misinterpreted the *Buckley* Court's narrowing construction as creating another bright-line "major purpose" test to which all statutes should conform.¹⁴⁵ Had the court properly identified the burden, applied the correct standard of scrutiny, and balanced the burden on protected political speech against the government's interest in regulating campaign finance, it might well have found that the statute was, in fact, constitutional on its face.

This flawed analysis left tremendous confusion in its wake. District courts bound by the precedent were forced to apply the bright-line BCRA test, as well as the "major purpose" test.¹⁴⁶ And, even though the Fourth Circuit reversed those decisions, it did so without overruling *NCRL III*. As a result, the decision remains binding precedent for future challenges to North Carolina's campaign finance regulations. But, *stare decisis* does not require that the court continue to blindly follow improperly reasoned precedent. Just as a row of stitches must sometimes be ripped out to create a proper seam, the Fourth Circuit's *NCRL III* decision should be ripped from the circuit's jurisprudence and replaced with a proper constitutional analysis.

140. § 163-278.14A (2007) (amended and transferred to § 163A-1429 (2017)).

141. *Id.*

142. See discussion of Judge Michael's dissent at *supra* note 96.

143. *NCRL III*, 525 F.3d at 310–11 (Michael, J., dissenting).

144. *Id.* at 315.

145. *Id.*

146. *Real Truth About Obama, Inc. v. FEC*, 796 F. Supp. 2d 736 (E.D. Va. 2011), *aff'd sub nom. Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012); *Ctr. for Individual Freedom, Inc. v. Ireland*, 613 F. Supp. 2d 777 (S.D. W. Va. 2009), *aff'd in part, rev'd in part sub nom. Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F. 3d 270 (4th Cir. 2013).

III. FRAMEWORK FOR A COMPLETE CONSTITUTIONAL REVIEW

Future challenges to North Carolina's statutes are inevitable. Even if the legislature doesn't act to update the outdated statutes and outmoded regulations, the statutory scheme remains susceptible to a constitutional challenge. The Supreme Court's decision in *Citizens United* left unresolved the question of whether a statute that discriminates on the basis of the speaker's identity (for instance, by prohibiting contributions to candidates by for-profit corporations) would survive challenges under the First or Fourteenth Amendments.¹⁴⁷ This Part will provide a suggested framework for the court to use in the event it is asked to evaluate one or more components of North Carolina's statutory scheme in the future, rather than employing the tests articulated in *NCRL III*.¹⁴⁸

A. *Selecting the Appropriate Constitutional Balancing Test*

The court must begin by identifying the type of burden placed on speech in order to apply the appropriate level of review in its analysis. Campaign finance regulations typically break into three familiar categories: (1) those that directly limit speech and expressive conduct by imposing limits on expenditures;¹⁴⁹ (2) those that regulate expressive association and

147. *Citizens United v. FEC*, 558 U.S. 310, 364–65 (2010) (holding “[t]he First Amendment does not permit Congress to . . . suppress political speech on the basis of the speaker’s corporate identity”); see also, e.g., *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 879 n.12 (8th Cir. 2012) (noting “*Citizens United*’s outright rejection of the government’s anti-distortion rationale, as well as the Court’s admonition ‘that the State cannot exact as the price of [state-conferred corporate] advantages the forfeiture of First Amendment rights’” (alteration in original) (internal citation omitted) (quoting *Citizens United*, 558 U.S. at 351)).

148. While it is beyond the scope of this Comment to fully discuss justiciability concerns, it is worth noting differences recognized in campaign finance challenges. For instance, a plaintiff who can show it has self-censored its speech may have standing even though a statute has not been enforced against it. See, e.g., *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590–91 (7th Cir. 2012) (holding that a “plaintiff must show ‘an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and . . . a credible threat of prosecution thereunder’” (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979))). Even when a plaintiff has engaged in some activity allowed by the statute, it may bring a challenge for actions it did not take for fear of prosecution. See *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 50 (1st Cir. 2011) (rejecting the government’s argument that “a ‘plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others’” (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18–19 (2010))).

