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 **MEMORANDUM OF LAW IN SUPPORT OF INTERVENORS-DEFENDANTS' MOTION TO DISMISS**

INTRODUCTION

Independence and impartiality are cornerstones of an effective judiciary in a democracy. Any system in which judges are required to run for office, like the one in place in North Carolina, presents inherent difficulties for achieving and maintaining the appearance of independence and impartiality because campaign contributors may appear before a judge to whose campaign they helped to finance. Not surprisingly, a large majority of the public believe that campaign contributions influence judicial decisions.[1] Responding to such concerns, North Carolina became the first state to enact a voluntary public financing program for campaigns for its appellate judicial seats.

While North Carolina's full public funding program is the first in the nation for judicial campaigns, programs that provide public funding to candidates who voluntarily agree to certain restrictions have been praised and upheld by the United States Supreme Court and other courts in several circuits. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 96 (1976); *Daggett v. Comm'n on Governmental Ethics*

[1] *See* Phyllis Williams Kotey, *Public Financing for Non-Partisan Judicial Campaigns: Protecting Judicial Independence while Ensuring Judicial Impartiality*, 38 Akron L. Rev. 597, 608-09 (2005) (discussing the results of a national survey in which seventy-six percent of respondents felt that campaign contributions had "some influence" or "a great deal of influence" on the judges' decisions).

& Election Practices, 205 F.3d 445, 464 (1st Cir. 2000); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996); *Ass'n of Am. Physicians and Surgeons v. Brewer*, 363 F. Supp. 2d 1197 (D. Ariz. 2005), appeal docketed, No. 05-15630 (9th Cir. 2005). Courts, recognizing that public financing programs serve compelling interests in combating corruption or the appearance thereof and enhancing First Amendment values, have soundly rejected claims that such programs discriminate against or violate the rights of persons and groups who do not participate in or otherwise support the programs.

Despite the laudable goals of North Carolina's judicial public funding program (hereinafter the "JPFP"), and the case law rejecting challenges to similar programs, the law establishing the JPFP has been challenged by four plaintiffs. The plaintiffs—a sitting judge who prevailed in the 2004 judicial election *without* participating in the JPFP, a candidate for judicial office who has already raised substantial amounts of money, and two political committees that have never made independent expenditures—allege that the statutes enacted to create and implement the JPFP discriminate against them and violate their First Amendment rights. Because Counts I-III and V-IX of Plaintiffs' Second Amended Complaint fail to state a claim, those counts must be dismissed.[2]

STATEMENT OF THE CASE

Plaintiffs assert First Amendment and equal protection challenges to Article 22D of Chapter 163 of the North Carolina General Statutes, which created a voluntary system of full public financing for campaigns for North Carolina Supreme Court justices and judges of the North Carolina Court of Appeals, *see* N.C. Gen. Stat. §§ 163-278.61et seq, as well as other statutes enacted to implement Article 22D. In enacting Article 22D in 2002, the legislature sought to "ensure the fairness of democratic elections" and "protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of [judicial] elections, . . . since impartiality is uniquely important to the integrity and credibility of the courts." *Id.* § 163-278.61. In 2002, North Carolina also enacted provisions pertaining to contributions to candidates for the Supreme

[2] Because Intervenors-Defendants are intervening to defend against only Counts I-III and V-IX of Plaintiffs' Second Amended Complaint, this memorandum does not address Count IV of Plaintiffs' Second Amended Complaint.

Court and Court of Appeals "[i]n order to make meaningful the provisions of Article 22D." *Id.* § 163-278.13(e2).

Article 22D permits candidates to choose whether to participate in the JPFP or to conduct privately financed campaigns. Those who wish to participate agree to accept spending limits. *Id.* § 163-278.64. To qualify for public funds, participating candidates must collect contributions from at least 350 registered North Carolina voters, in amounts between $10 and $500 ($1,000 maximum for the candidate and certain family members), that in total amount to between approximately $34,000 and approximately $70,000. *Id.* §§ 163-278.64(b), 163-278.62(9), 163-278.62(10).[3] After the required number of qualifying contributions have been collected, candidates apply for certification as a participating candidate with the State Board of Elections. With the exception of those contributions and a small amount of seed money, *id.* § 163-278.64(d), participating candidates may raise no private contributions; they receive lump-sum grants of public funds with which to conduct their campaigns in contested general elections, *id.* § 163-278.65(a),(b). Although base allocations are available only for the general election, certified candidates are eligible to receive "rescue funds" in the primary, *see id.* § 163-278.65(a), discussed below.

To encourage participation, and thereby to promote its goals, Article 22D contains mechanisms – "trigger" provisions – to protect participating candidates from being grossly outspent by nonparticipating opponents. The trigger provisions authorize payment of "rescue funds" to participating candidates in the primary and general elections when funds raised or spent by nonparticipating opponents, independent spending by the opponents' supporters, or some combination thereof, exceed the maximum qualifying contributions aggregate permitted for the primary, *id*. §163-278.62(18), or the base amount of public funding allocated for the office sought for the general election, *id.* §§ 163-278.67, 163-278.62(18). Participating candidates can then respond to high-spending opposition, although rescue funds are capped at two times the maximum qualifying contributions for the office sought in a primary, and two times the

[3] The amounts vary slightly between the two levels of the judiciary.

initial amount distributed to participating candidates in a general election. *Id.* §§ 163-278.67(b), (c); 163-278.65 (b)(4).

