DECLARATION OF PROFESSOR MICHAEL J. GERHARDT

Michael J. Gerhardt, declares as follows pursuant to 28 U.S.C. § 1746:

1. I have been a tenured member of the faculty of the University of North Carolina Law School since 2005. I currently serve as the Burton Craige Distinguished Professor of Jurisprudence, a university chair which is the highest honor that the University of North Carolina awards to a faculty member. Among my areas of expertise in research, writing, and teaching are Constitutional Law and the law of both the First and Fourteenth Amendments to the U.S. Constitution. Over the past 37 years, I have taught lecture courses or seminars on the First Amendment at Cornell, Duke, the University of Pennsylvania, William & Mary, and the University of North Carolina Law Schools. I am the author of seven books and more than 100 law review articles on constitutional law, and I am honored to have been selected as the Order of the Coif Distinguished Scholar for 2020-2021, an honor awarded to only one legal scholar each year based on their outstanding scholarship. In addition, I have had the distinction of serving as special counsel to the Senate Judiciary Committee for the confirmation hearings of seven of the nine justices currently on the Supreme Court. Mastering First Amendment law has been crucial for advising senators on pending Supreme Court nominations.

2. My university affiliation is noted for identification purposes only. The opinions reflected here are my own, not the views of the University of North Carolina Law School.

3. Attached to this Declaration as Exhibit A is my most recent curriculum vitae which, among other things, includes my publications in the previous ten years. While I have not testified as an expert at trial or by deposition in the previous four years, I have testified as an expert before the U.S. Congress more than 20 times, including as one of a panel of four constitutional law experts during the 2019 impeachment proceedings against then President Trump. In 2021, I served as special counsel to the Presiding Officer in Mr. Trump's second impeachment trial in the Senate.

4. I am not being compensated for my testimony in this matter.

5. I have been asked to consider the issue of the constitutionality of North Carolina General Statute § 163-274(a)(9) which makes it a class 2 misdemeanor "[f]or any person to publish or cause to be circulated derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reckless disregard of its truth or falsity, when such report is calculated or intended to affect the chances of such candidate for nomination or election."

6. Based on my knowledge concerning the U.S. Constitution, (more fully described below), my opinion is that the statute is unconstitutional.

7. My opinion is based on the following:

a. Though apparently never enforced prior to 2022, the North Carolina statute dates back at least to 1931. As such, this law was enacted several decades before the Supreme Court rendered several landmark decisions on the First Amendment that govern the question of whether or not the above referenced statute

is constitutional. Thus, it is not surprising that the statute conflicts with well-settled First Amendment doctrine and thus is unconstitutional.

b. The expression subject to the statute's coverage is clearly political, and, as such, entitled to the highest degree protection possible under the First Amendment. It is well settled that a content-based law, such as the North Carolina law in this case, is subject to strict scrutiny, requiring the law to be justified by a compelling interest and narrowly tailored to achieve its intended purpose. The Supreme Court has rejected the claim that barring or punishing so-called false political speech is compelling. Moreover, the law at issue here is not narrowly tailored. There are other less restrictive measures for redressing deliberately false statements in campaigns, including but not limited to counter-speech and defamation actions. While there was plenty of counter-speech in the Attorney General election in 2020, the party claiming offense here never filed a civil action for defamation, and such a civil action is not as extreme or punitive as a criminal action that is designed to replace it.

c. In the landmark case of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court ruled that political expression is fully protected by the First Amendment so long as the expression was not "directed at inciting or producing imminent lawless activity" and was "likely to incite or produce such action." Obviously, the political advertisement at issue here meets neither of these conditions. As such, the North Carolina statute violates this important doctrine, and

the political expression here may not serve as a basis for a criminal prosecution. Any attempt to criminalize this expression is plainly unconstitutional.

d. As the Supreme Court has repeatedly declared, most recently in *Citizens United v. Federal Election Commission*, 558 U.S.310 (2010), political advertisements are core political speech. In line with its own longstanding precedents, the Court reiterated that "political speech must prevail against laws that would suppress it, whether by design or in inadvertence." Thus, the Court ruled that "strict scrutiny" is required in every case in which the government is attempting to punish, sanction, or limit political speech. The Court overruled its prior precedent that had held that the government's "antidistortion" justification was sufficiently compelling to enable the government to punish or limit political speech during a political campaign. Any such effort, the Court explained, "interferes with the 'open marketplace of ideas'" that the First Amendment protects. The Court stressed that all "speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech." In the Court's judgment, political ads – and responses to them - -are quintessential political speech, which is indispensable to our democracy.

