

United States Court of Appeals
for the
Fourth Circuit

**W. RUSSELL (“RUSTY”) DUKE; NORTH CAROLINA RIGHT TO LIFE
COMMITTEE FUND FOR INDEPENDENT POLITICAL EXPENDITURES and
NORTH CAROLINA RIGHT TO LIFE STATE POLITICAL ACTION COMMITTEE,**
Plaintiffs-Appellants,

and

BARBARA JACKSON,
Plaintiff,

– v. –

**LARRY LEAKE, in his official capacity as Chairman of the North Carolina State Board of
Elections; GENEIVE C. SIMS, in her official capacity as Secretary of the State Board of
Elections; ROBERT B. CORDLE, LORRAINE G. SHINN, CHARLES WINFREE, in their
official capacity as members of the State Board of Elections,**

Defendants-Appellees,

and

COMMON CAUSE NORTH CAROLINA and JAMES R. ANSLEY,
Intervenors-Defendants/Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT RALEIGH**

OPENING BRIEF OF APPELLANTS

**JAMES BOPP, JR.
ANITA Y. WOUDEBERG
JOSIAH NEELEY
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
(812) 232-2434**

Counsel for Plaintiffs-Appellants

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Jurisdictional Statement

The district court's subject matter jurisdiction in this case rests on 28 U.S.C. § 1331 because this is a civil action alleging that the challenged North Carolina statutory provisions violate the First and Fourteenth Amendments of the U.S. Constitution. This Court has jurisdiction over this federal question, under 28 U.S.C. § 1291, to review the district court's final order and judgment granting Defendants-Appellants State Board of Elections' ("Board") and Intervenors-Defendants Common Cause and James Ansley's ("Intervenors") Motion to Dismiss, entered March 27, 2006. JA 207. Plaintiffs-Appellants Barbara Jackson, W. Russell Duke ("Judge Duke"), North Carolina Right to Life Committee Fund for Independent Expenditures ("IEPAC"), and North Carolina Right to Life State Political Action Committee ("SPAC") (collectively "Challengers") appealed that judgment as of right, Fed. R. App. P. 4, filing their Notice of Appeal on April 26, 2007. JA 217. Barbara Jackson moved to be dismissed from this appeal on June 28, 2007, which was granted on June 29, 2007.

Statement of the Issues

- I. Whether the District Court had Article III jurisdiction because Challengers have standing and their claims are ripe and not moot.
- II. Whether the District Court erred in holding that the rescue fund, reporting requirement, and 21-day contribution ban are constitutional and that therefore Challengers failed to state a claim upon which relief can be granted.

Statement of the Case

On August 8, 2005, Challengers filed their Verified Complaint in the Middle District of North Carolina (Cause No. 5:06-cv-00324) against the Board, the Districts Attorney of Wake and Guilford counties, and the Attorney General, challenging North Carolina's public funding scheme under the First Amendment. JA 10 (Docket 1). On September 7, 2005, Challengers amended their Complaint to also challenge a \$50 surcharge imposed upon all North Carolina lawyers to help fund the public funding scheme. JA 10 (Docket 5). The Board filed its Motion to Dismiss on November 14, 2005, JA 11 (Docket 8), and Intervenor filed their Motion to Dismiss, as well as their Motion to Intervene, on November 15, 2005. JA 12 (Docket 12, 14). Challengers filed a Motion for Preliminary Injunction and requested that the hearing for the preliminary injunction be consolidated with a trial on the merits on November 16, 2005. JA 12-13 (Docket 21, 23, 24). A request for

class action was timely filed by Challengers on December 6, 2005. JA 13 (Docket 27). Challengers furnished supplemental affidavits regarding the status of Judge Duke's campaign on February 27, 2006, JA 15 (Docket 47), and July 6, 2006. JA 15 (Docket 50). On August 7, 2006, the District Court dismissed the Guilford County District Attorney and transferred the case to the Eastern District. JA 15-16 (Docket 53). The case was transferred on August 11, 2006, JA 16 (Docket 55), and on September 6, 2006, the Eastern District Court granted Intervenors' Motion to Intervene. JA 17 (Docket 63). On September 11, Challengers filed a Second Amended Complaint. JA 17 (Docket 68). Answers to the Complaint were filed on September 22, 2006, by the Board and Intervenors. JA 17-18 (Docket 69, 73). On October 26, 2006, the District Court denied Challengers's Motion for Preliminary Injunction and Motion to Consolidate and dismissed Challengers' surcharge challenge due to lack of jurisdiction under the Tax Injunction Act. JA 19 (Docket 83). On March 30, 2007, the District Court entered final judgment granting the Board's and Intervenors' respective Motions to Dismiss and denying as moot Challengers' class action request. JA 19 (Docket 85). In particular, the District Court found that Appellant Jackson lacked standing in the case, that the remaining District Attorney and the Attorney General should be dismissed as defendants in the case, and that Challengers had failed to state a claim upon which relief could be

granted under F.R.C.P. 12(b)(6), adopting the rationale of its Order denying Challengers' Preliminary Injunction request. JA 19 (Docket 84). On April 26, 2007, Challengers timely filed their Notice of Appeal with respect to the District Court's holding that Challengers failed to state a claim upon which relief could be granted. JA 19 (Docket 86). Pursuant to this Court's order, Challengers now file this brief.

Statement of Facts

The North Carolina Legislature created a public funding scheme for judicial candidates by implementing Article 22D of the "Elections and Election Laws," N.C. Gen. Stat. §§ 163-278.62 through 163-278.70, and amending Article 22A of the "Elections and Election Laws," § 163-278.13, which regulates election campaigns in the State of North Carolina. The public funding scheme is regulated and enforced by the North Carolina Board of Elections. § 163-22(a) and (d).

The scheme is funded by the North Carolina Candidates Financing Fund, taxpayer designations, contributions from attorneys, unspent Public Campaign Financing Fund revenues, and voluntary donations. § 163-278.63(b). It is also funded by an annual \$50 surcharge placed upon "every active member of the North Carolina State Bar," § 84-34, a Bar to which membership is mandatory for attorneys

to be licensed in North Carolina.¹ § 84-16. The North Carolina Bar Administrative Committee oversees membership and membership fees. N.C. Admin. Code 1A § .0701(5).

A candidate who wishes to participate in North Carolina's public funding scheme must first "file with the Board a declaration of intent to participate in the act as a candidate for a stated office," affirming that

only one political committee, identified with its treasurer, shall handle all contributions, expenditures, and obligations for the participating candidate and that the candidate will comply with the contribution and expenditure limits set forth in subsection (d) of this section and all other requirements set forth in this Article or adopted by the Board.

§ 163-278.64(a). Candidates are ineligible to participate in the fund if they have collected more than \$10,000 in contributions or made expenditures in excess of \$10,000 prior to filing the declaration of intent. § 163-278.64(d)(1).

After the candidate has filed a declaration of intent, he or she becomes a participating candidate, and may apply to be certified to receive public funding.

§ 163-278.64(b). To be certified, a candidate must raise qualifying contributions, from at least 350 registered voters, that total between 30 and 60 times the filing fee, for the candidate's respective office. § 163-278.62(9), (10) & (18); § 163-

¹ Plaintiff-Appellants' challenge to the \$50 surcharge was dismissed for lack of jurisdiction because of the Tax Injunction Act. JA 183. Challengers do not appeal that decision of the district court.

278.64(b). Thus, in 2006, a candidate for Supreme Court would need to raise between \$34,590 and \$69,180, and a candidate for Court of Appeals would need to raise between \$33,150 and \$66,300. § 163-278.62(9), (10) & (18); § 163-278.64(b). When a participating candidate has received this level of support, he or she can submit an itemized report of contributions to the Board. § 163-278.64(c)(2). The Board then certifies that the candidate has met the requirements of § 163-278.64(c).

The participating candidate, now a certified candidate, is then eligible to receive an initial distribution to his or her campaign if he or she faces a contested general election campaign. § 163-278.65(b)(4). This government contribution is “in an amount equal to 125 times the candidate’s filing fee” for Court of Appeals races (\$138,125 in 2006) and 175 times the candidate’s filing fee for Supreme Court races (\$201,775 in 2006). § 163-278.65(b)(4).