In order to implement the trigger and rescue funds provisions, Article 22D contains reporting requirements for nonparticipating candidates and entities making independent expenditures.[4] Those provisions require nonparticipating candidates who have a participating opponent to report total income, expenses, and obligations within 24 hours after total expenditures (including obligations to make expenditures) or contributions exceed 80 percent of the trigger for rescue funds. *Id.* § 163-278.66(a). Entities making independent expenditures supporting or opposing candidates for the North Carolina Supreme Court or Court of Appeals are required to make such reports when their expenditures (including obligations to make expenditures) or contributions exceed $5,000. *Id* Thereafter, nonparticipating candidates and entities making independent expenditures must file additional reports after receiving, expending, or obligating to spend more than $1,000. *Id.*

Candidates who prefer to use private funds for their campaigns may choose not to participate in the JPFP. Such candidates face no expenditure limits, are subject to contribution limits of $1,000 ($2,000 from certain family members) may receive no contributions between 21 days before the general election and the day after the general election if such contribution would cause the candidate to exceed the trigger for rescue funds, and are subject to the disclosure requirements discussed above. *Id.* §§ 163-278.13(e2), 163-278.66(a).

Along with establishing the JPFP, Article 22D also enacted a voter education provision. *Id.* § 163-278.69. This provision instructs the North Carolina State Board of Elections (the "Board") to publish a Judicial Voter Guide that explains, *inter alia*, the functions of the appellate courts, the purpose and function of the JPFP, and the laws concerning voter registration. *Id.* § 163-278.69(a). The Judicial Voter Guide also includes information concerning all candidates for the North Carolina Supreme Court and

[4] North Carolina law defines the term "independent expenditure" as "an expenditure to support or oppose the nomination or election of one or more clearly identified candidates that is made without consultation or coordination with a candidate or agent of a candidate whose nomination or election the expenditure supports or whose opponent's nomination or election the expenditure opposes." N.C. Gen. Stat. § 163-278.6(9a).

Court of Appeals, as provided by those candidates in accordance with a format established by the Board. *Id.* § 163-278.69(b). The guide is required to contain the following statement: "The above statements do not express or reflect the opinions of the State Board of Elections." *Id.* § 163-278.69(c).

Article 22D established the North Carolina Public Campaign Financing Fund (the "Fund") to finance, *inter alia*, the JPFP, the production and distribution of the Judicial Voter Guide, and the administrative and enforcement costs of the Board related to the Article. *Id.* § 163-278.63(a). As originally established, sources of financing for the Fund included unspent funds distributed to participating candidates, money received as penalties for violations of Article 22D, and voluntary donations by individual taxpayers (including attorneys), business entities, labor unions, and professional associations. *Id.* §§ 105-41; 163-278.63. In 2005, the North Carolina Legislature amended the law, instituting a $50 surcharge upon the annual membership fee of active members of the North Carolina State Bar specifically "for the implementation of Article 22D." 2005 N.C. Sess. Laws 237; *see also* N.C. Gen. Stat. §§ 84-34, 105-41, 163-278.63.

Plaintiffs, one current candidate for a seat in the North Carolina judiciary, one potential judicial candidate in 2012, and two political committees, assert constitutional challenges to Article 22D, and specifically to provisions that address rescue and trigger funds, contribution limits, reporting requirements, and the attorney bar membership surcharge. As discussed further below, Plaintiffs fail to state a claim with respect to their challenges to provisions establishing the JPFP generally, and to the rescue and trigger funds provisions, the reporting requirements, and the attorney bar membership surcharge, specifically.

STATEMENT OF UNDISPUTED FACTS

Plaintiff Barbara Jackson was a candidate for judge for the North Carolina Court of Appeals in the 2004 election. (Sec. Am. Compl. ¶ 24.) Plaintiff Jackson elected to participate in the JPFP, but did not raise enough qualifying contributions to participate in the JPFP for either the primary or general election. (*Id.* ¶¶ 24, 28.) Nevertheless, Plaintiff Jackson won the primary and the general election as a nonparticipating candidate. (*Id.* ¶ 18.)

Less than one year into her eight-year term on the North Carolina Court of Appeals, Judge Jackson has already declared her intent to run for re-election in 2012. (*Id.* ¶¶ 18, 28.) Although Judge Jackson has alleged that the JPFP punishes and penalizes her, (*see id.* ¶¶ 32, 33, 46, 59, 88,) she leaves open the possibility that she will choose to participate in the JPFP in her next campaign, (*Id.* ¶ 24.)

Plaintiff W. Russell ("Rusty") Duke, Jr. is a North Carolina Superior Court judge who is running for North Carolina Supreme Court Justice in 2006. (*Id.* ¶ 19; See http://www.sboe.state.nc.us/pdf/2006%20general%20candidate%20list%20final.xls) Judge Duke chose not to participate in the JPFP in 2006. (Sec. Am. Compl. ¶ 24;) http://www.sboe.state.nc.us.[5] As of September 14, 2006, Judge Duke has raised $345,424.90 in contributions towards his campaign and spent $94,031.21 on his campaign. (*See* selected documents from Plaintiff Duke's campaign disclosure statements, attached hereto as Exhibit 1.)[6]

The initial disbursement to participating candidates for the Supreme Court 2006 election was $216,650.[7] *See* N.C. Gen. Stat. § 163-278.65 (b)(4); *see also* N.C. Gen. Stat. § 163-107. As of September 18, North Carolina Supreme Court Justice Sarah Parker, Judge Duke's opponent and a participant in the JPFP, has received $124,774.90 in rescue funds.[8]

Plaintiff North Carolina Right to Life Committee Fund for Independent Political Expenditures ("NCRTL-IEPAC") was formed in 1999 "to make independent expenditures."[9] North Carolina Right to

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[5] A list of 2006 candidates participating in the JPFP can be found at http://www.sboe.state.nc.us, after choosing "Campaign Finance" from the horizontal menu bar at the top of the page, and then choosing "NC Public Campaign Fund" from the vertical menu bar on the left of the screen.

