No. 07-1454

United States Court of Appeals
For the Fourth Circuit

W. RUSSELL ("RUSTY") DUKE, JR., *et al.*
Plaintiffs - Appellants,

v.

LARRY LEAKE, in his official capacity as the Chairperson of the North Carolina Board of Elections, *et al.*,
Defendants - Appellees,

and

JAMES R. ANSLEY; COMMON CAUSE NORTH CAROLINA,
Intervenor-Defendants.

On Appeal from the United States District Court
for the Eastern District of North Carolina
The Honorable W. Earl Britt

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The North Carolina Public Campaign Financing Fund

In 2002, the North Carolina General Assembly established the North Carolina Public Campaign Financing Fund ("the Fund") as part of Article 22D of the State's Election Code. Article 22D created voluntary public financing for appellate judicial campaigns and provided for voter education on appellate judicial races. N.C.G.S., Chapter 163, Article 22D (N.C.G.S. § 163-278.61 *et seq*.). In 2006, the General Assembly amended several provisions of the statute to better accomplish its purpose. According to section 163-278.61:

> The purpose of [Article 22D] is to ensure the fairness of democratic elections in North Carolina and to 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 elections, those effects being especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts. Accordingly, this Article establishes the North Carolina Public Campaign Financing Fund as an alternative source of campaign financing for candidates who demonstrate public support and voluntarily accept strict fund-raising and spending limits.

The Fund, administered by the State Board of Elections ("State Board"), provides a comprehensive scheme that allows qualifying candidates to voluntarily forgo much private fund-raising in order to receive public financing for their campaigns. Features of the Fund relevant to this lawsuit include the following:

Candidates running for appellate judicial seats may choose whether to participate in the Fund or to conduct privately financed campaigns. Those who participate must agree to abide by restrictions on contributions and expenditures. N.C.G.S. § 163-278.64(d). To qualify, candidates may file a notice of intent to participate and collect qualifying contributions from at least 350 registered voters, in amounts between $10 and $500, which in aggregate must equal between 30 and 60 times the candidate's filing fee. N.C.G.S. § 163-278.64(a)-(b). Upon certification that a candidate has qualified for participation, a base level of funding is distributed by the Fund to the candidate equaling 125 times the filing fee for

Court of Appeals races and 175 times the filing fee for Supreme Court races. N.C.G.S. § 163-278.65(b).[1]

To encourage participation and thereby promote its goals, Article 22D contains mechanisms, or "trigger" provisions, to protect participating candidates from being grossly outspent. These trigger provisions authorize "rescue funds" beyond the base level of public funding, but are capped.[2] *See* N.C.G.S. § 163-278.67(a)-(c).

Rescue funds are disbursed whenever "[f]unds in opposition to a certified candidate or in support of an opponent to that candidate" ("opposition funds") exceed a designated trigger amount.[3] N.C.G.S. § 163-278.67(a). Opposition funds

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[1] No funds are distributed for uncontested primaries or general elections, and only "rescue funds" can be distributed in a contested primary. N.C.G.S. § 163-278(b).

[2] On August 2, 2007, the General Assembly ratified HB 1828, entitled "An Act to Strengthen the Matching Funds Provision of the Judicial Public Campaign Act; and to Appropriate Funds for Implementation." *See* Addendum. Among other things, this Act changes the term "rescue funds" to "matching funds." The Act has not yet been signed into law by the Governor, nor has it been precleared by the United States Department of Justice under § 5 of the Voting Rights Act, 42 U.S.C. §§ 1971 *et seq.*, as amended. Defendants foresee no reason why the Governor will not sign the bill, nor why preclearance will not be obtained. Defendants will inform the Court when the bill has been signed into law and has been precleared. Defendants will continue to use the term "rescue funds" in this brief because it is the term that has been used before the district court and in the Plaintiffs' brief to this Court.

[3] A "certified candidate" is defined by section 163-278.62(3) as a "candidate running for office who chooses to receive campaign funds from the Fund" and accepts accompanying statutory conditions.

include campaign expenditures or obligations made, or funds raised or borrowed, by an uncertified opponent of the certified candidate as well as independent expenditures made by entities on behalf of the uncertified candidate. N.C.G.S. § 163-278.67(a). The trigger for a contested primary equals the maximum qualifying contributions for the certified candidate (60 times the filing fee). N.C.G.S. § 163-278.62(18). For a contested general election, the trigger equals the base level of funding under the Fund (125 times the filing fee for Court of Appeals races and 175 times the filing fee for Supreme Court races). *Id*. The certified candidate will not receive rescue funds if a non-participating opponent does not reach the trigger amount. N.C.G.S. § 163-278.65(b)(3).

Rescue funds are disbursed in an amount equal to the total by which the "trigger" was exceeded by spending of uncertified opponents and entities making certain independent expenditures. N.C.G.S. § 163-278.67(a). But total rescue funds available in a contested primary are capped at two times the maximum qualifying contributions for the office sought. N.C.G.S. § 163-278.67(b). In a contested general election, rescue funds are capped at two times the base level of funding. N.C.G.S. § 163-278.67(c).

In order to implement the rescue fund provisions, help combat actual and apparent corruption, and provide information to the public, Article 22D contains

reporting requirements for non-participating candidates and entities making independent expenditures. N.C.G.S. § 163-278.66(a). Non-participating candidates with participating opponents are required to make an initial report, disclosing total income, expenses and obligations, to the Board within 24 hours after their campaign expenditures, obligations, and funds raised or borrowed exceed 80% of the trigger for rescue funds. *Id.* Entities making independent expenditures are required to make an initial report within 24 hours of expending more than $5,000. *Id.*[4]

After the initial report, non-participating entities file a report whenever an individual expenditure, obligation, contribution or loan equals or exceeds $1,000. *Id.*[5] Contrary to Plaintiffs' assertions (Opening Br. 45-46), this does not mean that reports must be made whenever *aggregate* expenditures, obligations, contributions or loans reach $1,000.

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[4] When this action was first filed, N.C.G.S. § 163-278.66(a) set the reporting threshold at $3,000 for entities making independent expenditures, and at 50% of the trigger for rescue funds for non-certified candidates. N.C.G.S. § 163.278.66(a) In 2006, the General Assembly amended this provision, replacing it with the current law. 2006 N.C. Sess. Laws 192, § 12 (effective August 3, 2006, pursuant to § 19).

[5] Any report filed pursuant to this requirement would also include any expenditures, obligations, contribution or loans under $1,000 made or received since a previous report. Thus, it is only an individual expenditure, obligation, contribution or loan equal to or greater than $1,000 that triggers the duty to report even if all expenditures, obligations, contributions or loans do ultimately get reported.

"[T]he schedule and forms for reports required by this subsection shall be made according to procedures developed by" the State Board. N.C.G.S. § 163-278.66(a). Contrary to Plaintiffs' suggestion that the reporting provision may require non-certified candidates to report every 24 hours after reaching 80% of the trigger (Opening Br. 8-9), the statute requires only the initial report to be filed within 24 hours and then explicitly instructs the Board to set reporting schedules thereafter. N.C.G.S. § 163-278.66(a). In 2006, the State Board set eight reporting dates between August 22 and November 3, which required the Duke committee to report if an individual expenditure, obligation, or contribution of at least $1,000 had been made or received.[6]

Because certified candidates may not receive any private contributions after they have been certified to receive public funding, Article 22D does not place any specific reporting requirements on certified candidates, other than those reporting qualifying contributions. All reporting requirements for political committees generally, however, are applicable to committees of certified candidate committees, including mandatory quarterly reports. *See* N.C.G.S. § 183-278.9; *see generally*, N.C.G.S. § 163-278.5 *et seq*. Similarly, any political committee making

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[6] State Board, *August 23, 2006, Letter to The Rusty Duke Committee*, http://www.sboe.state.nc.us/cf_pdf/2006/20070803_55557.pdf .

an independent expenditure on behalf of a certified candidate must report that independent expenditure to the State Board. N.C.G.S. § 183-278.9.

In addition, when this action was first filed, section 163-278.13(e2)(3) prohibited any non-participating candidate from accepting, and any contributor from making, "a contribution during the period beginning 21 days before the day of the general election and ending the day after the general election." The statute does not prohibit "a candidate or the spouse of that candidate from making a contribution or loan secured entirely by that individual's assets to the candidate's own campaign." *Id*. In 2006, the 21-day prohibition on contributions was modified so that such contributions are prohibited only "if that contribution causes the candidate to exceed the 'trigger for rescue funds' defined in G.S. 163-278.62(18)." 2006 N.C. Sess. Laws 192, § 16 (effective August 3, 2006, pursuant to § 19).

Plaintiffs

W. Russell ("Rusty") Duke, Jr. is a North Carolina Superior Court judge and was a candidate for Chief Justice of North Carolina in the 2006 general election. (J.A. 93, ¶ 19). Duke lost that election to incumbent Sarah Parker by a vote of 1,138,346 to 568,980.[7]

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[7] State Board, *2006 General Election Results*, http://www.sboe.state.nc.us/enrs/resultsby_contest_summary.asp?ED=11xx07xx2006AGENERAL2006REPUUS

North Carolina Right to Life Committee Fund for Independent Political Expenditures ("IEPAC") is a political committee organized by North Carolina Right to Life, Inc., for the purported purpose of making independent expenditures. (J.A. 88, ¶ 9). Since filing the Statement of Organization with the State Board in 1999, IEPAC has made no independent expenditures in judicial elections and only report expending a total of $2,205.18 during the 2005-06 election cycle. At no point during that time did IEPAC have sufficient funds in its accounts to make an independent expenditure of $5,000 or more.[8]

North Carolina Right to Life State PAC ("SPAC") is a political committee organized by North Carolina Right to Life, Inc., for the purpose of supporting or opposing candidates. (J.A. 88-89, ¶ 10). In the three most recent election cycles (2002, 2004 and 2006), SPAC has not made any contributions to any judicial candidate; indeed, SPAC's reports to the State Board show that it has not made any contributions to any candidates since 2000, when it contributed $275.00 to a

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[8] State Board, *N.C. Right to Life IEPAC Disclosure Reports* (hereinafter"IEPAC Diclosure Reports"), http://www.sboe.state.nc.us/webapps/cf_rpt_search/cf_report_doc_results.aspx?ID=STA-95C243-C-001&OGID=9780).

candidate for governor, a candidate for the North Carolina House of Representatives, and a candidate for the North Carolina Court of Appeals.[9]

The 2006 Elections

In 2006, there were twelve candidates in the general election for seats on the North Carolina Supreme Court or Court of Appeals.[10] Eight of these were certified to participate in the Fund. Four, including Plaintiff Duke, chose not to participate or did not qualify for participation. (*2006 Candidates Report*, *supra* n.10). In the 2006 primary, thirteen of the seventeen candidates declared their intent to qualify for the program and four did not. One of those who declared his intent to qualify won the primary but was not successful in qualifying.