149. See, e.g., *WRTL II*, 551 U.S. 449, 479 (2007) (applying strict scrutiny to a statute that regulated expenditure by non-profit corporations).

conduct by placing limits on campaign contributions;¹⁵⁰ and (3) those that compel the disclosure of information.¹⁵¹ Regulations limiting expenditures must survive strict scrutiny,¹⁵² those limiting contributions must survive “heightened” scrutiny,¹⁵³ and those requiring disclosures must survive a lesser “exacting” scrutiny.¹⁵⁴ When a statute’s definition is used to impose several types of burdens, like North Carolina’s political committee definition, the court should review the definition separately in the context of each application.

Having identified the type of regulation at issue, the court must next determine that the government interest advanced by the regulation is sufficiently important to justify the burden on speech. The Supreme Court has held that preventing quid pro quo corruption or its appearance and preventing circumvention of regulations are the only sufficiently important government interests that would justify the imposition of contribution or expenditure limits.¹⁵⁵ The Court has characterized this interest as primarily being the prevention of quid pro quo bribery, wherein a donation is made to a candidate with the expectation that favorable government action will flow to the donor after the candidate is elected.¹⁵⁶ The Court has also recognized the government’s interest in providing information to the electorate and in

150. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1445 (2014) (declining to “revisit *Buckley*’s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review”).

151. *McKee*, 649 F.3d at 55 (applying exacting scrutiny to a statute which required disclosure). The court in *McKee* stated, “Since *Buckley*, the Supreme Court has distinguished . . . between laws that restrict ‘the amount of money a person or group can spend on political communication’ and laws that simply require disclosure . . .” *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam)).

152. *WRTL II*, 551 U.S. at 464; *McConnell v. FEC*, 540 U.S. 93, 205 (2003), *overruled in part on other grounds by Citizens United*, 558 U.S. 310; *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 (1986); *Buckley*, 424 U.S. at 44–45.

153. *McConnell*, 540 U.S. at 144.

154. *McKee*, 649 F.3d at 55–56.

155. *McCutcheon*, 134 S. Ct. at 1441–42. At various times, the Court has also recognized that contribution limits might be justified by other governmental interests. *See, e.g.*, *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring) (noting the government’s strong interest in democratizing the influence of money in elections); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (identifying for the first time that the government has an interest in preventing “the corrosive and distorting effects” of aggregated wealth flowing into campaigns), *overruled by Citizens United*, 558 U.S. at 365; *Burroughs v. United States*, 290 U.S. 534, 545 (1934) (recognizing the government’s interest in safeguarding the electoral process). The Court soundly rejected these other goals in *McCutcheon* and held “[a]ny regulation must instead target what we have called ‘quid pro quo’ corruption or its appearance.” *McCutcheon*, 134 S. Ct. at 1441.

156. *Id.*

gathering information to facilitate enforcement, and circuits around the country have nearly uniformly used this interest as sufficient justification to uphold disclosure and disclaimer requirements.¹⁵⁷

After determining the government's purpose and its interest in achieving that purpose, the court must determine whether the law at issue actually accomplishes that purpose and whether it was drawn precisely enough to protect speech the government does not need to regulate to achieve that purpose. The critical inquiry is whether the statute or regulation has been drawn closely enough to achieve the government's stated purpose without unduly burdening the ability of the public to freely associate, pool resources, amplify individuals' voices, and engage meaningfully in the political process.