The State's interest underlying the North Carolina's punishment of false political speech in this case is, presumably, the reduction, or elimination, of the harmful or distortive effects of such expression. *Citizens United* ruled that such an interest is not sufficiently compelling to warrant punishment of the offending

political speech. As the Court declared, the First Amendment "prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." The same limitation applies of course to state or local governments that seek to punish the expression of political speech.

e. The First Amendment is based on the understanding that it protects a marketplace of ideas, which allows for political claims to be tested through their competition with one another and not on the opinion of a censor. The District Attorney, who seeks the prosecution of his opponent to whom he lost, aggressively responded to the Attorney General's ads. Such competing speech is precisely what the First Amendment is designed to facilitate. The First Amendment protects not only the District Attorney's speech but that of their targets.

f. In 2012, the United States Supreme Court considered the constitutionality of the so-called Stolen Valor Act, 18 U.S.C. § 704(b), which made it a crime to falsely claim receipt of military decorations or medals and provided an enhanced penalty if the Congressional Medal of Honor was involved. *See United States v. Alvarez*, 567 U.S. 709 (2012). The respondent, Alvarez, was indicted after falsely claiming that he was awarded the medal of honor. *Id*. at 713-14. The statement, in the words of the Court "was an intended, undoubted lie." *Id*. In ultimately holding the law unconstitutional, the Court rejected a categorical rule advanced by the government that "false statements receive no First Amendment protection." *Id*. at 719. The Court, in invalidating the statute, held that "[w]hen

content-based speech regulation is in question, however, exacting scrutiny is required" because "[s]tatutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment." 567 U.S. at 715.

In explaining its rationale, the Supreme Court declared that "the Constitution demands that content-based restrictions on speech be presumed invalid and that the Government bear the burden of showing their constitutionality." *Id*. at 716-17 (internal quotation omitted). The Court held that there was "no general exception to the First Amendment for false statements," *id*. at 718, because "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *Id*.

The Court ultimately held that the law was unconstitutional because the government had "not shown, and cannot show, why counterspeech would not suffice to achieve its interest," 567 U.S. at 726, or that in seeking "to regulate the protected speech," the challenged restriction must be the "least restrictive means among available, effective alternatives." *Id*. at 729.

A criminal proceeding is hardly the "least restrictive means" available to the offended District Attorney, especially when (i) a civil action for defamation is available in the State of North Carolina, (ii) the losing candidate used plenty of "counterspeech" to respond to the Attorney General's ad, and (iii) the losing candidate filed a complaint with the State Board of Elections seeking a criminal

referral. When a party does not avail himself of all the less restrictive remedies, no one should be allowed to pursue a more restrictive criminal proceeding for the same offense. Even if the losing candidate did avail himself of all possible civil remedies, he is not guaranteed a favorable outcome.

g. The North Carolina statute at issue was enacted long before the Supreme Court's development of the modern overbreadth and vagueness doctrines, both of which are violated here. The overbreadth doctrine provides that a statute that creates substantial uncertainty about the extent to which it punishes protected speech is unconstitutional because it has the effect of chilling, or discouraging, speakers from engaging in protected political expression for fear that it will lead to their prosecution. The North Carolina statute is substantially overbroad because candidates do not know whether or to what extent their private conversations, interviews, or meetings one-on-one or with small groups, may serve as the basis for their prosecution.

The vagueness doctrine provides that a statute is unconstitutional if its coverage is unclear and therefore fails to give proper notice to citizens about whether or to what extent their protected expression may be prosecuted. The North Carolina statute at issue here provides that derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reckless disregard of its truth or falsity, when such report is calculated or intended to affect the chances of such candidate for nomination or election." Yet, none of the basic

terms of this statute – such as "derogatory reports" and "reckless disregard" and "truth" and "falsity" – are defined. Nor could they be defined in ways that avoid conflicts with current Supreme Court doctrine. For example, in another landmark Supreme Court decision, *New York Times v. Sullivan*, 376 U.S. 254 (1964), set forth the modern doctrine of defamation, which requires "actual malice" and more than just showing the published comments were false. And of course truth is an absolute defense to a defamation claim.

The fact that two major news outlets found the Attorney General's ad not to be false should be more than enough to demonstrate that one supposed basis for the prosecution – falsity – cannot be established in this case. Even if we assume that the question of whether or not the ad is false is a close call (which it is not), the election, not litigation, was the most appropriate venue in which to challenge its veracity.

h. The fact that the statute has not been enforced or invoked prior to the current circumstance raises concerns about the extent to which it is being abused to relitigate the election or to retaliate against the winner of the election. There is no practical way for a lawsuit brought under the act to be resolved within the time frame of an election. (Indeed, that was not done here.) Hence, as a practical but inevitable matter, the statute may only be used for the purposes of harassing candidates for their political speech *after* an election and relitigating claims that were debated during the political campaign(s) in question. The courts should not be used to facilitate such illicit purposes which include the chilling of future political speech.

i. Other federal court decisions on the First Amendment strongly direct that the statute at issue is unconstitutional. Two examples should suffice for present purposes, especially since they are consistent with Supreme Court doctrine and other decisions. For example, in *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016), the United States Court of Appeals for the Sixth Circuit considered an Ohio law – Ohio R.C. § 3517.21(B)(10) – whose provisions are nearly identical to N.C. Gen. Stat. § 163-274(a)(9). The Ohio statute made it a crime to "[p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate."

