David A. Burton
109 Black Bear Ct, Cary, NC 27513-4941

May 5, 2006

Mr. Gary Bartlett
Executive Director, NC State Board of Elections
P. O. Box 27255, Raleigh, 27611-7255

re: Complaint regarding Rep. Richard Morgan's campaign finance report

Dear Mr. Bartlett,

This is a follow-up to my complaint of March 7, regarding campaign finance law violations by Rep. Richard Morgan. I, being duly sworn, state that the following is true and correct to the best of my knowledge and belief. I am a registered voter, and I am writing pursuant to NCGS 163-278.22(7) to ask you to investigate apparent violations of Article 22A by Rep. Morgan and his associates and political committees, and report those violations to the proper district attorney. I allege the following facts:

1. Introduction.

The gist of most of this complaint is that a supposedly-independent issue advocacy political committee, the *North Carolina Republican Mainstreet Committee* (NCRMC or NCRMSC), coordinated its activities with Mr. Morgan, and at his direction used corporate contributions of as much as $100,000 to fund radio advertisements in support of his 2004 reelection campaign and the campaigns of several of his legislative allies, and in so doing violated NC election laws.

2. Urgency.

Per G.S. 163-278.35, on July 20, 2006, it will become legal for Mr. Morgan and his associates to destroy their records from the campaign during which they committed these violations. So <u>it is essential that your investigation commence promptly, so that the relevant records can be subpoenaed before it becomes legal for the subjects of the investigation to destroy those records</u>.

3. Misleading and incomplete information from NCRMC.

On March 30, 2004, Mr. Roger Knight wrote to the SBOE on behalf of NCRMC, requesting an opinion from the SBOE, pursuant to G.S. 163-278.23. Relying upon the information in Mr. Knight's letter, you replied on April 8, 2004. However, Mr. Knight's letter was misleading and omitted important information:

a.) The letter did not mention the relationships between the NCRMC and several candidate. In fact, two of the NCRMC's three board members were candidates, and Mr. Morgan subsequently revealed that he was controlling the NCRMC, when he referred, in a press interview, to the plans of the NCRMC as being his own plans. The fact that the NCRMC was controlled by candidates is relevant because Mr. Knight was asking for an opinion about whether the NCRMC was a "political committee." Being *"controlled by a candidate"* is prong (a) of the four-prong test in G.S. 163-278.6(14) for determining whether an entity is a political committee.

b.) The letter made no mention of the fact that the NCRMC planned to run ads which named clearly identified candidates. But that is highly relevant to the issue which the SBOE was asked to rule upon. In fact, the phrase *"clearly identified candidate(s)"* appears in Article 22A no fewer than 27 times, and G.S. 163-278.12A applied specifically to advertising which *"names a candidate."*

c.) The letter said that the *"NCRMSC will not advocate the election or defeat of any candidate for office. Instead, the NCRMSC will focus its advertising on positive messages relating to issues of interest to the organization."* But that was contradicted by the public statements of Mr. Morgan, himself. In truth, the only issue of interest to the NCRMC was the reelection of Mr. Morgan and his legislative allies. In a May 8, 2004 article in the *Winston-Salem Journal*, Mr. Morgan, himself, told the press how the NCRMC was going to spend its money, and stated its purposes as *"a Morgan protection plan"* and to *"support"* his legislative allies. Rep. Morgan was quoted as saying, "We have a Morgan protection plan in place. I plan to support the people who support me." That "protection," the article reported, was the NCRMC's radio ads. You may read the article here: http://www.mooregop.org/w-s-journal_5-8-2004_highlighted.html

d.) The letter said that the NCRMC would distribute "issue advocacy" advertisements and educational materials "throughout North Carolina." But that is not what they did. Instead, they ran ads in targeted media markets, where Morgan and his legislative allies faced primary challenges, during the heat of a primary campaign. That is relevant because G.S. 163-278.14A says, *"(a) Either of the following shall be means, but not necessarily the exclusive or conclusive means, of proving that an individual or other entity acted 'to support or oppose the nomination or election of one or more clearly identified candidates': (2) ...contextual factors such as ... the timing of the communication ... [and] the distribution of the communication to a significant number of registered voters for that candidate's election ... may be considered in determining whether the action urged could only be interpreted by a reasonable person as advocating the nomination, election, or defeat of that candidate in that election."*

4. SBOE advisory opinion nullified.

Since the April 8, 2004 opinion letter to Mr. Knight and the NCRMC relied upon a misleading description of the NCRMC, I contend that the SBOE advisory opinion is nullified and does not shield the NCRMC from prosecution and civil action.