[6] These totals have been compiled from Plaintiff Duke's Second Quarter Disclosure Report (filed July 10, 2006), and Plaintiff Duke's informational reports filed on August 1, August 31 and September 14, 2006. On July 10, 2006, Plaintiff Duke's total expenditures were $82,795.22. On August 1, 2006, he reported expenditures totaling $4,275.40 for that reporting period. On September 14, 2006, he reported expenditures of $2,472.58 for that reporting period. Selected pages from these reports are attached hereto as Exhibit 1. To review the full reports, visit http://www.sboe.state.nc.us. Choose "Campaign Finance" from the menu bar at the top of the screen and then choose "View Campaign Finance Reports" from the menu bar on the left of the screen.

[7] North Carolina State Board of Elections, "2006-2007 Campaign Finance Manual," p. 129, *available at* http://www.sboe.state.nc.us/cfrsweb/Manual/complete%20manual%202006.pdf.

[8] *See* E-mail from Kim Westbrook Strach, Deputy Director-Campaign Finance Division, North Carolina State Board of Elections (Sept. 20, 2006, 03:42 EST), attached hereto as Exhibit 2.

[9] *See* Sec. Am. Compl. Ex. A; http://www.sboe.state.nc.us/cf_pdf/1999/20051109_41907.pdf.

Life State Political Action Committee ("NCRTL-SPAC") was formed no later than 2002 "to support/oppose candidates."[10] It appears, however, that neither group has made independent expenditures in support of or opposition to any judicial candidates in any election,[11] and Plaintiffs do not allege to the contrary. Nor do Plaintiffs allege in their Second Amended Complaint that NCRTL-IEPAC (or NCRTL-SPAC) wishes to make independent expenditures in future judicial elections or that it would make such independent expenditures if the JPFP were not in place. Yet Plaintiffs allege that "because of" provisions relating to the trigger of rescue funds, NCRTL-IEPAC will not make independent expenditures in future judicial elections. (Sec. Am. Compl. ¶¶ 37, 38, 48, 93.)[12]

QUESTION PRESENTED

Do Counts I-III and V-IX of Plaintiffs' Second Amended Complaint, attacks on the JPFP generally, and specifically on the rescue and trigger funds provisions, the reporting requirements, and the attorney bar membership surcharge, fail to state claims upon which relief may be granted?

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure should be granted if the plaintiff can prove no set of facts to support its claim and entitle it to relief. *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). Although the court should accept as true all well-pleaded allegations when considering a motion to dismiss, *see id.*, the court need not accept unsupported legal allegations, *Revene v. Charles County Comm'rs*, 882 F.2d 870, 873 (4th Cir.

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[10] *See* Sec. Am. Compl. Ex. B; http://www.sboe.state.nc.us/CF_Report/cf_report_select2_05.asp?ID=STA-95C243-C-001&OGID=9780 (indicating that NCRTL-SPAC existed in 2002, but not clearly showing date of formation). NCRTL-SPAC's predecessor, National Right to Life PAC, however, was in existence as of 1990 but is currently closed. *See* http://www.sboe.state.nc.us/CF_Report/cf_report_select_05.asp?NM=right+to+life.

[11] *See* http://www.sboe.state.nc.us/CF_Report/cf_report_select_05.asp?NM=right+to+life.

[12] Accordingly, it is highly questionable whether NCRTL-IEPAC, which has never made contributions or independent expenditures, and has not alleged in the Second Amended Complaint that it would make any relevant contributions or expenditures but for the existence of the challenged statutes, has standing to sue under Article III of the U.S. Constitution. *See Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 771 (2000) (explaining that in order to establish the "irreducible constitutional minimum" for standing, a party must allege and demonstrate causation, redressability and "injury in fact," meaning "a harm that is both 'concrete' and 'actual or imminent,' not conjectural or hypothetical"); *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315 (4th Cir. 2002) (denying standing because plaintiffs' claims of injury were speculative, and they could not demonstrate traceability or redressability).

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). Moreover, a court may take judicial notice of indisputable facts, such as matters of public record and exhibits to a complaint. *See Nolte v. Capital One Fin. Corp.*, 390 F.3d 311, 317 (4th Cir. 2004); *Clark v. BASF Salaried Employees' Pension Plan*, 329 F. Supp. 2d 694, 697 (W.D.N.C. 2004). Judicial notice is particularly appropriate when a party supplies the court with the necessary information and requests that the court consider those facts. *Briggs v. Newberry County Sch. Dist.*, 838 F. Supp. 232, 233-34 (D.S.C. 1992), *aff'd*, 989 F.2d 491 (4th Cir. 1993).

ARGUMENT

I. Plaintiffs' Claims That the JPFP's Reporting Requirements Violate the First Amendment Should Be Dismissed as a Matter of Law.

In Counts I, II and V of their Second Amended Complaint, Plaintiffs allege that the JPFP's reporting requirements violate the First and Fourteenth Amendments, because requiring reporting within 24 hours is too "narrow" a window in which to report, and because reporting is required after expenditures have been obligated, rather than actually spent. (Sec. Am. Compl. ¶¶ 60-61, 66-67, 80-81.) *McConnell v. FEC*, 540 U.S. 93 (2003), as well as various other cases, dispose of such arguments.[13]

In *McConnell*, the Supreme Court upheld reporting provisions that contain *both* challenged aspects of the JPFP's reporting requirements: that reporting must be made within 24 hours and that reporting must be made when funds are obligated, rather than spent. The Court upheld, without discussion, 24-hour reporting requirements for electioneering communications after every "disclosure date," that is, the first date and all subsequent dates on which a person's aggregate undisclosed expenses

[13] Plaintiffs have no allegations showing the vagueness asserted in the title of Count V and have therefore waived any claim as to vagueness.

