

**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

**BRIEF OF AMICUS CURIAE DEMOCRACY NORTH CAROLINA IN
SUPPORT OF APPELLEES AND URGING AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Amicus Democracy North Carolina is a non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code and does not have a parent corporation, nor does it issue stock. No publicly held corporation owns ten percent or more of the stock of the *amicus*.

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**STATEMENT OF IDENTITY, INTEREST IN CASE AND SOURCE
OF AUTHORITY TO FILE**

This *amicus curiae* brief in support of Appellees is filed on behalf of Democracy North Carolina, a nonpartisan, nonprofit corporation incorporated in 2001 and organized under Section 501(c)(3) of the Internal Revenue Code. Although not a membership organization, Democracy North Carolina has supporters throughout the state who are registered voters and who vote in North Carolina judicial elections. Democracy North Carolina conducts research on the impact of campaign money on state elections, sponsors educational forums about voting and voting rights, and advocates for measures that improve and protect of the integrity of the election system. The organization has been involved in the development and implementation of North Carolina’s judicial public campaign financing program, including distribution of the Judicial Voter Guide and educating candidates and the public about the key provisions of the program. The Court’s ruling in this case will significantly impact Democracy North Carolina’s ability to achieve its goal of improving the integrity of judicial elections in this state.

One of the key features of the judicial public campaign financing program involves providing a limited yet competitive amount of matching or “rescue” funds to a participating candidate with an opponent who exceeds the spending limit accepted by the participating candidate. The rescue funds

provision is effective only if the funds are available to the participating candidate in a timely manner, and therefore, Democracy North Carolina supports the Appellees in the present case and respectfully urges affirmance of the district court's decision.

Counsel for all of the parties in the case have indicated their consent to the filing of this brief, and therefore the authority to file is based on Rule 29(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

1. Whether the constitutionality of N.C. Gen. Stat. 163-278.13(e2)(3), which prohibits certain campaign contributions during the 21 days immediately preceding a judicial election, is subject to strict scrutiny or a lesser standard of review.
2. Whether the District Court properly held that the 21-day provision is constitutional and that therefore Appellants failed to state a claim upon which relief could be granted.

SUMMARY OF THE ARGUMENT

The district court properly dismissed Appellants' challenge to the constitutionality of a provision in North Carolina law that upheld the

prohibition of certain campaign contributions in the 21 days preceding a judicial election. The Supreme Court has consistently said that restrictions on campaign contributions are subject to less rigorous scrutiny than restrictions on expenditures. Although limitations on expenditures must be narrowly tailored to further a compelling government interest in order to satisfy strict scrutiny, limitations on contributions need only be closely drawn to match a sufficiently important interest. North Carolina has a sufficiently important interest in maintaining the integrity and impartiality of its judicial branch. The rising costs of campaigning, the difficulty that candidates who are not independently wealthy face in running a successful campaign, and the pressure on candidates to provide *quid pro quo* favors in exchange for campaign contributions from special interest groups are all issues of concern in drafting a campaign finance statute. These issues are of even greater concern in the context of judicial elections because judges, unlike legislators and executives, must maintain impartiality and the appearance of impartiality. A lack of public faith in the impartiality of the judiciary is a lack of belief in the rule of law.

To help alleviate these concerns, North Carolina has enacted an innovative system of full public funding for judicial elections that frees candidates from the pressure of raising large amounts of monies from special

interest groups and self-interested donors and thus reduces the appearance of corruption. The 21-day provision is closely drawn to match this anti-corruption interest because it protects candidates who accept the restrictions associated with public funding from being blindsided by large infusions of external contributions to their opponent in the final days before an election. Therefore, the judgment of the district court should be affirmed.

ARGUMENT

THE DISTRICT COURT PROPERLY HELD THAT N.C. GEN. STAT. § 163-278.13(e2)(3), WHICH LIMITS CAMPAIGN CONTRIBUTIONS DURING THE 21 DAYS IMMEDIATELY PRECEDING A JUDICIAL ELECTION, IS CONSTITUTIONAL.

A. The Appropriate Standard Of Review For Campaign Finance Laws That Limit Contributions, As Opposed To Restricting Expenditures, Is Whether The Law Is Closely Drawn To Match A Sufficiently Important State Interest.

