

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

No. 5:06-CV-324-BR

BARBARA JACKSON, et al., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 LARRY LEAKE, et al., )  
 )  
 Defendants. )

ORDER

This matter is before the court on defendants’ and intervenor-defendants’ motions to dismiss. Plaintiffs filed a response to the motions, and defendants and intervenor-defendants filed replies. The motions are ripe for disposition.

**I. BACKGROUND**

On 8 August 2005, plaintiffs Barbara Jackson, Wilton R. Duke, North Carolina Right to Life Committee Fund for Independent Political Expenditures (“IEPAC”), and North Carolina Right to Life State Political Action Committee (“SPAC”) filed this action in the Middle District of North Carolina. They assert constitutional challenges to the North Carolina Public Campaign Financing Fund (the “Fund”), N.C. Gen. Stat. § 163-278.61 *et seq.*, which provides a voluntary source of campaign financing to candidates for the North Carolina appellate courts, and the provision enacted to implement that Fund, N.C. Gen. Stat. § 84-34.<sup>1</sup> On 7 August 2006, U.S. District Judge N. Carlton Tilley, Jr. held that IEPAC and SPAC lack standing to sue the District Attorney for Guilford County, dismissed that defendant, and transferred the case to this court.

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<sup>1</sup>That statute requires every active member of the North Carolina State Bar to pay annually a \$50 “surcharge.” N.C. Gen. Stat. § 84-34.

On 5 September 2006, the undersigned held a status conference, ruled on a number of motions, and set a briefing schedule on the remaining motions. On 26 October 2006, the court (1) found Jackson lacks standing with respect to all her claims except that challenging N.C. Gen. Stat. § 84-34; (2) dismissed plaintiffs' claims challenging § 84-34 for lack of jurisdiction; and, (3) denied plaintiffs' motion for a preliminary injunction. Remaining are Duke's and SPAC's claims challenging N.C. Gen. Stat. § 163-278.13(e2)(3) (the "21 day provision"); Duke's and IEPAC's claims challenging N.C. Gen. Stat. §§ 163-278.66(a) and § 163-278.67 (the "reporting and rescue funds provisions"),<sup>2</sup> and, Duke's claim challenging the public financing scheme as a whole, all of which are against members of the North Carolina State Board of Elections; Roy Cooper, the Attorney General for the State of North Carolina; and, C. Colon Willoughby, Jr., the District Attorney for Wake County.<sup>3</sup>

## II. DISCUSSION

### A. Standing

As the court noted in its earlier order, defendants argue that plaintiffs lack standing as to

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<sup>2</sup> Section 163-278.66 requires nonparticipating candidates to report campaign contributions or expenditures that exceed certain specified trigger amounts to the Board within 24 hours and any independent entities making expenditures in support of a nonparticipating candidate to make similar reports to the Board . . . ; (2) Section 163-278.67 provides for "rescue funds" for participating candidates in the event the expenditures of a nonparticipating candidate (or of an independent entity in support of a nonparticipating candidate) exceed certain specified trigger amounts . . . [and]; (3) Section 163-278.13(e2)(3) prohibits contributions to the campaign of any candidate during the period beginning 21 days before the general election and ending the day after the general election . . .

(10/26/06 Order at 2 (quoting Jackson v. Leake, No. 1:05-CV-691, 2006 WL 2264027, \*1 (M.D.N.C. Aug. 7, 2006).)

<sup>3</sup>While members of the North Carolina Bar Administrative Committee remain named defendants, they are not required to participate in these proceedings; they are, however, bound by any judgment entered in the action. (See 9/6/06 Order (allowing said defendants' motion pursuant to Fed. R. Civ. P. 20(b).)

their claims against Attorney General Cooper and District Attorney Willoughby. (10/26/06 Order at 7 n.3.) Because this issue is jurisdictional, the court must address it before considering the motions to dismiss for failure to state a claim. (See id. at 4 (citing Emery v. Roanoke City School Bd., 432 F.3d 294, 298 (4<sup>th</sup> Cir. 2005).)

The doctrine of standing is an integral component of the case or controversy requirement. There are three components of constitutional standing: (1) the plaintiff must allege that he or she suffered an actual or threatened injury that is not conjectural or hypothetical; (2) the injury must be fairly traceable to the challenged conduct; and (3) a favorable decision must be likely to redress the injury. The party attempting to invoke federal jurisdiction bears the burden of establishing standing.

(Id. (quoting Miller v. Brown, 462 F.3d 312, 316 (4<sup>th</sup> Cir. 2006).)

Defendants contend that plaintiffs have alleged no actual or imminent injury traceable to any action of Cooper or Willoughby. Plaintiffs name Cooper as a defendant based on his authority, as Attorney General, to provide the State Board of Elections with legal assistance in execution of the Board's authority to assist a county or municipal board of elections in matters where litigation is contemplated or had been initiated and where the uniform administration of Chapter 163 has or would be threatened. (See Second Am. Compl. ¶ 13 (citing N.C. Gen. Stat. § 163-25<sup>4</sup>)). "Consequently," plaintiffs state, "Attorney General Cooper can assist the State

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<sup>4</sup>That statute provides in relevant part:

The State Board of Elections shall possess authority to assist any county or municipal board of elections in any matter in which litigation is contemplated or

(continued...)

