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Analysis of South Carolina S. 255:
An Unconstitutional Bill Seeking to Reshuffle the Titanic's Deck Chairs – After the Ship Has Sunk Already

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The Center for Competitive Politics ("CCP")[2] provides the following analysis of the bill designated as S. 255[3] to regulate certain "campaign practices," which is currently pending before the South Carolina Senate Committee on the Judiciary. To invoke a metaphor that is overused, but one that is especially apropos here, S. 255 is proposing to rearrange the deck chairs on the Titanic. The only difference is that, here, S. 255 is seeking to do so long after the Titanic already hit the iceberg and sank. Specifically:

- S. 255 purports to regulate as "independent expenditure committees" ("IE committees") groups that only engage in issue advocacy activities, or that only engage in a minimal amount of election advocacy.

- S. 255 appears to require IE committees to comply with the same registration, reporting, and administrative burdens under South Carolina's campaign finance law that federal judges twice ruled in 2010 and 2012 were unconstitutional, and which state authorities have not enforced since those rulings.

- If the intent of S. 255 is not to precipitate a constitutional showdown with the federal judiciary by attempting to revive provisions of South Carolina campaign finance law already declared to be unconstitutional, then the bill must be amended to clarify this apparent conflict.

- Regardless of what other specific campaign finance registration, reporting, and administrative burdens S. 255 would impose on IE committees, the oppressive disclaimer that S. 255 additionally would require would make certain forms of issue advocacy and political advertising practically impossible.

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[2] The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. Just this past year, we secured judgments in federal court that struck down laws in the states of Colorado and Utah for violating the First Amendment. We are also currently involved in litigation in California, Missouri, and against the federal government.

[3] S. 255, as introduced (122nd General Assembly, 1st Reg. Sess.).

- S. 255 also must clarify what donor disclosure requirements it seeks to impose on IE committees, as it is unclear whether only donors who earmark their funds for regulated speech must be disclosed, or whether a group must disclose all of its donors. Clarification on this point is also essential to the constitutionality of the legislation.

A) Background: The 2010 and 2012 *South Carolina Citizens for Life* and *South Carolinians for Responsible Government* Decisions

To point out the gaping constitutional holes in S. 255, we could (but do not) simply attach copies of the U.S. District Court's 2010 opinion in *South Carolina Citizens for Life v. Krawcheck* ("*SCCFL*"),[4] and the separate 2012 opinion in *South Carolinians for Responsible Government v. Krawcheck* ("*SCFRG*"),[5] and call it a day. In those rulings, South Carolina's titanic and unconstitutionally expansive regulation of political committees (a.k.a. "PACs") ran aground on the iceberg of the First Amendment. For the five to seven years since the two federal judges, ruling in two separate proceedings, invalidated this cornerstone of South Carolina's campaign finance laws, state authorities (and specifically the State Ethics Commission) have complied with the rulings and have not sought to apply or revive the unlawful statute.

The South Carolina statute (held to be unlawful) defines a political "committee" as:

> an association, a club, an organization, or a group of persons which, to influence the outcome of an elective office, receives contributions or makes expenditures in excess of five hundred dollars in the aggregate during an election cycle. It also means a person who, to influence the outcome of an elective office, makes:
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> (a) contributions aggregating at least twenty-five thousand dollars during an election cycle to or at the request of a candidate or a committee, or a combination of them; or
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> (b) independent expenditures aggregating five hundred dollars or more during an election cycle for the election or defeat of a candidate.
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> "Committee" includes a party committee, a legislative caucus committee, a noncandidate committee, or a committee that is not a campaign committee for a candidate but that is organized for the purpose of influencing an election.[6]

In *SCCFL*, the court held that this definition conflicts with relevant rulings by the U.S. Supreme Court and U.S. Court of Appeals for the Fourth Circuit[7] because it "place[s] significant burdens on groups that qualify as committees without meaningful consideration of the group's

[4] 759 F. Supp. 2d 708 (D. S.C. 2010).
[5] 854 F. Supp. 2d 336 (D. S.C. 2012).
[6] S.C. Code § 8-13-1300(6).
[7] *SCCFL*, 759 F. Supp. 2d at 716 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976) and *N. Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008)).