In the seminal campaign finance case, *Buckley v. Valeo*, 424 U.S. 1, 20 (1976), the Supreme Court drew a distinction between laws that restrict expenditures and laws that limit campaign contributions. The Court held that while amassing resources and spending money for a campaign does implicate both the right to association and the right to free speech, these rights are not absolute. *Id.* at 23-25. The Court concluded that restrictions on expenditures burden First Amendment rights more seriously than limitations on contributions, and thus different standards of review should

apply to each. *Id.* Although restrictions on expenditures must be narrowly tailored to a compelling government interest, contribution limits need only be closely drawn to match an important government interest. *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 528 U.S. 377, 387–88 (2000). Because N.C. Gen. Stat. § 162-278.13(e2)(3) limits only outside contributions made to a candidate during the 21 days immediately preceding an election, the lower standard of review is appropriate in this case.

1. Whereas restrictions on campaign expenditures directly burden First Amendment rights of association and free speech, limits on contributions do so only indirectly.

A restriction on spending directly decreases the amount of political speech engaged in by a candidate on behalf of his or her own campaign, or by an independent political association in support of that candidate. Because every form of political expression from the “humblest handbill” to the largest performance hall costs money, restrictions on spending necessarily reduce both the quantity and quality of the discussion of political candidates by limiting “the number of issues discussed, the depth of their exploration, and the size of the audience reached.” *Buckley*, 424 U.S. at 19.

In contrast, limits on contributions from outside sources only marginally affect political association and free speech. *Id.* at 20. A contribution is merely a symbolic way of associating the contributor with a

political candidate. *Id.* at 21. Meanwhile, contributors remain free to engage in other means of direct advocacy and candidates remain free to seek other means of financing. The issue before the *Buckley* Court was whether a cap on campaign contributions impermissibly burdened First Amendment freedoms. The Court held that limiting the amount of money a contributor can give to a specific campaign “involves little direct restraint” on his or her free speech and association because the contributor can continue to spend money elsewhere to discuss the candidates and issues. *Id.* Furthermore, the Court held that limits on contributions do not impermissibly burden a candidate’s First Amendment rights, as long as the limits are not so severe as to prevent a candidate from “amassing the resources necessary for effective advocacy.” *Id.* The \$1,000 limit on individual contributions at issue in *Buckley* easily passed this test, as its “overall effect” on political speech and association was simply requiring candidates “to raise funds from a greater number of persons.” *Id.* at 22.

Since *Buckley*, the Supreme Court has consistently reaffirmed the view that limiting campaign contributions only indirectly burdens political expression when compared with the direct and more serious consequences of restrictions on independent expenditures. *See, e.g., Randall v. Sorrell*, 126 S. Ct. 2479, 2488 (2006); *McConnell v. FEC*, 540 U.S. 93, 136 (2003); *FEC v.*

Beaumont, 539 U.S. 146, 161 (2003); *Nixon*, 528 U.S. at 386; *California Med. Assn. v. FEC*, 453 U.S. 182, 194–95 (1981). While spending limits “preclude most associations from effectively amplifying the voice of their adherents,” limits on contributions merely restrict one form of supporting a candidate while leaving open many other avenues for effective advocacy. *McConnell*, 540 U.S. at 136 (citations omitted).

2. Because limiting campaign contributions does not seriously implicate First Amendment freedoms, a standard of review less demanding than the strict scrutiny applied to restrictions on expenditures is appropriate.

Just as the Supreme Court has made it clear that restrictions on expenditures and limitations on contributions affect political speech and association differently, the Court has also clearly applied different standards of review to each. *See, e.g., McConnell*, 540 U.S. at 134 (collecting cases). The Court has explained that for First Amendment challenges in the campaign finance setting, “the level of scrutiny is based on the importance of the political activity at issue to effective speech or political association.” *Beaumont*, 539 U.S. at 161 (citations omitted). Because restrictions on campaign expenditures are a direct restraint on political speech and association, they are subject to the strictest scrutiny. *See Buckley*, 424 U.S. at 16; *See also Nixon*, 528 U.S. at 386. Thus, restrictions on expenditures must

be narrowly tailored to further a compelling government interest to pass constitutional muster. *See Beaumont*, 539 U.S. at 162.