Additional government contributions are available to a certified candidate if the combined sum of (a) contributions from a noncertified opponent, (b) independent expenditures² made in support of that opponent, and (c) independent expenditures in opposition to the certified candidate exceeds a

²An independent expenditure is defined as “an expenditure to support or oppose the nomination or election of one or more clearly identified candidates that is made without consultation or coordination with a candidate or agent of a candidate whose nomination or election the expenditure supports or whose opponent’s nomination or election the expenditure opposes.” § 163-278.6(9a).

certain trigger amount.³ § 163-278.67(a). These government contributions, called “rescue funds,” are made in an “amount equal to the reported excess.” § 163-278.67(a). That is, for every dollar spent by a noncertified candidate or independent group on behalf of a noncertified candidate or in opposition to a certified candidate, the certified candidate receives a dollar of government contributions. § 163-278.67(a). Rescue funds are “limited to . . . two times the amount described in G.S. § 163-278.65(b)(4),” either \$132,600 (Court of Appeals) or \$138,360 (Supreme Court) in a contested primary and either \$276,250 (Court of Appeals) or \$403,550 (Supreme Court) in a contested general election. § 163-278.67(c)&(d).

Importantly, independent expenditures in support of a certified candidate or in opposition to a noncertified candidate are not factored into calculating the trigger amount, and no rescue funds are issued to noncertified candidates nor deducted from a certified candidate’s government funding based upon independent expenditures so made. § 163-278.67(a).

In order for the Board to determine when the trigger amount has been reached, the North Carolina public funding scheme sets up a series of reporting requirements for noncertified candidates and third party groups. § 163-278.66(a).

³ This trigger amount is equal to the maximum qualifying contribution sum in the case of a primary, and the amount of the initial distribution in the case of a general election. § 163-278.62(18).

Noncertified candidates with certified opponents are required to “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 funds.” *Id.* Subsequently, noncertified candidates must follow an expedited reporting schedule, which requires them to file 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) in excess of one thousand dollars (\$1,000).” *Id.*

Likewise, “any entity making independent expenditures in support of or opposition to a certified candidate or in support of a candidate opposing a certified candidate” is required to “report the total funds received, spent, or obligated for those expenditures 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, exceeds five thousand dollars (\$5,000).”⁴ *Id.* Subsequently, such groups must follow the same

⁴ Section 163.278.66(a) originally required an entity making independent expenditures to report expenditures only if they both surpassed, in total, the threshold of \$3,000 and were made after the candidate spent “fifty percent (50%) of the trigger for rescue funds”—usually near \$100,000. § 163-278.66(a). Effective August 3, 2006, the statute was amended removing the 50% line and changing the

expedited reporting schedule as noncertified candidates, 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) in excess of one thousand dollars (\$1,000).” *Id.*

Because of these reporting requirements, noncertified candidates may be required to file as many as 40 separate reports during the primary,⁵ and as many as 121 reports during the general election campaign,⁶ before the trigger amount has

threshold expenditure amount from \$3000 to \$5000.

⁵ For primary races in 2006, the primary trigger was \$66,300 for Court of Appeals races and \$69,180 for Supreme Court races. § 163-278.62(9); § 163-278.62(18). Noncertified candidates must file a report once they have received contributions totaling 80% of the trigger—\$55,344 for Supreme Court primary candidates and \$53,040 for Court of Appeals primary candidates—and thereafter every time the campaign receives \$1000 in contributions, every time the campaign makes obligations for \$1000, and every time it spends \$1000 on the campaign. § 163-278.66(a). Thus, a noncertified Court of Appeals primary candidate could be required to make as many as 40 reports before the trigger amount is even reached, and a Supreme Court primary candidate could be required to make as many as 40 reports before the trigger amount is reached. [$1 + ((66,300 - 53,040) / 1000) \times 3 = 40$; $1 + ((69,180 - 55,344) / 1000) \times 3 = 40$].

⁶ For the general election in 2006, the trigger amount for Supreme Court races was \$201,775 for Supreme Court races and \$138,125 for Court of Appeals races. § 163-278.62(18); § 163-278.65(b)(4). Noncertified candidates must file a report once they have received contributions totaling 80% of the trigger— \$161,420 for Supreme Court candidates; \$110,500 for Court of Appeals candidates—and thereafter every time the campaign receives \$1000 in contributions, every time it obligates \$1000, and every time it spends \$1000 on the campaign. § 163-278.66(a). Thus, a noncertified candidate for Supreme Court could be required to make as

even been reached, and every day thereafter. § 163-278.66(a). In contrast, a certified candidate need make only two reports—one during the certification process and one after the election. § 163-278.66(b). Similarly, independent groups that support a noncertified candidate or oppose a certified candidate may be required to file hundreds of reports during the campaign season,⁷ whereas independent groups opposing a noncertified candidate are never required to file expedited reports.⁸ § 163-278.66(a).

A noncertified candidate is also subject to a 21-day contribution ban designed to “make meaningful the provisions of Article 22D.” § 163-278.13(e2). Noncertified candidates or their political committees cannot accept or receive “a contribution during the period beginning 21 days before the day of the general election and

many as 121 reports before the trigger amount is even reached, and a noncertified candidate for Court of Appeals could be required to make as many as 83 reports. [1+ ((201,775 - 161,420)/1000) x 3 = 121; 1 + ((138,125 - 110,500)/1000) x 3 = 83].

⁷ Independent groups are required to file reports for every \$1000 received, obligated, or spent in opposition to a certified candidate or in support of his or her noncertified opponent once they have spent \$5000 on the campaign. § 163-278.66(a). Because the difference between \$5000 and the trigger amount divided by 1000 is greater than the number of total days in the election, independent groups could potentially be required to file reports on every day of the campaign.

⁸ For reasons that are unclear, independent expenditures made in support of a certified candidate are subject to the reporting requirements, even though such expenditures do not affect the distribution of rescue funds. § 163-278.66(a).

ending the day after the general election.”⁹ § 163-278.13(e2)(3). An exception is made for any contributions a candidate would like to make to his or her own campaign. § 163-278-13(e2).

Appellant Judge Duke is a judge in North Carolina Superior Court for Judicial District 3A. JA 46, 93 (Duke Affidavit ¶ 1; Amended Complaint ¶ 19). He ran for Supreme Court Justice in 2006 as a noncertified candidate facing a certified opponent and raised in excess of the trigger amount. JA 46, 93, 95 (Duke Affidavit ¶ 2; Amended Complaint ¶¶ 19, 24).

Judge Duke wanted to solicit and accept contributions for his 2006 campaign during the final 21 days before the general election. JA 95 (Amended Complaint ¶ 24). However, because § 163-278.13(e2)(3) of Article 22A made it unlawful for Judge Duke to solicit and accept contributions to the campaign during the final 21 days before the regular election (and could subject him to criminal charges for doing so), Judge Duke was prohibited from engaging in such protected expression. § 163-278.13(f); JA 95 (Amended Complaint ¶ 24). Due to the 21-day ban, Judge Duke

⁹ A contribution is defined as “any advance, conveyance, deposit, distribution, transfer of funds, loan, payment, gift, pledge or subscription of money or anything of value whatsoever, to a candidate to support or oppose the nomination or election of one or more clearly identified candidates, to a political committee, to a political party, or to a referendum committee, whether or not made in an election year, and any contract, agreement, promise or other obligation, whether or not legally enforceable, to make a contribution.” § 163-278.6(6).

did not exercise his First Amendment rights to solicit contributions during the last 21 days of his campaign. JA 47, 95 (Duke Affidavit ¶ 4; Amended Complaint ¶ 19).

Appellant North Carolina Right to Life State Political Action Committee (“SPAC”) intended to make contributions to a 2006 judicial campaign during the final 21 days before the general election. JA 95 (Amended Complaint ¶ 19). However, § 163-278.13(e2)(3) of Article 22A makes it unlawful for SPAC to make contributions to a judicial candidate during the final 21 days before the regular election. In addition, by doing so, SPAC could subject that judicial candidate to criminal charges. § 163-278.13(f). Consequently, SPAC did not make such a contribution during the last 21 days of the election and, as such, was not merely chilled in its willingness to engage in such protected expression but was completely prohibited from doing so. JA 95 (Amended Complaint ¶ 24). As a result of this statute, SPAC did not and will not exercise its First Amendment rights in the 2006 election and in future elections. JA 95 (Amended Complaint ¶ 19)

Judge Duke was required to report within 24 hours all expenditures and obligations he made throughout his campaign once the amount of his campaign expenditures exceeded 80% of the trigger amount, or \$168,620 for the general election. § 163-278.66(a); JA 47 (Duke Affidavit ¶ 4). Appellant North Carolina

Right to Life Committee Fund for Independent Political Expenditures (“IEPAC”) was subject to a similar provision which requires reporting of initial independent expenditures and obligations over \$5000. § 163-278.66(a). Once this occurred, Judge Duke and IEPAC would have been required to follow an expedited reporting schedule. *Id.* These burdensome requirements unconstitutionally impinged upon Judge Duke and IEPAC’s freedom of speech under the First and Fourteenth Amendments. JA 100-02 (Amended Complaint ¶¶ 39-45).

