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THE CONSTITUTIONALITY OF "RESCUE FUND TRIGGERS" IN NORTH CAROLINA'S JUDICIAL CAMPAIGN REFORM ACT

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I. INTRODUCTION

The United States has long wrestled with the theoretical implications of the Free Speech clause of the First Amendment to its Constitution.[1] We laud its near-absolute protection of freedom to speak against the majority swell.[2] We loathe its imprimatur of

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1. *See* RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 1:11, at 1–17 (1994) ("One can keep going round and round on the original meaning of the First Amendment, but no clear, consistent vision of what the framers meant by freedom of speech will ever emerge."); *see also* ZECHARIAH CHAFFEE, JR., FREE SPEECH IN THE UNITED STATES (1941) (discussing the history of the First Amendment).

2. Justice Brandeis noted the importance of maintaining political freedom to speak against the majority in *Whitney v. California*.

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . . But they knew that order cannot be secured merely through fear of punishment for its infraction, that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed

unseemly or dangerous ideas.[3] Determining the meaning and scope of the First Amendment often strikes at the heart of our national and personal values.

In recent years, campaign finance reform has again stirred us to clarify the ever-shifting boundaries of the First Amendment. Proponents of campaign finance reform cite the problems of corruption and unequal access to political office as an unassailable impetus for restructuring our election financing system.[4] Reformers tell us the First Amendment is intended to promote representative political debate—any tilt of the political balance toward the wealthy demands a regulatory response in order to protect the common

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> remedies . . . .

Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

3. Professor Harry Wellington implied that the "search for truth" theory of the First Amendment must inevitably produce a First Amendment jurisprudence that tolerates repugnant ideas.

> In the long run, true ideas do tend to drive out false ones. The problem is that the short run may be very long, that one short run follows hard upon another, and that we may become overwhelmed by the inexhaustible supply of freshly minted, often very seductive, false ideas. . . . Truth may win, and in the long run it may almost always win, but millions of Jews were deliberately and systematically murdered in a very short period of time. . . .

ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: POLICIES AND PRINCIPLES 754 (1997) (quoting Harry Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1130, 1132 (1979)); *see also* Cohen v. California, 403 U.S. 15, 24–25 (1971) (holding that the offense to public values was an insufficient basis upon which to restrict speech).

> To many, the immediate consequence of this freedom [of speech] may often appear to be only verbal tumult, discord, and even offensive utterance. . . . That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.

Id.

4. *See* Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 563–64 (1999).

voter and hence preserve the very essence of democracy.[5] Detractors of campaign reform argue the First Amendment prohibits any so-called "reforms" that undercut constitutional protections.[6] Political speech, they say, is at the center of First Amendment protection; it is the most cherished speech of a free democracy.[7] Placing limits on who may financially support what political causes and ideas, and to what extent, chips away at the very foundations of democracy—small encroachments ought to be sharply rebuked.[8]

This debate about the nature of free speech in the context of campaign finance reform provided the backdrop for North Carolina's recent passage of the Judicial Campaign Reform Act (the Act).[9] The Act requires, among other things, that election of North Carolina appellate judges be nonpartisan and publicly funded.[10] Nestled within the public funding portion of the Act is a provision allowing publicly funded candidates to receive "rescue funds" when attacked by opposing parties.[11] Rescue fund triggers have received considerable attention by the courts, producing opposing views as to their constitutionality under the First Amendment.[12] This paper explores the free speech implications of

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5. *See, e.g.*, Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 276–77 (1993) (arguing that "poor or middle-class" citizens are denied equal access to the political system by current campaign fundraising methods and thus have their representation in democratic government diluted).

6. *See, e.g.*, James Bopp, Jr. & Richard E. Coleson, *The First Amendment Needs No Reform: Protecting Liberty From Campaign Finance "Reformers"*, 51 CATH. U. L. REV. 785, 836–37 (2002).

7. *See id.*

8. B. Chad Bungard, *You Can't Touch This: A Lesson To Legislators on Political Speech*, 1 FIRST AMEND. L. REV. 13, 23–24 (2003) (discussing the repeated failed attempts of legislators to regulate issue advocacy in the process of passing campaign finance reform).