for electioneering communications exceed a threshold amount. *McConnell*, 540 U.S. at 194-97.[14] The Court then upheld a provision that, like Article 22D, required disclosure for electioneering communications or independent expenditures when a contract for them is formed, even if the ads have not yet been disseminated. *Id.* at 199-202, 124 S. Ct. at 692-94, 157 L. Ed. 2d at 583-84 (rejecting as speculative a claim made by the plaintiffs that confusion may result if such contracts are not executed). In fact, the Court explained that *failing* to require reporting when obligations are made would "open a significant loophole," for "political supporters could avoid preelection disclosures concerning ads slated to run during the final week of a campaign" by entering into contracts requiring payment to be made after the election. *Id.* at 200, 124 S. Ct. at 693, 157 L. Ed. 2d at 584 (emphasis added). *McConnell* demonstrates that Plaintiffs fail to state a claim that the JPFP's reporting requirements are unconstitutional.

Under *McConnell*, reporting requirements satisfy First Amendment constraints because they advance three important state interests: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive" campaign finance reform provisions. 540 U.S. at 196; *see also Buckley*, 424 U.S. at 66-68. Plaintiffs also acknowledge that the reporting requirements "assist the Board in implementing the rescue fund," (*see* Sec. Am. Compl. ¶¶ 60, 66,) a state interest explicitly endorsed in *Daggett*, 205 F.3d at 466. Plaintiffs' repeated statement that "the corruption-related interest cited by the *Buckley* Court remains 'the only legitimate and compelling government interest [] thus far identified for restricting campaign

[14] That the court in *Citizens for Responsible Gov't v. Davidson*, 236 F.3d 1174 (10th Cir. 2000), found the 24-hour reporting requirement in that case "patently unreasonable," *id.* at 1197, which Plaintiffs cite in support of their claim, (Am. Compl. ¶ 62,) is not persuasive. First, that opinion was issued prior to *McConnell*. Second, the *Davidson* court held that the 24-hour timeframe, which was required at all times and did not serve a public financing program, was not narrowly tailored. *Davidson*, 236 F.3d at 1197. On the other hand, the JPFP's 24-hour reporting requirement timeframe, like the one at issue in *McConnell*, is required only when certain thresholds are met, and is integral to implementation of the JPFP, particularly the issue of rescue funds. *See* N.C. Gen Stat. § 163-278.66-67; *infra* Argument Section II.

finances,'" (*see* Sec. Am. Compl. ¶¶ 60, 66, 76,) thus demonstrably does not hold for reporting requirements, which affirmatively serve first Amendment values by providing information to voters.[15]

Like reporting requirements, public financing *furthers*, rather than *hinders*, First Amendment values and thus sufficiently important and significant state interests. *See Buckley*, 424 U.S. at 92-107. In *Buckley*, the Court explained that the public funding system was an 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." *Id*. at 92-93, 96 S. Ct. at 670, 46 L. Ed. 2d at 729. The Court further noted that:

> the central purpose of the Speech and Press Clauses was to assure a society in which "uninhibited, robust, and wide-open" public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish. Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech . . . .

Id. at 93 n.127, 96 S. Ct. at 670 n.127, 46 L. Ed. 2d at 730 n.127 (citations omitted). Because public funding for campaigns promoted rather than impaired First Amendment values, *Buckley* did not apply heightened scrutiny to the public financing provisions of the Federal Election Campaign Act ("FECA"), even though the law conditioned participation in the program on acceptance of spending limits. *Id.* at 57 n.65, 85-107, 96 S. Ct. at 653 n.65, 666-77, 46 L. Ed.2d at 709 n.65, 725-38. The purposes of the JPFP are precisely those held to be protective of First Amendment values: to "ensure the fairness of democratic elections" and "protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of [judicial]

[15] Sprinkled within their claims that the rescue fund and reporting provisions are unconstitutional, Plaintiffs vaguely assert that the JPFP both "coerces" participation in and deters non-participation in the program. (*See, e.g.*, Sec. Am. Compl. ¶¶ 60, 66, 71.) Plaintiffs wisely do not allege that a constitutional violation follows from such assertions since they are untrue both as a matter of fact and law. Plaintiffs cannot genuinely allege that the JPFP coerces candidates to participate when Plaintiff Duke has chosen not to participate and Plaintiff Jackson has not decided whether she is going to participate in the future. (*Id*. ¶ 25.) Moreover, as several courts have recognized, states may provide incentives to induce acceptance of spending limits even if such incentives create some pressure for participation in public funding programs, but such incentives do not defeat the voluntary nature of public funding programs. *See, e.g.*, *Gable v. Patton*, 142 F.3d 940, 947-59 (6th Cir. 1998); *Rosenstiel*, 101 F.3d at 1550-51; *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993); *see also Daggett*, 205 F.3d at 468-70.

elections, . . . since impartiality is uniquely important to the integrity and credibility of the courts." N.C. Gen. Stat. § 163-278.61.

Public financing promotes "uninhibited, robust, and wide-open public debate" not only through direct subsidies for speech but also through more indirect means. A full public funding system severs the connection between candidates hungry for cash and donors hungry for influence and thereby combats "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." *McConnell*, 540 U.S. at 136, (internal quotation omitted). "Because the electoral process is the very 'means through which a free society democratically translates political speech into concrete governmental action,' . . . measures aimed at protecting the integrity of the process, [such as the JPFP], tangibly benefit public participation in political debate." *Id.* at 137 (quoting *Nixon v. Shrink Mo Gov't PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring)).[16] Because North Carolina's reporting requirements directly and indirectly advance the same integrity-protecting purpose that public funding serves, Counts I, II, and V must be dismissed for failure to state a claim.