major purpose, thereby threatening to chill significant First Amendment rights."[8] The judge in the *SCFRG* case concurred, holding that South Carolina's political "committee" definition is "overbroad and facially unconstitutional" because it:

> does not relate to an organization's "major purpose," and "potentially subjects a group to the statutory burdens of a 'committee' based on a single $500 transaction, regardless of whether (a) the transaction was relevant to the organization's "major purpose," or (b) the $500 expenditure constituted a meaningful portion of the group's disbursements.[9]

B) S. 255 Appears to Impose the Same PAC Reporting, Registration, and Administrative Burdens Already Held to be Unconstitutional

If enacted into law, it appears that S. 255 would merely reshuffle some of the language and features (deck chairs, if you will) of the political committee statute invalidated by *SCCFL* and *SCFRG* and apply them to groups that engage in pure issue advocacy, or that only occasionally seek to "influence the outcome of an election." Specifically, S. 255 would regulate as an "independent expenditure committee":

> two or more individuals, or a person other than an individual who is *not organized or operating for the primary purpose* of supporting or opposing candidates or ballot measures or influencing the outcome of an election, that engages in election communications in excess of five hundred dollars during an election cycle.[10]

An "election communication" is defined as:

> the following forms of communication to support or oppose a clearly identified candidate or ballot measure, or *to influence the outcome of an election*:
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> (a) a paid advertisement broadcast over radio, television, cable, or satellite;
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> (b) a paid placement of content on the internet or other electronic communication network,
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> (c) a paid advertisement published in a newspaper, in a periodical, or on a billboard; or
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> (d) a mailing or other printed materials.[11]

Under existing South Carolina law, the phrase "to influence the outcome of an election" includes not only speech that expressly advocates the election or defeat of candidates, but also "any communication made, not more than forty-five days before an election, which promotes or

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[8] *Id.* at 719; *see also id*. at 720 ("This Court concludes that the committee provisions of the South Carolina Ethics Act at issue simply sweep too far. The committee definition set forth at S.C. Code § 8-13-1300(6) is in direct conflict with the Fourth Circuit's decision in *Leake*, and therefore requires invalidation by this Court.").
[9] 854 F. Supp. 2d at 343-4.
[10] S. 255 § 1 (to be codified at S.C. Code § 8-13-1300( )) (emphasis added).
[11] *Id.* (emphasis added).

supports a candidate or attacks or opposes a candidate, regardless of whether the communication expressly advocates a vote for or against a candidate."[12] S. 255 presumably would retain this existing statutory definition.

Groups that trigger IE committee status must disclose: (1) "concerning *contributions* to the committee *related to election communications* . . . the full name, mailing address, and occupation and employer, if any, of each person who has made aggregate contributions during *the reporting period* of one thousand dollars or more"; and (2) "concerning expenditures related to election communications . . . the full name, mailing address, and occupation and principal place of business, if any, of each person to whom an expenditure for personal services, salaries, and reimbursed expenses has been made during a reporting period . . . ."[13]

These reporting requirements are intrusive enough on their face, but they are only the tip of the iceberg, considering that S. 255 also apparently purports to regulate IE committees under the political committee provisions held to be unconstitutional in *SCCFL* and *SCFRG*. Not only does S. 255 use the same "committee" nomenclature and the same $500 per-election cycle threshold for triggering regulation,[14] but S. 255 also specifies that an IE committee is a group that is "not organized or operating for the primary purpose of" election activity. Indeed, this is the central and defining feature of a political "committee" under South Carolina's existing statute held to be unconstitutional by the *SCCFL* and *SCFRG* decisions. The only difference is that S. 255 states explicitly what was only implicit under the invalidated statute.[15]

The fact that S. 255 would regulate IE committees as PACs under the unconstitutional existing law is also apparent in the bill's requirement for IE committees to file disclosures based on the "reporting period." This phrase appears eight times throughout the legislative text, but is not defined in the bill or under the existing statute. This language only makes sense if IE committees would be required to file the same recurring periodic reports under the quarterly reporting period as PACs, as well as certain expedited reports during pre-election reporting periods.[16]

To the extent IE committees would be subject to the same requirements held to be unconstitutionally burdensome under the PAC law, the *SCCFL* decision described those requirements as follows:

> Designation as a "committee" under the South Carolina Ethics Act involves a number of organizational, administrative, reporting, and funding requirements.