In contrast, limits on contributions “lie closer to the edges than to the core of political expression.” *Beaumont*, 539 U.S. at 161. *Buckley* and its progeny have consistently treated contribution limitations as “merely marginal speech restrictions subject to relatively complaisant review under the First Amendment.” *Id.*; *accord Nixon*, 528 U.S. at 387. In *Nixon*, the Court directly considered the question of what standard of review applies to contribution limits. In reversing the Eighth Circuit’s application of strict scrutiny to Missouri’s \$1,075 contribution limit, the Court declared “it has . . . been plain ever since *Buckley* that contribution limits would more readily clear the hurdles before them.” *Id.* at 387. The Court went so far as to state that in reviewing contribution limits,

there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words strict scrutiny. Nor can we expect that mechanical application of the tests associated with strict scrutiny – the tests of compelling interests and least restrictive means – will properly resolve the difficult constitutional problem that campaign finance statutes pose.

Id. at 400, (Breyer, J. concurring) (internal quotations omitted); *accord McConnell*, 540 U.S. at 137. Contribution limits, therefore, need only satisfy the “lesser demand of being closely drawn to match a sufficiently important

interest” to be held constitutional. *McConnell*, 540 U.S. at 136. (citations omitted); *accord Nixon*, 528 U.S. at 387–88.

It is unclear from the district court’s opinion in this case which test it employed in upholding the 21-day provision. *See Jackson v. Leake*, 476 F.Supp.2d 515, 527–28 (E.D.N.C. 2006) (using “compelling interest” and “sufficiently important interest” interchangeably). Appellants assume in their opening brief that strict scrutiny applies. Appellant’s Br. 53. However, *amicus* believes that the less demanding standard of review usually applied to limitations on contributions is appropriate here, and that the 21-day provision satisfies this standard because it is closely drawn to match the State’s sufficiently important interest in maintaining the integrity and impartiality of its judicial branch.

Even if the more rigid standard of strict scrutiny applies, however, the district court did not err in holding that the 21-day provision is constitutional because it is narrowly tailored to advance the State’s compelling interest in preventing actual or perceived political corruption.

B. North Carolina Has A Sufficiently Important State Interest In Maintaining The Integrity And Impartiality Of Its Judicial Branch.

In *Buckley v. Valeo*, the United States defended the Federal Election Campaign Act's limitations on outside contributions on three grounds: preventing corruption or the appearance of corruption, equalizing opportunities for all candidates, and suppressing the rising costs of political campaigning. 424 U.S. at 25. The Court held that the first reason alone provided a "constitutionally sufficient justification" for the marginal infringement on political free speech and association imposed by contribution limitations. *Id.* at 26. Since *Buckley*, nearly every case that has examined a campaign financing scheme has done so with an eye toward the government's interest in preventing political corruption, or its appearance, and many contribution limits have been upheld on this ground. *See, e.g., North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 715 (4th Cir. 1999); *Gable v. Patton*, 142 F.3d 940, 951 (6th Cir.), *cert. denied*, 525 U.S. 1177 (1999); *California Med. Ass'n. v. FEC*, 453 U.S. 182, 199 (1981). Although the Supreme Court has never considered how *Buckley* and its progeny apply to judicial elections, lower courts and commentators have expressed the view that the need to free candidates from corrupting influences is even greater in the judicial context. *See, e.g., Morial v. Judiciary Comm'n of La.*, 565 F.2d 295, 305 (5th Cir. 1977); Jason Miles Levien & Stacie L. Fatka, *Cleaning Up Judicial Elections: Examining the*

First Amendment Limitations on Judicial Campaign Regulation, 2 Mich. L. & Pol'y Rev. 72 (1997). The inevitable public perception that elected judges rule in favor of those who made contributions undermines the integrity of the judiciary and is corrosive to an effective system of government. See Levien & Fatka, *supra* at 76–78. Therefore, courts should recognize that the government has a sufficiently important, even a compelling interest in maintaining the impartiality of its judicial branch, and evaluate campaign financing schemes accordingly.

1. The government's interest in preventing the corruption of its legislative and executive branches, or even the appearance of such corruption, has been held to justify limiting campaign contributions.