II. Plaintiffs' Claims Against the JPFP's Rescue Funds and Trigger Provisions Should Be Dismissed For Failure to Allege a Cognizable Constitutional Injury.

In Counts III, VI and VII, Plaintiffs Jackson, Duke and NCRTL-IEPAC challenge the constitutionality of Article 22D's rescue fund provisions. (*See* Sec. Am. Compl. ¶¶ 68-72, 83-94;) N.C. Gen. Stat. § 163-278.67. The rescue fund provisions ensure that participating candidates, who are otherwise constrained by a spending limit, are not grossly outspent by their opposition. Specifically, when opposition fundraising or spending, including independent expenditures, goes over that limit, the participating candidate receives "rescue funds" with which to respond. According to Plaintiffs, ensuring

[16] Public funding systems also foster First Amendment interests by freeing candidates from the rigors of fundraising and permitting them to devote time to communication and debate. *See Buckley*, 424 U.S. at 96 ("Congress properly regarded public financing as an appropriate means of relieving . . . candidates from the rigors of soliciting private contributions.") (internal quotation omitted); *Rosenstiel*, 101 F.3d at 1553 (recognizing Minnesota's compelling interest in reducing "the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning"); *Vote Choice*, 4 F.3d at 39 (upholding Rhode Island public financing law because such programs "'facilitate communication by candidates with the electorate' [and] free candidates from the pressures of fundraising") (quoting *Buckley*, 424 U.S. at 91).

that participating candidates are not completely drowned out by wealthy candidates and independent spenders amounts to "punishing" or "penalizing" non-participating candidates and has a "chilling effect" on the free speech rights of Plaintiffs. (*See, e.g.*, Sec. Am. Compl. ¶¶ 70, 71, 88, 94.)

Plaintiffs do not and cannot claim Article 22D limits what they can spend. Unlike participating candidates, neither non-participating candidates nor independent spenders are subject to any expenditure limitations.[17] Rather, Plaintiffs complain that they do not wish to spend anything, knowing that their speech will have to compete with that of a candidate they oppose. Allegedly, the "knowledge" that the candidate receiving rescue funds will have an opportunity to respond "imposes a climate of self-censorship" on Plaintiffs. (Sec. Am. Compl. ¶ 71.[18]) The very allegation demonstrates that Plaintiffs' reluctance to speak stems not from the operation of the JPFP but from their own states of mind—a desire not to spend money when others can also do so. *Cf. McConnell*, 540 U.S. at 228 ("Their alleged inability to compete stems not from the operation of § 307, but from their own personal 'wish' not to solicit or accept large contributions, *i.e.*, their personal choice.").[19] With these allegations, Plaintiffs cannot state a claim against the JPFP.[20]

Moreover, as recognized by courts in both the First and Ninth Circuits, Plaintiffs cannot state a claim even if any reluctance to spend when others can respond could be traced indirectly to the JPFP. The plaintiffs in *Daggett* challenged the trigger for independent expenditures in Maine's Clean Election Act, the functional equivalent of the rescue funds provisions in Article 22D, on precisely the same grounds. 205 F.3d at 464. They failed on that claim and did not seek Supreme Court review.

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[17] Plaintiffs allege that the rescue funds provision "amounts to an unconstitutional content-based regulation of political free speech." (*See* Am. Compl. ¶ 70.) Because the JPFP does not restrict Plaintiffs' spending in the first place, however, the rescue funds cannot be characterized as any sort of regulation of Plaintiffs' political speech.

[18] The veracity of this allegation with respect to Plaintiff NCRTL-IEPAC is dubious. NCRTL-IEPAC made no independent expenditures in either the 2000 or the 2002 judicial races, yet the JPFP did not begin operating until 2004.

[19] Moreover, such alleged self-censorship has not materialized. Plaintiff Duke has made and continues to make expenditures on his campaign, despite the fact that he has exceeded the trigger and his opponent has received rescue funds as a result *See* Exhibit 1 and *supra*, n.6.

[20] Indeed, *McConnell*'s analysis calls into question the standing of Plaintiffs Jackson, Duke and NCRTL-IEPAC to assert these claims. 540 U.S. at 228 (denying standing to sue because the "plaintiffs fail here to allege an injury in fact that is 'fairly traceable' to BCRA").

The *Daggett* court noted that the complaint about Maine's triggers "boil[ed] down to a claim of a First Amendment right to outraise and outspend an opponent." 205 F.3d at 464. In rejecting that claim, the court noted:

> Appellants misconstrue the meaning of the First Amendment's protection of their speech. They have no right to speak free from response—the purpose of the First Amendment is to secure the widest possible dissemination of information from diverse and antagonistic sources. The public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures. These facts allow us comfortably to conclude that the provision of matching funds based on independent expenditures does not create a burden on speakers' First Amendment rights.

Id. (internal quotations and citations omitted);[21] *see also Brewer*, 363 F. Supp. 2d at 1201-03 (expressly adopting *Daggett*'s reasoning and holding that trigger mechanisms and rescue fund provisions similar to those in Article 22D are constitutionally permissible).

Plaintiffs make precisely the same argument that *Daggett* and *Brewer* resoundingly rejected: They claim that a "chilling effect" arises from knowing that their spending will be matched with public funds. (Sec. Am. Compl. ¶ 71.) Plaintiffs evidently prefer not to speak at all, if in doing so they must engage their opponents on the merits, rather than with the sheer power to outspend them. In Plaintiffs' view, more speech is not better—only their speech should reach the voters. North Carolina may not choose to use its own resources to improve the quality of public discourse, say Plaintiffs; rather, Plaintiffs have a right to monopolize the marketplace of ideas. Allegations so incompatible with First Amendment

[21] This reasoning echoed a similar analysis in the district court in Daggett. Of those attacking matching funds, the district court said:

> Their view of free speech is that there is no point in speaking if your opponent gets to be heard as well. The question is not whose message is more persuasive, but whose message will be heard. The general premise of the First Amendment . . . on the other hand, is that it preserves and fosters a marketplace of ideas. . . . In that view of the world, more speech is better. . . . This "marketplace of ideas" metaphor does not recognize a disincentive to speak in the first place merely because some other person may speak as well.