[12] S.C. Code § 8-13-1300(31).
[13] S. 255 § 2 (to be codified at S.C. Code § 8-13-1375(A), (B)) (emphasis added).
[14] *Compare* S. 255 § 1 (to be codified at S.C. Code § 8-13-1300( )) with S.C. Code § 8-13-1300(6).
[15] While the *SCCFL* and *SCFRG* opinions used the phrase "major purpose" from the U.S. Supreme Court's *Buckley* decision, S. 255 uses the phrase "primary purpose." This is a distinction without a difference, as the two phrases are generally understood as meaning the same thing and are used interchangeably. *See, e.g.*, *N. Carolina Right to Life*, 525 F. 3d at 289 (holding that, given "the Supreme Court's insistence that political committees can only be regulated if they have the support or opposition of candidates as their *primary purpose*," North Carolina could not "impos[e] a political committee designation – and its associated burdens – on entities when influencing elections is only '*a major purpose*' of the organization.") (emphasis added). Nonetheless, so as to avoid any confusion, CCP recommends using the phrase "major purpose" in legislation, as that is the language used by the U.S. Supreme Court. *See Buckley*, 424 U.S. at 79 ("To fulfill the purposes of the Act [political committees] need only encompass organizations that are under the control of a candidate or *the major purpose* of which is the nomination or election of a candidate.") (emphasis added).
[16] *See* S.C. Code § 8-13-1308(B), (D).

> For example, any group that qualifies as a "committee" under the Act is required to: (1) maintain records of contributions, contributors, and expenditures, S.C. Code Ann. § 8-13-1302; (2) file a statement of organization, S.C. Code Ann. §§ 8-13-1304, 1306; (3) file various certified campaign reports, S.C. Code Ann. § 8-13-1308; (4) comply with bank account requirements, S.C. Code Ann. § 8-13-1312; (5) comply with a $3,500 contribution limit, S.C. Code Ann. § 8-13-1322; (6) reject anonymous contributions, S.C. Code Ann. § 8-13-1324; (7) comply with prohibitions on certain expenditures or contributions, § 8-13-1332; (8) solicit contributions in places other than on capitol grounds and capitol office complexes, S.C. Code § 8-13-1336; (9) comply with the prohibition on personal use of campaign funds, S.C. Code Ann. § 8-13-1348; (10) comply with dissolution requirements, S.C. Code Ann. § 8-13-1368; (11) provide self-identification in election-related communications, S.C. Code Ann. § 8-13-1354; (12) disclose information required by contribution and expenditure reporting forms, S.C. Code Ann. § 8-13-1360; (13) file a statement of inactivity when necessary, S.C. Code Ann. § 8-13-1362; (14) comply with requirements concerning use of surplus funds, S.C. Code Ann. § 8-13-1370; and (15) risk criminal or civil penalties for non-compliance, S.C. Code §§ 8-13-1510, 1520.[17]

The ongoing, recurring PAC reports that IE committees apparently would be required to file also are extremely problematic if, to take an example from the *SCCFL* decision, "an entity that spends several million dollars annually on issue advocacy or community outreach . . . decides to spend [$501] on a campaign related communication."[18] As the U.S. Court of Appeals for the Eighth Circuit has held, "Requiring a group to file perpetual, ongoing reports regardless of [its] purpose, and regardless of whether it ever makes more than a single independent expenditure," is unconstitutionally burdensome, while "having independent expenditure committees file a one-time report whenever money is spent . . . would be less problematic, and allow [a state] to achieve its interest in helping the public make informed choices in the political marketplace."[19]

If, on the other hand, it is not the intent of S. 255 to regulate IE committees under the existing PAC law that has been invalidated by the *SCCFL* and *SCFRG* decisions, then it must make this point abundantly clear. It could do so by also amending the statute to exclude IE committees from the "committee" definition at S.C. Code § 8-13-1300(6). Alternatively, and preferably – because it is confusing for the statute to continue to contain language held to be unconstitutional and that is no longer being enforced by the State Ethics Commission, the General Assembly should simply remove the unconstitutional PAC provisions from the statute. In either case, S. 255 also must clarify what the "reporting period" is to which it refers repeatedly.