Duke's opponent, Chief Justice Sarah Parker, was certified for participation in the Fund. (*Id.*) On April 16, 2006, Duke had raised or expended more than $173,320.00, over 80% of the trigger for rescue funds, and was notified in a May 23, 2006, letter from the State Board that he should submit an initial report including expenditures, contributions and obligations for April 16-May 30, 2006. (J.A. 49). According to publicly available reports, Duke never reported any

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[9] *See* State Board, *N.C. Right to Life SPAC Disclosure Reports 2001-06* (hereinafter "SPAC Disclosure Reports"),http://www.sboe.state.nc.us/webapps/cf%5Frpt%5Fsearch/cf_report_doc_results.aspx?ID=STA-C3727N-C-001&OGID=4025)

[10] *See* State Board, *2006 Candidates* (hereinafter "*2006 Candidates Report*"), http://www.sboe.state.nc.us/newpages/judicial%20public%20financing%20draft.htm.

obligations (as opposed to actual expenditures) during the 2006 election.[11] No candidates qualified for rescue funds in the 2006 primary, but during the general election, the Sarah Parker for Chief Justice Committee received $155,019.55 in rescue funds.[12] These funds were paid because the amount raised by her opponent Duke reached the statutory trigger of $216,650, then exceeded that trigger by $135,032.71. Additionally, the N.C. Republican Party spent and additional $19,986.84 on independent expenditures opposing Parker. No other candidates in 2006 were entitled to rescue funds.[13]

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure *de novo*. *Mylan Laboratories v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). Although a court should accept all well-pleaded factual allegations in a complaint as true when considering a motion to dismiss, *see id.*, it need not accept

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[11] State Board, *The Rusty Duke Committee Disclosure Report filed May 31, 2006 and Informational Reports filed June 26 (two reports), July 6, Aug. 1, Aug. 30, Sept. 14, Oct. 2, Oct. 16, Oct. 23, Oct. 30 (amended Nov. 1), Nov. 1 & Nov. 3, 2006 (hereinafter "Duke Committee Reports")*, http://www.sboe.state.nc.us/webapps/cf%5Frpt%5Fsearch/cf_report_doc_results.aspx?ID=STA-6B4RRR-C-001&OGID=5546)

[12] *See* State Board, *Rescue Funds: Sarah Parker*, http://www.sboe.state.nc.us/cfrsweb/downloads/forms/2006%20Candidates%20Rescue%20Funds/Sarah%20Parker.pdf.

[13] *See* State Board, *Rescue Funds Status Reports*, http://www.sboe.state.nc.us/newpages/judicial%20public%20financing%20draft.htm

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).

When considering a 12(b)(6) motion to dismiss, a court may take judicial notice of indisputable facts, including matters of public record and exhibits to a complaint. *See Nolte v. Capital One Fin. Corp.*, 390 F.3d 311, 317 (4th Cir. 2004). Judicial notice is particularly appropriate when a party provides the court with the necessary information and requests consideration of 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). Insofar as the motion to dismiss focused on issues of standing, pursuant to Federal Rule of Civil Procedure 12(b)(1), this Court's review is *de novo*. *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005). Similarly, "[w]hen a defendant raises standing as the basis for a motion under Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction, . . . the district court 'may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.'" *Id.* (quoting *Richmond, F. & P. R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)).

SUMMARY OF ARGUMENT

Independence and impartiality are cornerstones of an effective judiciary in a democracy. Any system in which judges are required to run for office, like North Carolina's, presents inherent difficulties for achieving and maintaining the appearance of independence and impartiality because campaign contributors may appear before a judge whose campaign they helped to finance. Responding to such concerns, North Carolina enacted a voluntary public financing program for campaigns for its appellate judicial seats.

While North Carolina's full public funding program was the first in the nation for judicial campaigns, programs that provide public funding to candidates who voluntarily agree to certain restrictions have been upheld and praised 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 & Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996). Courts, recognizing that public financing programs serve significant – even compelling – interests in combating corruption or the appearance thereof and enhancing First Amendment values, have soundly rejected claims that such programs violate the rights of persons who do not participate in the program or who make independent expenditures. Despite the

Fund's laudable goals and the case law rejecting challenges to similar programs, the plaintiffs, a 2006 candidate for judicial office and two political committees, challenge the statutes enacted to create and implement the Fund as violative of their First Amendment rights.

Case law, however, holds to the contrary. The Supreme Court has recognized that a public funding system aims "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. Public financing promotes "uninhibited, robust, and wide-open public debate," *id*. at 93 n.127, 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. The district court upheld North Carolina's statutory scheme for public funding of judicial appellate elections.

This Court should affirm the district court's decision and reject Plaintiffs' attempt to stop North Carolina from ensuring the integrity of its judicial elections. Plaintiffs pursue non-justiciable claims. The organizational plaintiffs lack standing to challenge the provisions applicable to independent entities, because they have failed to allege any facts showing that the Fund has had, or will have, any effect

whatsoever on their behavior. Duke's claims are now moot. He has not properly alleged that he intends to run again for appellate judicial office. Accordingly, this lawsuit does not present a case or controversy capable of generating jurisdiction in federal court.

Even if Plaintiffs' assertions were justiciable, they have failed to state claims for which relief can be granted. They fruitlessly attack the provisions supplying "rescue funds" to candidates who voluntarily accept public financing but face opposition spending in excess of the base subsidy. As several courts have previously held, the rescue fund provisions do not burden speech. In fact, they enhance cherished First Amendment values by ensuring that electoral debates are robust.

Plaintiffs' arguments against the provisions requiring reporting of certain contributions, obligations, and expenditures are similarly groundless. The reporting requirements easily satisfy the "exacting scrutiny" prescribed the Supreme Court, as they are "substantially related" to several compelling state interests. As crucial elements of the Fund, they are especially indispensable in furthering the State's interest in battling actual and apparent corruption in judicial elections.

Finally, Plaintiffs find no success in attacking the district court's dismissal of their claims against the ban on certain contributions in the 21 days leading up to an election. Viewed in the overall context of North Carolina's public financing program, the 21-day prohibition serves to combat corruption by preventing candidates or contributors from circumventing the provision of rescue funds and thereby undermining the overall operation of the Fund.

In light of the numerous defects in Plaintiffs' argument, this Court should affirm the decision below.

ARGUMENT

I. PLAINTIFFS DO NOT PRESENT THE COURT WITH AN ACTUAL CASE OR CONTROVERSY.

Plaintiffs begin their argument by raising questions of jurisdiction, standing and mootness, trying to persuade the Court to entertain their claims. It is appropriate that Plaintiffs have raised these questions because federal courts are courts of limited jurisdiction that can hear only cases that present an actual case or controversy. As this Court has explained:

> Article III of the Constitution limits the jurisdiction of federal courts to cases or controversies. Doctrines like standing, mootness, and ripeness are simply subsets of Article III's command that the courts resolve disputes, rather than emit random advice. *The courts should be especially mindful of this limited role when they are asked to award prospective equitable relief instead of damages for a concrete past*

> *harm*, and a plaintiff's past injury does not necessarily confer standing upon him to enjoin the possibility of future injuries.

Bryant v. Cheney, 924 F.2d 525, 529 (4th Cir. 1991) (emphasis added); *see also McConnell v. FEC*, 540 U.S. 93, 226 (2003) ("A plaintiff seeking injunctive relief must show [that] he is immediately in danger of sustaining some direct injury as [a] result of the challenged conduct") (internal quotation marks and citations omitted).

A. PLAINTIFFS IEPAC AND SPAC LACK STANDING TO PROSECUTE THEIR CAUSES OF ACTION.

Plaintiffs IEPAC and SPAC assert numerous claims against the Fund. These political committees, however, lack standing to prosecute their claims, because they have made no allegations showing that they suffered any injury caused by operation of the Fund. They have therefore failed to make claims this Court has jurisdiction to entertain.

An essential element of the case-or-controversy requirement is a plaintiff's establishment that he has standing to sue. *McConnell*, 540 U.S. at 224-25 (assessing the constitutionality of the Bipartisan Campaign Reform Act of 2002 ("BCRA")). As explained in *McConnell*, the requirements of standing are as follows:

> First, a plaintiff must demonstrate an "injury in fact," which is "concrete," "distinct and palpable," and "actual or imminent."

> Second, a plaintiff must establish "a causal connection between the injury and the conduct complained of – the injury has to be 'fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] some third party not before the court.'" Third, a plaintiff must show the "'substantial likelihood' that the requested relief will remedy the alleged injury in fact."

540 U.S. at 225-26 (citations omitted).

In *McConnell*, the Court held that several sets of plaintiffs lacked standing. First, Senator McConnell lacked standing because the harm he alleged was "too remote temporally" in that it would happen, if at all, five years hence. *Id.* at 226. Likewise, other plaintiffs were found to lack standing because "[t]heir alleged inability to compete stems not from the operation of § 307 [of BCRA], but from their own personal 'wish' not to solicit or accept large contributions, *i.e.*, their personal choice." *Id.* at 228. Finally, certain plaintiffs lacked standing to challenge the "millionaire provisions" in BCRA because none of them was "'a candidate in an election affected by the millionaire provisions – *i.e.*, one in which an opponent chooses to spend the triggering amount of his own funds – and it would be purely 'conjectural' for the court to assume that any plaintiff ever will be.'" *Id.* at 230 (citations omitted).