Daggett, 74 F. Supp. 2d 53, 58 (D. Me. 1999) (citation omitted), *aff'd*, 205 F.3d 445.

values cannot state a constitutional claim.[22]

Appellate courts have considered constitutional challenges to the two types of triggers challenged by Plaintiffs: (1) those that release matching funds based on nonparticipating candidate spending (Count VI), and (2) those that release matching funds based on independent spending (Counts III and VII). Challenges in the first category have been uniformly rejected. In *Gable*, the Sixth Circuit noted that providing public matching funds to participating candidates who faced high levels of spending by nonparticipating candidates was necessary to "assuage the wholly legitimate fears of participating [candidates] that they will be vastly outspent due to their agreement to accept spending limits." 142 F.3d at 947. In *Rosenstiel*, the Eighth Circuit also upheld such provisions under the First Amendment, recognizing that matching funds "avert a powerful disincentive for participation in [the state's] public financing scheme: namely, a concern of being grossly outspent by a privately financed opponent with no expenditure limit." *Id.* at 1551; *see id.* at 1552 (noting that funding additional speech, "promotes, rather than detracts from, cherished First Amendment values"). *Daggett* embraced the reasoning of these cases in upholding Maine's trigger based on nonparticipating candidate spending. *See* 205 F.3d at 468-470.

The decision in *Rosenstiel* cast doubt on the earlier Eighth Circuit decision that is cited by the Plaintiffs, *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), which addressed the second category of triggers—those based on independent spending. Analyzing the impact of *Rosenstiel* on *Day*, the *Daggett* court noted:

> Although *Day* involved independent expenditures while *Rosenstiel* regarded candidate expenditures, the logic of the two cases is somewhat inconsistent. In *Rosenstiel*, the fact that a candidate's expenditure triggered the release of his opponent's spending limitation did not burden his First Amendment rights; yet in *Day*, the fact that a non-candidate's

[22] Contrary to Plaintiffs' claim, (Am. Compl. ¶¶ 60, 71,) there is no constitutional impediment to systems, such as those in FECA and Article 22D, that create a level playing field among candidates by providing public funding to those who accept voluntary spending limits. *Buckley* held only that an interest in equalizing electoral influence could not justify FECA's *mandatory* spending limits. 424 U.S. at 48-49. According to the Court, a mandatory spending limit unconstitutionally "reduces the quantity of expression" available to inform the electorate, *id*. at 19 , whereas public funding "enlarge[s] public discussion" consistently with First Amendment requirements, *id*. at 92-93. In other words, states may not promote equality by leveling down (banning spending by those with wealth), but may do so by leveling up (facilitating spending with financial aid). Adhering to this principle, Article 22D includes no mandatory spending caps.

> spending triggered matching funds burdened the speaker's First Amendment rights. . . . [T]he continuing vitality of *Day* is open to question.

205 F.3d at 464 n.25. *Daggett* expressly rejected *Day*'s reasoning, remarking that it could not "adopt the logic of *Day*, which equates responsive speech with an impairment to the initial speaker." *Id.* at 465; *see also Brewer*, 363 F. Supp. 2d at 1201-03 (rejecting *Day*'s reasoning and adopting reasoning of *Daggett*). Because firmly established jurisprudence recognizes that public funding programs, with and without triggers, promote First Amendment values, *see supra* Argument Section I, this Court should likewise reject *Day*'s superseded and discredited illogic.[23] Consistent with the First Circuit in *Daggett* and the district court in *Brewer*, this court should thus find that the rescue funds are not unconstitutional burdens on speech, but are rather mechanisms through which the state of North Carolina furthers the functionality of the JPFP, thus expanding the range and quality of judicial campaign discourse.[24]

III. Plaintiffs Fail to State a Claim That the Distinction Between Participating and Nonparticipating Candidates Violates the Constitution.

Count VIII is titled as a First Amendment claim but pled as an Equal Protection claim. The confusion in drafting is symptomatic of confusion in the claim. At bottom, Plaintiffs argue that a distinction between candidates who participate in public funding systems and those who do not violates the Constitution. (Sec. Am. Compl. ¶ 98.) But *every* voluntary public funding system necessarily creates

[23] Contrary to Plaintiffs' repeated claim, *see, e.g.*, (Sec. Am. Compl. ¶ 3, 33, 34, 38, 39, 72,) a law may not be found unconstitutional merely because it chills speech. If such chill is proven, the state may nevertheless establish the statute's constitutionality by demonstrating that the burden on speech is justified by a compelling state interest. *Day* did not invalidate Minnesota's trigger upon finding that it impaired speech; the trigger fell only because the court found no interest sufficiently compelling to justify imposing that burden. Minnesota had argued in *Day* that the matching funds provision was necessary to encourage participation in the state's public financing program. Because participation rates were nearly 100 percent *before* enactment of the matching funds provisions, the Eighth Circuit found that argument unpersuasive. But when another trigger *was* shown to be an integral part of the state's public funding system, as it later was in *Rosenstiel*, 101 F.3d at 1555, the Eighth Circuit upheld those provisions under the First Amendment. The JPFP's triggers have been an integral part of the system from its inception.