9. Judicial Campaign Reform Act, 2002 Sess. Laws 158 (codified at N.C. GEN. STAT. § 163-278.61–.71). The Act took effect for elections held in 2004 and thereafter. N.C. GEN. STAT. § 163-278.61 (2003).

10. *Id.*

11. *See id.* § 163-278.67.

12. *See generally* Kenneth N. Weine, *Triggering The First Amendment: Why Campaign Finance Systems That Include "Triggers" Are Constitutional*,

the Act's rescue fund provision and renders an opinion as to its constitutionality.

Section II of the paper explains the function of the statute and the policy interests relating to the rescue fund provision. Section III analyzes the constitutional arguments commonly advanced on both sides of the debate. In this section, the rescue fund provision is examined as to whether it (1) burdens protected speech, (2) is content-neutral or content-based, and (3) meets the likely standard of judicial inquiry. Section IV concludes with an opinion as to the constitutionality of the Act's rescue fund clause.

II. THE STATUTE

Underlying Policy and Goals

Prior to October 10, 2002, North Carolina campaign finance reformers cited a budding two-fold crisis in the state's appellate judicial election system: (1) judicial elections were being hijacked by special interest money, thereby diminishing meaningful influence of the ordinary voter and (2) the electorate was increasingly concerned that judges would not issue fair and impartial rulings but would instead decide legal disputes in favor of the largest campaign contributors.[13] Public confidence in an elected

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24 J. LEGIS. 223 (1999) (discussing the legislation and judicial precedent involving rescue fund triggers through 1998).

13. Citing an American Viewpoint poll, the North Carolina Center for Voter Education noted:

> The most disturbing result of the public opinion study is that there is considerable cynicism about judicial elections. More respondents (47%) believe that judicial elections do not reflect the will of the average voter . . . and 78% think that campaign contributions influence judges' decisions "a great deal" or "some". . . . Fifty-eight percent (58%) of those polled believe that [there] are two systems of justice in North Carolina, one [for] the rich and powerful and one for everyone else.

Statewide Survey Shows Deep Concern About Judicial Elections in North Carolina, REFORM LETTER (N.C. Ctr. for Voter Educ.), Aug. 2002, at 1, http://www.ncvotered.com/downloads/newsletter/jul2002.pdf [hereinafter

judiciary was purported to be shaky and getting worse. The Justice at Stake Campaign reported:

> According to [a recent poll], 72 percent of Americans are concerned that the impartiality of judges is compromised by their need to raise campaign money. Thirty-five percent of the respondents said they were "extremely" or "very" concerned.[14]

In response to these startling statistics, a myriad of special interest groups mounted a vigorous campaign to change the system.[15] Even the American Bar Association joined in the fray, echoing the call for reformation of judicial selection methods throughout the nation.[16]

On October 10, 2002, North Carolina's Judicial Campaign Reform Act was signed into law.[17] Originally touted as "a modest

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Statewide Survey] (on file with the First Amendment Law Review).

14. News Release, Am. Bar Ass'n, Poll: Confidence in Judiciary Eroded by Judges' Need to Raise Campaign Money: New American Bar Association President Calls for End to Political Battles over the Courts (Aug. 12, 2002) (on file with the First Amendment Law Review).

15. *See Governor Easley Signs Judicial Campaign Reform Act*, REFORM LETTER (N.C. Ctr. for Voter Educ.), Dec. 2002, at 1, 3, http://www.ncvotered.com/downloads/newsletter/dec2002.pdf [hereinafter *Governor Easley*] (on file with the First Amendment Law Review).

The following were "key members" of the "broad coalition of groups and individuals" organized by The N.C. Voters for Clean Elections: N.C. Center for Voter Education, Democracy South, Common Cause, N.C. League of Women Voters. *Id.* Other coalition members included: Business and Professional Women of N.C., Covenant With North Carolina's Children, NAACP of North Carolina, N.C. Association of Educators, N.C. Council of Churches, N.C. PIRG, and the N.C. Conservation Council. *Id.*

16. Former American Bar Association president and Raleigh attorney Alfred P. Carlton, Jr., placed the issue of judicial independence and judicial election reform at the forefront of the ABA's agenda. *Summer of Reform*, EYES ON JUSTICE (The Justice at Stake Campaign, Washington, D.C.), Sept. 12, 2002.