Additionally, Judge Duke was required to decide whether to limit the receipt of contributions or his own expenditures so as not to exceed the trigger amount during his 2006 campaign—assuming no independent expenditures were made, which were beyond his control—or to suffer the penalty for receiving such contributions and making such excess expenditures by triggering rescue funds for his certified opponent. JA 97-98 (Amended Complaint ¶ 32). Therefore, the trigger provision in § 163-278-67(a) chilled and penalized the exercise of Judge Duke’s First Amendment rights to receive contributions and make expenditures for his campaigns. JA 97-98 (Amended Complaint ¶ 32)

Likewise, IEPAC intended to make independent expenditures on behalf of a noncertified candidate or opposing a certified candidate. JA 99-100 (Amended Complaint ¶ 37). However, because IEPAC’s expenditures count towards the

trigger amount and could result in government contributions being issued to candidates they opposed, IEPAC did not make independent expenditures on behalf of a noncertified candidate. JA 99-100 (Amended Complaint ¶ 37). Therefore, §§ 163-278.62(18) and 163-278.66(a) are an unconstitutional penalty on IEPAC's free speech rights under the First and Fourteenth Amendments. Additionally, because the "trigger provision" in § 163-278-67(a) contains no exception for independent expenditures made to support a noncertified candidate, the "trigger provision" in § 163-278-67(a) substantially burdens IEPAC's right to engage in protected forms of political expression in this and in future elections. JA 100 (Amended Complaint ¶ 38). IEPAC was and continues to be chilled from engaging in such protected expression and as a result, cannot fully exercise its First Amendment rights in future elections. JA 100 (Amended Complaint ¶ 38).

As a result of North Carolina's public funding scheme, Challengers are deprived of their constitutional rights under the First and Fourteenth Amendments to the United State Constitution. JA 105 (Amended Complaint ¶ 55).

Summary of the Argument

Challengers contend that the public funding scheme, in particular the rescue funds, the reporting requirement for noncertified candidates and independent groups, and the 21-day ban of contributions crafted to support the rescue funds,

unconstitutionally burden Challengers' free speech rights. The District Court properly found that Challengers have standing to make such a contention because each of them has been subjected to the offending provisions. Because of that, Challengers presented ripe claims that are capable of repetition yet evading review, rendering them not moot as well. However, with regard to the substance of Challengers' constitutionality claim, the District Court held upheld the provisions as constitutional, adopting law for this novel issue from the First and Sixth Circuit Court of Appeals, and thereupon holding that Challengers did not present claims upon which relief could be granted. The District Court erred in doing so.

The District Court incorrectly held that the rescue funds provision did not burden First Amendment rights by adopting the First Circuit's decision in *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000). In that case, the court held that the rescue funds challenged did not burden free speech because they merely afforded an opportunity to reply. Such a narrow scope and purpose for public funding is not the case here. Money received by a certified candidate can be used for any purpose he or she deems appropriate. Applying *Daggett* to the present case is inappropriate.

Instead, the Court should have, and this Court should, adopt the rationale put forth in the Eighth Circuit's ruling in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994).

There, the court held that Minnesota's rescue funds were unconstitutional because they burdened and chilled third party expenditures because such expenditures could trigger government funding for that candidate's certified opponent. This is precisely the effect North Carolina's rescue funds had upon IEPAC and Judge Duke. As in *Day*, the rescue funds substantially burdened Judge Duke's and IEPAC's free speech.

In addition to burdening speech, the rescue funds provision is not narrowly tailored to serve a compelling interest. While the State may be concerned about the integrity of elections in light of the amounts of money used in campaigns, it cannot regulate such campaigns as a means to deter political speech. Additionally, the State's interest in preventing corruption or the appearance thereof as to contributions to candidates is not achieved through the rescue funds, but rather the State's contribution limits. Indeed, rescue funds are triggered by any contribution, regardless of size or source, undercutting the State's anti-corruption interest. Nor is any interest in fairness served by the rescue funds, as a certified candidate can secure more personal funds than a noncertified candidate merely because an independent expenditure was made on behalf of that noncertified candidate. Because it burdens speech and is not narrowly tailored to further a compelling government interest, the rescue funds provision is unconstitutional.

The reporting requirement imposed upon certain types of expenditures similarly fails. Subject to strict scrutiny, the reporting requirement is not narrowly tailored to any of the three compelling interests cited by the District Court: (a) disclosure, (b) preventing the corrupting influence of large contributions, or (c) supporting the rescue fund.

The reporting requirement inadequately serves an interest in disclosure because it does not require reporting of independent expenditures made in opposition to a noncertified candidate, which is information just as relevant to the voter as any other independent expenditures. The reporting requirement is also more burdensome than necessary because neither 24-hour reporting, reporting in \$1000 increments, nor multiple reporting of the same funds is necessary to achieve disclosure. Fewer reports could adequately protect this interest.

With regard to preventing corruption, the reporting requirement is overinclusive because it applies to independent expenditures, de minimus contributions, and contributions by a candidate to his or her own campaign, none of which has the requisite risk of corruption to justify government regulation of speech. The requirement also only applies if a noncertified candidate is facing a certified opponent and has received contributions or made or obligated expenditures at 80% of the trigger amount, making any anti-corruption interest inadequately served. The

reporting requirement may also be underinclusive if it is construed to require reporting only of individual contributions of \$1000 or more, allowing individuals or groups to subvert this requirement by repeatedly contributing just under this amount. In any event, it is not the reporting of contributions that prevents corruption—for reporting expenditures does not curb corruption—but the limitation thereof, as is evidenced by North Carolina’s \$4000 limit on third-party contributions. The 24-hour reporting, \$1000 incremental reporting, and multiple reporting of the same funds are not tailored to serve the State’s interest in fighting corruption.

As indicated above, the State does not have a compelling interest in the rescue funds. Regardless, the reporting requirement is overinclusive as to that purported interest because it requires excessive reporting: reports must be made of expenditures made in support of a certified candidate even though such expenditures do not count toward the trigger amount. Similarly, the 24-hour reporting, \$1000 incremental reporting, and multiple reporting of the same funds is substantially more burdensome than necessary to preserve the rescue funds, making the reporting requirement inadequately tailored.

The reporting requirement is also overbroad for requiring reporting of “obligations,” which may include potential expenditures that are never actually made. Because of this overbreadth, and because it burdens speech and is not

narrowly tailored to further a compelling government interest, the reporting requirement is unconstitutional.

Finally, the 21-day ban on contributions should not have been found constitutional. The District Court relied upon Sixth Circuit precedent to conclude that the ban serves a compelling interest in preventing corruption. However, unlike in the Sixth Circuit case, this case involves a ban that only applies to noncertified candidates who are opposed by a certified candidate who has not yet received the maximum public funding available to him or her. Even if it is assumed to be persuasive, the Sixth Circuit's rationale is distinguishable because in this case the ban does not completely prohibit contributions within the 21-day window. So the ban does not serve an anti-corruption interest.

If the interest served by the ban is to preserve the rescue funds, as the District Court suggests, even assuming that such an interest is compelling, the ban is still inadequate. The trigger for rescue funds can be pulled in the event that expenditure money is either received or spent. And yet the ban only restricts contributions. Because the ban only addresses one aspect of the trigger—that of monies received—it does not serve its purpose of ensuring that rescue funds are timely provided to certified candidates during the final days and weeks of the campaign. Indeed, given that contributions are limited to fewer than \$4000, the greatest threat

to the adequacy of the rescue funds is expenditures, which are not capped. Because it does not adequately address this problem, the ban does not serve an interest in preserving the rescue fund provision and is therefore unconstitutional.

For these reasons, the District Court erred in dismissing the Challengers' claims and upholding the public funding scheme.