[24] Plaintiffs' vague equal protection challenges to the trigger provisions in Counts III, VI and VII are indistinguishable from their First Amendment claim and fail for the same reasons. Because the trigger provisions do not hinder or chill First Amendment rights, they need only be rationally related to a legitimate state interest. *City of Dallas v. Stanglin*, 490 U.S. 19, 23 (1989). As recognized by many courts, the rescue provisions are not only rationally related to the stated purposes of Article 22D, but necessary to effectuate it. *See Daggett*, 205 F.3d at 468-470; *Gable*, 142 F.3d at 947; *Rosenstiel*, 101 F.3d at 1551.

such a classification, and *no* public funding system has ever been found unconstitutional on that ground.[25] Furthermore, in *Buckley*, the Supreme Court explained that legislatures have discretion in choosing the method to measure of public support before providing candidates with public money. *Buckley*, 424 U.S. at 99-100. Like the JPFP, Maine and Arizona's public financing programs, both of which have been upheld, require a candidate to obtain a minimum number of qualifying contributions before obtaining public funds. *See* Me. Rev. Stat. Ann.§ 1125(3); Ariz. Rev. Stat. Ann. § 16-946. What Plaintiffs paint as "invidious discrimination" is the inevitable product of a campaign finance system that offers both public and private funding options.

Offering those options, as the JPFP does, neither "penalizes" candidates nor operates "to reduce their strength below that attained without public financing." (Sec. Am. Comp. ¶¶ 98, 100.) Plaintiffs' own allegations defeat such mischaracterizations. In 2004, Plaintiff Jackson failed to qualify for public funds, yet *won* election to the North Carolina Court of Appeals. (*Id*. ¶¶ 18, 24.) Plaintiff Duke, who had the option to participate in the JPFP but has chosen not to, has already raised approximately $345,424 in campaign contributions,[26] well over the base amount publicly funded candidates have received, with several weeks remaining to raise more. In sum, the privately financed Plaintiffs suffer no cognizable constitutional injury by complying with a law that offers a public funding alternative for other judicial candidates. Count VIII should be dismissed for failure to state a claim under the Equal Protection Clause or the First Amendment.

IV. Plaintiffs Fail to State a Claim That the Surcharge on Attorney Bar Membership Fees Violates the First Amendment Because It Is Used to Implement Article 22D.

The North Carolina State Bar (hereinafter the "NC Bar") is an agency of the State of North Carolina. N.C. Gen. Stat. § 84-15. Attorneys domiciled in North Carolina must be members of the NC

[25] Indeed *Buckley*, which upheld the presidential public funding system, has been read to *require* such a distinction by courts that have interpreted that decision to preclude mandatory participation in a system with spending limits. *See, e.g., Rosenstiel*, 101 F.3d at 1549.

[26] This total has been compiled from Plaintiff Duke's Second Quarter Disclosure Report (filed July 10, 2006), and Plaintiff Duke's informational reports filed on August 1, August 31 and September 14, 2006. *See* Exhibit 1 and *supra*, n.6.

Bar to practice in North Carolina courts. *Id.* § 84-16; *see id.* § 84-4.1. Every active member of the NC Bar must pay an annual membership fee not to exceed $300. *Id.* § 84-34. In addition to the annual fee, members are required to pay $50 each year to the Client Security Fund, which was established in 1984 to reimburse clients who have suffered financial loss as the result of dishonest conduct of North Carolina lawyers. N.C. Admin Code tit. 27, r. 1D.1401. Members must also pay a $50 surcharge to their annual fee "for the implementation of Article 22D." N.C. Gen. Stat. § 84-34. Article 22D established both the JPFP and the production and distribution of the Judicial Voter Guides.

Plaintiffs Jackson and Duke argue that the $50 surcharge for the implementation of Article 22D violates their First Amendment rights by forcing them to support candidates with whom they ideologically disagree. (Sec. Am. Compl. ¶¶ 105-109.) Because Supreme Court jurisprudence holds to the contrary, Plaintiffs fail to state a claim as to Count IX of their Second Amended Complaint.[27]

In *Board of Regents v. Southworth*, 529 U.S. 217 (2000), students at the University of Wisconsin, a public university, brought a First Amendment challenge to a mandatory activity fee that was used by the school to support organizations engaging in political or ideological speech because the fees were used to "subsidi[ze] speech they f[ou]nd objectionable, even offensive." *Id.* at 221, 230. The Court explained that such a fee could be assessed constitutionally as long as there was "viewpoint neutrality in the allocation of funding support," even though it was "inevitable" that the fees would result in subsidies to speech that some students found objectionable and offensive. *Id.* at 230, 232-33 (upholding programs that distributed money in a non-discretionary, viewpoint-neutral manner). The Court explained that the fee simply created a *mechanism* for the speech of the student groups, and its "sole purpose" was "facilitating the free and open exchange of ideas by, and among, its students." *Id.* at 229, 233 (emphasis added). The Court recognized that the use of the funds or tuition for the *university's* speech would warrant a different analysis. *Id.* at 229, 235 (emphasis added).

[27] The issue herein is not whether, in designing the surcharge, the legislature made the correct or optimal policy choice about how to finance Article 22D. The operative issue is simply whether N.C. Gen. Stat. § 84-34 "serves as an unconstitutional burden upon Plaintiffs Jackson and Duke's First Amendment freedom of speech and association," (*see* Sec. Am. Compl ¶ 109,) regardless of policy considerations. Because the answer to that question is no, Plaintiffs' claim must fail.

In line with the reasoning of *Southworth*, the Supreme Court and several other courts have consistently rejected Plaintiffs' argument that funding mechanisms for public financing systems, other than those that tax protected expressive and associational activity, implicate the First Amendment. In *Buckley*, the Court rejected the plaintiffs' argument that failing to permit taxpayers to designate particular candidates or parties as recipients of their money from a public financing fund violated the Constitution, stating that "[t]he scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree." 424 U.S. at 91 & n.124. As the Court noted, "[t]he fallacy of [this] argument is apparent: every appropriation . . . uses public money in a manner to which some taxpayers object." *Id.* at 91-92; *see also Brown v. Legal Foundation of Washington*, 538 U.S. 216, 232 (2003) (discussing that a special tax to fund legal services, even if funds were to pay legal fees of a lawyer representing a tenant in a dispute with a landlord who was compelled to contribute to the program, would unquestionably be legitimate).