17. *Governor Easley*, *supra* note 15, at 3. The Act passed 57–54 in the State House (the vote was largely along party lines, with 56 Democrats and 1 Republican voting for the Act and 54 Republicans and no Democrat voting against the Act) and 34–12 in the State Senate. *See* Jim Hightower, *Free The Judges*, THE NATION, Nov. 25, 2002, at 8.

step on the road toward broader campaign finance reform affecting *all statewide races . . .*" in North Carolina,[18] the Act provided for nonpartisan election of state appellate court judges and granted publicly generated campaign funding to candidates running for those offices.[19] North Carolina became the second state to enact public campaign funding legislation for appellate level judges,[20] a move called "the most sweeping judicial reform America has had in years" by national media.[21] Its passage was hailed by reformers as a "significant victory for the people over the special interests," a victory which would ultimately instill greater public confidence and trust in the judicial system.[22]

The Rescue Funds Provision

The Act accomplished two basic objectives: (1) establishing a nonpartisan judicial election scheme for the North Carolina Court of Appeals and the North Carolina Supreme Court and (2) providing a publicly financed campaign fund for qualifying candidates in those elections.[23] Of particular concern in this paper is the public campaign funding provision.

The public funding provision requires candidates for state-wide judicial office[24] to meet certain criteria in order to be

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18. *Better For The Bench*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 10, 2001, at A8 (emphasis added).

19. *Id.*

20. *See Judicial Reform Is Historic Step*, NEWS & RECORD (Greensboro, N.C.), Sept. 28, 2002, at A12.

21. *See* Hightower, *supra* note 17, at 8.

22. *Governor Easley*, supra note 15, at 1. Governor Mike Easley stated:

> Many a time I can recall the trial judge saying to the jury 'you have no friends to reward, you have no enemies to punish, yours is but to seek the truth.' This bill goes a long way toward making certain that there is no impediment to that anywhere in a court system that we believe has the most integrity in the nation, and we want to keep it that way.

Id.

23. Judicial Campaign Reform Act, N.C. GEN. STAT. § 162-278.61 (2003).

24. *See id.* § 163-278.62(12). In North Carolina, the only statewide

"certified," and thus eligible for public campaign funding.[25] In order to be certified by the State Board of Elections, candidates must meet two basic requirements: (1) file a declaration of intent to participate in the Act's funding scheme[26] and (2) demonstrate support of their candidacy by generating sufficient "qualifying contributions."[27] Once candidates are certified, they are provided public funds for use in conducting their campaigns[28] and are bound by certain campaign contribution and expenditure restrictions.[29]

Because certified candidates are restricted in the amount they may spend during their campaign, the Act provides for the disbursement of additional "rescue funds" to allow a candidate to respond to attacks made by opposing candidates or independent interest groups during the course of the campaign.[30] If a certified candidate shows that funds in excess of the "rescue fund trigger" amount have been spent in opposition to his candidacy, or in support of an opponent, then the State Board of Elections is required to issue to the attacked candidate additional funding equal to the reported excess of the "rescue fund trigger."[31] The "rescue fund trigger" amount is roughly equal to the amount a candidate may spend during the primary and general elections.[32]

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judicial offices are those on the Court of Appeals and Supreme Court.

25. *See id.* § 163-278.64.

26. *Id.* § 163-278.64(a). In this declaration a candidate must affirm that one political party will handle the candidate's "contributions, expenditures, and obligations" and that the candidate will comply with specified contribution and expenditure limits. *Id.*

27. *Id.* § 163-278.64(b). This "demonstration" must consist of qualifying contributions (no less than $10, no more than $500) from at least 350 registered voters in an amount totaling thirty to sixty times the candidacy filing fee (which fee is 1% of the annual salary of the office sought). *Id.*; *see also id.* §§ 163-278.62(9)–.62(10), .62(15), 163-324.

28. *See* § 163-278.65(b)(4).

29. *See id.* § 163-278.64(d) (describing the contribution and expenditure limits); § 163-278.65 (describing the amount of funding available to a candidate).

30. *See id.* § 163-278.67.