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[17] *SCCFL*, 759 F. Supp. 2d at 713-714. The $3,500 contribution limit already had been circumscribed prior to the *SCCFL* decision, and presumably would not purport to apply here to organizations that do not make any contributions to or coordinate their activities with candidates. *See id.* at 713 n.5 and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). *See also SCFRG*, 854 F. Supp. 2d at 341-2 (describing the same PAC burdens).

[18] *SCCFL*, 759 F. Supp. 2d at 716.

[19] *Ia. Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 598 (8th Cir. 2013) (internal citations and quotation marks omitted).

In addition, S. 255 must clarify what it means when it requires groups to disclose "contributions" that are "related to election communications." Does this mean groups will only have to disclose donors who respond to a solicitation specifically for funds to pay for "election communications," or otherwise specifically designate or earmark their donations for such purposes? Or, does it mean that a group must disclose any donors whose funds were used by an organization to pay for "election communications," regardless of the purpose for which those funds were given? While the former could be constitutional, the latter would not be.

As the *SCCFL* decision explained, the constitutionality of campaign finance disclosure laws is determined by "exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest."[20] If the disclosure required for IE committees is not limited to donors who earmark their funds to pay for IEs, then whatever governmental interest is served by the disclosure requirement would not be served. Specifically, donors to 501(c)(3) charities or 501(c)(4) advocacy groups, as well as members of 501(c)(5) labor unions and 501(c)(6) trade associations, provide funds for all sorts of reasons unrelated to any political communications the groups may sponsor. If the South Carolina General Assembly has a legitimate reason for requiring disclosure of donors who fund a group's "election communications," that legitimate reason does not extend to also requiring disclosure of a group's members merely because they pay ordinary organization dues, fund a charity's soup kitchen, or contribute to a conservation group's lobbying efforts.

C) Issue Advocacy Regulated by S. 255

In the discussion above, we mentioned that S. 255 would regulate groups engaged merely in issue advocacy as IE committees or PACs. This point merits some elaboration, especially because this is another major constitutional infirmity in the bill.

To reiterate, S. 255 would regulate any communications made within 45 days before an election which "promotes or supports a candidate or attacks or opposes a candidate, regardless of whether the communication expressly advocates a vote for or against a candidate."[21] At a superficial level, this may seem like a reasonable regulation of what are commonly known as "political ads." However, it is insufficiently precise, and would sweep in a large universe of pure issue advocacy.

For example, suppose that, within the 45 days prior to the June 14, 2016 South Carolina state primary,[22] the South Carolina Pet Owners Society,[23] a 501(c)(3) charitable organization, had sponsored ads identifying certain state legislators who happened to be on the primary ballot for re-election, and asking constituents to contact those legislators to support a bill to ban puppy

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[20] 759 F. Supp. 2d at 725 (internal citations and quotation marks omitted).

[21] *See* S. 255 § 1 (to be codified at S.C. Code § 8-13-1300( )) (defining "election communication" with respect to communications that "influence the outcome of an election") and S.C. Code § 8-13-1300(31) (defining "influence the outcome of an elective office"). We assume the bill's use of the word "election" in this context instead of "elective office" is not intended to create a material difference in the meaning of the phrase as a whole. *See* S.C. Code § 8-13-1300(9) (defining "election"), (4) (defining "candidate"), and (11) (defining "elective office"). If, on the other hand, S. 255 does intend to convey a different meaning through this subtle difference in wording, then the bill must make that explicitly clear, and also define the phrase "influence the outcome of an election."

[22] *See* "2016 Election Calendar," South Carolina Election Commission. Retrieved on February 9, 2017. Available at: https://www.scvotes.org/files/2016%20Election%20Calendar%202016-10-19.pdf (October 19, 2016).

[23] This is a fictional organization used for illustrative purposes only.

mills.[24] Could such ads be considered to "oppose" a candidate? They certainly could be, if the inference one draws is that a legislator identified in the ad is not otherwise supportive of the bill. After all, who could be against puppies? On the other hand, what if the ad is intended to reinforce certain legislators who have already publicly come out in support of the bill against an intense lobbying effort by puppy mill owners opposed to the bill? In this light, one could infer the ads "support" those legislators. This ambiguity is problematic in and of itself, as the U.S. Supreme Court has held that speech laws may not "put[] the speaker . . . wholly at the mercy of the varied understanding of his hearers."[25]

Indeed, on the face of the statute itself, the South Carolina law could be said to regulate point blank pure issue advocacy. To wit, the statute could be read to regulate communications that "promote[] or support[]" or "attack[] or oppose[]" state elected officials who happen to be candidates, even in their official capacity. The statute does not limit the application of these concepts in a sufficiently precise way so that they only apply to "promot[ing] or support[ing]" or "attack[ing] or oppos[ing]" those candidates in their capacity as candidates.