In the alternative, I contend that the NCRMC ads were not truly "issue advocacy" ads, which, according to the SBOE's letter, also nullifies the advisory opinion.

In the alternative, I note that the Fourth Circuit "magic words" precedent in *NCRTL v. Leake*, upon which the SBOE relied for guidance when writing its advisory opinion, was, itself, based upon portions of the *Buckley v. Valeo* decision which were subsequently overturned by the *McConnell* decision. Thus that portion of *NCRTL v. Leake* will probably be overturned. I also note that the SBOE advisory opinion warned Mr. Knight and the NCRMC that the Fourth Circuit decision is under appeal, and, that *"If the [Fourth Circuit] ruling should be overturned, this advisory opinion would be nullified."* I contend that this likelihood is high enough to support a conclusion that the NCRMC was in "apparent violation" of Article 22A, and thus justify reporting the matter to the proper district attorney per G.S. 163-278.22, or at least to justify subpoenaing relevant documents prior to the July 20 deadline, to preserve them for use when *NCRTL v. Leake* is finally settled.

5. NCRMC letter deliberately misleading.

The omissions and misstatements in Mr. Knight's letter to the SBOE are so glaring that they cannot be due to anything other than a deliberate intention to mislead the SBOE. I contend that such deliberate deception warrants assessment of triple damages, per G.S. 163-278.34.

6. Not "independent expenditures."

One possible defense that could be offered by Morgan is that the NCRMC's activities were "independent expenditures." According to G.S. 163-278.6(9a), to qualify as an "independent expenditure" the NCRMC's activities must have been "without consultation or coordination" with Morgan and his campaign team.

But that is preposterous. Rep. Morgan provably coordinated with the NCRMC, and even told the press what the NCRMC was going to do before they did it, and publicly identified its plans as being his own, so its expenditures were certainly not "independent expenditures" under NC law. See also G.S. 163-278.13(a), and (since the NCRMC was a federal committee) 11 CFR 109.21 (the federal definition of "coordination").

Were not Rep. Morgan coordinating with the NCRMC , he would have no way of knowing how the NCRMC was going to spend its money. But in a May 8, 2004 article in the *Winston-Salem Journal*, Rep. Morgan was quoted as saying, "We have a Morgan protection plan in place. I plan to support the people who support me." That "protection," the article reported, was the NCRMC's radio ads.

Note that Morgan referred to the NCRMC as "we" and "I." He made it clear that the NCRMC had not merely communicated to him what their plans were for their advertising. He went beyond that by identifying their plans as his own plans. In other words, the NCRMC took its instructions from Rep. Morgan, himself.

7. NCRMC's ads were to "support the nomination or election" of candidates.

What it means to "support the nomination or election" of candidates is defined in NC by G.S.163-278.14A, "Evidence that communications are 'to support or oppose the nomination or election of one or more clearly identified candidates.'" G.S.163-278.14A defines multiple tests to make that determination:

§ 163_278.14A. Evidence that communications are "to support or oppose the nomination or election of one or more clearly identified candidates."

(a) Either of the following shall be means, but not necessarily the exclusive or conclusive means, of proving that an individual or other entity acted "to support or oppose the nomination or election of one or more clearly identified candidates":

(1) Evidence of financial sponsorship of communications to the general public that use phrases such as "vote for", "reelect", "support", "cast your ballot for", "(name of candidate) for (name of office)", "(name of candidate) in (year)", "vote against", "defeat", "reject", "vote pro_(policy position)" or "vote anti_(policy position)" accompanied by a list of candidates clearly labeled "pro_(policy position)" or "anti_(policy position)", or communications of campaign words or slogans, such as posters, bumper stickers, advertisements, etc., which say "(name of candidate)'s the One", "(name of candidate) '98", "(name of candidate)!", or the names of two candidates joined by a hyphen or slash.