In *California Medical Association*, the Supreme Court upheld a provision of the Federal Election Campaign Act placing a \$5,000 limit on contributions from individuals and unincorporated associations to political committees organized under the FEC. 453 U.S. at 199. The Court concluded that unlimited contributions to political committees have as much potential to corrupt elections by “completely dominat[ing] the operations and contributions policies” of those committees as do the large contributions to candidates discussed in *Buckley*. *Id.*

In *Nixon*, the Court considered a state law that limited contributions to a maximum of \$1,075 for candidates campaigning for state office. 528 U.S.

at 383. The Court not only affirmed that *Buckley* is controlling for purposes of state campaign financing schemes, but in upholding the law stated that “even without the authority of *Buckley*, there would be no serious question about the legitimacy of the interests claimed,” namely Missouri’s interest in preventing either actual or perceived corruption. *Id.* at 390. Unlike the Eighth Circuit, which struck down Missouri’s contribution limits for lack of empirical evidence, the Court refused to impose on the State the burden of proving that contributions above the limit actually have a corrupting influence on candidates either while seeking election or once in office. *Id.* at 391–92. The Court went on to explain:

Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.

Id. at 390 (citation omitted). In addition, the Court noted that the fear that excessive campaign contributions may corrupt elections is “neither novel nor implausible,” *id.* at 391, and is one of the major reasons why limits on contributions are held to a lower standard of scrutiny than restrictions on campaign expenditures, *id.* at 392.

2. Because judges, unlike their counterparts in the legislature and executive branch, are required to maintain neutrality in their decision-making, the need to prevent actual or perceived corruption is correspondingly higher.

Courts and commentators alike agree that judicial elections pose unique problems to the regulation of campaign funding, *See, e.g.*, David B. Rottman & Roy A. Schotland, *What Makes Judicial Elections Unique?*, 34 *Loy. L.A. L. Rev.* 1369, 1369 (2001); *Morial v. Judiciary Comm'n of La.*, 565 F.2d 295, 305 (5th Cir. 1977). Some even go so far as to suggest abolishing the election of judges altogether, *See* Michael W. Bowers, *Public Financing of Judicial Campaigns: Practices and Prospects*, 4 *Nev. L.J.* 107, 114-15 (2003). While North Carolina is not prepared to strip its electorate of their say in determining who should sit on the bench, it has nonetheless enacted a public funding scheme with special sensitivity toward the difficulties posed by judicial elections.

In this day of omnipresent media communication, it is no surprise that judicial elections, once “low key affairs, conducted with civility and dignity,” are now highly reported, politicized campaigns marked by million-dollar budgets and heated competition. *See* Richard Briffault, *Public Funds and the Regulation of Judicial Campaigns*, 35 *Ind. L. Rev.* 819, 819 (2002). As a result, many judicial candidates must continuously search for additional funding. Often special interests groups representing social causes are the

most readily available sources. *See* Deborah Goldberg, *Public Funding of Judicial Elections: The Roles of Judges and the Rules of Campaign Finance*, 64 Ohio St. L.J. 95, 95 (2003). Apart from portraying candidates as biased toward certain causes or points of view, the involvement of special interest groups often results in “smear campaigning” and pressure on judges to take the concerns of their financial backers into account when ruling on controversial issues. *See id.* Additionally, of course, lawyers and litigants who will appear before judges are likely to be a large source of funds for judicial elections.

While none of this is new in the context of legislative and executive elections, the central reason for distinguishing the judiciary is that judges do not represent a constituency. *See* Terry Carter, *Footing the Bill for Judicial Campaigns*, 40 A.B.A. J. E-Report 1 (2002). As one court put it, “Judges remain different from legislators and executive officials, even when all are elected.” *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993). Unlike other elected officials, judges must adhere to the rule of law, not to the popular views of the electorate. Most judicial candidates are prohibited from making any campaign promises other than a pledge to faithfully and impartially discharge the duties of their office. *See* Goldberg, *supra* at 100 n.22 (noting that thirty-seven states enforce this rule, following

Canon 5 of the ABA Model Code of Judicial Conduct). Also unlike their legislative and executive counterparts, a large percentage of a judicial candidate's campaign contributors are the same individuals who will have cases before the judge if he or she is elected. *See* Rottman & Schotland, *supra*, at 1369. One account of a highly publicized Texas case in 1985 reported that during the course of the litigation, lawyers for the plaintiffs had contributed \$315,000 to the campaigns of various judges assigned to the case, while lawyers for the defendants, who ultimately lost, contributed only \$72,700. *See* Levien & Fatka, *supra*, at 71.