In a case challenging Arizona's public financing program, the Court of Appeals for the Ninth Circuit recently held that it lacked jurisdiction to adjudicate claims by an organization that asserted in its January 2004 complaint, *inter alia*: 1)

it had previously made independent campaign expenditures; 2) it "desire[d] to make independent campaign expenditures in the upcoming 2004 statewide elections in Arizona;" and 3) it "would have made independent expenditures" in past Arizona elections and "intends to make independent expenditures in Arizona in the future," but "fears" that the public financing program would deprive it of its First and Fourteenth Amendment rights. *Ass'n of Am. Physicians & Surgeons v. Brewer*, 486 F.3d 586, 588 (9th Cir. 2007), *aff'd in part*, *rev'd in part*, No. 05-15630, 2007 U.S. App. Lexis 17003 (9th Cir. July 18, 2007).[14] The organization subsequently stated that "'if the Act was not in place and an election occurred in which [the organization] wished to support or oppose a candidate for office,'" it 'would . . . fully participate in the political process.'" *Id.* The Ninth Circuit determined that it lacked jurisdiction to hear the case because:

> [The organization] has not unequivocally declared that it will set up a new PAC and enter elections in Arizona if it should win this case. Its stated intentions are hypothetical and contingent on the interest it

[14] The current status of the district court's holding in *Brewer* is somewhat unclear. The Ninth Circuit denied the plaintiffs' request for rehearing *en banc*, *see Brewer*, No. 05-15630, Order (9th Cir. July 13, 2007), but five days later, the original panel issued a new order finding that one of the plaintiffs had a surviving claim without disturbing the dismissal of the other plaintiffs' claims, *see Brewer*, No. 05-15630, Order, 2007 U.S. App. LEXIS 17003 (9th Cir. July 18, 2007). Specifically, the court held that one plaintiff had stated a non-moot claim against Arizona Revised Statute § 16-912(A), and it remanded that claim to the district court. That provision requires independent entities expressly advocating in elections to observe certain disclosure requirements – it is not part of Arizona's matching funds program.

> finds in some indefinite time in some conceivable election. The Association is not engaged in a lawsuit where it alleges actual injury.

Id. at 589.[15]

The burden of establishing compliance with standing requirements rests upon the party asserting the claim. *Friends for Ferrell Parkway v. Stasko*, 282 F.3d 315, 320 (4th Cir. 2002). SPAC and IEPAC have failed to meet their burden of demonstrating that either of them has standing to prosecute their claims.

For the same reasons that the courts lacked jurisdiction to hear the claims of some of the plaintiffs in *McConnell* and *Brewer*, this Court lacks jurisdiction to hear SPAC and IEPAC's claims. Like the Arizona plaintiffs, the claims of the PACs in this case are "hypothetical and contingent" because they have no concrete or definite plans to participate in future elections. Plaintiffs repeatedly claim that they will not make certain contributions or independent expenditures because of the challenged statutes, but they nowhere specifically allege that, but for the challenged statutes, they stand ready to make and would in fact make, such contributions or independent expenditures to (or in support of) specific candidates.

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[15] Although the Court technically determined that the organization's claim was moot, rather than lacking in standing, similar considerations drive mootness and standing determinations. Each focuses on whether a plaintiff is in a position to litigate a live case or controversy, but at different points in time. *See United States Parole Comm. v. Geraghty*, 445 U.S. 388, 397 (1980) ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." (quoting Henry Monaghen, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973))).

(*See* J.A. 93-120 ¶¶ 18-109.). While their Complaint is silent in this regard, the public record is not. Reports filed by these two political committees with the State Board demonstrate that neither IEPAC nor SPAC is actually harmed or hindered by the statutes they challenge. (IEPAC Disclosure Reports, *supra* n.7; SPAC Disclosure Reports, *supra* n.9.)

In the Second Amended Complaint, IEPAC alleges that it "intend[ed] to make independent expenditures over $3,000 supporting a nonparticipating candidate," but did not because of the rescue fund provision. (J.A. 108 ¶ 65). But Plaintiffs fail to allege, and publicly available facts disprove, that the rescue fund provisions actually harmed or hindered their speech. Rather, "[t]heir alleged inability to [exercise their rights] stems not from the operation of [the Fund], but from their own personal 'wish' not to [give or spend money], *i.e.*, their personal choice." *See McConnell*, 540 U.S. at 228.

First, IEPAC did not even allege that it had the capacity to give over $5,000 in the 2006 judicial campaign, (*see generally* J.A. 93-120 ¶¶ 18-109), and IEPAC's own publicly available disclosure records show that they never had sufficient funds in its account to make an independent expenditure over $5,000.[16] Moreover, like

[16] *See* IEPAC Disclosure Reports, *supra* n. 8. Contrary to the allegations in Plaintiffs' complaint, independent expenditures must meet a $5,000 threshold, not a $3,000 threshold, before the expenditures are used in calculations to determine whether and for how much rescue funds will be distributed. N.C.G.S. § 163.278.66(a)-

the *Brewer* plaintiffs, IEPAC chose not to make any independent expenditures in 2006 judicial elections. They chose not to do so even though in two out of the three races with non-certified candidates – a race between two non-certified candidates[17] and a race where the non-certified opponent raised far less than enough to trigger rescue funds[18] – IEPAC could have freely spent well over $5,000 without triggering rescue funds. Finally, IEPAC's only reported expenditures, $2,205.18, were disbursed for operating expenses.

Similarly, reports filed by SPAC demonstrate that it is neither harmed nor hindered by the statutes it challenged. Plaintiffs' Complaint simply alleges "SPAC would like to make contributions to a 2006 judicial campaign during the final 21 days" (J.A. 95 ¶ 24), and "as a result and due to" the 21-day provision it will not contribute. But the public record shows that SPAC did not disclose any contributions made to judicial candidates before the 21 days leading up to the election or to any candidate in either the 2002, 2004 or 2006 elections.[19]

163.278.67(a)(1).

[17] State Board, *2006 Candidates,* http://www.sboe.state.nc.us/newpages/judicial%20public%20financing%20draft.htm.

[18] State Board, *Rescue Fund Status: Bob Hunter,* http://www.sboe.state.nc.us-/cfrsweb/downloads/forms/2006%20Candidates%20Rescue%20Funds/BobHunter.pdf.

[19] *See* SPAC Disclosure Reports, *supra* n.9.

Additionally, SPAC did not allege that they had chosen judicial candidates to whom to contribute or that they had sufficient funds to make a contribution.

When considered in light of these facts set forth in the public record, IEPAC and SPAC have failed to demonstrate any actual injury resulting from the challenged statutes, thereby denying this Court of jurisdiction to consider those claims. Accordingly, this Court should affirm the district court's dismissal of Count II in its entirety, Counts III, V and VII with respect to IEPAC, and Count IV with respect to SPAC.

B. PLAINTIFFS' CLAIMS ARE MOOT.

"Federal courts have no power to hear moot cases." *Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006), *cert. denied*, 167 L. Ed. 2d 1090 (U.S. 2007). The Supreme Court has instructed that in order for a claim not to be considered moot, "the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.'" *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (citation omitted). As this Court has explained, "[t]he doctrine of mootness constitutes a part of the constitutional limits of federal court jurisdiction. 'To qualify as a case fit for federal-court adjudication, an actual controversy must be

extant at all stages of review, not merely at the time the complaint is filed.'" *Brooks*, 462 F.3d at 348 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)).

As Plaintiffs note, there is an exception to the mootness doctrine. "A case is not moot, and the exercise of federal jurisdiction may be appropriate . . . if a party can demonstrate that the apparent absence of a live dispute is merely a temporary abeyance of a harm that is 'capable of repetition, yet evading review." *Brooks*, 462 F.3d at 348 (citation omitted). An action is "capable of repetition, yet evading review" when two criteria are met: First, the duration of the challenged action must be too short to be litigated before it terminates, and second, there must be a reasonable expectation that the party will be subject to the challenged action in the future. *Spencer v. Kemna*, 523 U.S. 1, 17 (1998). "[T]he capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *Lyons*, 461 U.S. at 109.

Duke's claims are now moot. Duke was an unsuccessful candidate for the office of Chief Justice of North Carolina in the 2006 general election, an election that is now over. He has not alleged that he will run for appellate judicial office in the future; rather, he alleges only that he would run for office and not seek

certification in 2006. (*See* J.A. 97-118, ¶¶ 28, 59, 77, 96, 101). Thus, there is nothing in the pleadings alleging that Plaintiff Duke may ever again be subject to the provisions governing the Fund, much less at risk of suffering a real or immediate injury or threat of injury as a result of the Fund's provisions. *See Lyons*, 461 U.S. at 101-03.

Plaintiffs' arguments that their claims are not moot because they are "capable of repetition, yet evading review" are unconvincing. In *Brewer*, the Court of Appeals dismissed a gubernatorial candidate's challenges to Arizona's public financing program, similar to Duke's challenges, as moot. 486 F.3d at 588-89. It stated the following:

> Matt Salmon was the Republican candidate for governor of Arizona in the 2002 election. He alleges that he suffered injury in that election by virtue of the Clean Elections Act. He adds that "the unconstitutional nature of the Act creates a situation that is capable of repetition, yet evading review." . . . The gravamen of his action is the asserted unconstitutionality of the Act. He alleges no injury that he is suffering or will suffer. The situation he was in as a candidate for governor may, of course, recur. There is no allegation that he will be a candidate. He is not a spokesman for future candidates for governor. His only allegation is that in 2002 he suffered an injury unspecified in dollars or in actual harm. No current controversy exists.

Id. at 589.

Like the candidate in *Brewer*, Duke falls far short of the "reasonable showing" required by *Lyons* to warrant the rare exception to the constitutionally

mandated mootness doctrine. In fact, Plaintiffs essentially admit as much. In their attempts to show that the mootness exception should apply, Plaintiffs state that "IEPAC, SPAC, and groups like them *can* be subjected to the challenged provision every judicial election cycle and yet be without recourse to change them unless this Court finds it has jurisdiction to hear their claims." (Opening Br. 25 (emphasis added)). They thus fail to even argue that the "*named plaintiff* [] make[s] a reasonable showing that he *will* again be subjected to the alleged illegality." *See Lyons*, 461 U.S. at 109 (emphasis added).