1. *Strict Scrutiny Applied to Expenditure Limits*

Regulations that limit expenditures must survive strict scrutiny.¹⁵⁸ The government must show that the statute or regulation is narrowly tailored to achieve the government's interest in preventing corruption.¹⁵⁹ While direct limitations have not been allowed since *Buckley*, the law may impose indirect limits to prevent circumvention of the law, for instance by treating coordinated expenditures as contributions and thereby subjecting them to limitations.¹⁶⁰ The Supreme Court has upheld such regulations as a

157. *Citizens United*, 558 U.S. at 369 (recognizing that (1) "the public has an interest in knowing who is speaking about a candidate shortly before an election" and (2) providing this information to the public is a sufficiently important government interest); *Buckley*, 424 U.S. at 66-67 (recognizing that disclosure laws further the government's sufficiently important interests in deterring actual corruption, avoiding the appearance of corruption, and "provid[ing] the electorate with information 'as to where political campaign money comes from and how it is spent'" (quoting H.R. REP. NO. 92-564, at 4 (1971))); see also *McConnell*, 540 U.S. at 196; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978).

158. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (holding that a law imposing expenditure limits on political parties could not survive strict scrutiny); *FEC v. Nat'l Conservative PAC*, 470 U.S. 480 (1985) (declaring expenditure limit on PACs unconstitutional).

159. *WRTL II*, 551 U.S. 449, 464 (2007).

160. *Compare McConnell*, 540 U.S. at 205 ("[R]ecent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against 'circumvention of [valid] contribution limits.'" (second alteration in original) (quoting *FEC v. Beaumont*, 539 U.S. 146, 155 (2003))), with *WRTL II*, 551 U.S. at 479 (declining to recognize the anti-circumvention interest to justify application of a statute prohibiting a non-profit from airing issue ads). The Court in *WRTL II* acknowledged that there is a limit to how far the anti-circumvention interest can be extended. *Id.* (stating that "such a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny").

valid means of preventing circumvention.¹⁶¹ It has, however, struck such regulations when they were applied to independent expenditures that did not pose the same risk of corruption.¹⁶²

2. *Heightened Scrutiny Applied to Contribution Limits*

Regulations that impose contribution limits must survive heightened scrutiny, which requires that the statute be “closely drawn” to match the government’s interest in “preventing corruption and the appearance of corruption.”¹⁶³ Limitations on donations to candidates and parties can prevent quid pro quo corruption by limiting the amount of financial interest connecting a donor and candidate.¹⁶⁴ The further removed the candidate and donor are the more likely the government will need to rely on its interest in preventing the appearance of corruption—that is, preventing the public’s *perception* that a quid pro quo arrangement has occurred.¹⁶⁵

Whether such limitations survive heightened scrutiny will frequently depend on the identities of the contributor and recipient. The limitation will be most effective—and the regulation more closely drawn—when it prevents large financial contributions directly to a candidate from any source. Limitations applied to political parties rather than candidates are somewhat less effective because they are an intermediary between the donor and candidate.¹⁶⁶ Political parties use their resources to support a wide array of candidates, usually from diverse regions within a state and in different branches of government. Donations to the political parties are necessarily less likely to have the same kind of corrupting influence as donations made directly to a candidate.

The same logic leads to the conclusion that limitations on contributions to Super PACs are less likely to prevent quid pro quo

161. *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001) (holding coordinated expenditures may be limited to minimize circumvention of contribution limits).

162. *Citizens United*, 558 U.S. at 357 (concluding “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption”).

163. *McConnell*, 540 U.S. at 173 (applying heightened scrutiny to regulation that limited campaign contributions); *Beaumont*, 539 U.S. at 162 (requiring that regulations limiting contributions be “closely drawn to match a sufficiently important interest” (internal quotations and citations omitted)); see also *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 386–88 (2000).

164. *McConnell*, 540 U.S. at 182 (holding that a ban on “soft-money” contributions was closely drawn to prevent corruption or the appearance of corruption).

165. *Id.* at 136.

166. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1452 (2014) (reasoning that when money flows through independent actors, such as political parties, the risk of quid pro quo corruption is lower).

corruption, and thus less likely to survive the heightened scrutiny standard. When expenditures are not coordinated with the campaign, they have less value to the candidate, and the principals in the Super PAC are less likely to be accorded special favors by the candidate once elected (at least in theory).¹⁶⁷ Additionally, quid pro quo corruption requires prior subjective agreement, which cannot legally occur between a Super PAC and a candidate because, by definition, the Super PAC is prohibited from telling the candidate that it plans to assist the campaign.¹⁶⁸

However, prior subjective agreement is not the only way that corruption or the appearance of corruption might occur. Let us return to our earlier example and imagine that John Hancock would like to support Ben in his run for state senate. He could contribute (i) \$5,200 to Ben in both the primary and general election, (ii) an unlimited amount to the state party, (iii) \$5,200 to the Senate caucus of Ben's party in both the primary and general election, and (iv) \$5,200 to other candidates in Ben's party who don't have competitive races and can themselves contribute the maximum amount to Ben. This allows him to legally direct far more than the maximum allowable \$10,400 to the candidate and makes it even more difficult to follow the flow of the money from the donor to the candidate.

Imagine then that Ben, who is fully aware of all of these legal donations, learns that Hancock has established a Super PAC. Does it really matter that they don't collaborate on the exact mailers to be sent by the PAC to potential voters? Ben knows that the Super PAC is supporting him. If the contribution limit is intended to prevent corruption by ensuring that an individual is not able to contribute a "corruptible" amount of money to Ben, does this system really accomplish the government's goal?

The court must carefully connect the limitation imposed to the government's interest in preventing not only outright corruption but also in preventing the appearance of corruption or the circumvention of the law. To the extent that a donor is able to easily circumvent the regulation by spending unlimited funds on behalf of a particular candidate, the government's interest may be undermined, thereby rendering the regulation underinclusive.

167. *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 497–98 (1985). In discussing the potential for corruption, the Court stated:

The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.

Id. at 498.

168. *See supra* Section I.B.

3. *Exacting Scrutiny Applied to Disclosure Laws*

Regulations requiring disclosure must survive exacting scrutiny.¹⁶⁹ Providing information to the electorate is a “sufficiently important” governmental interest to justify the imposition of disclosure laws, as is its interest in preventing circumvention of the law by gathering information to enable enforcement.¹⁷⁰ While the law need not be narrowly tailored or even closely drawn, the government must show that it bears a substantial relation to those interests.¹⁷¹

It is not enough to simply say that the public has an interest in knowing the information. The government must show that the public has an interest in receiving the particular information it compels to be disclosed.¹⁷² The court should also consider whether the government has shown that the information it gathers is actually made available to the public in a meaningful way and in a timely fashion to enable the public to evaluate the expenditures of money for campaign purposes prior to an election. The regulation can only bear a “substantial relation” to the government’s interest if it is actually providing relevant information to voters prior to the election or using the disclosed information to enforce existing regulations and prevent circumvention.¹⁷³ While regulations in this context rarely fail due to overbreadth or vagueness, it is possible that a court could find that a regulation does not actually further the government’s interest because it fails to capture enough relevant information, or because the government fails to make that information available to the public, or because the government fails to make meaningful use of the information once it has been disclosed.

B. *First Amendment Overbreadth Analysis*

After determining that the regulation is a justifiable means of furthering the state’s interest, the court must determine whether the actual application of the statute is overbroad—that is, whether it has the potential

169. *See supra* note 97 and accompanying text; *see also* *Buckley v. Valeo*, 424 U.S. 1, 64 (1978) (stating that disclosure laws must survive exacting scrutiny).

170. *Buckley*, 424 U.S. at 66.

171. *Id.* at 64.

172. *Id.* (stating that there must “be a ‘relevant correlation’ or ‘substantial relation’ between the governmental interest and the information required to be disclosed” (first quoting *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960); then quoting *Gibson v. Fla. Legislative Comm.*, 372 U.S. 539, 546 (1963))).