31. *See id.*

32. *See id.* § 163-278.62(18). During a primary election, spending "in opposition to" a certified candidate that exceeds the maximum amount of "qualifying contributions" must be compensated with rescue funds. *Id.*

In plain English, the rescue funds provision works like this. A certified candidate may not spend more than a specified amount during a campaign. This causes a problem when a non-certified candidate or an independent interest group attacks the certified candidate. Because of the expenditure limitations, a certified candidate would otherwise be unable to respond to the attacks—expenditure limits tie a candidate's hands when attacked. The rescue funds provision allows an attacked candidate to receive additional funds necessary to combat the attacks—rescue funds untie the candidate's hands.

Policy Arguments of The Statute

The rationale underlying the creation of the Act's public financing scheme for judicial elections paralleled the traditional justifications for campaign finance reform: campaign costs are allegedly trending toward the exorbitant and threatening to undermine equal participation in the democratic election process.[33] The escalating cost of elections will allegedly diminish access to political power structures for those without sufficient wealth to

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During a general election, spending "in opposition to" a certified candidate that exceeds the maximum amount of "base level" funding must be compensated with rescue funds. "Base level" funds are the public funds available under the statute, and differ according to the office sought. *See id.* § 163-278.65(b)(4). Candidates for the Court of Appeals are given a base funding of 125 times the amount of their filing fee (1% of the current salary of a Court of Appeals judge). *Id.* Candidates for Supreme Court are given a base funding of 175 times the amount of their filing fee (1% of the current salary of a Supreme Court justice). *Id.*

33. *See* Buckley v. Valeo, 424 U.S. 1, 96 (1976) (citing the elimination of improper influence of large private contributions as a goal of public campaign financing); *see, e.g.*, Richard Briffault, *National Symposium on Judicial Campaign Conduct and the First Amendment: Public Funds and the Regulation of Judicial Campaigns,* 35 Ind. L. Rev. 819, 819–23 (2002) (discussing the need to reduce the potential influence of wealthy contributors in judicial elections); Bradley A. Smith, *Some Problems with Taxpayer-Funded Political Campaigns*, 148 U. PA. L. REV. 591, 591 (1999) (noting the traditional arguments in favor of campaign finance reform are unequal voter influence over the political power structure and the possibility of corruption of political officials by the need for large contributions).

participate and cause a perception of corruption in the political process because candidates will be viewed as beholden to the interests of wealthy donors.[34] These arguments were viewed as especially applicable in the context of judicial elections in North Carolina, where public opinion surveys indicated lagging public confidence in fair and impartial judicial elections.[35] Officially, the policy purpose of the statute is

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34. *See, e.g.*, Christopher J. Ayers, Recent Development, Perry v. Bartlett, *A Preliminary Test for Campaign Finance Reform*, 79 N.C. L. REV. 1788, 1794–98 (2001) (summarizing the two common arguments for campaign finance reform as reduction of political corruption and providing opportunities for equal access to the political process); Briffault, *supra* note 4, at 563–64 (arguing that the problems with the current system of campaign funding are unequal access to political power structures and decreasing integrity of the election system); Raskin & Bonifaz, *supra* note 5, at 276–77 (1993) (arguing that "poor or middle-class" citizens are denied equal access to the political system by current campaign fundraising methods and thus have their representation in democratic government diluted).

35. *See Statewide Survey*, *supra* note 13, at 1. Citing a study of North Carolina voters by American Viewpoint, the North Carolina Center for Voter Education noted the following:

> The most disturbing result of the public opinion study is that there is considerable cynicism about judicial elections. More respondents (47%) believe that judicial elections do not reflect the will of the average voter than those who do believe (46%) that the outcome of such races reflect the will of the average voter. . . . Of primary concern to voters is the increasing role of money in judicial elections. Eighty four percent (84%) of voters are concerned that lawyers are some of the biggest campaign contributors to judicial candidates, and 78% think that campaign contributions influence judges' decision "a great deal" or "some". Voters perceive the role of money not just in terms of potential influence on judicial candidates, but also as a barrier to electability: 85% are concerned that because the cost of running for judge in North Carolina can cost over one million dollars, some people who would make good judges don't run for office. Fifty-eight percent (58%) of those polled believe that [there] are two systems of justice in North Carolina, one for the rich and powerful and one for everyone else.

Id.