Board of Elections in its determination of whether litigation should be pursued,” including litigation against plaintiffs regarding the enforcement of North Carolina’s public financing scheme. (9/27/06 Mem. Opp’n Mot. Dismiss at 15.)

There is not a sufficient connection between the Attorney General’s actions pursuant to this authority and enforcement of the Fund’s provisions against plaintiffs. As a general matter, even though the Attorney General might offer legal assistance to the Board under § 163-25, whether or not the challenged provisions of the Fund are enforced against plaintiffs is ultimately left up to the Board itself. See N.C. Gen. Stat. § 163-278.68(a) (“The Board . . . shall administer the provisions of this Article.”). More importantly, if plaintiffs violated the challenged statutes, § 163-25 does not even come into play. As Judge Tilley recognized, if SPAC committed a violation of the statute it challenges, the 21 day provision, it would be prosecuted criminally, if at all, by the Guilford County District Attorney (after the Board of Elections conducts an investigation and refers the matter for prosecution). Jackson v. Leake, No. 1:05-CV-691, 2006 WL 2264027, \*5, 7 (M.D.N.C. Aug. 7, 2006). If IEPAC violated the statutes it challenges, the reporting and rescue funds provisions, it faces civil penalties imposed by the Board of Elections (after consultation with the Guilford County District Attorney). Id. at \*5. If Duke violated any

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<sup>4</sup>(...continued)

has been initiated, provided, the county or municipal board of elections in such county petitions, by majority resolution, for such assistance from the State Board of Elections and, provided further, that the State Board of Elections determines, in its sole discretion by majority vote, to assist in any such matter. It is further stipulated that the State Board of Elections shall not be authorized under this provision to enter into any litigation in assistance to counties, except in those instances where the uniform administration of Chapter 163 of the General Statutes of North Carolina has been, or would be threatened.

The Attorney General shall provide the State Board of Elections with legal assistance in execution of its authority under this section or, in his discretion, recommend that private counsel be employed.

N.C. Gen. Stat. § 163-25.

of the provisions at issue he, as a judicial candidate, could be prosecuted by the District Attorney for Wake County (after the Board of Elections conducts an investigation and refers the matter for prosecution) and/or subjected to civil penalties (after the Board of Elections consulted with that District Attorney). N.C. Gen. Stat. §§ 163-278.27(b)(2), -278.34(f). The Attorney General is not directly involved in enforcing the Fund's provisions against plaintiffs. Any harm plaintiffs suffer in relation to enforcement of the Fund is fairly traceable to the Board's conduct.

Turning to Willoughby, the District Attorney for Wake County, plaintiffs argue that they have standing to sue him given that he possesses general prosecutorial authority under N.C. Gen. Stat. § 7A-61. That statute provides in relevant part that “[t]he district attorney shall . . . prosecute in a timely manner in the name of the State all criminal actions and infractions requiring prosecution in the superior and district courts of his prosecutorial district . . .” N.C. Gen. Stat. § 7A-61. While the District Attorney for Wake County could conceivably exercise his authority under § 7A-61 to prosecute a violation the 21 day provision occurring in his district, it is highly unlikely he would do so in the absence of a report from the Board of Elections pursuant to § 163-278.27(c). The generalized duty of the District Attorney for Wake County to prosecute criminal infractions occurring in his district is not a sufficient basis to connect him to enforcement of the statute at issue. Any injury that plaintiffs might suffer as a result of his conduct is speculative.

Plaintiffs have failed to show they possess standing to sue the Attorney General and the District Attorney for Wake County, and those defendants will be dismissed.

B. Failure to State a Claim

For purposes of a motion to dismiss pursuant to Rule 12(b)(6), the complaint is construed in the light most favorable to the non-moving party, and its allegations are taken as true. As stated by the Supreme Court:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). “[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim.”  
Revene v. Charles County Com’rs, 882 F.2d 870, 872 (4<sup>th</sup> Cir. 1989).

In conjunction with plaintiffs’ preliminary injunctive relief request, the court considered the legal merits of their claims and concluded that plaintiffs were not likely to succeed. For the reasons set forth in the order denying plaintiffs’ motion for a preliminary injunction, (see 10/26/06 Order at 11-22), the court finds plaintiffs have failed to state claims against defendant members of the State Board of Elections.

**III. CONCLUSION**

In sum, the motions to dismiss are ALLOWED. Plaintiff Duke’s claims against defendants C. Colon Willoughby, Jr. and Roy Cooper are DISMISSED for lack of standing. Plaintiff Duke’s, IEPAC’s, and SPAC’s claims against the members of the State Board of Elections challenging N.C. Gen. Stat. §§ 163-278.12(e2)(3), 163-278.66, and 163-278.67 and the

public financing scheme as a whole are DISMISSED for failure to state a claim. Plaintiffs' motion for class certification is DENIED as moot.

This 30 March 2007.

A handwritten signature in green ink, appearing to read "W. Earl Britt", is written above a horizontal line.

W. Earl Britt  
Senior U.S. District Judge