Argument

Standard of Review

This Court reviews the district court's grant of a motion to dismiss de novo. *Mylan Laboratories v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). When the court decides the motion, it "must take all well-pleaded material allegations of the complaint as admitted and view them in the light most favorable to the appellant." *De Sole v. U.S.*, 947 F.2d 1169, 1171 (4th Cir. 1991). The court must also construe the factual allegations in the light most favorable to the appellant. *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991). However, the court is "not so bound with respect to the complainant's legal conclusions, otherwise [the motion to dismiss a complaint for failure to state a claim] would serve no function, for its purpose is to provide a defendant with a mechanism for testing the legal sufficiency of its complaint." *Id.* The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim. *Freeze v. U.S.*, 343 F. Supp. 2d 477, 480 (M.D.N.C. 2004) (citing *Revene v. Charles County Comm'rs*, 882 F.2d 870, 872 (4th Cir. 1989)).

"A motion to dismiss for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief." *Matkari*, 7 F.3d at 1134. Motions to dismiss are

to be granted sparingly. *Rutherford v. Newport News*, 919 F. Supp. 885, 888 (E.D. Va. 1996) (citing *Fayetteville Investors v. Commercial Builders*, 936 F.2d 1462, 1466 (4th Cir. 1991)). The court has “long held that a motion to dismiss should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be provided in support of his claim. *Matkari*, 7 F.3d at 1134.

I. The District Court Properly Found that It Has Article III Jurisdiction Over Challengers’ Claims.

A. Challengers Have Standing to Challenge the Public Funding Scheme.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court stated that a plaintiff must demonstrate an injury in fact, a causal connection between the injury and defendants, and that the injury can be remedied with a favorable decision from the Court. *Id.* at 560-61. See also *Va. Soc’y for Human Life, Inc. v. Federal Election Comm’n*, 263 F.3d 379, 386 (4th Cir. 2001). The injury suffered must be both concrete and particularized and actual or imminent, rather than hypothetical. *Lujan*, 504 U.S. at 560-561.

As the District Court held, Challengers have standing to bring their challenge because they have suffered a concrete and particularized injury in fact.¹⁰ JA 187.

¹⁰The District Court found that Judge Jackson did not have standing to challenge the public funding scheme. JA 187. Challengers do not appeal that

Judge Duke announced his candidacy for the 2006 Supreme Court election on February 21, 2006. JA 46 (Duke Affidavit ¶ 2). However, in doing so, he was immediately subjected to the restrictions of the North Carolina public financing scheme because he raised sufficient funds to trigger rescue funds for his participating opponent. JA 46-47 (Duke Affidavit ¶ 3). The injuries he suffered were actual and imminent.

Likewise, IEPAC and SPAC intended to make independent expenditures and contributions, respectively, and by doing so, they would have been subjected to the rules established by the public financing scheme. IEPAC intended to make expenditures in the 2006 campaign year but did not and would not without an injunction against the Board because in doing so IEPAC would be funding the opponent of the candidate it wishes to support. JA 108, 117 (Amended Complaint ¶¶ 65, 93). Similarly, SPAC intended to make contributions during the 21 days before the 2006 election day but did not and would not without an injunction because it is banned from doing so. JA 95, 112 (Amended Complaint ¶¶ 24, 77). Both organizations have consequently been harmed by the provisions they challenge in this case. Challengers have been injured by the various statutory provisions they

decision and have voluntarily dismissed her as an appellant for this appeal. *See* this Court's Order of June 29, 2007.

challenge. Consequently, the District Court's determination that Challengers have standing should be affirmed.

B. Challengers' Claims Against the Public Funding Scheme are Ripe.

For a claim to be ripe, a case must be sufficiently immediate and real to justify judicial intervention. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). The plaintiff must have "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there must exist a credible threat of prosecution thereunder." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 n.3 (1979).

The challenged public funding provisions were in force against Challengers in the 2006 election and affected whether and how they made expenditures, independent expenditures, and contributions during that election cycle. Judge Duke experienced hardship under the fund because he raised in excess of the trigger amount for his campaign and was subject to the reporting requirement and 21-day ban because his opponent participated in the rescue fund scheme. JA 47 (Duke Affidavit ¶¶ 4, 5). Likewise, IEPAC did not make the independent expenditures it intended to make because the rescue fund provisions were in place, and SPAC was deprived of making any campaign contributions during the 21-day window before the 2006 election date. JA 44-45 (Holt Affidavit ¶¶ 2, 3). Consequently, the injuries

they suffered are not anchored in a hypothetical future event, but were actual, concrete harms. Challengers' claims are ripe for this Court's review.

C. Challengers' Claims Are Not Moot.

“Federal courts have no power to hear moot cases, and because a case can become moot at any time—even after the entry of a final judgment—the doctrine prevents a federal court of appeals from exercising its appellate jurisdiction in a moot case.” *Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006). However, a federal court can retain jurisdiction “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.”” *Id.* (quoting *Mellen v. Bunting*, 327 F.3d 355, 364 (4th Cir. 2003). “The exception applies where ‘(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.’” *Federal Election Comm’n v. Wisconsin Right to Life*, Nos. 06-969, 06-970, 2007 WL 1804336 at *9 (June 25, 2007) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). Challengers satisfy these requirements.

Challengers are no longer subject to the provisions they challenge that caused them injury during the 2006 election cycle. However, circumstances such as Judge Duke's are easily repeatable because noncertified candidates subject to the rescue

funds' regulations are likely to exist in each election despite the existence of the public funding scheme. Judge Duke brought his challenge in a timely manner—prior to his declaration of candidacy—and yet it was not resolved until after the November general election. JA 46 (Duke Affidavit ¶ 2). His claims against the public funding scheme are susceptible to repetition each judicial election cycle and yet could perpetually evade review if this Court finds them moot.

Similarly, IEPAC and SPAC intended to make independent expenditures and contributions, respectively, and expect to do so in the future. JA 95 (Amended Complaint ¶ 24). They also timely filed their cause of action well in advance of being subject to the reporting requirements and the 21-day ban, respectively. Consequently, 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. This Court should not find their claims moot even though they are no longer subjected to the challenged provisions.

Finally, this Court should assert jurisdiction over Challengers' challenge to § 163-278.66(a), a reporting requirement provision that was amended during the pendency of the district court litigation. While it is true that a case challenging a law that is amended or repealed during the case can become moot, *Am. Legion Post 7 of*

Durham, N.C. v. City of Durham, 239 F.3d 601, 606 (4th Cir.2001), if the provision is amended yet leaves the “objectionable features of the prior law substantially undisturbed, the case is not moot.” *Naturist Soc., Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992). As the District Court states, the portions of the reporting requirement that are challenged—the 24-hour time frame, the \$1000 increments, and the reporting of obligations—survived the amendment process. JA 195. The \$1000 incremental reporting requirement was changed to be applicable when \$5000, rather than \$3000, is independently expended, and the requirement that the report be made only when the benefitting candidate had reported in excess of 50% of the trigger was removed. These changes do not affect the nature of Challengers’ claim that the reporting requirements are unconstitutional because of the 24-hour reporting requirement, the \$1000 expenditure reporting requirement, and the requirement to report obligations as well as money received and spent. Consequently, this Court, as did the District Court, should find the challenge to the reporting requirements is properly before it.

II. The District Court Erred in Finding that the Rescue Funds, the Reporting Requirements, and the 21-Day Ban Do Not Unconstitutionally Burden Freedom of Speech, Are Not Overbroad, Are Narrowly Tailored to Further a Compelling Government Interest, and Satisfy Strict Scrutiny.

A. The District Court Erred in Finding that the Rescue Funds Provision Does Not Unconstitutionally Burden First Amendment Freedom of Speech, and Is Narrowly Tailored to Further a Compelling Government Interest.

At the center of North Carolina’s public funding scheme is the provision for rescue funds found in § 163-278.67 (“rescue funds provision”). Under the rescue funds provision, certified candidates receive government contributions to their campaigns once the total amount of contributions to a noncertified opponent combined with the total amount of independent expenditures made in opposition to the certified candidates and in support of their opponents exceeds a set trigger amount. Independent expenditures made in support of a certified candidate or in opposition to a noncertified candidate are not factored into the trigger amount, and no rescue funds can be issued to noncertified candidates based on independent expenditures made in opposition to their candidacy or in support of their opponents.