Even if the Court were to find that Plaintiffs SPAC and IEPAC initially had standing, *see* Argument I.A., *supra*, their claims are now moot as well because they make no specific claims that they intend to contribute or make expenditures in the future. (J.A. 95, 100; ¶¶ 24, 38). *See Brewer*, 486 F.3d at 589. As described in the previous subsection, their assertions of harm were too attenuated even for the 2006 election. Those assertions are even more attenuated for future elections. Like Duke, there is no basis for applying the "capable of repetition, yet evading review" exception to their claims. Accordingly, this Court should affirm the dismissal of Count II in its entirety, Counts III, V and VII with respect to IEPAC, and Count IV with respect to SPAC. Accordingly, this Court should affirm the district court's dismissal of Counts I, III, IV, V, VI, and VII.

II. PLAINTIFFS' CLAIMS AGAINST THE RESCUE FUND PROVISIONS WERE PROPERLY DISMISSED FOR FAILURE TO STATE A CONSTITUTIONAL INJURY.

In Counts III, VI and VII of their Complaint, Plaintiffs challenge the constitutionality of Article 22D's rescue fund provisions, North Carolina General Statute section 163-278.67. (J.A. 109-110, ¶¶ 68-72; 114-117, ¶¶ 83-94). The rescue fund provisions ensure that participating candidates – who are otherwise constrained by a spending limit – are not grossly outspent by their opposition. According to Plaintiffs, ensuring that participating candidates are not completely drowned out by wealthy candidates and independent spenders amounts to "punishing" or "penaliz[ing]" plaintiffs and thus has a "chilling effect" on their free speech. (*See e.g.,* J.A. 109-110, ¶¶ 70, 71; 115, ¶ 88, 117, ¶ 94**).**

The district court rejected this argument. (J.A. 212). After emphasizing that the public financing system placed "no direct restriction" on expenditures by candidates and their spouses or independent entities, the district court adopted the reasoning enunciated by the First Circuit in *Daggett.* It held:

> 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 [the court] comfortably to conclude that the provision of matching funds . . . does not create a burden on speakers' First Amendment rights.

(J.A. 203 (quoting *Daggett*, 205 F.3d at 464)).[20] Because the rescue fund provisions place no burden on First Amendment rights, and in fact enhance First Amendment values by supporting a system of speech-promoting public financing, this Court should affirm that holding.

A. THE DISTRICT COURT CORRECTLY FOUND THAT RESCUE FUNDS IMPOSE NO BURDEN ON NON-PARTICIPATING CANDIDATES' FIRST AMENDMENT RIGHTS.

To assess Plaintiffs' constitutional claims, this Court first "review[s] the challenged provision[s] of the statute to determine whether it burdens First Amendment rights, and if it does, whether it is narrowly tailored to serve a compelling state interest." *Daggett*, 205 F.3d at 464.

The Supreme Court has recognized that public financing systems represent a legislative 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. In *Buckley*, 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

[20] The district court largely articulated its reasons for granting the motions to dismiss in its order denying Plaintiffs' motion for a preliminary injunction. (*See* J.A. 193-205).

> 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 (citations omitted). Because public funding for campaigns promotes rather than impairs First Amendment values, *Buckley* did not apply heightened scrutiny to the public financing provisions of the Federal Elections Campaign Act of 1971 ("FECA"), even though the law conditioned participation in the program on acceptance of spending limits. *Id.* at 57 n.65, 85-107. Since the rescue fund provisions, like the provisions assessed in *Buckley*, do not burden the First Amendment rights of non-certified candidates, Plaintiffs have failed to state a claim.

Courts considering the validity of public financing systems have *uniformly* rejected challenges to triggers based on spending by non-participating candidates. *See Daggett*, 205 F.3d at 464; *Rosenstiel*, 101 F.3d at 1553; *Gable v. Patton*, 142 F.3d 940, 947-49 (6th Cir. 1998), and the district court found this unanimous analysis convincing. (J.A. 202-204, 212). The reasoning of those courts is persuasive and should guide analysis of this case.

Rejecting a challenge to matching (or rescue) funds in a review of Maine's Clean Election Act, the First Circuit stated that the complaint about Maine's

triggers "boil[ed] down to a claim of a First Amendment right to outraise and outspend an opponent." *Daggett,* 205 F.3d at 464. The court explained:

> [Plaintiffs] 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.

Id. (internal quotation marks and citations omitted); *see also Ass'n of Am. Physicians and Surgeons v. Brewer*, 363 F. Supp. 2d 1197, 1201-03 (D. Ariz. 2005)(expressly adopting *Daggett*'s reasoning in holding that trigger mechanisms and matching funds provisions based on independent expenditures are constitutionally permissible), *aff'd in part*, *rev'd in part on other grounds*, 2007 U.S. App. Lexis 17003 (9th Cir. July 18, 2007).

Similarly, in *Rosenstiel*, the Eighth Circuit upheld a trigger provision based on non-participating candidate spending against a First Amendment challenge, recognizing that such triggers "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." *Rosenstiel,* 101 F.3d at 1551; *see also id.* at 1552 (noting that Minnesota's public financing program "promotes, rather than detracts from, cherished First Amendment values"). And

following a similar line of analysis, the Sixth Circuit upheld Kentucky's matching funds provision, rejecting a challenger's argument that he suffered a "penalty" because of the provisions operation. *Gable*, 142 F.3d at 947-49.

The analysis followed in those cases applies to North Carolina's program. Plaintiffs admit that the "rescue funds provision does not directly limit the amount that can be spent or contributed to a campaign." (Opening Br. 32). Non-participating candidates are not subject to any expenditure limitations whatsoever. Nonetheless, they argue that the "rescue fund provision is designed to chill and penalize contributions and independent expenditures made on behalf of non-certified candidates." (*Id*.) They claim that a "chilling effect" arises from knowing that their spending will be matched with public funds. (J.A. 110). In essence, Plaintiffs assert that the rescue fund promotes responsive speech that they prefer not be heard, echoing the challengers in *Daggett* and *Gable*. While Plaintiffs prefer a system that essentially guarantees that their own speech smothers competing voices, the Constitution provides no mandate for that preference.

Focusing closely on the specific allegations in Plaintiffs' Complaint, it is clear that they do not even begin to establish a First Amendment violation. While Plaintiffs insist that the provision of rescue funds "penalizes" non-certified candidates, they never explain how the State's method for calibrating the size of

disbursements to a *participating* candidate constitutes a "penalty" to a *non-participating* candidate. They point to no precedent in First Amendment law for characterizing as punitive a system that does not impose any legal sanction on a speaker or even attempt to regulate that speaker's conduct or speech.

Similarly, Plaintiffs' use of familiar First Amendment terminology is simply misplaced; they have failed to explain how a law "chills" speech despite posing no threat of adverse legal action on the allegedly "chilled" speaker. As the Supreme Court has explained, speech may be chilled by "the threat of enforcement of an overbroad law" and this concern is especially weighty where the challenged statute "imposes criminal sanctions." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). *See also Gooding v. Wilson*, 405 U.S. 518, 521 (1972).

No analogous concern exists here. The disbursement of rescue funds inflicts no sanction on Plaintiffs, no matter how much money they spend. Faced with no threat of adverse legal action, Plaintiffs instead complain that the disbursement of rescue funds may amplify competing messages they would prefer to drown out. While that may affect their electoral strategy, it does not, as a matter of First Amendment law, constitute a "chilling" of protected speech.[21]

[21] There is no doubt, of course, that a First Amendment burden may exist when government action indirectly "entail[s] the likelihood of a substantial *restraint* upon the exercise" of protected expression by private actors. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (emphasis added). That risk is not alleged

Not only do Plaintiffs' arguments find no basis in constitutional law, but, if adopted, they would categorically prohibit a state from calibrating a public financing system to meet electoral realities, requiring instead that states fund all participating candidates at the upper limit of an election's potential cost. While Plaintiffs argue that the rescue funds 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 fund-raising 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 as the rescue funds. 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.

Accordingly, the district court's ruling that the rescue fund enhanced speech, not hindered it, was firmly grounded in First Amendment law, and should be affirmed.

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here.

B. PROVIDING RESCUE FUNDS BASED ON INDEPENDENT EXPENDITURES DOES NOT VIOLATE THE RIGHTS OF ENTITIES MAKING INDEPENDENT EXPENDITURES.

The district court also rejected Plaintiffs' assertions in Counts II and III that the rescue fund provisions violate the First Amendment rights of independent entities supporting non-participating candidates. Plaintiffs allege in their Complaint that the rescue funds "punish[] those entities like Plaintiff NCRTL-IEPAC, who intend to make independent expenditures over $3,000 supporting a nonparticipating candidate" and impose a "chilling effect" on their speech. (J.A. 108-109).

Even if Plaintiffs IEPAC and SPAC had standing to challenge the alleged effects of the rescue fund provisions on independent spenders, *see* Argument I.A, *supra*, that challenge fails to state a claim for the same reasons it fails with respect to non-participating candidates. Rescue funds based on independent spending, like those based on non-participating candidate spending, enhance First Amendment values. *See* Argument II.A, *supra*. Accordingly, the rescue fund provisions do not burden the rights of entities making independent expenditures.

For the same reasons that they have found that matching funds based on opposing candidate spending does not burden First Amendment rights of those opposing candidates, courts have consistently held that the distribution of matching

funds based on independent spending does not inflict a constitutional harm. *See Daggett*, 205 F.3d at 464; *Brewer*, 363 F. Supp. 2d at 1201-03. The district court in this case adopted the reasoning of *Daggett* and *Brewer* and dismissed Plaintiffs' claim that the trigger of rescue funds by independent spenders violates those spenders' rights. (J.A. 202-204, 212).

