UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

BARBARA JACKSON, *et al.*, Plaintiffs, v. LARRY LEAKE, in his official capacity as the Chairperson of the North Carolina Board of Elections, *et al.*, Defendants, and JAMES R. ANSLEY and COMMON CAUSE NORTH CAROLINA Intervenors-Defendants.	Civil Action No. 5:06CV324BR **REPLY MEMORANDUM OF LAW IN SUPPORT OF INTERVENORS-DEFENDANTS' MOTION TO DISMISS**

Plaintiffs' hostility to robust public debate, elections based on a battle of ideas, and Supreme Court precedent is presented strikingly in their brief responding to Defendants' and Intervenors-Defendants' motions to dismiss. Plaintiffs argue that the JPFP should be struck down for precisely the reason that the presidential public financing system was *upheld* in *Buckley v. Valeo*, 424 U.S. 1 (1976). Plaintiffs claim that the trigger provisions of the JPFP violate their First Amendment rights and that the program harms them because, "[s]imply put, the public financing scheme encourages and makes possible speech by participating candidates who might not otherwise speak by financially assisting them to do so." (Plaintiffs' Revised Response Brief in Opposition to Defendants' and Intervenor-Defendants' Motion to Dismiss [hereinafter "Pltfs.' Resp."] at 7.)

While Plaintiffs' "simply put" description is correct, the conclusion they draw from it is not. That the JPFP places no restrictions upon Plaintiffs, nor harms them in any

way, is plain from Plaintiffs' own description of the program. But even more to the point, the Supreme Court upheld the presidential public financing program, not despite, but rather *because* it sought to accomplish the same goal as the JPFP, noting that the program "is a congressional effort, not to abridge, restrict, or censor speech, but rather *to use public money to facilitate and enlarge public discussion and participation in the electoral process*, goals vital to a self-governing people." *Buckley*, 424 U.S. at 92-93 (emphasis added).

I. Plaintiffs' Claims that the Trigger and Rescue Funds Provisions Are Unconstitutional Fail to State a Claim for Relief.

Plaintiffs' contention that the triggers for and the issue of rescue funds harms them does not hold water. While Plaintiffs' argue that the triggers chill their speech, they notably do *not* argue that their speech is chilled by the prospect of responsive spending by a participating opponent when Plaintiffs' combined fundraising and spending remain too low to trigger rescue funds. But the likelihood of response is just as great (or greater) at that point and the money comes from the same source. Accordingly, if, as *Buckley* held, a base public financing distribution is constitutional, so is an additional distribution. Had the base subsidy been large enough to eliminate the need for rescue funds, Plaintiffs would have had no complaint. But North Carolina chose instead to increase public subsidies only when necessary for truly competitive races. As the *Brewer* court recognized in granting a motion to dismiss a challenge to the trigger provisions in Arizona's public financing program, such fiscal responsibility does not transform an unquestionably constitutional system into one that fails First Amendment scrutiny. *See Ass'n of Am. Physicians and Surgeons v. Brewer*, 363 F. Supp. 2d 1197, 1201-03 (D.

Ariz. 2005), appeal docketed, No. 05-15630 (9th Cir. 2005). Accordingly, as a matter of law, Counts III, VI and VII of Plaintiffs' Second Amended Complaint must be dismissed.

II. Plaintiffs' Claims that the Reporting Requirements of the JPFP Violate the First Amendment Must be Dismissed as Abandoned and as a Matter of Law.

Plaintiffs admit that a facial challenge to the JPFP's reporting requirements, N.C. Gen. Stat. § 163-278.66(a), fails to state a claim, but deny that they have challenged the reporting requirements on their face. Plaintiffs state the following in their response brief:

> Intervenor-Defendants argue that [Supreme Court precedents] resolve this question. . . . However, the challenges raised in *McConnell* and *Buckley* were facial challenges to reporting requirements. In the present case, Plaintiffs challenge the reporting requirements as applied to Plaintiffs. . . . Consequently, *McConnell* and *Buckley* do not foreclose the reporting requirement issue Plaintiffs here challenge.

(*See* Pltfs.' Resp. at 8-9). Counts One and Two of Plaintiffs' Second Amended Complaint, however, conclude with Plaintiffs explicitly asking this Court to "[d]eclare 163-278.66(a) facially unconstitutional and as applied."[1] Because Plaintiffs' have abandoned their claim that N.C. Gen. Stat. § 163-278.66(a) is facially unconstitutional, the facial challenges in Counts I and II of Plaintiffs' Second Amended Complaint must be dismissed.