Public funding of elections, though not inherently unconstitutional, may be so if it burdens the exercise of political speech but is not narrowly tailored to serve a compelling government interest. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990). To determine the constitutionality of the rescue funds

provision, this Court must first determine: (a) whether the provision burdens First Amendment rights, and if so, (b) whether the statute is narrowly tailored to further a compelling government interest. *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000)

1. The Rescue Funds Provision Burdens First Amendment Rights.

Under the rescue funds provision, both independent expenditures and contributions by a candidate to his own campaign count towards the trigger amount and can result in the release of rescue funds once the trigger amount is reached. States cannot constitutionally place limitations on the amount of independent expenditures made during a campaign. *Buckley v. Valeo*, 424 U.S. 1, 46 (1976) (“independent advocacy . . . does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions”). Similarly, while a State may place limits on the amount third parties can contribute to a campaign, it cannot constitutionally place limits on the amount a candidate can contribute to his own campaign. *Buckley*, 424 U.S. at 52 (“[the State’s interest in] the prevention of actual and apparent corruption of the political process does not support the limitation on the candidate’s expenditure of his own personal funds”). As the Sixth Circuit noted in *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004):

Buckley drew a line in the sand, and prohibited the government from restricting a candidate's ability to make expenditures on his own behalf. By defining contribution to include contributions by the candidate to his own [campaign] committee, the statute runs the risk of limiting expenditures. While Kentucky avoids the brunt of this problem by exempting candidate contributions to their own campaigns from otherwise applicable contribution limits, the problem still exists in those sections of the code where candidate contributions to their own campaigns are not exempted from regulation. Thus, by failing to exempt candidate contributions to their own campaigns from the trigger provision, Kentucky applies an indirect regulation on expenditures.

Id. at 667.

Courts are divided, however, over whether First Amendment rights are similarly burdened by rescue fund provisions such as the one at issue here. And it was based upon this divide that the District Court granted the Board's and Intervenors' Motion to Dismiss, choosing to follow the First Circuit over the Eighth. This issue is one of first impression in the Fourth Circuit.

In *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), the Eighth Circuit struck down Minnesota's rescue funds provision on the grounds that making independent expenditures and contributions in support of a candidate that result in an equal government contribution to that candidate's opponent improperly penalized First Amendment rights. The *Day* court reasoned that independent groups would be chilled from expending money opposing a candidate if they knew that doing so would result in a government funded contribution to that candidate's campaign.

Day, 34 F.3d at 1360 (“[t]he knowledge that a candidate who one does not want to be elected will . . . receive a public subsidy equal to . . . the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech”). According to *Day*, the rescue funds provision turned independent expenditures over the trigger amount into de facto contributions to an opponent’s campaign and was therefore an impermissible restriction on First Amendment rights.

By contrast, in *Daggett v. Comm’n on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000), the First Circuit upheld the rescue funds provision of the Maine Clean Election Act against a First Amendment challenge. The court in *Daggett* rejected *Day*’s analysis, arguing that the provision for rescue funds did not burden First Amendment rights. *Id.* at 464. *Daggett* based its decision on the supposition that the rescue funds provision simply made it possible for certified candidates to reply to campaign speech. *Id.* at 465 (“We cannot adopt the logic of *Day*, which equates responsive speech with an impairment to the initial speaker”).¹¹ In granting the motion to dismiss, the district court adopted holding of

¹¹ The *Daggett* court also called into question the relevance of *Day*, stating that the Eighth Circuit had retreated from *Day* in *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996). *Daggett*, 205 F.3d at 52 n.25. *Rosenstiel*, however, dealt with a different type of provision than the one at issue in *Day* or in the present case. In *Rosenstiel*, candidates were given a government contribution to their campaign if

Daggett rather than *Day*, largely without elaboration.

Of the two decisions, *Day* presents the better rationale for a decision here. *Daggett* seems to take for granted that rescue funds would be used for responsive speech. Nothing in the rescue funds provision, however, requires that the certified candidate spend a government contribution responding to the candidate or group that caused the contribution, and rescue funds are triggered even by expenditures that do not directly involve the certified candidate. Money spent by noncertified candidates on administrative costs, consultants, internal polling, fund-raising, voter registration, even complying with the reporting requirements of the public funding scheme itself, all result in government contributions to the candidate's opponent once the trigger amount is reached. Likewise, a certified candidate need not spend all or even part of his government contributions responding to the candidate or group that caused the contribution but may spend "rescue funds" however he wishes.

they agreed to abide by a certain expenditure limit. *Rosenstiel*, 101 F.3d at 1546. This expenditure limit was waived, however, if the publicly funded candidate's non-funded opponent received contributions or made expenditures over a set trigger amount. *Id.* at 1547. Unlike in *Day* or in this case, in *Rosenstiel* a candidate's spending over the trigger amount did not result in any government contributions going to that candidate's opponent. It simply released the opponent from his promise to abide by a certain expenditure limitation. Since contributions and expenditures in *Rosenstiel* did not cause equivalent contributions to an opponent, it cannot be said to limit the significance of the *Day* decision.

There is not even a requirement that the expenditure triggering rescue funds be adverse to the certified candidates' interest. In a three person race, money spent by Candidate A attacking Candidate B (both noncertified candidates) would result in a government contribution to Candidate C (a certified candidate) even though C has benefitted from the original expenditure. By contrast, a noncertified candidate is never eligible for rescue funds, no matter how much money is spent in opposition to his candidacy or in support of his certified opponent by independent groups.

Instead of merely providing a right of reply, the rescue fund provision is designed to chill and penalize contributions and independent expenditures made on behalf of noncertified candidates. It transforms contributions or independent expenditures for a noncertified candidate into contributions to that candidate's certified opponent. The stated purpose of the North Carolina public funding scheme is "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" § 163-278.61. The rescue funds provision does not directly limit the amount that can be spent or contributed to a campaign. In fact, the direct result of the fund is that more money will be spent on campaigns, not less. The rescue funds provision thus can only achieve the Fund's stated purpose by chilling private contributions and expenditures on behalf of noncertified candidates.

Thus, *Day*'s analysis is more in keeping with the rescue funds provision's purpose and effect and should be adopted here.

2. The Fund's Rescue Funds Provision Is Not Narrowly Tailored to Further a Compelling Government Interest.

Because it burdens First Amendment rights, the rescue funds provision is subject to strict scrutiny. *Buckley*, 424 U.S. at 22. To survive strict scrutiny, the law or regulation in question must be narrowly tailored to further a compelling government interest. *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002). A law can fail to be narrowly tailored to serve a compelling interest in one of several ways. It may be overinclusive if it restricts speech that does not implicate the government's compelling interest in the statute. *Simon & Schuster v. New York State Crime Victims Board*, 502 U.S. 105, 121 (1991). The regulation may also be underinclusive if it fails to restrict speech that does implicate the government's interest. *See, e.g., Carey v. Brown*, 447 U.S. 455, 465 (1980). Finally, a regulation can fail to be narrowly tailored if the state's compelling interest can be achieved through a less restrictive means. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 (1990).

The rescue funds provision is not narrowly tailored to any compelling government interest. The North Carolina public funding scheme's stated purpose is

“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” § 163-278.61. As noted above, this purpose cannot be served by the government pouring more money into campaigns, unless on the theory that, by doing so, the scheme will deter non-government funded political speech. If this is the case, the scheme is specifically designed to chill protected political speech and is therefore patently unconstitutional.

Nor can the rescue funds provision be justified in terms of the State’s interest in combating corruption or the appearance of corruption. As the Supreme Court noted in *Buckley*, states have a compelling interest in regulating large contributions because of the risk of corruption that can result. *Buckley*, 424 U.S. at 26 (“[t]o the extent that large contributions are given to secure a political *quid pro quo* . . . the integrity of our system of representative democracy is undermined”). In this case, however, North Carolina has already enacted a less restrictive means of preventing the corrupting influence of large contributions, namely, a \$4000 contribution limit. § 163-278.13. Because large contributions are already prohibited by this rule, the rescue funds provision does not advance the State’s interest in preventing the risk of corruption that comes from large campaign contributions.

The rescue funds provision is also not narrowly tailored to the State’s interest

in preventing the corrupting influence of large contributions because it applies to all contributions, no matter how small, and also applies to independent expenditures and contributions made by a candidate to his or her own campaign. While the State has a compelling interest in prohibiting large campaign contributions from third parties, this interest does not extend to small campaign contributions. *Randall v. Sorrell*, 126 S. Ct. 2479, 2494-95 (2006). Since all contributions, no matter how small, may trigger rescue funds, the rescue funds provision is overinclusive. Similarly, the State's compelling interest in preventing corruption does not extend to independent expenditures or contributions by a candidate to his or her own campaign, as there is not the same risk of corruption involved in those transactions. *Buckley*, 424 U.S. at 46, 53.