Plaintiffs urge this Court to rely on *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), as an analytic framework for invalidating the rescue fund provision. (Opening Br. 31). However, the Eighth Circuit's reasoning in *Rosenstiel* – which upheld a provision releasing publicly funded candidates from an expenditure limit when non-participating candidates exceeded a spending threshold – casts doubt on the continuing validity of its earlier decision in *Day*. 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 triggers 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 spending triggered matching funds burdened the speaker's First Amendment rights. . . . [T]he continuing vitality of *Day* is open to question.

Daggett, 205 F.3d at 464 n.25;[22] *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, and their trigger and matching funds provisions, promote First Amendment values, *see supra*, Argument II.A., this Court should likewise reject *Day*'s superseded and discredited logic.[23]

In addition to their "chilling" arguments, Plaintiffs proffer two reasons for adopting the rationale of *Day* as a means of invalidating the rescue fund. First, Plaintiffs contend that rescue funds cannot be defended as promoting responsive speech, because it is impossible to predict whether a disbursement of rescue funds will fuel a direct response to the triggering expenditures. But the premise of this

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[22] Plaintiffs attempt to minimize the Eighth Circuit's departure from *Day*, suggesting that because *Rosenstiel* dealt with a provision releasing candidates from expenditure limits, rather than supplying rescue funds, *Day*'s significance is undiminished. (Opening Br. 30-31). This distinction carries no weight. Releasing a candidate from spending limits surely has the potential to amplify that candidate's speech, against the wishes of entities spending money to defeat the candidate, just like rescue funds. The source of the additional funds for the participating candidate is immaterial.

[23] Even if this Court found the reasoning in *Day* persuasive, that would not end the analysis. In *Day*, the court first found a burden on First Amendment rights, and then went on to find that the challenged provisions were not narrowly tailored. *Day*, 34 F.3d at 1361. For reasons discussed in Argument II.C, *infra*, the reservations the Eighth Circuit expressed about the tailoring of Minnesota's matching funds do not apply to North Carolina's system.

argument is faulty: money is fungible, and particular campaign expenditures serve multiple purposes, so there is never any way to tell whether "the certified candidate spend[s] a government contribution responding to the candidate or group that caused the contribution." (Opening Br. 31).

Plaintiffs' second argument is that there is no guarantee that a triggering expenditure is adverse to a certified candidate's interest, especially in the context of a three-way race. For one thing, there will never be a three-way race in the general election, because in North Carolina's non-partisan judicial elections only the top two candidates from the primary ultimately compete. *See* N.C.G.S. § 163-322. Even if this hypothetical situation arose in a primary – and plaintiffs have alleged no facts establishing that it will – the disbursement of rescue funds still does nothing to regulate the speech of those making independent expenditures, whether or not those funds fuel a direct response to the triggering expenditure.

Consistent with the decisions in *Daggett* and *Brewer*, as well the district court below, this Court should find that the rescue fund provisions do not burden speech, but rather are mechanisms through which the State of North Carolina furthers the functionality of the Fund, thus expanding the range and quality of campaign and political discourse. Consequently, this Court should affirm the district court's dismissal of Counts II and III in their entirety.

C. THE RESCUE FUND PROVISIONS ARE NARROWLY TAILORED TO SERVE A COMPELLING STATE INTEREST.

Since the provision of rescue funds to certified candidates does not burden the First Amendment rights of non-certified candidates or entities making independent expenditures, no further inquiry is necessary. Even if strict scrutiny applied to the rescue funds, however, the statute would survive. *Day* provides no contrary authority on this point. In *Day*, the challenged trigger was held invalid only because the court questioned the state's compelling interest. Minnesota had argued that the matching funds provision was necessary to encourage participation in the state's public financing program. Because participation rates were nearly 100 percent even before enactment of the matching funds provisions, however, the Eighth Circuit found that argument unpersuasive. *Day*, 34 F.3d at 1361. But if a trigger is an integral part of the state's public funding system, it survives First Amendment scrutiny. *See Rosenstiel*, 101 F.3d at 1555. Rescue funds are an integral part of North Carolina's system, because without them, the risk of being drowned out by a non-certified opponent would render participation implausible. Viewed in the context of the public financing system as a whole, the rescue fund provides crucial support to ensure that a system of voluntary participation remains viable. It is therefore narrowly tailored to serve the State's compelling interest in combating actual and apparent corruption in its judicial elections.

States have a compelling interest in curbing corruption, and the appearance of corruption, that results when official acts are linked to private money, and courts have lauded public financing as a means of safeguarding that interest. A public financing system serves the same interest as contribution limits, *i.e.*, combating "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 marks 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, 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)).[24]

[24] Public funding systems also foster First Amendment interests by freeing candidates from the rigors of fund-raising 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."); *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 v. DiStefano*,4 F.3d 26, 39 (1st Cir. 1993) (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).

To have a viable system of public financing, the State must provide participants with some assurance that accepting the restrictions attached to public subsidies will not make it impossible for them to compete.

Plaintiffs' central error is in attacking the interests served by individual disbursements, whereas the proper analysis focuses on the interests served by preserving an effective system of public financing. Each of Plaintiffs' arguments, however, divorces particular elements of the system from the larger system of public financing it supports. (Opening Br. 34-35).

Similarly, their contention that rescue funds are unnecessary because the State already imposes contribution limits is unpersuasive. The fact that North Carolina uses contribution limits as one tool to battle corruption hardly precludes it from adding the even more powerful tool of public financing to its arsenal. In *Buckley*, the Court upheld a statute that imposed contribution limits, as well as public financing, and it highlighted the salutary effects of the latter. 424 U.S. at 92-93.[25]

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[25] As participation rates in the presidential public financing program demonstrate, the benefits of a public financing program cannot be realized if the grants are not comparable to the cost of relevant races and, as a result, no one participates. *See* 2007 Op. Fed. Election Comm'n No. 3 (Mar. 1, 2007), *available at* http://saos.nictusa.com/aodocs/2007-03.pdf ("Press reports indicate that certain candidates and potential candidates for the 2008 presidential election have decided that, if they become their parties' nominees, they will choose not to receive public funds in the general election . . . ."); Campaign Finance Inst. Task Force on Financing

Finally, Plaintiffs content that "the rescue funds provision [cannot] be justified as a way of achieving 'fairness' or 'equality.'" (Opening Br. 35). But the State has never claimed that the purpose of the Fund is to equalize the absolute dollar amount spent on behalf of each judicial candidate. Instead, the State has set out to create a system of voluntary public funding that is attractive but not mandatory and expands participation in the electoral process. By constructing a "choice-increasing framework," North Carolina has created a system where "candidates will presumably select the option that they feel is most advantageous to their candidacy," and this dynamic "promotes, rather than detracts from, cherished First Amendment values." *Rosenstiel*, 101 F.3d at 1552.

III. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' CLAIMS THAT THE FUND'S REPORTING REQUIREMENTS VIOLATE THE FIRST AMENDMENT BECAUSE THOSE CLAIMS HAVE BEEN ABANDONED AND ARE BASELESS AS A MATTER OF LAW.

A. PLAINTIFFS ABANDONED IN THE DISTRICT COURT THEIR FACIAL CHALLENGE TO THE REPORTING REQUIREMENTS.

Plaintiffs abandoned in the district court any facial challenge they originally made to the Fund's reporting requirements. Once a claim has been abandoned in the district court, it cannot be revived upon appeal. *Parnell v. Supreme Court of*

Presidential Nominations, So the Voters May Choose 2-3 (2005), available at http://cfinst.org/president/pdf/VotersChoose.pdf (documenting overwhelming participation of presidential candidates from 1976-2004 in public financing program).

Appeals of W. Va., 110 F.3d 1077, 1082 (4th Cir. 1997) ("Although the issue has been briefed on appeal to us, we decline to consider it because it was abandoned when the merits of the case were litigated in district court."); *Imperial v. Suburban Hosp. Assoc.*, 37 F.3d 1026, 1031 (4th Cir. 1994) ("[Plaintiff's] effort to preserve on appeal an initial claim for injunctive relief, after abandoning it below, cannot succeed"). Accordingly, Plaintiffs may not now pursue a facial challenge to the Fund's reporting requirements, as they have attempted to do in Argument II.B. of their Opening Brief.

Although Plaintiffs appeared to state a facial challenge to the Fund's reporting requirements in their Second Amended Complaint,[26] they subsequently made clear they were challenging the Fund's reporting requirements only as applied. In fact, Plaintiffs conceded that a facial challenge to the Fund's reporting requirements, N.C.G.S. § 163-278.66(a), fails to state a claim. Plaintiffs stated the following in their brief opposing Defendants' motions to dismiss:

> 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.

[26] Counts I and II of plaintiffs' Second Amended Complaint conclude with plaintiffs explicitly asking the district court to "[d]eclare 163-278.66(a) facially unconstitutional and as applied." (J.A. 106-07 ¶ 61; J.A. 108-09 ¶ 67).

(Resp. Opp'n Mot. Dismiss, Docket No. 77, at 8-9 (emphasis added)).[27] Having abandoned a challenge to N.C.G.S. § 163-278.66(a) on its face in the district court, Plaintiffs may not now revive that challenge on appeal. *See Parnell*, 110 F.3d at 1082; *Imperial*, 37 F.3d at 1031.

B. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS' FACIAL CHALLENGE TO THE FUND'S REPORTING REQUIREMENTS FAILS AS A MATTER OF LAW.

Even if Plaintiffs had not abandoned their facial challenge to the Fund's reporting requirements, the district court correctly dismissed those challenges for failure to state a claim. (J.A. 193-200, 212). As Plaintiffs previously acknowledged (Docket No. 77 at 8-9), a facial challenge to the reporting requirements is foreclosed by *Buckley* and *McConnell*. The Court in *McConnell* held that *Buckley* foreclosed a facial challenge to the reporting provisions of BCRA, which required 24-hour disclosure of persons contributing $1,000 or more to PACs or individual spending, or obligating to spend, more than a threshold amount in a calendar year on electioneering communications. *McConnell*, 540 U.S. at 194-97.

[27] This document is not included in the Joint Appendix because Defendants did not anticipate that Plaintiffs would try to resurrect a claim that they earlier abandoned.