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

(b) Notwithstanding the provisions of subsection (a) of this section, a communication shall not be subject to regulation as a contribution or expenditure under this Article if it:
  (1) Appears in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, or magazine, unless those facilities are owned or controlled by any political party, or political committee;
  (2) Is distributed by a corporation solely to its stockholders and employees; or
  (3) Is distributed by any organization, association, or labor union solely to its members or to subscribers or recipients of its regular publications, or is made available to individuals in response to their request, including through the Internet.

To begin with, it is clear that none of the exceptions in subsection (b) applies.

I offer three distinct proofs that the NCRMC's ads were to support or oppose the nomination or election of one or more clearly identified candidates:

Proof #1: The opening sentence of 163-278.14A(a) states (in words 8-15) that the enumerated tests in that section are not an exclusive list of the ways for proving the purpose of the communications. If that statement is not meaningless, then there must be other means for such proof, besides the two means listed in subsections (a) and (b). But a usual principle of legal interpretation is that legal language should not be interpreted to be meaningless or redundant unless any other interpretation would lead to absurd results.

I contend that another conclusive way of proving the purpose is a public admission by the candidate -- such as the boast which Morgan made to the Winston-Salem Journal, stating that the purpose of the NCRMC was "Morgan protection" and to "support" his legislative allies. It is difficult to imagine more compelling proof than that.

Mr. Morgan told the press that his reelection and the reelection of his legislative allies was precisely the intended purpose of the NCRMC. In the May 8, 2004 Winston-Salem Journal he is quoted stating the intended purpose of the NCRMC: *"We have a Morgan protection plan in place,"* he said. *"I plan to support the people who support me."*

Remarkably, Mr. Morgan even used the statute's terminology ("support") when describing the NCRMC's planned advertising as being his own plan to "protect" himself and "support" his legislative allies.

If that does not constitute proof that the purpose of the NCRMC's ads was to support the nomination or election of candidates, then words 8-15 of the first sentence of 163-278.14A(a) are meaningless.

Additionally, G.S. 163-278.14A(a) gives two specific examples of means for proving that the purpose of advertising is to "support the nomination or election" of a candidate. The NCRMC's advertisements meet both of those tests, as well.

Proof #2: The first of those two example means of proof is G.S. 163-278.14A(a)(1), which gives examples of "magic words" or "campaign words or slogans." I have only partial quotes from the NCRMC ads, such as this one, gleaned from a quote in a news story: *"It is because of strong leaders like Speaker Morgan [that] Republicans were able to shape a legislative agenda that focused on finding real solutions to real problems."* That sentence doesn't use any of G.S. 163-278.14A(a)(1)'s examples of "magic words" to advocate Morgan's reelection. But it is a statement which supports a candidate rather than advocating for any issues, and the phrase "strong leaders like {candidate-name}" is at least as obviously "campaign slogan" language as is "{candidate-name} the One," which is one of the examples in the statute. Thus, that NCRMC ad meets the test in G.S. 163-278.14A(a)(1) for proving that communication is to "support the nomination or election" of a candidate.

Proof #3: The second of the two examples given in G.S. 163-278.14A of means for proving that an advertisement is to "support the nomination or election" of a candidate is G.S. 163-278.14A(a)(2), which says that if the "course of action" which is being encouraged by an ad is unclear, then "contextual factors" should be considered, such as the timing of the ad and where it was run. In this case, the

contextual factors support the conclusion that the purpose was to support the nomination of candidates, since the ads were run only during the heat of a primary election campaign, and in media markets where Morgan and his legislative allies faced primary opposition.