The federal appellate court, following the *Alvarez* Stolen Valor Case ultimately struck down the Ohio laws as "content-based restrictions that burden core protected political speech and [which] are not narrowly tailored to achieve the state's interest." 814 F.3d at 469.

In so holding, the Sixth Circuit found that "Ohio's political false-statements laws target speech at the core of First Amendment protections – political speech." 814 F.3d at 473. The laws reached "not only defamatory and fraudulent remarks, but *all* false speech regarding a political candidate, even that which may not be material, negative, defamatory, or libelous." *Id*. (emphasis in original). As a result, "strict scrutiny" was the appropriate level of review for the challenge. *Id*. That

standard rendered the law "presumptively unconstitutional" such that it could only survive if it served "a compelling state interest" and was "narrowly tailored to achieve that interest." *Id*. The Sixth Circuit found that the law met the first test by "protecting voters from confusion and undue influence, and "ensuring that an individual's right to vote is not undermined by fraud in the election process." *Id*. (internal quotation omitted). The law, however, failed the second test.

The Sixth Circuit further found that the Ohio laws did not "pass constitutional muster because they are not narrowly tailored in their (1) timing, (2) lack of a screening process for frivolous complaints, (3) application to non-material statements, (4) application to commercial intermediaries, and (5) over-inclusiveness and under-inclusiveness." 814 F.3d at 474.

With regard to timing, the appellate court found that there was "no guarantee the administrative or criminal proceedings will conclude before the election or within time for the candidate's campaign to recover from any false information that was disseminated." 814 F.3d at 474. The frivolous complaint issue arose from the fact that they were not restricted "to state officials who are constrained by explicit guidelines or ethical obligations," but could be made by "political opponents." *Id*. The failure of the statute to facially exclude non-material falsehoods, rendered the statute "not narrowly tailored to preserve fair elections." *Id*. at 475. The court also found fault that the statute applied "not only to the speaker of the false statement," but also potentially to "commercial intermediaries." *Id*. Finally, the Sixth Circuit

found the law "both over-inclusive and underinclusive," by virtue of the fact that it could damage an accused campaign while at the same time failing to timely penalize an offender. *Id*.

j. In *281 Care Committee v. Arneson*, 766 F.3d 774 (8th Cir. 2014), the Eighth Circuit found a similar Minnesota law unconstitutional on nearly identical grounds, finding that "a credible threat of prosecution" led to an impermissible chilling of political speech. *Id*. at 781. The following year, the Supreme Judicial Court of Massachusetts struck down that State's cognate law using a strict-scrutiny analysis and rejecting the State's "attempt to shoehorn [the challenged law] into the exception for defamatory speech." *Commonwealth v. Lucas*, 472 Mass. 387, 395 (2015). Earlier, in 2007, the Supreme Court of Washington struck down its version of the law in *Rickert v. State*, 161 Wash. 2d 843 (2007), finding that the "mere threat of such a process will chill political speech." *Id*. at 855.

k. If this law were to be upheld and a prosecution under it were allowed to go forward, it would produce chaos in North Carolina courts and elections. Upholding the statute would incentivize losing candidates to harass the winners, relitigate claims, and put the winners to the expense of hiring private counsel to go back and reconstruct their respective campaign strategies. This statute impermissibly extends the contested elections into the federal or state courts of North Carolina.

Moreover, if a prosecution is allowed to proceed, it would be a terrible precedent. It would mean that, in this State, elections would no longer settle disputes between candidates. Rather, prosecutions brought by losing candidates would proliferate, and courts, not the voting public in the State, would become the final arbiters of the claims made in elections.

l. Everything that we know about the First Amendment – Supreme Court doctrine, its basic purposes, other federal court decisions, the likely consequences from allowing the law to stand – all point to one obvious conclusion: This law is unconstitutional. Here, we do not have different sources that conflict with or that are in tension with each other. In a case where all the sources on which we legitimately rely to apply the First Amendment are in agreement, the right thing to do is to follow them. In this case, that means this law should be declared unconstitutional.

8. I am over 18 years of age and am competent to make this declaration. Under the terms of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19th day of July, 2022.

Michael J. Gerhardt