173. *Id.* at 66–68.

to sweep within its ambit too much protected speech.¹⁷⁴ The overbreadth doctrine is focused not on whether the statute is capable of achieving the government's interest, but rather on whether the government could employ narrower means to do so and thereby impose a lesser burden on protected speech. The Supreme Court has held that overbreadth is a "strong medicine" to be applied with hesitation and has consequently required that a statute must be *substantially* overbroad to justify being invalidated for overbreadth.¹⁷⁵

Substantial overbreadth occurs when a statute poses a realistic danger of burdening "a substantial amount of constitutionally protected speech."¹⁷⁶ This analysis requires the court to conceive of every type of speech which may be regulated by the law and then analyze (1) how regulation of that speech is related to the government's stated interest, and (2) whether the burden of the regulation imposed might be so severe that it keeps the public from engaging in political discourse.¹⁷⁷

The amount of protected speech that may be swept within the ambit of the statute without rendering it unconstitutionally overbroad is correlated to the severity of the burden imposed. When the state imposes expenditure limits, the statute must be narrowly tailored to avoid regulating protected speech at all, if possible. On the other hand, when the state seeks only to compel disclosure of information about speech rather than limiting the ability to speak, the law may burden a significant amount of protected speech and remain constitutional, because the burden imposed is so much less severe. It may be helpful to think of the regulation as a dart and protected speech as the concentric circles on the dart board. When the law requires disclosure, the government may win if its dart lands anywhere on the board, but as the burden on speech becomes more severe, the

174. *Iowa Right to Life Comm. v. Tooker*, 717 F.3d 576, 590 (8th Cir. 2013) (discussing extensively the disagreement among circuits as to whether "exacting scrutiny" requires narrow tailoring).

175. *New York v. Ferber*, 458 U.S. 747, 769 (1982). "[T]he overbreadth doctrine is 'strong medicine' and [we] have employed it with hesitation, and then 'only as a last resort.' We have, in consequence, insisted that the overbreadth involved be 'substantial' before the statute involved will be invalidated on its face." *Id.* (citation omitted) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

176. *City of Houston v. Hill*, 482 U.S. 451, 466–67 (1987).

177. *See, e.g., id.* (holding a city ordinance unconstitutional because it did not allow "the 'breathing space' that 'First Amendment freedoms need to survive'" (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))); *see also* ERWIN CHIMERINSKY, *CONSTITUTIONAL LAW* § 11.2 (5th ed. 2015). Relying on *City of Houston v. Hill*, Professor Chimerinsky notes "that substantial overbreadth might be demonstrated by showing a significant number of situations where a law could be applied to prohibit constitutionally protected speech." *Id.*

government must aim closer for the center. When it imposes expenditure limits, it only wins if it hits the bullseye.

C. *First Amendment Vagueness Analysis*

Even if the court finds that the law is adequately tailored to accomplish its purpose, it may still violate the First Amendment by allowing the government to discriminate on the basis of viewpoint.¹⁷⁸ The question for the court in reviewing a statute for vagueness under the First Amendment is whether the statute relies on standards that allow a regulator to justify a different application of the law to similar speakers or messages.¹⁷⁹ A law which relies on wholly subjective standards may leave room for discriminatory enforcement, resulting in viewpoint discrimination. The court must determine whether the law sets out sufficiently precise guidance to ensure that decisions about enforcement will not be based on the viewpoint of the speaker. This review is based largely on the level of discretion given to the regulator, but also has in view the effect that such a subjective standard might have on the speaker who, unable to determine whether a regulator might enforce the law against him after he speaks, decides not to speak at all. This is particularly worrisome where a law regulating speech imposes criminal penalties, as is the case with North Carolina's campaign finance laws.

D. *Fourteenth Amendment Vagueness Analysis*

Because criminal penalties may increase the chilling effect on protected speech, courts frequently choose to combine the vagueness analysis under the First Amendment with the due process analysis under the Fourteenth Amendment, but this is not particularly helpful. In the context of the First Amendment, the vagueness inquiry seeks to ensure that speakers are not forced to guess at the *application* and *enforcement* of a statute by a regulator.¹⁸⁰ In the context of the Fourteenth Amendment, the

178. See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (stating that in order to avoid arbitrary and discriminatory enforcement, "laws must provide explicit standards for those who apply them")