Either way, S. 255 would require the South Carolina Pet Owners Society to disclose its donors (regardless of the ambiguity discussed above concerning whether this is limited to donors of earmarked funds or all donors) and associate them on campaign finance reports as having funded "election communications." South Carolina Pet Owners Society employees who work on such efforts also would have to be disclosed as having received payment for their work. This, despite the fact that the South Carolina Pet Owners Society and its donors and staff had no intention of getting involved in the election.

While this example may involve a relatively innocuous issue, one need only change the hypothetical to involve a highly charged issue like gun control, abortion, or gay rights, and the donor and spending disclosure requirements suddenly become much more ominous. This is especially so considering the multitude of instances around the country where individuals have been harassed, threatened, or retaliated against – sometimes even by government officials – as a result of having their names, addresses, and employer information disclosed by laws such as S. 255.[26]

Moreover, while the 45-day pre-election window may not seem very long, in reality, a substantial part of any election year would be regulated because S. 255 would apply to speech occurring before general, special, primary, and runoff elections, as well as nominating conventions and caucuses.[27]

These problems track the concerns articulated by the *SCCFL* decision. In *SCCFL*, the court did not rule on the plaintiff's challenge to the constitutionality of South Carolina's regulation of speech during the 45-day pre-election time windows deemed to "[i]nfluence the outcome of an elective office" because the court's invalidation of the PAC law made the issue moot.[28] That did not stop the court from pointing out some crucial differences, however, between

[24] The South Carolina Senate was in session until June 2, 2016. *See* S. 1336 (S. Carolina Gen. Assembly 121st Sess.) (providing for adjournment *sine die* on June 2, 2016).
[25] *FEC v. Wis. Right to Life, Inc.* (*WRTL II*), 551 U.S. 449, 469 (2007) (internal citations and quotation marks omitted).
[26] *See*, *e.g.*, KIMBERLY STRASSEL, THE INTIMIDATION GAME (2016).
[27] *See* S. 255 § 1 and S.C. Code § 8-13-1300(31)(c), (9).
[28] *See SCCFL*, 759 F. Supp. 2d at 725-6.

the South Carolina law and the federal "electioneering communications" law[29] under the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the constitutionality of which was upheld by the U.S. Supreme Court.

Specifically, the *SCCFL* opinion noted that South Carolina's regulation of speech within the pre-election time windows "is broader than the BCRA definition" held to be constitutional in several ways:

- "While the BCRA definition of electioneering communications includes broadcast, cable, and satellite communications, South Carolina law provides that regulable communications include television and radio advertisements as well as communications made through telephone bank, direct mail, electronic mail, and any paid advertisements conveyed through an unenumerated medium that cost more than five thousand dollars."[30]

- "BCRA imposes restrictions on electioneering communications that occur within 60 days before a general election and 30 days before a primary election. The South Carolina definition of 'influence' includes communications made 45 days before an election without reference to whether the election is a general or a primary election, thereby extending the window during which communications prior to a primary election may be subjected to regulation."[31]

- "BCRA requires that a regulable communication refer to a '*clearly identified candidate*,' while the South Carolina law does not require a communication to contain such a clear identification of a candidate in order for it to be regulated."[32]

D) Disclaimer Requirements

S. 255 would require any "election communication" that is disseminated by radio, television, cable, or satellite to contain a "clearly spoken" disclaimer that identifies not only the name of the sponsor, but also its address.[33] A typical disclaimer, such as "Paid for by the Acme Organization, 123 Main Street, Charleston, South Carolina," would require more than six seconds to speak "clearly." For groups with limited funds sponsoring a 15-second issue advocacy ad on television, this disclaimer would eat up 40 percent of the ad, leaving the remaining nine seconds of air time practically useless. Even for longer 30-second ads, the disclaimer requirement would still impose a substantial burden by zapping away 20 percent of the ad time.