As the district court held (J.A. 195-96) and Plaintiffs acknowledge (Opening Br. 51), the three substantial state interests advanced by reporting requirements are as follows: "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. *McConnell*, 540 U.S. at 196; *see also Buckley*, 424 U.S. at 66-68. As recognized in *Buckley*, the interests promoted by reporting requirements may vary from one application to another. For example, while reports from contributors may do more to curb corruption than do reports from independent expenditures, the interest in informing voters is prominently served by the latter because reports from independent spenders assist in defining a candidate's constituents. *Buckley*, 424 U.S. at 81. This is particularly applicable to the non-partisan judicial races in North Carolina, and therefore to the Fund, because voters do not have a party label with which to guage the range of philosophies a candidate may represent. *See id.* at 70.

In Counts I, II, and V, Plaintiffs allege that the Fund's reporting requirements violate the First and Fourteenth Amendments, because the required reporting is too burdensome, and because reporting is required after expenditures have been obligated, rather than actually spent. (J.A. 108-109, 113-114 ¶¶ 60-61, 66-67, 80-81). But Plaintiffs rely on three faulty premises in arguing that the

Fund's reporting requirements are unconstitutional. First, they misunderstand the reporting provisions' requirements. Second, they mistate the proper standard of review. Finally, they suggest that the reporting requirements should be scrutinized separately for each state interest they support, again in contrast to Supreme Court precedent. *Buckley* and *McConnell* dispose of Plaintiffs' arguments.

1. Plaintiffs' Assertions That the Fund's Reporting Requirements Are Overly Burdensome and Require Duplicative Reporting Are Based on Misreadings of the Law.

Plaintiffs' facial attacks on the Fund's reporting requirements are built upon multiple misunderstandings of the reporting provision. The reporting provision requires non-participating candidates with certified opponents to file an initial report within 24 hours after their campaign spends or receives funds in excess of 80% of the rescue fund trigger. Entities making independent expenditures must file the initial report within 24 hours of expending over $5,000. N.C.G.S. § 163-278.66(a). The statute requires only that the *initial* report be filed within 24 hours, and further provides that "the schedule . . . for reports required by this subsection shall be made according to procedures developed by the Board." N.C.G.S. § 163-278.66(a). Further, after the initial report, the statute requires non-participating candidates and entities to file according to the schedule adopted by the State Board

only when they spend or receive an additional amount in excess of $1,000, N.C.G.S. § 163-278.66(a), not, as Plaintiffs' imply, whenever *aggregate* expenditures, obligations, contributions or loans reach $1,000. (Opening Br. 45-46).

Plaintiffs wrongly assert that the reporting requirements may require non-certified candidates to file up to 40 and 121 separate reports during the primary and general election periods respectively, and may require independent entities "to file reports on every day of the campaign." (Opening Br. 38). This argument is clearly, but inaccurately, premised on the assumption that the initial 24-hour reporting requirement continues after the first report is filed. In fact, in the case of Duke's candidate committee, disclosure filings available on the State Board's website show that Duke filed a total of 13 reports to comply with this provision – eight such reports on or about the dates set by the State Board and five other reports before August 22. *See* Duke Committee Reports, *supra* n.11.

Moreover, Plaintiffs claim that the reporting burden is "almost entirely one sided" because certified candidates need to file only a single report during the primary and again during the general election. (Opening Br. 42). This is simply untrue. Certified candidates, like all other candidates and political committees, are required to submit quarterly reports to the State Board. *See* N.C.G.S. § 183-278.9.

While it is true that certified candidates and entities making independent expenditures are not subject to the expedited reporting requirements under N.C.G.S. § 163-278.66(a), they still must comply with North Carolina's general campaign finance provisions required of all candidates and political committees. *See generally*, N.C.G.S. § 163-278.5 *et seq*.

Similarly, contrary to Plaintiffs' assertions, the Fund does not require repeated reporting of the same contribution or expenditure. (Opening Br. 16-17, 43). While the Fund requires reporting of contributions received and expenditures made, that requirement pertains to two separate occurrences and is no different than reporting requirements in all campaign finance programs, including those in North Carolina outside of the Fund. *See* N.C.G.S. § 163-278.9**.**

2. The Fund's Reporting Requirements Are Subject to Exacting Scrutiny and a Rationality Test.

The Supreme Court has stated that disclosure requirements generally do not impose a serious infringement on First Amendment rights and are the "least restrictive means of curbing the evils of campaign ignorance and corruption." *Buckley*, 424 U.S. at 68. Accordingly, as recognized by the district court (J.A. 195) and by Plaintiffs, reporting requirements are subject to "exacting scrutiny," which requires there to be a "'relevant correlation' or 'substantial relation' between the

governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. at 64. The Supreme Court has held that three government interests inherent in campaign finance reporting requirements – combating corruption, informing voters, and enforcing substantive campaign finance provisions – outweigh any possible infringement and pass such scrutiny because the "free functioning of our national institutions" are involved. *Id.* at 66.

A considerable part of Plaintiffs' argument as to why the Fund's reporting requirements are unconstitutional is premised on their claim that the reporting requirements are not narrowly tailored. A "narrowly tailored" assessment, however, is *not* part of the relevant exacting scrutiny standard. In fact, such scrutiny was explicitly rejected by the Court in *Buckley*. *See id* at 83-84. The Court held that line-drawing as to the particulars for reporting requirements was "necessarily a judgmental decision" best left to legislative discretion. *Id.* at 83. The Court explained that because reporting requirements serve several goals, Congress could not be required to set a threshold for reporting that is tailored only to one or two of those goals. *Id.* It further held that the enforcement goal could *never* be well served if the threshold for reporting were set at the point that disclosure would only reveal evidence of a law violation. *Id.* at 83-84.

Accordingly, reporting requirements should be struck down only if the particulars of the provisions are "wholly without rationality." *Id.* at 83.

3. The Fund's Reporting Requirements Satisfy the Applicable Standard of Review.

a. The Reporting Provisions Rationally Further Several State Interests.

Plaintiffs admit that, like the reporting requirements at issue in *Buckley* and *McConnell*, the Fund's reporting requirements further all three recognized state interests.[28] (Opening Br. 51). The required reporting informs the electorate of where campaign money is coming from and where it is spent in order to assist voters in evaluating judicial candidates before the election. It also helps voters learn more about the candidates' philosophies, since North Carolina judicial elections are nonpartisan. *See Buckley*, 424 U.S. at 66-67. Moreover, such information deters actual and apparent corruption by exposing large contributions and expenditures, and helps the electorate to evaluate post-election judicial action. *See id.* at 67. Finally, as Plaintiffs acknowledge, the reporting requirements "assist the Board in implementing the rescue fund" (J.A. 106, 108 ¶¶ 60, 66), a sufficient

[28] Plaintiffs claim that the reporting requirements are unconstitutional not because they do not further sufficient state interests, but because they are not separately narrowly tailored to meet each of the several goals they advance.

state interest explicitly endorsed in *Daggett*, 205 F.3d at 466. *See also McConnell*, 540 U.S. at 196; *Buckley*, 424 U.S. at 68.

The Fund's reporting requirements are rationally set up to further those three goals. For informational and corruption-deterring purposes, North Carolina, separately from the Fund, requires reporting of contributions and expenditures for *all* candidates and independent spenders over a certain threshold. To help administer the Fund, including the distribution of rescue funds, and to further the anti-corruption and informational interests involved when a candidate raises private contributions, the statute requires additional reporting for candidates not participating in the program and for those independent entities' spending in such races for or against a participating candidate or in favor of a non-participating candidate.[29] The statute also requires reporting at 80% of the trigger to make sure rescue funds can be issued promptly, and requires the reporting of contributions, obligations to spend, and expenditures because all of those actions factor into the trigger of rescue funds.

The Fund's required reporting is not overly burdensome. As shown above, the Fund requires 24-hour reporting only after the *first* trigger is met.

[29] Plaintiffs note that such reporting is not required for independent spending in opposition to non-participating candidates. (Opening Br. 42). This reporting distinction makes sense because such reporting is unnecessary to implement the Fund.

Subsequently, reporters are subject to an expedited reporting schedule, which, in the 2006 election, resulted in eight reporting dates for Duke over the course of a three-month period. That is a far cry from Plaintiffs' hyperbolic claim that the Fund requires 161 reports; it is an extremely light reporting schedule compared to the continuous 24-hour reporting requirements held constitutional in *McConnell*. In *McConnell*, the Supreme Court upheld 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 for electioneering communications exceed a threshold amount. *McConnell*, 540 U.S. at 194-97.[30]

The Fund does not require reporting beyond what is necessary to effectuate the Fund's purposes. First, Plaintiffs' conclusion that "a candidate could be required to report the same $1,000 three separate times" is inaccurate. (Opening Br. 43) Plaintiffs illogically treat a contribution and a subsequent expenditure as if they are "the same" event. *See* Argument III.B.1, *supra* at 46. Second, North Carolina reasonably concluded that both obligations and expenditures should be

[30] It is also a far cry from the 24-hour reporting requirement at all times that the court in *Citizens for Responsible Gov't PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000), found to be "patently unreasonable," *id.* at 1197, and which Plaintiffs cite in support of their claim. (J.A. 108 ¶ 67). Moreover, that opinion, issued prior to *McConnell,* did not assess reporting provisions that served a public financing program.

reported. As the Supreme Court has noted, requiring reporting of obligations made in advance of actual payment is an important loophole-closing device; without it, campaigns and independent entities could skirt the expedited reporting requirements by obligating funds while waiting to disburse funds until after the election. *McConnell*, 540 U.S. at 201. Requiring reports of ultimate expenditures keeps the flow of information from becoming muddled in the event that not all obligations actually mature into expenditures. The structure of the reporting requirements is thus tightly connected to the State's overriding interests.

Accordingly, as in *Buckley*, it cannot be said that the Funds' reporting requirements, in their efforts to further three state interests, are "wholly without rationality." *See Buckley*, 424 U.S. at 83. Rather, they are a "reasonable and minimally restrictive method of furthering First Amendment values." *Id.* at 82. This Court should affirm the district court's dismissal of Counts I, II and V.[31]

b. Plaintiffs' Analysis is Inapposite.