> to ensure the fairness of democratic elections in North Carolina and to protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, those effects being especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts.[36]

The Act's rescue funds provision is related to these broader policy objectives. In *Buckley v. Valeo*, the Court upheld the FECA's contribution limits and public campaign funding but struck its expenditure limits as a violation of First Amendment speech rights.[37] In so doing, the Court distorted the original design of campaign finance reform and instead " 'created a campaign finance system very different from the one Congress intended. . . . In simple economic terms, the *Buckley* Court limited supply (contributions), while leaving demand (expenditures) free to grow without limit.' "[38] Therefore, subsequent campaign finance reform schemes have sought to limit expenditures without offending *Buckley*.[39] The primary tool employed in this effort has been the creation of enticements for candidates to accept *voluntary* restrictions on expenditures.[40]

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36. § 163-278.61.

37. Buckley v. Valeo, 424 U.S. 1, 19–23 (1976).

38. Kenneth N. Weine, *supra* note 12, at 226 (quoting BURT NEUBORNE, CAMPAIGN FINANCE REFORMS & THE CONSTITUTION: A CRITICAL LOOK AT *BUCKLEY V. VALEO* (Brennan Center for Justice, Campaign Finance Reform Series 1997)).

39. *See id.*; *see also* Republican Party of Minn. v. White, 536 U.S. 765, 768, 774–76 (2002) (holding unconstitutional a clause in the Minnesota canon of judicial conduct prohibiting a judicial candidate from "announc[ing] his or her views on disputed legal or political issues").

40. Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445, 466–68 (1st Cir. 2000) (discussing the need to limit expenditures through voluntary means or risk violating the First Amendment). Although some have argued that the enticement tactics have crossed over into coercion, they remain a primary tool of imposing expenditure limits without violating

Chief among these enticements is public campaign funding.[41] The problem, of course, is that candidates who accept the public funding, and thereby agree to the expenditure limits, put themselves in a precarious position.[42] A publicly funded candidate must agree to limit his or her spending, while a non-publicly funded candidate has no such limit. The results are clear: "No candidate will unilaterally disarm . . . when faced with potentially unlimited expenditures by opposing candidates or their allies."[43]

Rescue funds attempt to remedy this problem. They permit a candidate to respond to attacks either by increasing the candidate's spending limits or, as in North Carolina's Act, by granting a direct public subsidy when opposing expenditures exceed those of the publicly funded candidate.[44] Therefore, whenever a non-participating candidate or private interest group attacks a participating candidate, the non-participating party triggers a public subsidy of the very message it seeks to oppose. While the policy question of whether triggers are necessary to the success of campaign reform may be debated in other circles, this paper squarely addresses whether rescue fund triggers violate the First Amendment rights of independent entities and non-publicly funded candidates.

III. ANALYSIS

Three basic issues guide the inquiry into whether the Act's rescue fund trigger is constitutional under the First Amendment: (1) whether the trigger constitutes a burden on protected speech, (2) whether the trigger constitutes a content-neutral or content-based regulation, and (3) whether the asserted government interest underlying the need to regulate speech and the means chosen to

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the First Amendment. *See id.*

41. *See id.*

42. "[M]any candidates would decline voluntary limits because they are afraid of not having the financial resources to respond to independent spenders or opponents who do not voluntarily limit their spending." Weine, *supra* note 12, at 226.

43. *Id.* at 223.

44. *See id.* at 228.

regulate the speech at issue are sufficient to pass the constitutional test applied.[45]

Burden on Protected Speech

The political speech at issue in the Act's rescue funds provision has long been recognized as worthy of the highest protection afforded under the Constitution.[46] Courts and commentators have affirmed with nearly one voice that political speech holds an unrivaled status as the darling of the First Amendment liberties.[47] In its seminal ruling on restrictions relating to speech in political campaigns, the *Buckley* Court advanced the basic principle that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression . . ."[48] Commentators have since underlined the high value placed on political speech. "In a nation where the people are sovereign, it is absolutely essential that the citizenry is able to make informed choices among the candidates for public office."[49]

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45. *See, e.g.*, Fed. Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 493–502 (1985) (applying this basic framework to political speech); *see also Daggett*, 205 F.3d *passim* (applying this framework in assessing state public election financing schemes); Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) (applying this analytical framework specifically to a rescue fund trigger provision).

46. The principle that political speech is protected in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people" has stood the test of time. Roth v. United States, 354 U.S. 476, 484 (1957); *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (supporting the United States's constitutional commitment to public debate, which is "robust, uninhibited, and wide-open").