Confronting the precise question raised in this case, the Arizona Supreme Court in *May v. McNally*, 55 P.3d 768, 203 Ariz. 425 (2002), rejected Plaintiffs' argument that a public funding program was ideological. *Id.* at 772-73, 203 Ariz. at 429-430. In upholding a ten percent surcharge on civil and criminal fines to support the public financing system for statewide offices, the Court stated that "*Buckley* . . . affirms the proposition that the public financing of political candidates, in and of itself, does not violate the First Amendment, even though the funding may be used to further speech to which the contributor objects." *Id.* at 771; 203 Ariz. at 428.[28]

[28] The provision challenged in this case, which places a surcharge on North Carolina bar membership dues, is unlike provisions that place a tax on protected expressive and associational activity. Following Supreme Court precedent regarding special taxes upon singled out First Amendment *expression*, the Vermont Supreme Court struck down taxes on lobbying expenditures to influence elections as a means for funding public financing programs. *Vt. Soc'y of Ass'n Executives. v. Milne*, 779 A.2d 20 (2001). While the trial court in the *May v. McNally* case also struck down a tax on lobbyists, *see Lavis v. Bayless*, No. CV 2001-006078, slip op. at 4-5 (Ariz. Super. Ct., Maricopa Cty. 2001) (attached hereto as Exhibit 3), that ruling was not appealed, *see May v. McNally*, 55 P.3d 768, 770, 203 Ariz. at 427 (Ariz. 2002), and its reasoning is at odds with the approach taken by the Arizona Supreme Court. *Cf. Lavis*, No. CV 2001-006078, slip op. at 4-5 *and McNally*, 55 P.3d at 772, 203 Ariz. at 429 (finding germaneness discussion inapplicable).

As was the case in *Southworth*, because the Board allocates funds through the JPFP and publishes and distributes the Judicial Voter Guide in a viewpoint-neutral way, it does not force Plaintiffs to "support candidates with whom they ideologically disagree." The JPFP distributes funds to qualifying candidates based on an objective formula. The Judicial Voter Guide provides objective information and a candidate statement sought from each candidate, as well as a disclaimer that the candidate statements express or reflect the opinions of the Board. N.C. Gen. Stat. § 163-278.69. Accordingly, the funding of the JPFP and the Judicial Voter Guides through a surcharge on NC Bar annual membership dues, like the mechanism for the presidential funding program considered in *Buckley*, and the surcharge for the Arizona public financing program considered in *May*, is allocated in a viewpoint-neutral way. Plaintiffs therefore fail to state a claim with respect to Count IX.

Plaintiffs also allege that the surcharge is unconstitutional under *Keller v. State Bar of California*, 496 U.S. 1, 14 (1990), (*see* Sec. Am. Compl. ¶ 106,) but *Keller* is inapplicable to this case. In *Keller*, the Court held that an integrated bar that requires attorneys to join and pay dues to an association, may only "constitutionally fund activities germane to those goals out of the mandatory dues of all members." *Id.* at 4, 5 n.2, 14 (assessing plaintiffs' claim that association's activities such as lobbying for legislation on gun control and filing amicus briefs in cases concerning the constitutionality of a victim's bill of rights violated their First Amendment rights). But as the Arizona Supreme Court reasoned in upholding the funding structure for Arizona's public financing system, the framework provided in *Keller,* for situations where ideological speech is made by a bar association *itself,* is inapplicable here. *See May v. McNally,* 55 P.3d at 772, 203 Ariz. at 429 (adopting *Southworth* approach and rejecting *Keller* line of cases as controlling in analysis of public funding of campaigns, declaring that "[i]f the government seeks to facilitate or expand the universe of speech and accomplishes its goal in a viewpoint neutral way, the question whether speech is germane is simply inapposite") (emphasis added); *see also Southworth*, 529 U.S. at 240 (Breyer, J., concurring) ("[T]he clear connection between fee payer and offensive speech that loomed large in our decisions in the union and bar cases is simply not evident here."); *id.* at 240

(relationship between fee payer and ultimately objectionable expression is far more attenuated than when an attorney must pay membership dues to bar association that itself promotes objectionable messages).[29]

CONCLUSION

For all the reasons stated herein, this Court should grant Intervenors-Defendants' motion to dismiss Counts I-III and V-IX of Plaintiffs' Second Amended Complaint for failure to state a claim upon which relief can be granted.

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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

[29] Even if *Keller* were applicable, however, North Carolina's bar dues surcharge is constitutional under the test set forth in that case. The purpose of Article 22D is to "ensure the fairness" of judicial elections "since impartiality is uniquely important to the integrity and credibility of the courts." N.C. Gen. Stat.Gen. Stat. § 163-278.61. This purpose is directly aligned with the NC Bar's purposes in, *inter alia*, facilitating the administration of justice, advancing the science of jurisprudence, and elevating integrity in the legal profession, *see* N.C. Admin Code tit. 27, r. 1A.0101, purposes specifically highlighted in *Keller* for which mandatory bar fees may be constitutionally applied. *See Keller*, 496 U.S. at 14 (discussing the similarity between, on the one hand, the goals of regulating the legal profession and improving the quality of the legal service available, and, on the other hand, the goals of "aid[ing] in all matters pertaining to the advancement of the science of jurisprudence or the improvement of the administration of justice").