Although Plaintiffs acknowledge that the appropriate standard of review for a challenged reporting requirement is exacting scrutiny, and not strict scrutiny, they

[31] Plaintiffs have not alleged any facts that demonstrate a burden that follows from including both obligations and expenditures in the reporting provision. In fact, publicly available records show that Plaintiff Duke and entities making independent expenditures during 2006 judicial elections did not report any obligations during the 2006 campaign. *See* Duke Committee Reports, *supra* n.11.

nonetheless proceed to argue that the reporting requirements must be "narrowly tailored to further a compelling government interest." (Opening Br. 39). They go on to suggest a number of reasons why, under the narrowly tailored standard, the reporting requirements fail because they are "overinclusive" or "underinclusive" with respect to the interests identified by the district court. These arguments attempt to inject a standard of review that is wholly inapposite. Plaintiffs compound this misapplication of the law by arguing, contrary to the directives in *Buckley*, that each particular aspect of the reporting requirements must be equally suited to serve each state interest.

Plaintiffs try to demonstrate a mismatch between the State's interests and the mechanisms used to achieve them by picking apart the various elements of the reporting provision and then arguing that the chosen provision, standing alone, does too much or too little. This mode of analysis diverges sharply from the Supreme Court's treatment of reporting requirements. Significantly, in *Buckley*, while the Court identified three discrete governmental interests furthered by the challenged provisions, it upheld the reporting requirements as generally supportive of those interests. *Buckley*, 424 U.S. at 64-85; *see also Daggett*, 205 F.3d at 466.. In contrast to Plaintiffs' proposed approach, it did not attempt to justify each

provision as facilitating a particular goal. *See Buckley*, 424 U.S. at 83; *Daggett*, 205 F.3d at 466..

Indeed, Plaintiffs' analysis lacks consistency. For example, at one point they insist that the reporting provisions would be "less burdensome" if they required candidates "to make one-time reports when they have received, obligated, or expended, for example, 90%, 95%, or 98% of the trigger amount, or to require $1,000 reports only after they reach the higher percentage." (Opening Br. 42-43). Later, however, they characterize the reporting requirement as "underinclusive," suggesting that "[a] contribution is no less likely to have a corrupting influence on candidates who do not end up raising 80% of the trigger amount than do candidates who do." (Opening Br. 45). Similarly, they complain that the provisions are underinclusive because "[r]eporting is not required . . . for independent expenditures made in opposition to a candidate opposing a certified candidate" (Opening Br. 40-41), while simultaneously attacking the provisions as overinclusive for requiring the reporting of independent expenditures in support of certified candidates. (Opening Br. 48-49). Under Plaintiffs' proposed analytic framework, the more goals a program can further, the *less* likely it is to be constitutional, for the less likely it is that each provision can be narrowly tailored to achieve each goal.

Finally, Plaintiffs argue that the reporting requirements must be facially invalidated because they are overbroad. Not only is such relief extraordinary, but Plaintiffs fail here even to state a colorable overbreadth claim.

In some cases, an overbroad statute may be facially enjoined "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Application of this remedy, as the Supreme Court has stated, is "strong medicine," and as a result, "particularly where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id. See also Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1081 (4th Cir. 2006) ("'[A] law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications.'") (quoting *New York v. Ferber*, 458 U.S. 747, 771 (1982)) (alterations in original).

Plaintiffs' have not come close to establishing that the "strong medicine" of a facial invalidation on the basis of overbreadth is warranted. Their overbreadth argument does little more than reiterate their "narrow tailoring" arguments, discussed *supra*, contending that N.C.G.S. § 163-278.66(a) falls short because it requires candidates to report obligations (even though some obligations may not

mature into actual expenditures), and forces independent entities to "report . . . expenditures twice." (Opening Br. 51-52). As already noted *supra*, this argument is factually wrong. But even if Plaintiffs were right about these facts, any added burden, when "judged in relation to the statute's plainly legitimate sweep," *Broadrick*, 413 U.S. at 615, is clearly not "substantial" enough to justify facial invalidation.

C. PLAINTIFFS' AS-APPLIED CHALLENGE TO THE FUND'S REPORTING REQUIREMENTS FAILS AS A MATTER OF LAW.

This Court should also affirm the district court's dismissal of Plaintiffs' as-applied challenge to the reporting requirements for failure to state a claim. Plaintiffs did not sufficiently plead an as-applied challenge. "While a complaint attacked by a Rule 12(b)(6) motion . . . does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 167 L. Ed. 2d 929, 940 (U.S. 2007) (citations omitted). *See also Papasan*, 478 U.S. at 286 (stating that court is not bound to accept legal conclusions couched as factual allegations); *Revene*, 882 F.2d at 873 (explaining that unsupported legal allegations may warrant dismissal); *United Black Firefighters*, 604 F.2d at 847 (holding that court need not accept conclusory factual allegations devoid of any reference to actual

events). This is particularly the case with respect to 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 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*, 9 Cal. 4th 1069, 1084, 892 P.2d 1145, 1152 (Cal. 1995).

The Supreme Court recently clarified that in order to survive a motion to dismiss for failure to state a claim, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 167 L. Ed. 2d at 949. Accordingly, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 940.

Plaintiffs failed to allege sufficient facts to state a claim for an as-applied challenge to the reporting requirements that is plausible on its face. Nowhere do they allege *any* specific facts about why N.C.G.S. § 163-278.66(a) – which they admit is facially constitutional – would be overly burdensome or otherwise unconstitutional when applied to them. (J.A. 100-102, ¶¶ 39-45; 105-108, ¶¶ 56-67). In fact, most of Plaintiffs' allegations regarding the reporting requirements

do not *mention* plaintiffs.[32] (*See, e.g.,* J.A. 106, 109 ¶¶ 61, 67 ("[T]he 24-hour reporting requirement is 'patently unreasonable' and is not narrowly tailored")).

In sum, Plaintiffs failed to allege any factual predicate for their as-applied challenge to the Fund's reporting requirements. Accordingly, as in *Twombly*, "[b]ecause the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly*, 167 L. Ed. 2d at 949. *See also Ridge at Red Hawk, LLC v. Schneider*, No. 06-4162, 2007 U.S. App. LEXIS 16204, at *10 (10th Cir. July 9, 2007) (explaining that *Twombly* instructed that "the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims"). This Court therefore should affirm the district court's dismissal in their entirety of Counts I and II of Plaintiffs' Second Amended Complaint.

[32] 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 Fund "punish[es] those entities like Plaintiff NCRTL-IEPAC"). (J.A. 106, 108, ¶¶ 59, 65).

IV. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' CLAIM THAT THE PROHIBITION ON CONTRIBUTIONS WITHIN 21 DAYS OF THE GENERAL ELECTION IS UNCONSTITUTIONAL.

The Fund prohibits any non-participating candidate from accepting, and any contributor from making to such candidate, "a contribution during the period beginning 21 days before the day of the general election and ending the day after the general election if that contribution causes the candidate to exceed the 'trigger for rescue funds' defined in G.S. 163-278.62(18)." N.C.G.S. § 163-278.13(e2)(3) (as amended by 2006 N.C. Sess. Laws 192, § 16). The statute further makes clear that it does not prohibit "a candidate or the spouse of that candidate from making a contribution or loan secured entirely by that individual's assets to that candidate's own campaign." *Id*. Nevertheless, Plaintiffs allege that this provision violates their First Amendment rights "to engage in political speech and to associate." (J.A. 139, ¶ 78). The district court properly rejected this contention and dismissed this claim.

In *Buckley*, the Supreme Court drew a distinct line between the constitutional treatment of contribution restrictions contained in FECA (which the court upheld) and the expenditure restrictions in FECA (which the court struck down). *Buckley*, 424 U.S. at 19-21. As the Court explained, a restriction on campaign contributions "does not in any way infringe the contributor's freedom to

discuss candidates and issues." *Id.* at 21. In light of their limited impact on First Amendment freedoms and the importance of the governmental interests at stake, the Supreme Court has emphasized that, when analyzing contribution restrictions, "there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny.'" *McConnell*, 540 U.S. at 137 (internal quotation marks and citation omitted). Instead, "a contribution limit involving even 'significant interference' with associational rights is nevertheless valid if it satisfies the 'lesser demand' of being 'closely drawn' to match a 'sufficiently important interest.'" *Id*. at 136 (internal quotation marks and citation omitted). In applying this "less rigorous standard of review," the Supreme Court has also emphasized that the courts must show "proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise." *Id*. at 137.

Plaintiffs, however, argue that the prohibition on contributions to non-certified candidates during the 21 days immediately prior to the general election does not, in and of itself, serve an interest in preventing corruption or its appearance.[33] Again, Plaintiffs' argument betrays a fundamental misunderstanding of the Fund and the role of the 21-day prohibition in the Fund's operation.

[33] The one case cited by Plaintiffs to support their argument that this "sufficiently important interest" is not adequate to support the 21-day prohibition – *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) – considered a limit on the *amount* of contributions, and says nothing about the *timing* of contributions.

The 21-day prohibition cannot be considered as a stand-alone provision. Rather, it is an integral part of the Fund's overall objective of ensuring electoral integrity. The intent of the 21-day prohibition is "to make meaningful the provisions" of the Fund, which in turn are geared towards "ensur[ing] the fairness of democratic elections in North Carolina and [] protect[ing] 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 elections" to appellate judicial office. N.C.G.S. § 163-278.61. Accordingly, the district court properly found that the 21-day prohibition serves an important – indeed a compelling – governmental interest.

Likewise, the 21-day prohibition is sufficiently tailored to advance that interest. In *Gable*, 142 F.3d 940, the Sixth Circuit considered a statutory prohibition on contributions immediately prior to an election quite similar to North Carolina's. Kentucky's Public Financing Campaign Act provided that, with limited exceptions, "No slate of candidates for Governor and Lieutenant Governor shall knowingly accept any other campaign contribution during the twenty-eight (28) days immediately preceding a primary or regular election and during the fourteen (14) days immediately preceding a runoff primary." KY. REV. STAT. ANN. § 121A.030(5) (repealed 2005). The Court of Appeals upheld the constitutionality of the 28-day ban, stating that this modest restriction was "justified by Kentucky's

interest in combating corruption." *Gable*, 142 F.3d at 951. The district court here similarly and properly held that N.C.G.S. § 163-278.13(e2)(3) is "narrowly tailored to advance North Carolina's interest." (J.A. 202, 212).