In October, 2002, North Carolina became the first state to enact a system of full public funding for judicial elections. *See* Carter, *supra*, at 1. The State's purpose in creating the public financing scheme was to "ensure the fairness of democratic elections" and "protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of [judicial] elections . . . since impartiality is uniquely important to the integrity and credibility of the courts." N.C. Gen. Stat. § 163-278.61 (2002). Scholars have praised North Carolina's system as a "success story" in balancing the importance of maintaining judicial impartiality with the need to run successful campaigns. *See* Phyllis Williams Kotey, *Public Financing*

for Non-Partisan Judicial Campaigns: Protecting Judicial Independence While Ensuring Judicial Impartiality, 38 Akron L. Rev. 597, 606–07 (2005); *See also* Doug Bend, Note, *North Carolina's Public Financing of Judicial Campaigns: A Preliminary Analysis*, 18 Geo. J. Legal Ethics 602 (2005) (stating North Carolina should be credited for system where candidates can effectively campaign without being independently wealthy or drastically overspending). Most importantly, the system fosters trust in the election process by allowing participants to be competitive without relying on significant funding from contributors who may later argue before them in court. *See id.* at 603.

The district court properly considered the State's interest in preventing actual or perceived corruption in upholding the constitutionality of the 21-day provision. 476 F.Supp.2d at 527-28. The State designed the full public funding scheme specifically with the anti-corruption interest in mind. *See* N.C. Gen. Stat. § 163-278.61. To encourage participating in public funding, the State included the “rescue funds” provision to safeguard a participating candidate against being grossly outspent by an opponent. *See* N.C. Gen. Stat. § 163-278.67. The 21-day provision in turn is necessary to allow the State adequate time to provide rescue funds. Thus, the district court correctly concluded that the marginal burden on First Amendment

rights inflicted by the 21-day provision is justified by the State's interest in maintaining a judiciary free from the corrupting influence of excessive private campaign contributions. 476 F.Supp.2d at 528.

C. The 21-Day Provision Is Closely Drawn To Match North Carolina's Interest In Ensuring An Impartial And Corruption-Free Judiciary.

N.C. Gen. Stat. § 163-278.13(e2) provides:

In order to make meaningful the provisions of [this Article], the following provisions shall apply with respect to candidates for justice of the Supreme Court and judge of the Court of Appeals:

(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 if that contribution causes the candidate to exceed the "trigger for rescue funds." . . . This subdivision applies with respect to a candidate opposed in the general election by a certified candidate . . . who has not received the maximum rescue funds available

The district court was correct in concluding that the 21-day provision is narrowly tailored to further North Carolina's interest in preventing actual or perceived corruption. *Jackson v. Leake*, 476 F.Supp.2d at 528. A prohibition on contributions during the 21 days immediately preceding judicial elections is necessary to "make meaningful" the entire public financing scheme, which in turn was enacted to protect the "integrity and credibility of the courts" from the "detrimental effects" of unrestricted contributions to judicial campaigns. *See* N.C. Gen. Stat. § 163-278.61. The

21-day provision effectuates the rescue funds provision, thus allowing a publicly funded candidate to receive additional financing in a timely manner, up to a maximum amount, if his or her opponent's total fundraising at that date would "trigger" the release of rescue funds. *See* N.C. Gen. Stat. § 163-278.67. The 21-day provision does not immediately limit the opponent whose fundraising does not cause the release of rescue funds, nor does it ever limit the opponent of a participating candidate who has already received the maximum amount of rescue funding. It applies only in the case where a participating candidate is entitled to receive rescue funds. Without the opportunity to receive and spend rescue funds in a timely manner, there would be a great disincentive for judicial candidates to participate in public funding, for fear of being grossly outspent by nonparticipating opponents.