Clearly, the NCRMC ads met the test in G.S. 163-278.14A(a)(2) for communication to "support the nomination or election" of a candidate. However, the enforceability of G.S. 163-278.14A(a)(2) is currently in question, due to an ongoing court case (*NCRTL v. Leake*). But the 12/10/2003 *McConnell* decision, which upheld BCRA's use of contextual factors to classify communications, leads to the expectation that when the legal dust settles on *NCRTL v. Leake* the contextual factors test of G.S.163-278.14A(a)(2) is likely to be upheld. I contend that this likelihood is high enough to conclude that Morgan and the NCRMC were in "apparent violation" of the statutes and thus trigger a duty, per G.S. 163-278.22, for the SBOE to report the matter to the appropriate district attorney.

8. NCRMC's advertising constituted "expenditures" under NC law.

G.S. 163-278.6(9) defines "expenditure" as spending *"to support or oppose the nomination, election, or passage of one or more clearly identified candidates ... [as well as] any payment or other transfer made by a candidate [or] political committee."* The definitions are, unfortunately, somewhat circular, and therefore ambiguous, because the definition of an "expenditure" depends, in part, on the definition of a "political committee," which depends on the definition of "expenditure." But the ambiguity is resolved when any of the spending was to "support or oppose the nomination or election" of one or more clearly identified candidates, per G.S. 163-278.14A, as was the case for the NCRMC's ads.

9. Failure to report spending for material that names candidates.

G.S. 163-278.12A "Disclosure of spending for material that names candidates" (which has since been repealed) required that , "Any ... entity that makes an expenditure for ... advertisements ... shall report those expenditures [to the SBOE] ... if the ... advertisement names a candidate ... [except for] ... Material that is solely informational and is not intended to advocate the election or defeat of a candidate or prospective candidate ... [and the press] …"

Note that the term "expenditure" in this section is the common dictionary definition, not the narrower definition of G.S. 163-278.6(9). Also, the exception for material which "is not intended" to advocate the election or defeat of a candidate does not apply to the NCRMC, because at least some of the NCRMC's advertisements were express advocacy under NC law.

G.S. 163-278.12A was repealed by Session Laws 2004-125, s. 4, effective July 20, 2004. But that was after the 2004 primary campaign in which the NCRMC was active, so the NCRMC was still required to comply with this section.

10. NCRMC was a "political committee" under NC law.

G.S. 163-278.6(14) says, *"The term 'political committee' means ... combination of two or more persons ... that makes ... contributions or expenditures and has one or more of the following characteristics: a. Is controlled by a candidate... ; or d. Has as a major purpose to support or oppose the nomination or election of one or more clearly identified candidates."*

The NCRMC was a "political committee" under NC law by virtue of both (a) and (d). (a) applies because the NCRMC was controlled by Reps. Morgan, McComas & Brubaker, all of whom were candidates at the time (Morgan was pulling the strings, but two of its three officers were McComas & Brubaker). (d) also

applies since its major purpose was (in Morgan's own words) to "support" his legislative allies and "protect" him, though the enforceability of (d) is in question until *NCRTL v. Leake* is settled.

The term "expenditure," as used in this section, does not have its common dictionary definition. It has the much narrower definition in G.S. 163-278.6(9), which refers by implication to G.S. 163-278.14A.

But because the NCRMC was controlled by candidates, all that is necessary to prove that it was a political committee under NC law is to show that it made a single "expenditure," no matter how small, to support or oppose a candidate's nomination or election.

11. Failure to file required Statement of Organization.

G.S. 163-278.7(b) requires that political committees file (and update as conditions change) a "Statement of Organization" with the NC SBOE. The NCRMC did not.

12. Failure to disclose affiliated or connected candidates and committees.

G.S. 163-278.7(b) requires that a candidate's campaign committee or other political committee disclose all "affiliated or connected" candidates and committees in its Statement of Organization. Morgan's campaign treasurer did not include the NCRMC as an "affiliated or connected committee" in his statement of organization for the Richard Morgan Campaign Committee. Neither did Brubaker's. Neither did McComas's. That constitutes additional violations, by each of them.