The 21-day prohibition on contributions in N.C.G.S. § 163-278.13(e2) serves the same purpose as the 28-day prohibition considered in *Gable* – to combat corruption by preventing candidates or contributors from being able to defeat the clear and compelling public policy purposes of the Fund in general and its trigger and rescue fund provisions in particular. It is also more closely drawn than the Kentucky law. Accordingly, the provision challenged by Plaintiffs is constitutional and this Court should affirm the dismissal of Count IV of Plaintiffs' Second Amended Complaint.

CONCLUSION

For the foregoing reasons, Defendants respectfully pray that this Court affirm the trial court's dismissal of this action.

REQUEST FOR ORAL ARGUMENT

Oral argument is hereby requested.

Respectfully submitted, this the 6th day of August, 2007.

Counsel for Defendants

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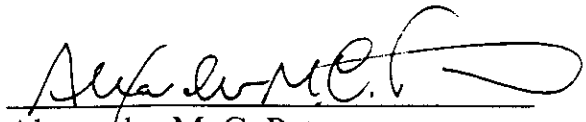

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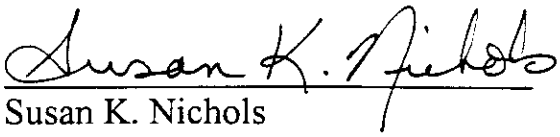

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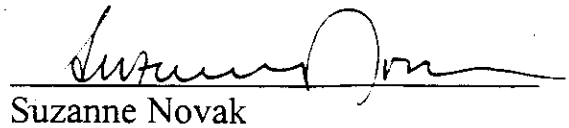

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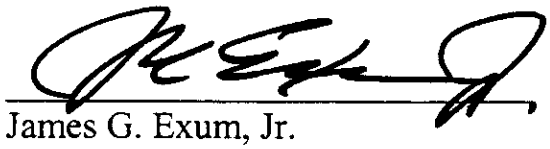

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1454 **Caption:** Duke v. Leake, et al.

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(s) Susan K. Nichols

Attorney for Defendants-Appellees

Dated: 8/6/07

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing **APPELLEES' ANSWERING BRIEF** upon Plaintiffs-Appellants via Federal Express addressed as follows:

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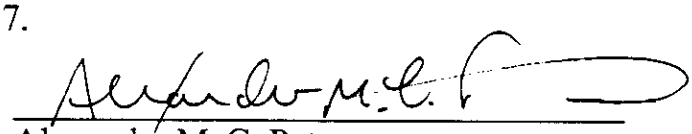
I further certify and pursuant to Local Rule 31(c), that I caused the foregoing to be filed with the Clerk of the Court of Appeals by placing a copy of same in the United States Mail, first class postage prepaid, addressed as follows:

Patricia S. Connor, Clerk
U.S. Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

This the 6th day of August, 2007.



Alexander McC. Peters
Special Deputy Attorney General

ADDENDUM

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

HOUSE BILL 1828
RATIFIED BILL

AN ACT TO STRENGTHEN THE MATCHING FUNDS PROVISION OF THE JUDICIAL PUBLIC CAMPAIGN ACT; AND TO APPROPRIATE FUNDS FOR IMPLEMENTATION.

The General Assembly of North Carolina enacts:

SECTION 1.(a) G.S. 163-278.66 reads as rewritten:

"**§ 163-278.66. Reporting requirements.**

(a) Reporting by Noncertified Candidates and Independent Expenditure Entities. – Any noncertified candidate with a certified opponent shall report total income, expenses, and obligations to the Board by facsimile machine or electronically within 24 hours after the total amount of campaign expenditures or obligations made, or funds raised or borrowed, exceeds eighty percent (80%) of the trigger for ~~rescue~~ matching funds as defined in G.S. 163-278.62(18). Any entity making independent expenditures in support of or opposition to a certified candidate or in support of a candidate opposing a certified ~~candidate~~ candidate, or paying for electioneering communications, referring to one of those candidates, shall report the total funds received, spent, or obligated for those expenditures or payments to the Board by facsimile machine or electronically within 24 hours after the total amount of expenditures or obligations made, or funds raised or borrowed, for the purpose of making the independent ~~expenditures,~~ expenditures or electioneering communications exceeds five thousand dollars ($5,000). After this 24-hour filing, the noncertified candidate or ~~independent expenditure~~ other reporting entity shall comply with an expedited reporting schedule by filing additional reports after receiving each additional amount in excess of one thousand dollars ($1,000) or after making or obligating to make each additional expenditure(s) or payment(s) in excess of one thousand dollars ($1,000). The schedule and forms for reports required by this subsection shall be made according to procedures developed by the Board.

(b) Reporting by Participating and Certified Candidates. – Notwithstanding other provisions of law, participating and certified candidates shall report any money received, including all previously unreported qualifying contributions, all campaign expenditures, obligations, and related activities to the Board according to procedures developed by the Board. A certified candidate who ceases to be certified or ceases to be a candidate or who loses an election shall file a final report with the Board and return any unspent revenues received from the Fund. In developing these procedures, the Board shall utilize existing campaign reporting procedures whenever practical.

(c) Timely Access to Reports. – The Board shall ensure prompt public access to the reports received in accordance with this Article. The Board may utilize electronic means of reporting and storing information."

SECTION 1.(b) G.S. 163-278.67 reads as rewritten:

"**§ 163-278.67. ~~Rescue~~ Matching funds.**

(a) When ~~Rescue~~ Matching Funds Become Available. – When any report or group of reports shows that "funds in opposition to a certified candidate or in support of an opponent to that candidate" as described in this section, exceed the trigger for ~~rescue~~ matching funds as defined in G.S. 163-278.62(18), the Board shall issue immediately to that certified candidate an additional amount equal to the reported excess within the

limits set forth in this section. "Funds in opposition to a certified candidate or in support of an opponent to that candidate" shall be equal to the sum of ~~the following:~~ subdivisions (1) and (2) as follows:

~~(1) Campaign expenditures or obligations made, or funds raised or borrowed, whichever is greater, reported by any one uncertified opponent of a certified candidate. Where a certified candidate has more than one uncertified opponent, the measure shall be taken from the uncertified candidate showing the highest relevant dollar amount.~~

~~(2) The sum of all expenditures reported in accordance with G.S. 163-278.66 of entities making independent expenditures in opposition to the certified candidate or in support of any opponent of that certified candidate.~~

(1) The greater of the following:

a. Campaign expenditures or obligations made, or funds raised or borrowed, whichever is greater, reported by any one nonparticipating candidate who is an opponent of a certified candidate. Where a certified candidate has more than one nonparticipating candidate as an opponent, the measure shall be taken from the nonparticipating candidate showing the highest relevant dollar amount.

b. The funds distributed in accordance with G.S. 163-278.65(b) to a certified opponent of the certified candidate.

(2) The aggregate total of all expenditures and payments reported in accordance with G.S. 163-278.66(a) of entities making independent expenditures or electioneering communications in opposition to the certified candidate or in support of any opponent of that certified candidate.

(b) Limit on ~~Rescue~~ Matching Funds in Contested Primary. – Total ~~rescue~~ matching funds to a certified candidate in a contested primary shall be limited to an amount equal to two times the maximum qualifying contributions for the office sought.

(c) Limit on ~~Rescue~~ Matching Funds in Contested General Election. – Total ~~rescue~~ matching funds to a certified candidate in a contested general election shall be limited to an amount equal to two times the amount described in G.S. 163-278.65(b)(4).

(d) Determinations by Board. – In the case of electioneering communications, the Board shall determine which candidate, if any, is entitled to receive matching funds as a result of the communication. The Board shall issue matching funds based on the communication only if it ascertains that the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. In making its determination, the Board shall not consider evidence external to the communication itself of the intent of the sponsor or the effect of the communication. The Board shall notify each candidate it determines is entitled to receive matching funds based on those communications, the sponsor of those communications, and any candidate who is an opponent of the candidate it determines is entitled to the matching funds. The Board shall give the sponsor of the communication and any opposing candidate an adequate opportunity to rebut the determination of the Board. In considering the rebuttal, all candidates in the race and the sponsor shall be given adequate and equal opportunity to be heard. The Board shall adopt procedures for implementing this subsection, balancing in those procedures adequacy of opportunity to rebut and adequacy and equality of opportunity to be heard on the rebuttal with the need to expedite the decision on awarding matching funds. The Board shall distribute the matching funds, if any, at the conclusion of its process.

(e) Proportional Measuring of Multicandidate Communications. – In calculating the amount of matching funds a certified candidate is eligible to receive under this section, the Board shall include the proportion of expenditures, obligations, or payments for multicandidate communications that pertain to the candidate."

SECTION 1.(c) Chapter 163 of the General Statutes is amended by deleting the term "rescue" wherever it appears and substituting the term "matching."

SECTION 1.(d) G.S. 163-278.62 is amended by adding a new subdivision to read:

"(5a) Electioneering communication. – As defined in G.S. 163-278.80 and G.S. 163-278.90, except that it is made during the period beginning 30 days before absentee ballots become available for a primary and ending on primary election day and during the period 60 days before absentee ballots become available for a general election and ending on general election day."

SECTION 2. G.S. 163-278.110 is amended by adding a new subdivision to read:

"(8) Except as otherwise provided in this Article, the definitions in Article 22A of this Chapter apply in this Article."

SECTION 3.(a) There is appropriated from the General Fund to the State Board of Elections for the 2007-2008 fiscal year the sum of twenty-five thousand dollars ($25,000) for the implementation of this act.

SECTION 3.(b) This section becomes effective July 1, 2007.

SECTION 4. Except as otherwise provided in this act, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 2nd day of August, 2007.

Beverly E. Perdue
President of the Senate

Joe Hackney
Speaker of the House of Representatives

Michael F. Easley
Governor

Approved _____.m. this _____ day of _____, 2007