47. " '[I]t can hardly be doubted that the constitutional guarantee [of free speech under the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office.' " Buckley v. Valeo, 424 U.S. 1, 15 (1976) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

48. *Id.* at 14.

49. *Id.*

Especially relevant to the context of rescue fund triggers is "issue advocacy" speech, a sub-category of political speech. In *Buckley*, the Court drew a bright-line distinction between express advocacy and issue advocacy.[50] Express advocacy may be regulated in certain instances; issue advocacy has absolute protection.[51] Speech deemed to be "express advocacy" is speech containing terms that expressly "advocate the election or defeat of a clearly identified candidate for [political] office."[52] Because the rescue fund provision applies to any speech "in opposition to" a certified candidate or "in support of" a certified candidate's opponent(s), independent entities advocating on behalf of selected issues may fall within the scope of the rescue funds provision if the issues they advocate are the subject of an election debate.[53] Thus, rescue fund triggers apply to *any* speech made in opposition to issues which a publicly funded candidate supports. In this respect, rescue fund triggers come very close to the "bright line" between express advocacy and issue advocacy, and thus venture into dangerous First Amendment territory.

> For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in

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50. Bungard, *supra* note 8, at 24.

51. *See* Bopp & Coleson, *supra* note 6, at 836–37.

52. *Buckley*, 424 U.S. at 44. Examples of express advocacy terms include: " 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.' " *Id.* at 44 n.52.

53. Since the phrase "issue advocacy" appears nowhere in the language of the Act (see especially sections 163-278.67(a)(2) and 163-278.66(a)), a literal reading of the Act could suggest that issue advocacy by independent entities would not trigger rescue funds. However, determining what is "in opposition to" (the specific language used in the Act) was a subject of federal litigation in *North Carolina Right to Life, Inc. v. Leake*, 108 F. Supp. 2d 498 (E.D.N.C. 2000). The overlap between issue advocacy and express advocacy arises when a candidate is clearly identified with a particular issue. For example, ads by the trial lawyers association stating "Tort Reform Is Bad for America" could be interpreted as an attack on the reelection campaign of George W. Bush. Likewise, ads by the American Medical Association stating "Government Health Care Is A Step Toward Communism" could be interpreted as a direct attack on a future campaign of Hillary Rodham Clinton.

> practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.[54]

At best, rescue fund triggers regulate political speech and may only be upheld in very limited circumstances.[55] At worst, they regulate issue advocacy speech and are subject to a near-absolute bar.[56]

While the type of speech subject to the rescue fund trigger is undoubtedly protected, the more complicated inquiry is whether the trigger constitutes a burden on speech. This question has provoked a hot and on-going debate.[57] The first appellate court to analyze the constitutional validity of rescue fund triggers was the Eighth Circuit Court of Appeals in *Day v. Holahan*.[58] The Minnesota statute at issue in *Day* provided that publicly financed candidates for state office could have their expenditure limits "increased by the sum of independent expenditures made in opposition to a candidate plus independent expenditures made on behalf of the candidate's major political party opponents . . . ."[59] The statute also required that the government provide additional funding to candidates "against whom the independent expenditures have been made," in an amount equal to one-half of the adverse independent expenditures.[60] Thus, if an independent interest group reached out to support a candidate, or a candidate's issues, then its

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54. *Buckley*, 424 U.S. at 42.

55. *See* Bopp & Coleson, *supra* note 6, at 836–37.

56. *See id.*

57. *See, e.g.*, Weine, *supra* note 12, *passim* (discussing the history of trigger litigation and arguing for upholding their constitutionality).

58. 34 F.3d 1356 (8th Cir. 1994).

59. *Id.* at 1359. The statute excluded from this sum the amount of expenditures made "by an association targeted to inform solely its own dues-paying members of the association's position on a candidate." *Id.*

60. *Id.* The conditions a candidate was required to meet included having eligibility to receive a public subsidy and raising twice the minimum match. *Id.*

expression of support triggered increased spending limits for the candidate who was deemed to be "attacked," and supplied that candidate with a public subsidy equal to one-half the amount spent by the independent group.[61]