179. *Id.*; see also *Thomas v. Chi. Park Dist.*, 534 U.S. 316 (2002). Although the court in *Thomas* was considering a regulation that authorized issuance of permits for use of a public park, its reasoning is also applicable here. The Court held that "[w]here the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content." *Id.* at 323. Therefore, the Court required that a "regulation contain adequate standards to guide the official's decision." *Id.*

180. See, e.g., *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 62 (1st Cir. 2011) (stating that "the doctrine seeks to . . . prevent 'arbitrary and discriminatory enforcement' of laws by

vagueness inquiry seeks to ensure that the *meaning of the words* used in the statute are not susceptible of multiple interpretations, that is, that they give adequate notice to individuals of what behaviors are punishable.¹⁸¹ Laws are impermissibly vague if they fail to “give [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited.”¹⁸² If the law employs words with clear meaning, it will not violate the Fourteenth Amendment’s due process as a result of vagueness.

CONCLUSION

The result of the current campaign finance regime in North Carolina is that those with access to knowledgeable attorneys and accountants have a great deal more freedom to engage in political speech than those who do not. Even worse, the regulatory scheme is so fragmented and ineffectual that it no longer serves the government’s interests in regulating campaign finance. Circumvention, obfuscation, and erroneous reporting are common.¹⁸³ It is hard to imagine that this complex system of categorizing speech and speakers is accomplishing its purposes without drastically chilling political speech, which is why it is even more critical that the court be very precise in its analysis of the legislature’s attempts to regulate campaign finance.

The public’s trust in our electoral system is eroding, and the legislature should act to update the laws and give them new teeth, and it should do so soon. When it does, and when the court is inevitably asked to once again evaluate the campaign finance scheme, the court should be as deliberate as possible, following a methodical framework to lay out its

requiring that they ‘provide explicit standards for those who apply them’” (quoting *Grayned*, 408 U.S. at 108); *United States v. Hussein*, 351 F.3d 9, 14 (1st Cir. 2003) (stating that a “statute is susceptible to [a vagueness] attack if it . . . prohibits or requires the performance of an act in terms so uncertain that persons of average intelligence would have no choice but to guess at its meaning”).

181. *Grayned*, 408 U.S. at 108 (stating that a statute or regulation “is void for vagueness if its prohibitions are not clearly defined”).

182. *Id.* For a thorough discussion of the two types of vagueness challenges, see *Ctr. for Individual Freedom, Inc. v. Tennant*, 849 F. Supp. 2d 659, 671–72 (S.D. W. Va. 2011); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18–21 (2010).

183. See Craig Jarvis, *Watchdog Group Calls on Sen. Hise to Recuse Himself over Campaign Finance Accusations*, NEWS & OBSERVER (May 9, 2017, 7:18 PM), <https://perma.cc/8ZAR-2DAE>; Nick Ochsner, *FBI to Probe Top House Republicans After WBTV Investigation*, CHARLOTTE OBSERVER (Dec. 31, 2015, 4:49 PM), <https://perma.cc/43XE-VLF7>; Travis Fain, *Berger’s Campaign Audited, Forfeits \$5,500*, WRAL (Aug. 16, 2017), <https://perma.cc/3V8R-MEP4>; Jim Morrill, *Charlotte Democratic Lawmaker’s Unreported Campaign Contributions Prompt State Review*, CHARLOTTE OBSERVER (Nov. 16, 2017, 11:30 AM), <https://perma.cc/5L5X-CKCK>.

decision so that it may be properly applied by the legislature when it once again responds with statutory revisions. Those statutory revisions are sorely needed, whether as a result of judicial action, or on the legislature's own initiative. The current scheme—rather than rooting out corruption and influence—appears to have the opposite effect: those with the most money are able to manipulate the law to get their message out to the public and their interests in front of elected officials, while those without such resources are silenced by the fear of prosecution lest they run afoul of this complex system of regulation and be subjected to criminal penalties. It is the difference between being given a megaphone and being given a kazoo.

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