In *Gable v. Patton* the Sixth Circuit upheld a provision of Kentucky's public financing scheme that prohibited both external contributions to candidates from outside sources and internal contributions from a candidate to his or her own campaign during the 28 days immediately preceding an election. 142 F.3d 940, 951 (6th Cir.), *cert. denied*, 525 U.S. 1177 (1999). Kentucky defended the 28-day provision on the grounds that it was necessary to ensure that campaign contributions are made prior to the scheme's final reporting date so that if a publicly funded candidate qualifies

for additional “rescue funds,” the State has adequate time to procure them prior to the election. *Id.* at 949–950. The *Gable* court agreed that the 28-day restriction on external contributions was an “indispensable” component of Kentucky’s public funding scheme, which in turn was justified by the State’s interest in preventing corruption. *Id.* at 949–51.

Additionally, the 28-day prohibition on external contributions remained valid even though the court later struck down the provision restricting internal contributions. *See id.* at 953. Thus, even though rescue funds could be triggered by additional contributions from a candidate to his or her own campaign during the 28 days preceding the election, the State’s interest in preventing corruption from outside sources was great enough to justify prohibiting external contributions during the same time frame. *See id.* at 951.

The district court in this case found the Sixth Circuit’s reasoning persuasive. *Jackson v. Leake*, 476 F.Supp.2d at 527. Like the provision in *Gable*, N.C. Gen. Stat. 163-278.13(e2) allows campaign contributions to be made up until the final days before an election. Also like in *Gable*, the 21-day provision is an integral part of the public funding scheme because it effectuates the rescue funds provision. Under N.C. Gen. Stat. § 163-278.65(b), candidates who participate in the public funding program receive

a fixed sum with which to campaign. However, the participating candidate is also eligible for “rescue funds” up to a maximum limit provided by N.C. Gen. Stat. § 163-278.67. In order to determine when a participating candidate becomes eligible for rescue funds, a nonparticipating opponent is required to report to the Board of Elections when his or her total amount of funds raised equals 80% of the trigger, and then to report additional amounts raised thereafter according to the provisions of N.C. Gen. Stat. § 163-278.66(a).

Without the 21-day provision, it is easy to imagine a scenario where a nonparticipating candidate continues to solicit contributions up until the day of the election, perhaps hitting the trigger with three weeks left to go, then receiving a surge of donations in the final seven days prior to the election. In this situation, the State is left with less than a week in which to determine and deliver the correct amount of rescue funds to the affected participating candidate, in amounts that could exceed \$400,000.00 for a contested general election¹, and the participating candidate has even less time in which to

¹ This figure is determined by the fact that in accordance with N.C. Gen. Stat. § 163-278.67(c), a participating candidate may receive rescue funds up to “an amount equal to two times” the original grant of public funding specified in N.C. Gen. Stat. § 163-65(b)(4). In 2006, the original grant for a participating Supreme Court candidate was more than \$200,000.00; the figure goes up slightly with each election. Hence a participating candidate is eligible for rescue funds in excess of \$400,000.00.

expend those funds on behalf of his or her campaign. *See* N.C. Gen. Stat. § 163-278.67(c).

As the district court recognized, North Carolina is certainly free to enact a number of provisions intended to “channel [candidates] into the corruption-reducing public finance scheme.” 476 F.Supp.2d at 528. Without the 21-day provision, few candidates would be willing to risk being grossly outspent in the days immediately preceding an election, and thus North Carolina’s important interest in maintaining an impartial judiciary would not be served. The district court also acknowledged that the 21-day provision applies only to external contributions and not to contributions by a candidate to his or her own campaign, a distinction which the *Gable* court held to be appropriate and not fatal to Kentucky’s 28-day provision. *Id.*

Thus, the only burden that the 21-day provision places on the First Amendment guarantees of free speech and political association is that it requires candidates to perform their fundraising earlier during the election cycle and, similarly, requires donors to provide their contributions before the 21-day pre-election deadline. This small burden is justified by North Carolina’s important interest in maintaining the integrity and impartiality of its judiciary by freeing potential judges from the corrupting influence of excessive campaign contributions by having a campaign finance scheme that

adequately protects candidates who rely upon public funding. In addition, the 21-day provision is not overbroad because it is limited to certain external contributions, applies only to appellate and supreme court judicial candidates in a limited number of situations, applies only for a short period of time, and is necessary to provide meaningful protection for candidates who participate in public funding.

CONCLUSION

For these reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1454

Caption: Duke, et. al., v. Leake, et al.,

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