Morgan and Brubaker were also required by law to report their connections with another political committee, called "Citizens for Honesty & Integrity," but neither did so. Morgan admitted his connection with that committee in remarks which were quoted by the Durham Herald Sun on June 5, 2003, in an article entitled, *"Co-speaker: I OK'd GOP meeting fliers / Pamphlets called critics in the party 'an evil enemy'."* You may read a copy of that article here:
http://www.mooregop.org/morgan_says_he_approved_attack_fliers.html

13. Failure to comply with registration and reporting requirements.

The NCRMC was organized as a federal "527" committee. However, G.S. 163-278.7A,"Gifts from federal political committees," makes it clear that being organized as a federal committee doesn't exempt a committee from the limits which apply to other political committees.

That section also makes it clear "contributions" from federal committees such as the NCRMC are subject to NC's legal limits, and that they must comply with the SBOE registration and reporting requirements that apply to other political committees.

The NCRMC did not register as required with the SBOE, and did not comply with the SBOE reporting requirements. In fact, they filed no reports at all with the SBOE.

14. Violation of limits on contributions made by the committee.

G.S. 163-278.13, "Limitation on contributions," states that *"(a) No individual, political committee, or other entity shall contribute to any candidate or other political committee any money or make any other contribution in any election in excess of four thousand dollars ($4,000) for that election."*

As a political committee under NC law, the NCRMC was prohibited by this provision from making any contribution valued at more than $4000. But it spent $237,366 on behalf of a handful of legislative candidates. I contend that those expenditures were "contributions" under G.S. 163-278.6(6) *("such contributions as... publication of campaign literature"*), and most of them were therefore illegal.

15. Violation of limits on contributions made to the committee.

G.S. 163-278.13, "Limitation on contributions," states: "(b) No candidate or political committee shall accept or solicit any contribution from any individual, other political committee, or other entity of any money or any other contribution in any election in excess of four thousand dollars ($4,000) for that election."

The NCRMC was prohibited by this provision from receiving any contribution valued at more than $4000. But it received contributions of $100,000, $25,000, $15,000, $15,000, $12,000, $10,000, $10,000, $5000, $5000, $5000, and $4178. See:
http://www.mooregop.org/CPI_527-North_Carolina_Republican_Main_Street_Committee-totcon-2004.xls

16. Violation of prohibition of contributions from corporations (NCRMC).

G.S. 163-278.15 prohibits contributions to political committees from corporations. But nearly all of the contributions to the NCRMC were from corporations. Since the NCRMC was a "political committee" under NC law, accepting those contributions was illegal. (Note: none of the corporations which contributed to the NCRMC were entities permitted to make contributions by G.S. 163-278.19(f).)

17. Violation of prohibition of contributions from corporations (Citizens for Honesty & Integrity).

Another Morgan-affiliated political committee, named *Citizens for Honesty & Integrity*, also received an illegal corporate contribution, in the form of a $2225.83 debt which was forgiven by *Lisella Public Affairs, LLC,* of Charleston, SC.

18. Influence peddling.

Most of the corporate contributions to the NCRMC were from corporations which had an interest in pending legislation, including the "payday lending" industry and the alcoholic beverage industry (which sought an increase in the alcohol limit for beer).

At least one of the corporate contributions made to the NCRMC was for the purpose of inducing Rep. Morgan to use his authority to kill a particular bill, which he did. It came from a small Virginia tobacco company called S&M Brands. Morgan was Co-Speaker of the NC House at that time. S&M wrote a check for $100,000 to the NCRMC, and in return Morgan killed the bill for them.

S&M isn't a party to the 1998 tobacco Master Settlement Agreement, so they had a competitive advantage over the big North Carolina tobacco companies which pay into the "Golden Leaf" tobacco settlement fund. That was an advantage S&M wanted to keep. But a bill moving through the NC General Assembly, HB 1100, would have ended S&M's competitive advantage.