Nor can the rescue funds provision be justified as a way of achieving "fairness" or "equality" with regard to elections. Such an interest is, to begin with, not compelling. *See Buckley*, 424 U.S. at 54 (an "ancillary interest in equalizing the relative financial resources of candidates competing for elective office . . . is clearly not sufficient to justify . . . infringement of fundamental First Amendment rights"). However, even if the State were to have a compelling interest in achieving electoral parity, the rescue funds provision would not advance that interest because it does not count independent expenditures made in support of a certified candidate or in

opposition to a noncertified one.

Suppose, for example, that a noncertified candidate has spent at or above the trigger amount and is subsequently supported by \$50,000 in independent expenditures, while his or her certified opponent is subsequently supported by \$100,000 in independent expenditures. Under this scenario, the certified candidate would receive an additional \$50,000 in rescue funds even though more money has been spent on behalf of his or her campaign than on behalf of his or her opponent. Thus, far from creating a level playing field, the rescue funds provision tilts heavily in favor of certified candidates, and against both those (like Judge Duke) who voluntarily declined to participate in the public funding scheme and those who are involuntarily excluded from it.

Because of these burdens, the State's public campaign funding scheme goes beyond mere promotion of the voluntary use of public funding by aiding in gathering data to enforce the fund and improperly injects the State into the political process by attempting to equalizing the relative financial resources of candidates. *Buckley*, 424 U.S. at 54. The rescue funds provision violates free speech by punishing noncertified candidates, like Judge Duke, who do not join the fund, and independent speakers, like IEPAC, who support noncertified candidates. Since it does not advance any compelling interest, whether preventing corruption or promoting

fairness, the rescue funds provision must be deemed unconstitutional. *See Buckley*, 424 U.S. at 45, 52-53 n.58.

B. The District Court Erred in Finding that the Fund's Reporting Requirement for Noncertified Candidates and for Entities Making Independent Expenditures Is Not Overbroad and Is Narrowly Tailored to Further a Compelling Government Interest.

Section 163-278.66(a) (the “reporting requirement”) states, in relevant part, that a “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 funds as defined in G.S. 163-278.62(18).” Subsequently, noncertified candidates must follow an expedited reporting schedule, which requires them to file 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) in excess of one thousand dollars (\$1,000).” *Id.*

Likewise, “any entity making independent expenditures in support of or opposition to a certified candidate or in support of a candidate opposing a certified candidate” is required to “report the total funds received, spent, or obligated for those expenditures 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, exceeds five thousand dollars (\$5,000).” *Id.* Subsequently, such groups must follow the same expedited reporting schedule as noncertified candidates, 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) in excess of one thousand dollars (\$1,000).” *Id.*

This stringent reporting requirement has the potential of necessitating up to 40 separate reports during the primary, and up to 121 reports during the general election campaign, starting before the trigger amount has even been reached, and potentially continuing every day thereafter. See this Brief at 9 n.5, 6. By contrast, a certified candidate need only file two reports, one during the initial certification process, and one at the end of the campaign. § 163-278.66(b) Similarly, independent groups who spend money in opposition to a certified candidate or in support of a noncertified one could be required to file reports on every day of the campaign, while independent groups who spend in support of a certified candidate are not required to file any reports. *See* this Brief at 10 n.7.

The District Court held that the reporting requirement serves compelling governmental interests and is therefore constitutional. However, the reporting

requirement, because it contains an expedited reporting schedule and requires multiple reports for the same funds, does not satisfy strict scrutiny and is overbroad. As such, it must be deemed unconstitutional.

1. The Fund's Expedited Reporting Requirement Is Not Narrowly Tailored to Further a Compelling Government Interest.

The reporting requirement burdens protected political speech so it is subject to “exacting scrutiny.” *Buckley*, 424 U.S. at 44. This standard of review requires that the challenged reporting law correlate with or substantially relate to the governmental interest preserved through the reporting statute and that it be narrowly tailored to reflect that interest. *Boos v. Barry*, 485 U.S. 312, 321 (1988) (stating that the Court requires the State to show both the correlation between the compelling governmental interest and the justification given for restricting a “particular category of speech,” and that the regulation is narrowly drawn to achieve that interest). *See also Daggett*, 205 F.3d at 465; *Rosenstiel*, 101 F.3d at 1549; *Day*, 34 F.3d at 1361; *Ass’n of Am. Physicians & Surgeons v. Brewer*, 363 F. Supp. 2d 1197, 1201 (D. Ariz. 2005), *appeal dismissed as moot*, 486 F.3d 586 (May 10, 2007). The Supreme Court recently indicated that anytime the “First Amendment is implicated, [a] tie goes to the speaker, not the censor. *Federal Election Comm’n v. Wisconsin Right to*

Life, Inc., Nos. 06-969, 06-970, slip op. at 21, 2007 U.S. WL 1804336 at *17 (U.S. June 25, 2007).

The district court identified three interests served by the reporting requirement: (a) disclosing to the electorate the information as to where political campaign money comes from and how it is spent; (b) deterring actual and apparent corruption; and (c) enforcement of more substantive campaign restrictions, i.e. the rescue funds provision. J.A. 195-96. As explained more fully below, the reporting requirements are not narrowly tailored to any of these interests.

a. The Reporting Requirement Is Not Narrowly Tailored to the State's Interest in Disclosure.

The first proposed compelling interest cited by the district court as justifying the reporting requirement was “disclosing to the electorate the information as to where political campaign money comes from and how it is spent.” J.A. 195. The reporting requirement is not narrowly tailored to this interest of disclosure. The provision specifies that an “entity making independent expenditures in support of or opposition to a certified candidate or in support of a candidate opposing a certified candidate shall report” as directed. Reporting is not required, however, for independent expenditures made in opposition to a candidate opposing a certified candidate, i.e. to independent expenditures for a noncertified candidate. § 163-

278.66(a). Thus, full disclosure is not secured for the electorate. The reporting requirement is therefore underinclusive. *White*, 536 U.S. at 783.

The reporting requirement is also excessively burdensome, and any interest the State has in disclosure can be achieved through less restrictive means. While the State has an interest in seeing that money contributed or spent on campaigns is disclosed, achieving this interest does not require the sorts of burdensome and patently unreasonable requirements included in the North Carolina public funding scheme. See *Citizens for Responsible Gov't v. Davidson*, 236 F.3d 1174, 1197 (10th Cir. 2000) (“[n]one of the State’s compelling interests in informing the electorate, preventing corruption and the appearance of corruption, or gathering data would be at all compromised by a more workable deadline”).

First, under the reporting requirement, candidates and independent groups must report contributions, obligations, and expenditures within 24 hours. The State’s interest in disclosure, however, is only served so long as disclosure is made before the election and with enough time for voters to make informed voting decisions. Disclosure can be served without requiring reports to be filed within 24 hours—by, for example, requiring weekly or intermittent reports. By requiring 24 hour disclosures, the reporting requirement is not narrowly tailored and improperly burdens protected political speech. *Id.*

Second, reporting in \$1000 increments is not necessary to achieve adequate disclosure. Because of this low reporting increment, noncertified candidates may be required to file reports on nearly every day of the campaign. Similarly, independent groups could be required to file reports every day of the campaign if they expend money supporting or opposing certified candidates, or supporting a certified candidate's noncertified opponent.

This reporting burden is almost entirely one sided. Certified candidates need file only one report during the primary and one report after the general election, and independent groups who spent money opposing noncertified candidates are likewise never required to file expenditure reports. § 163-278.66(a), (b). In any event, to the extent the State has an interest in disclosure of how a candidate spends money, as opposed to how he receives it, the reporting requirement is underinclusive since it does not require certified candidates to report their expenditures and obligations made using their government issued funds.

The provision could be drafted in a less burdensome way by requiring 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 \$1000 reports only after they reach the higher percentage. Since the State's interest in disclosure could be equally achieved by requiring fewer total reports, the

reporting requirement is not narrowly tailored to this interest.