Plaintiffs' as-applied challenge to the reporting requirements also must be dismissed for failure to state a claim. Plaintiffs do not sufficiently plead an as-applied challenge. As one court explained, an as-applied challenge seeks "relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the

[1] Moreover, most of Plaintiffs allegations regarding the reporting requirements do not even mention Plaintiffs. (*See, e.g.*, Sec. Am. Compl. ¶¶ 61, 67 ("[T]he 24-hour reporting requirement is 'patently unreasonable' and is not narrowly tailored.")

manner or circumstances in which the statute or ordinance has been applied . . . and contemplates analysis of the facts of a particular case." *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1152 (Cal. 1995). Yet, nowhere in the 19 paragraphs that Plaintiffs devote to allegations regarding the reporting requirements in their Second Amended Complaint do Plaintiffs allege *any* specific facts about why N.C. Gen. Stat. § 163-278.66(a), which they admit is facially constitutional, would be unconstitutional when applied to them. (*See* Sec. Am. Compl. ¶¶ 39-45, 56-67.) Only in paragraphs 59 and 65 do Plaintiffs even mention themselves, and even in those paragraphs, Plaintiffs refer to themselves only as part of a group (*i.e.*, the JPFP "punish[es] those candidates like Plaintiff Jackson").

Although this Court should accept as true all well-pleaded allegations when considering a motion to dismiss, *see Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993), it need not accept unsupported legal allegations, *Revene v. Charles County Comm'rs*, 882 F.2d 870, 873 (4th Cir. 1989), legal conclusions couched as factual allegations, *Papasan v. Allain*, 478 U.S. 265, 286 (1986), or conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979), of the kind made by Plaintiffs. As summarized in one treatise, "[w]hile facts must be accepted as alleged, this does not automatically extend to bald assertions . . . The plaintiff need not include evidentiary detail, but must allege a factual predicate concrete enough to warrant further proceedings." 2 James Wm. Moore et al., *Moore's Federal Practice* § 12.34(1)(b) (3d ed. 1997). Plaintiffs have failed to allege any factual predicate for their as-applied challenge to the JPFP's reporting requirements. Accordingly, Counts I and II of Plaintiffs' Second Amended Complaint should be dismissed in their entirety.

III. Plaintiffs' Equal Protection Challenge Should Be Dismissed as a Matter of Law.

Plaintiffs' equal protection challenge must fail. In *Buckley*, the Supreme Court noted that the presidential public financing program did not restrict candidates' rights because "any disadvantage suffered by operation of the eligibility formulae . . . [wa]s limited to the claimed denial of the enhancement of opportunity to communicate with the electorate." *Buckley*, 424 U.S. at 94-95. Accordingly, the Court determined that the *only* applicable test when evaluating whether the presidential public financing program denied plaintiffs equal protection of the laws was whether the program "unfairly or unnecessarily burdened the political opportunity of any party or candidate." *Id.* at 95-96. But Plaintiffs in this case do not even allege that the JPFP has unfairly or unnecessarily burdened the political opportunity of the Plaintiff candidates, nor could they. Plaintiff Jackson *won* her election despite not qualifying for the JPFP and Plaintiff Duke already has raised more than he would have initially received if he had chosen to participate in the program.

Moreover, Plaintiffs' equal protection claim must fail since the Supreme Court approvingly stated that the legislature "may legitimately require 'some preliminary showing of a *significant* modicum of support'" before a candidate may become eligible for public funds. *Id.* at 96. Plaintiffs argue that the JPFP's 350 voter qualifying contribution threshold could not possibly measure support since Plaintiff Jackson failed to meet the threshold, yet eventually won the election. This argument fails since it is apparent that either Plaintiff Jackson did not have significant support when she began her race or sufficient organization to demonstrate that support at the outset—the point in time at which public financing decisions are made—but rather, garnered support during the

race based on her campaign and the voter education provided by the JPFP.[2] Accordingly, Count VIII of Plaintiffs' Second Amended Complaint must be dismissed.

IV. Plaintiffs Fail to State A Claim that the $50 Bar Fee Surcharge Violates the Constitution by Compelling Speech.

The $50 surcharge on attorney bar dues, which is placed into the North Carolina Public Campaign Financing Fund and used to finance, *inter alia*, the JPFP, the production and distribution of the Judicial Voter Guide, and the administrative and enforcement costs of the State Board of Elections related to Article 22D, *see* N.C. Gen. Stat. § 163-278.63(a), does not unconstitutionally compel speech. Contrary to Plaintiffs' characterizations, Intervenors-Defendants do not contend that *May v. McNally* is "more compelling" than the Supreme Court cases of *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). (Pltfs.' Resp. at 9.) Rather, Intervenors-Defendants explain, as the *May* court did, that the "germaneness test" of *Keller* and *Abood* are inapplicable to a public financing program like the JPFP because the JPFP does not itself engage in content-based speech, but rather distributes money in a viewpoint-neutral manner. Plaintiffs correctly note that the *May* court stated that the "germaneness test" is predicated upon an association. But the court further highlighted how *May*, just like this case, was distinguishable from cases that applied that test in the most important of ways:

> Finally, and critically, the speech in *Abood*, *Keller*, and *United Foods* was viewpoint driven. In all three cases, the organization chose the funded speech based on its content. Thus, the objectors were compelled to be associated with a group message with which they disagreed. Here, the

[2] Although such democracy in action benefited Plaintiff Jackson, her success is exactly what Plaintiffs protest in this suit—a system in which voters have the opportunity to learn about and choose candidates based on their views and messages, rather than solely based on which candidates have access to wealth. (Pltfs.' Resp. at 7.) ("Simply put, the public financing scheme encourages and makes possible speech by participating candidates who might not otherwise speak by financially assisting them to do so.").

> Clean Elections Act allocates money to all qualifying candidates, regardless of party, position, or message . . . and thus the surcharge payers are not linked to any specific message, position, or viewpoint. The viewpoint neutrality of the disposition of funds distinguishes this case from *Abood*, *Keller*, and *United Foods*. We therefore conclude that the *Abood* lines of cases does not control the disposition of this case.

55 P.3d at 772.

Contrary to Plaintiffs' contentions, this case is no different than *May*. Plaintiff Duke's $50 surcharge is not used to support his opponent's campaign. Rather, Plaintiff Duke's surcharge is deposited into the Fund, which finances any qualifying candidate for appellate judicial office, the production and distribution of the Judicial Voter Guide, and the administrative and enforcement costs of the State Board of Elections. The surcharge does not force Plaintiffs Duke and Jackson to engage in compelled speech.

Finally, Plaintiffs' incorrectly state that the Supreme Court concluded that the "germaneness test" was inapplicable in *Board of Regents v. Southworth*, 529 U.S. 217 (2000), because the purpose of the program at issue in that case was to facilitate the free and open exchange of ideas, whereas the JPFP "was adopted not to create a forum for speech but in the interest of preventing corruption or appearance thereof." First, Plaintiffs themselves admit earlier in their brief that one purpose of the JPFP is to facilitate speech. (*See* Pltfs.' Resp. at 7) (stating that JPFP encourages and makes possible speech by participating candidates who might not otherwise speak); *see also* N.C. Gen. Stat. § 163-278.61 (listing a purpose of JPFP as "ensur[ing] the fairness of democratic elections"); *Buckley*, 424 U.S. at 92-93 (explaining that public financing fulfills goals of democracy by enlarging discussion and participation in electoral process). More importantly, *Southworth* found the germaneness test unworkable and inapplicable for the same reasons it is unworkable in this case—because it was almost unworkable in

the *Abood* line of cases where the institution *itself* was speaking, and would be even more so where the State undertook to stimulate a whole universe of speech and ideas by others. *Southworth*, 529 U.S. at 231-32; *id.* at 235 ("Where the University speaks . . . the analysis likely would be altogether different.) As in *Southworth*, the Fund is not itself speaking, but rather, is facilitating speech for an unlimited array of appellate judicial candidates. The "proper measure" for affording protection to the fee-payers' First Amendment rights, "the requirement of viewpoint neutrality in the allocation of funding support," *see Southworth*, 529 U.S. at 233-34, is a characteristic that is present in the JPFP.[3] Accordingly, under *Southworth*, as recognized by *May v. McNally*, Count IX of Plaintiffs' Second Amended Complaint must fail.

Dated: October 6, 2006

Respectfully submitted,

SMITH MOORE LLP

By: James G. Exum, Jr.
N.C. State Bar No. 1392
jim.exum@smithmoorelaw.com

By: /s/ Manning Connors
Manning Connors
N.C. State Bar No. 21990
manning.connors@smithmoorelaw.com

300 N. Greene Street, Suite 1400
Greensboro, NC 27401
(336) 378-5200

BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

Suzanne Novak
James Sample

161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6730

Attorneys for Intervenors-Defendants

[3] Intervenors-Defendants agree with the following statement from *May* that Plaintiffs cite: "[G]overnment may not condition involuntarily associated individuals' opportunity to . . . ply their trade or profession upon their compelled support of speech with which they disagree." *May v. McNally*, 55 P.3d 768, 771 (Ariz. 2002). That statement, however, does nothing to further Plaintiffs' claim. While the North Carolina $50 surcharge is a condition of employment for attorneys in the State, the second part of the of the suggestion does not hold—Supreme Court precedent makes it clear that the $50 surcharge requirement does *not* compel speech in violation of the Constitution. *Board of Regents v. Southworth*, 529 U.S. 217 (2000); *see also May*, 55 P.3d 768; (Mem. of Law in Supp. of Interv-Defs.' Mot. To Dismiss pp. 16-20).