HB 1100 passed the NC Senate 44-to-2 on 7/16/2003, and was sent back to the House for concurrence, just before the 7/20/2003 adjournment of the 2003 Long Session. The House leadership (Reps. Morgan & Black) sent it to the Rules Committee. The House was out of session until 5/10/2004. To keep the bill from being reported out of Rules and becoming law, S&M Brands gave the NCRMC a check for

$100,000. The donation was reported on 4/29/2004, which was just 11 days before the start of the 2004 Short Session. In return, Morgan ordered that HB 1100 be killed in committee.

Thanks to their $100,000 contribution, S&M kept their competitive advantage for another year and a half. But in 2005 Morgan was no longer Co-Speaker, and no longer had the ability to kill bills. So the equivalent of HB 1100 passed as part of the 2005 Appropriations Act, SB 622, and went into effect January 1, 2006.

See http://www.mooregop.org/quidproquo.html

19. Corporate contributions are class 2 misdemeanors by both contributors and recipients.

G.S. 163-278.19. makes corporate contributions to political committees (like the NCRMC and Citizens for Honesty and Integrity) class 2 misdemeanors by both the recipient and the corporate contributors.

20. Duty to investigate and report to DA for prosecution.

G.S. 163-278.22, "Duties of State Board," requires the NC SBOE *"(7) To make investigations to the extent the Board deems necessary with respect to statements filed under the provisions of this Article and with respect to alleged failures to file any statement required under the provisions of this Article, and, upon complaint under oath by any registered voter, with respect to alleged violations of any part of this Article. [and] (8) After investigation, to report apparent violations by candidates, political committees, referendum committees, individuals or persons to the proper district attorney as provided in G.S. 163-278.27."*

This letter is pursuant to section 163-278.22(7).

Additionally G.S. 163-278.27, "Criminal penalties; duty to report and prosecute," requires that *"(b) Whenever the Board has knowledge of or has reason to believe there has been a violation of any section of this Article, it shall report that fact, together with accompanying details, to the following prosecuting authorities:*

(1) In the case of a candidate for nomination or election to the State Senate or State House of Representatives: report to the district attorney of the prosecutorial district in which the candidate for nomination or election resides; ..."

The NC State Board of Elections has a legal duty to ensure that North Carolina's election laws are enforced. Because of the July 20 deadline, after which essential records can be destroyed by the subjects of the investigation, it is essential that the SBOE act quickly, at least to prevent the destruction of those records.

21. Penalties.

G.S. 163-278.34, "Civil penalties," says, *"(b) Civil Penalties for Illegal Contributions. - If an individual, person, political committee, referendum committee, candidate, or other entity intentionally makes or accepts a contribution in violation of this Article, then that entity shall pay to the State Board of Elections, in an amount to be determined by that Board, a civil penalty and the costs of investigation, assessment, and collection. The civil penalty shall not exceed three times the amount of the unlawful contribution or expenditure involved in the violation. The State Board of Elections may, in addition to the civil penalty, order that the amount unlawfully received be paid to the State Board by check, and any money so*

received by the State Board shall be deposited in the Civil Penalty and Forfeiture Fund of North Carolina."

I request that the SBOE enforce this section of the law, and require Rep. Morgan and his associates repay the unlawful contributions to and from the *North Carolina Republican Mainstreet Committee* and *Citizens for Honesty & Integrity*, plus the costs of investigation, assessment, and collection. In addition, because of the willful nature and large scale of the violations, I request that the SBOE assess civil damages of three times the amount of the unlawful contributions and expenditures.

Please do not let these violations of the law go unpunished.

Sincerely yours,

David A. Burton

cc: Larry Leake , Loraine Shinn, Charles Winfree, Genevieve Sims, Robert Cordle, Kim Strach, Jennifer Hubbard, Candi Rhinehart, Marshall Tutor, Frank Whitney, Roy Cooper, Colin Willoughby

North Carolina

_____ County

I, _____, a Notary Public for said County and State, do hereby certify that David A. Burton personally appeared before me this day, and being duly sworn, made oath that the foregoing Complaint is true and correct to the best of his knowledge and belief.

Witness my hand and official seal, this the _____ day of May, 2006.

_____

Notary Public

My commission expires _____, 20__.