Third, the reporting requirement is also excessively burdensome in that it requires the same money to be reported multiple times. The reporting requirement provides that a “noncertified candidate or independent expenditure 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) in excess of one thousand dollars (\$1,000).” § 163-278.66(a). Thus, under the reporting requirement, a candidate could be required to report the same \$1000 three separate times: once when it is received, once when it is obligated, and once when it is actually spent. The State may have an interest in disclosure, but it does not have an interest in requiring multiple disclosures of the same amount.

The District Court held that *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003) foreclosed challenges to obligations reporting. JA 198. In *McConnell*, the Supreme Court stated that the reporting of obligations was necessary to close a potentially “significant loophole” of “political supporters . . . avoid[ing] preelection disclosures concerning ads slated to run during the final week of a campaign” by entering into obligations requiring payment after the election. *McConnell*, 540 at 200. However, it is possible for North Carolina to close this

loophole in a less restrictive manner than the current law, for example, by requiring obligation reporting only when the obligation comes due near the end of or after the election. This would avoid requiring noncertified candidates to report obligations that are already reported in other ways, either as contributions or as expenditures. This would also give people enough time to respond to expenditures of interest. For all of these reasons, then, the reporting requirement is not narrowly tailored to North Carolina's interest in disclosure.

b. The Reporting Requirement Is Not Narrowly Tailored to the State's Interest in Preventing the Corrupting Influence of Large Contributions.

The district court's second proposed compelling interest that justified the reporting requirement was "detering actual and apparent corruption." JA 195. The reporting requirement is not narrowly tailored to the State's compelling interest in avoiding corruption. First, the reporting requirement is overinclusive as to this interest, because it applies, not only to large third party contributions, but also to independent expenditures, small contributions, and contributions made by a candidate to his or her own campaign. The State's compelling interest in avoiding corruption does not extend to these types of contributions and expenditures because they do not contain the same degree of risk of corruption as are inherent in large third-party contributions. *See Buckley*, 424 U.S. at 81 (upholding a disclosure

requirement because it was “narrowly limited to those situations where the information sought has a substantial connection with the government interests sought to be advanced.”)

The reporting requirement is also underinclusive as it only applies once a candidate has reached 80% of the trigger amount in contributions. 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 on candidates who do. Yet reporting is required only for the later. Likewise, whether a contribution is corrupting does not depend on whether a candidate’s opponent is certified or noncertified. Yet reporting is only required for noncertified candidates who face certified opponents. The reporting requirement is therefore underinclusive.

The reporting requirement also mandates that a noncertified candidate make reports “after receiving each additional amount in excess of one thousand dollars (\$1,000)” once 80% of the trigger amount has been reached. It is unclear whether this means that the noncertified candidate must file a report once he or she has received \$1000 in cumulative contributions, or only if he or she has received a single contribution totaling more than \$1000. If the former, then the reporting requirement is overinclusive, as the State’s interest in combating corruption extends only to large contributions, and is not advanced by reporting of de minimus

contributions or of independent expenditures and contributions by a candidate to his own campaign. *See Buckley*, 424 U.S. at 28-29. If, on the other hand, reporting is only required for contributions over \$1000, then the provision is underinclusive, and it allows a loophole whereby individuals or groups may repeatedly donate \$999 to a candidate without having those contributions reported. In either case, the reporting requirement is not narrowly tailored, and is unconstitutional.

A less restrictive means of combating corruption is already in place to serve this interest: North Carolina places a \$4000 limit on campaign contributions. The Sixth Circuit considered a similar circumstance in *Anderson*. The *Anderson* court held that the ban on post-election contributions did not serve the interest in preventing corruption because a contribution limit still applied and the possibilities for quid pro quo corruption are fewer after the candidate wins. *Anderson*, 356 F.3d at 670. Similarly, in this case, it is not the \$1000 reporting obligation that prevents the corruption or the appearance thereof, particularly because a contributor could still donate up to \$4000. Rather, it is the \$4000 limit itself that is narrowly tailored to effectively prevent the corruption or the appearance thereof by limiting the potential for quid pro quo arrangements. Consequently, the reporting requirement is not narrowly tailored to the State's interest in preventing corruption.

Finally, the reporting requirement is excessively and unduly burdensome for

all of the reasons mentioned in the foregoing section regarding disclosure.

Specifically, achieving this interest does not require 24 hour disclosure, reporting in \$1000 increments, or multiple reporting of the same funds. As such, the reporting requirement itself is not narrowly tailored to serve the proposed a compelling governmental interest and is unconstitutional.

c. The Reporting Requirement Is Not Narrowly Tailored to the State's Interest in Supporting Enforcement of the Rescue Funds

The district court's final proposed compelling interest that justified the reporting requirement was "enforcement of more substantive campaign restrictions," i.e. the rescue funds provision. JA 195-96. This is a mischaracterization of the analysis in the *Buckley* and *McConnell* line of cases. The Supreme Court said in *Buckley* that the third legitimate interest of "record-keeping, reporting, and disclosure requirements" is to act as an "essential means of gathering the data necessary to detect violations of the *contribution limitations*," *Buckley*, 424 U.S. at 67-68 (emphasis added), not any and all "substantive campaign restrictions," as the district court indicted. J.A 195-96. After *Buckley*, the Supreme Court said in *Federal Election Comm'n v. National Conservative PAC*, 470 U.S. 480 (1985), that it "held in *Buckley* . . . that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for

restricting campaign finances,” *id.* at 498, a statement that seemed to narrow the field of application of *Buckley*. However, in *McConnell* the Court expanded the understanding of data-gathering as a compelling interest in holding that the important state interest of “gathering the data necessary to enforce more substantive electioneering restrictions” applies to “the entire range of *electioneering communications*.” *McConnell*, 540 U.S. at 196 (emphasis added). The Court has not broadened the interest of data-gathering to aid enforcement of any and all “substantive campaign restrictions.” Thus, the rescue fund provision is not supported by such an interest.

However, even if the State’s interest in preserving the rescue fund is applicable, the reporting requirement would not pass strict scrutiny as it is not narrowly tailored to this interest. The reporting requirement requires reports from any independent groups that expend more than \$5000 “in support of or in opposition to a certified candidate or in support of any opponent of that certified candidate.” § 163-278.66(a). Rescue funds, however, are only issued based on independent expenditures made “in opposition to the certified candidate or in support of any opponent of that certified candidate.” § 163-278.67(a)(2). Funds spent in support of a certified candidate can never trigger rescue funds or prevent rescue funds from being triggered. Yet, they are subject to the same reporting requirements as

expenditures that do trigger rescue funds. § 163-278.66(a). The reporting requirement is thus overinclusive as to the State's interest in preserving the rescue fund.

The reporting requirement is more burdensome than necessary to achieve its objectives. While it may be necessary to require prompt reporting to ensure that rescue funds are delivered promptly to a certified candidate, reporting within 24 hours is excessively burdensome and goes beyond what is necessary to preserve the rescue fund. *Davidson*, 236 F.3d at 1197. In *Davidson*, the Tenth Circuit said that it “cannot . . . uphold the patently unreasonable twenty-four hour notice requirement. To require such immediate notice severely burdens First Amendment rights, and the provision is a far cry from being narrowly tailored.” *Id.* The Tenth Circuit continued: “[n]one of the State's compelling interests in informing the electorate, preventing corruption and the appearance of corruption, or gathering data would be at all compromised by a more workable deadline.” *Id.* In this case, the justification for quick reporting is significantly reduced before the trigger amount is reached or after the maximum amount of rescue funds have been released because rescue funds cannot be issued in those circumstances.

Likewise, as a candidate's spending approaches the trigger amount, requiring reports for every \$1000 received, obligated, or spent over 80% of the trigger amount

is an excessively burdensome means of preserving the rescue fund. The provision could be drafted in a less burdensome way by requiring 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 \$1000 reports only after they reach the higher percentage. This would significantly lessen Judge Duke's obligation to make reports under the trigger amount, potentially requiring 39 fewer reports in the primary and 120 fewer in the general election. *See* this Brief at 9 n.5, 6.

Nor is there any need to require noncertified candidates to report the same \$1000 multiple times, as is currently mandated by the reporting requirement. § 163-278.66(a). Not only is there a less restrictive means of accomplishing the same ends, but the requirement of multiple reports is not narrowly tailored to serve the State's compelling interests. *See supra* Part II.B.1.a, b. By requiring these numerous disclosures, § 163-278.66(a) unconstitutionally infringes upon Challengers' rights of free speech and free association without a corollary benefit to a compelling governmental interest. As such, the reporting requirements are not narrowly tailored to serve the government's interest in preserving the rescue fund.