Laws that restrict speech are subject to "strict scrutiny," meaning that the law must "further[] a compelling interest and [be] narrowly tailored to achieve that interest."[34] Here, it is dubious that the burdensome disclaimer requirement required by S. 255 would withstand such scrutiny, especially in light of the large universe of issue advocacy that it would regulate.

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[29] *See* 52 U.S.C. § 30104(f)(3)(A).
[30] *SCCFL*, 759 F. Supp. 2d at 726 (citing S.C. Code § 8-13-1300(31)(c)); *see also* S. 255 § 1 (to be codified at S.C. Code § 8-13-1300( )) (defining "election communication").
[31] *SCCFL*, 759 F. Supp. 2d at 726.
[32] *Id.* (emphasis in the original).
[33] S. 255 § 2 (to be codified at S.C. Code § 8-13-1375(C)); *see also id.* § 1 (to be codified at S.C. Code § 8-13-1300( )(a)).
[34] *WRTL II*, 551 U.S. at 464.

E) A Note on *SCCFL*, *SCFRG*, and the Fourth Circuit's *Leake* and *RTAA* Decisions

Our analysis of S. 255 relies heavily on the 2010 *SCCFL* ruling and the 2012 *SCFRG* ruling, both of which in turn rely heavily on the Fourth Circuit's 2008 *Leake* decision. Subsequent to the *SCCFL* and *SCFRG* rulings, the Fourth Circuit issued a ruling in a case called *The Real Truth About Abortion, Inc. v. FEC* ("*RTAA*").[35] There are some misconceptions that *RTAA* effectively reversed *Leake*, and to the extent anyone holds such a misconception, that also may cause them to question whether the *SCCFL* and *SCFRG* rulings continue to have vitality. This misconception is simply that.

For one, based on discussions we have had with the State Ethics Commission within the last year, we understand that agency continues to treat the *SCCFL* and *SCFRG* decisions as the controlling legal authorities regarding South Carolina's PAC law and its constitutional invalidity.

Secondly, the *RTAA* decision, on its face, actually further impeaches the constitutionality of S. 255 and the provisions of existing South Carolina campaign finance law the bill relies on. The *RTAA* decision explicitly distinguished the Federal Election Commission's regulatory definition of "express advocacy" at issue in that case from the North Carolina statute in *Leake*, which the Fourth Circuit reiterated was unconstitutional "because the terms of the [North Carolina] statute that defined express advocacy were clearly susceptible to *multiple interpretations*."[36] Here, for the reasons discussed above, S. 255 and the existing South Carolina statutory provisions it relies on also are clearly susceptible to multiple interpretations, and also would regulate speech that is clearly susceptible to multiple interpretations.

While the *RTAA* decision rejected the plaintiff's challenge to the Federal Election Commission's *application* of the agency's PAC regulation, the decision also reaffirmed the necessity of having a "major purpose test" in the first instance when regulating groups as PACs.[37] As discussed above, S. 255 fails to include any "major purpose" limitation in its regulation of IE committees, and is thus unconstitutional for the same reasons South Carolina's PAC law was held unconstitutional in *SCCFL* and *SCFRG*.

F) S. 255 May Leave South Carolina Taxpayers on the Hook for Attorneys' Fees

In all likelihood, S. 255 will be an exercise in futility, as it will be unenforceable out of the gate given its unconstitutional provisions. To the extent state authorities attempt to enforce it however, taxpayers may become liable for costly attorneys' fees to anyone who successfully sues to have the law invalidated or not enforced as applied to the challenger.[38]

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[35] 681 F.3d 544 (4th Cir. 2012).
[36] 681 F.3d at 552 (internal citations and quotation marks omitted) (emphasis in the original).
[37] *See id.* at 556-7.
[38] *See* 42 U.S.C. §§ 1983 and 1988; *see also, e.g.*, Matt Nese, "Utah Agrees to Pay $125,000 in Free Speech Lawsuit," Center for Competitive Politics. Retrieved on February 9, 2017. Available at: http://www.campaignfreedom.org/2016/08/10/utah-agrees-to-pay-125000-in-free-speech-lawsuit/ (August 10, 2016).