2. The Fund's Reporting Requirement Is Overbroad.

The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law

are substantial when “‘judged in relation to the statute’s plainly legitimate sweep.’” *Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1081(4th Cir. 2006) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Laws regulating First Amendment freedoms are closely examined to ensure they are precisely drafted. *Buckley*, 424 U.S. at 40-41.

The reporting requirement’s plainly legitimate sweep includes disclosing campaign finance information to the electorate, deterring actual or apparent corruption, and enforcing more substantive campaign restrictions. However, by requiring judicial candidates and independent expenditure entities to report “obligations made” and funds “obligated for . . . expenditures,” § 163-278.66(a) over-regulates protected speech. Judicial candidates such as Judge Duke and nonprofit entities like IEPAC not only must report actual expenditures that they make but also report any possibility of such an expenditure being made, even if the expenditure never actually takes place. A candidate may initially obligate to spend funds in one manner, for example, by agreeing to take his or her large sign-printing request to a particular print shop, only to cancel the obligation for a legitimate reason, such as finding a better deal elsewhere. Under the current system, this obligation would have to be reported but is not counted towards the fund itself and is not spent in that manner. Corruption would not be present and none of the three

legitimate purposes for the reporting requirement would legitimately be furthered.

See supra Part II.B.1.

Further, such entities must report those expenditures twice: once when they obligate the expenditure, and again when they actually make the expenditure. § 163-278.66(a). *See supra* Part II.B.1. By requiring these disclosures, § 163-278.66(a) is facially overbroad and creates an unconstitutional detriment to Challengers' rights of free speech and free association.

The fund's reporting requirements serve none of the three identified compelling interests: public disclosure, preventing corruption or the appearance thereof, and data-gathering to support enforcement of the rescue funds. Further, because the fund's reporting requirements are not narrowly tailored to any of the interests and are overbroad, they must be deemed unconstitutional.

C. The District Court Erred in Finding that the 21-day Ban Is Narrowly Tailored to Further a Compelling Government Interest and Satisfies Strict Scrutiny.

Section 163-278.13(e2) (“the 21 day ban”), provides that

[i]n order to make meaningful the provisions of Article 22D of the Chapter . . . (3) No candidate shall accept, and no contributor shall make to that candidate, a contribution during the period beginning 21 days before the day of the general election and ending the day after the general election. This subdivision applies with respect to a candidate opposed in the general election by a certified candidate as defined in Article 22D of this Chapter who has not received the maximum rescue funds available under G.S.163-278.67.

Time limits on contributions infringe upon the First Amendment right to free speech and to association. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 299 (1981). They essentially function as a zero contribution limit inside the restricted time period. *Id.* Contributions may be limited in order to prevent corruption from *large* campaign contributions. *Buckley*, 424 U.S. at 28-29. Thus, the government has a compelling interest in limiting the amount of contributions, not their timing. *Id.* *But see Gable v. Patton*, 142 F.3d 940, 950 (6th Cir. 1998) (asserting that forcing candidates to rearrange their fundraising because of time period restrictions is similar to requiring candidates “to raise funds from a greater number of persons”). The corruption-related interest cited by the *Buckley* Court “remains the only legitimate and compelling government interest [] thus far identified for restricting

campaign finances.” *Nat’l Conservative Political Action Comm.*, 470 U.S. at 496-97; *see also McConnell*, 540 U.S. at 143. Therefore, the 21-day ban must be narrowly tailored to the interest in preventing corruption to justify the burden and restriction of Challengers’ First Amendment rights.

The District Court, relying on *Gable*, held that the 21-day ban served a interest in preventing corruption. JA 200. The ban in *Gable* was a complete ban on contributions for a 28-day period (excepting a candidate’s own contributions to his or her campaign). *Gable*, 142 F.3d at 952. However, unlike the ban in *Gable*, § 163-278.13(e2)(3) only applies to noncertified candidates when a publically funded candidate is involved; as the District Court states, it is not a total ban on contributions. JA 200. Thus, it does not itself serve an interest in preventing corruption—its limited application undermines any suggestion of an interest in preventing corruption because those who are not opposed by a certified candidate or whose certified opponent has maxed out his or her rescue funds are not prevented from receiving “corrupting” contributions. The 21-day ban is underinclusive as to the corruption interest it purportedly serves.

It seems then that, as the District Court states, the government interest served by section 163-278.13(e2)(3) is preservation of the rescue fund provision, presumably by preventing last minute spending by a noncertified candidate that

cannot be matched in time for a certified opponent who can still receive rescue funds. JA 200. Indeed, the statute itself expressly recognizes the provision as a means of making the public funding scheme meaningful. § 163-278.13(e2) (“[i]n order to make meaningful the provisions of Article 22D of the Chapter, the following provisions shall apply . . .”).

As argued above, the rescue funds provision does not itself advance any compelling government interest and thus cannot justify the burdens on First Amendment rights imposed by the 21-day ban. *See supra* Part II.A.2. However, even if the rescue funds provision served a compelling interest, the 21-day ban would still be unconstitutional as it is not tailored to this interest. Unlike the trigger in *Gable*, North Carolina’s trigger is calculated based upon both contributions *and* independent expenditures. Yet the 21-day ban prohibits only third party contributions and does not apply to independent expenditures or to contributions made by a candidate to his or her own campaign.

Since both independent expenditures and candidate contributions to his or her own campaign can trigger rescue funds, the 21-day ban does not prevent noncertified candidates or third parties from making last minute expenditures that cannot be answered with rescue funds. Instead, the effect of the ban is to prevent noncertified candidates from securing additional funds and to force the candidate to

fund his or her campaign personally at a crucial time in the election cycle to respond to speech secured through expenditures made either by third parties or by his or her certified opponent, who receives additional funds because of such expenditures or prior candidate distributions.

Indeed, given that North Carolina already places a \$4000 limit on third party contributions, § 163-278.13(a), it is far more likely that any large last minute expenditures would be made through independent expenditures, which are not subject to such a limitation, rather than through third party contributions, which are. Because it only reaches contributions and only those made to a noncertified candidate with a certified opponent, the ban is not narrowly tailored to any interest the State might have in preventing corruption or preserving the rescue fund system and instead unconstitutionally and unjustifiably burdens the noncertified candidate's speech. The District Court erred in holding otherwise.

Conclusion

For the foregoing reasons, this Court should reverse the decision of the District Court, finding that Challengers have stated claims upon which relief can be granted, and resolve the merits of Challengers' claims. Because this case presents an issue of first impression in the Fourth Circuit, Challengers respectfully request an opportunity for oral argument to address any questions or concerns this Court may

have regarding the issues briefed herin.

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Respectfully Submitted,

/s/ Anita Y. Woudenberg

James Bopp, Jr.

Anita Y. Woudenberg

Josiah Neeley

BOPP, COLESON & BOSTROM

1 South 6th Street

Terre Haute, IN 47807-3510

812-232-2434

Counsel for Plaintiffs-Appellants

Certificate of Compliance With Fed. R. App. P. 32(a)(7)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), the undersigned certifies that this *Brief of Plaintiffs-Appellants* complies with the type-volume limitations of this Court.

1. In accordance with Federal Rules of Appellate Procedure 32(a)(7)(B), this brief contains 12,774 words.
2. The Brief has been prepared in proportionately spaced typeface using Word Perfect 9.0 in Times New Roman, 14 point font.

/s/ Anita Y. Woudenberg
Anita Y. Woudenberg
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812-232-2434

Certificate of Service

Undersigned counsel for Plaintiffs-Appellants hereby certifies that on July 3, 2007, two copies of their brief and appendix were mailed or delivered to:

Roy Cooper
Alexander McC. Peters
Susan K. Nichols
OFFICE OF THE ATTORNEY GENERAL
North Carolina Department of Justice
114 West Edenton Street
Raleigh, NC 27602
(919) 716-6900
Counsel for Defendants-Appellees

Suzanne Novak
Deborah Goldberg
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(212) 998-6730
Counsel for Defendant-Intervenors/Appellees

James Exum
Manning A. Connors, III
SMITH MOORE, LLP
300 North Greene Street
Suite 1400
Greensboro, NC 27401
(336) 378-5200
Local Counsel for Defendant-Intervenors/Appellees

/s/ Anita Y. Woudenberg
Anita Y. Woudenberg
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812-232-2434