In analyzing whether this reimbursement scheme burdened speech, the court first determined that the speech at issue was protected under the First Amendment.[62] It next addressed the crux of the inquiry: the extent of the burden. Here, the court noted that because the statute required public compensation to an attacked candidate, independent groups that advocated against the election of a candidate, or against an issue supported by that candidate, were made directly responsible for adding to the campaign coffers of the candidate they opposed.[63] The court held that the statute caused independent groups to self-censor their advocacy of a candidate or a candidate's issues, and thus created an impermissible chilling effect on speech.[64]

Several additional cases support the Eighth Circuit's conclusion that funding triggers impermissibly burden speech. These arguments fall mainly under the Court's "compelled speech" jurisprudence. Through Justice Jackson's well-known opinion in *West Virginia State Board of Education v. Barnette*,[65] the Court articulated the broad principle that government may not compel

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61. *See* Adam S. Tanenbaum, Day v. Holahan*:* *Crossroads In Campaign Finance Jurisprudence*, 84 GEO. L. J. 151, *passim* (1995) (making the argument that the "limit increase" provision of Minnesota's law ought to have been treated separately from the "public subsidy" provision).

62. *Day*, 34 F.3d at 1360.

63. *See id.* at 1360.

64. *Id.* Some commentators have rightly observed that the "chilling effect" discussed in *Day* was an inappropriately chosen doctrine. *See Tanenbaum*, *supra* note 61, at 161–64. Chilling effects are normally invoked in cases of overbreadth or vagueness—when a lack of precision in a statute leads a speaker to fear punishment and thus urges him to silence. *See* Smolla, *supra* note 1, § 3.03[2], at 3–97; *see also* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 793–95 (1988); Keyishian v. Bd. of Regents, 385 U.S. 589, 604 (1967) (noting the dangers of chilling effects on free speech which result from imprecise or unclear regulatory language).

65. 319 U.S. 624 (1943).

any person to support, by word or act, a message or belief.[66] There, the Court specifically and expressly refused to endorse the notion that "a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."[67] The Court went one step further in *Wooley v. Maynard*[68] where it held that the First Amendment protected both "the right to speak freely and the right to refrain from speaking at all. . . . The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' "[69]

Rescue fund triggers, when analyzed as compelled speech, raise significant constitutional problems. When the trigger applies, an independent interest group is compelled to facilitate the expression of a message with which it *necessarily* disagrees—the attacking party creates increased expenditure limits and additional public subsidies employed to convey the very message an attacking speaker sought to avoid.[70] This outcome violates precedent indicating the First Amendment prohibits the government from requiring a speaker to facilitate directly the communication of a message it did not choose.[71] Quite simply, by forcing an

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66. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

67. *Id.* at 634; *see also* Texas v. Johnson, 491 U.S. 397, 415 (1989) (reaffirming the principle that government may not compel speech).

68. 430 U.S. 705 (1977).

69. *Id.* at 714.

70. Perhaps this situation is distinguishable on the ground that the speaker is not itself being compelled to speak, that is, the candidate is speaking, not the independent interest group. The Court, however, has dismissed such distinctions in the past, even where the authorship of a message was clear. In *Tornillo* and *Pacific Gas*, the Court invalidated regulations which required speakers to facilitate the expression of opposing messages, even though the opposing speaker was clearly identified and distinct from the facilitating speaker. *See* Pac. Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1986); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

71. *See Miami Herald Publ'g Co.*, 418 U.S. at 258 (invalidating as unconstitutional a requirement that newspapers must provide counterargument space for political candidates who had been attacked in

independent interest group to play an instigating and supporting role in conveying an opposing message, rescue fund triggers are antagonistic to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."[72]

Not all courts have agreed with this line of analysis.[73] In *Daggett*, the First Circuit grappled with a rescue fund provision similar to the one at issue in *Day*, but found it to be constitutional.[74] There, the plaintiff challenged the Maine Clean Election Act (the Maine Act), which bestowed a publicly financed campaign fund upon candidates who agreed to abide by certain First Amendment limitations on their campaign activities.[75] One provision of the Maine Act granted a candidate attacked by an independent entity a dollar-for-dollar matching public subsidy, up to double the original campaign disbursement.[76] The plaintiffs relied heavily on *Day* in arguing the case, but the *Daggett* court broke new analytical ground. The court found that the rescue fund provision did not burden speech because the First Amendment granted no right to

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print, even though the opposing message was identified as directly attributable to its author); *Pac. Gas & Elec. Co.*, 475 U.S. at 20–21 (invalidating as unconstitutional a requirement that public utility companies must provide counterargument space for opposing messages within their billing envelopes, even though the author of the opposing message was clearly identified). *But see* Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74 (1980) (upholding a requirement for a shopping mall to allow protestors to speak on private property because the message could not be attributed to the owner). Even though the speakers in these cases were forced to allow opposing speech on private property, the governing principle emphasized by the Court in *Pacific Gas* was whether the speaker evidenced a particular objection to the message being conveyed. *See Pac. Gas & Elec. Co.*, 475 U.S. at 2–12.

72. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

73. *See* Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445 (1st Cir. 2000); *cf.* Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996); Wilkinson v. Jones, 876 F. Supp. 916 (W.D. Ky. 1995) (upholding rescue fund triggers, but only in the case of spending by candidates who chose not to participate in public funding).

74. *See Daggett*, 205 F.3d at 463–65.

75. *Id.* at 450–52.

76. *Id.* at 451.

speak free from response.[77] "We cannot adopt the logic of *Day*, which equates responsive speech with an impairment to the initial speaker."[78]

In upholding the Maine Act, the First Circuit relied on language in *Buckley* that asserted an underlying purpose of the First Amendment is to "secure the 'widest possible dissemination of information from diverse and antagonistic sources.' "[79] The Maine Act's consistency with this goal was sufficient to deem non-burdensome any so-called restriction on speech.[80] At least one commentator agreed with *Daggett's* rationale, arguing that rescue fund triggers enhance speech rather than chill it.[81] In noting several ways in which reformers can reach the result of characterizing rescue fund triggers as constitutional,[82] Weiner stated, "The First Amendment is concerned with persecution, not reprisal. That is, it protects individuals from being persecuted—or chilled from speaking. Its purpose is not to inhibit individuals from responding to speech."[83]

These arguments, however, fail to note two considerations. First, the question of whether government encourages more speech through a given regulation is not the true issue; the issue is whether the government is encouraging more (or less) speech by compelling a specific speaker to facilitate a message not of its choosing.[84] In this sense, *Daggett* fails to address the most debilitating arguments against its holding. The second consideration unaddressed by the *Daggett* court is that the First Amendment is not limited to the narrow goal of generating more speech from more persons. It also has the equally strong (if not stronger) purposes of promoting

77. *Id.* at 464. "The public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech . . . ." *Id.*

78. *Id.* at 465.

79. *Buckley*, 424 U.S. at 49.

80. *See Daggett*, 205 F.3d at 463–65.

81. *See* Weine, *supra* note 12, at 233.

82. *See id.* at 232.

83. *Id.* at 233. The *Daggett* court also stated, "We cannot adopt the logic of *Day*, which equates responsive speech with an impairment to the initial speaker." *Id.*

84. *See supra* notes 13–16 and accompanying text.

individual autonomy and democratic freedom.[85] These purposes are not necessarily served merely by increasing the amount or diversity of speech. As the District Court in *Day* noted, the First Amendment seeks to promote and protect "free and open debate."[86] Where a regulation erects an impediment to free and open debate in the political realm, or promotes an interest other than the unrestrained participation (or non-participation) of individuals "in politics, nationalism, religion, or other matters of opinion,"[87] that regulation undercuts personal liberty,[88] is antithetical to a tolerant democracy,[89] and places an unconstitutional burden on speech.[90]

Content Neutrality

A secondary issue in rescue fund trigger cases is whether the alleged restriction on political speech is content-neutral or content-based. If the trigger is found to be a content-neutral time, place, or

85. *See generally* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) (contending that speech is protected because of the value of speech to individuals); Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 AM. B. FOUND. RES. J. 523, 527 (1977) (suggesting that the function of free speech is to preserve democracy); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963) (citing as rationales for the First Amendment, *inter alia*, the value of individual self-fulfillment and self-governance through open discussion); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (noting the self-realization benefits of the First Amendment).

86. Day v. Hayes, 863 F. Supp. 940, 947 (D. Minn. 1994). It should be noted that the district court cited this principle as one of several in support of upholding the rescue trigger. But the principle plays a much larger role—stimulating free and open debate is a primary purpose of the First Amendment.

87. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

88. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 12 (1989) (noting that voluntary speech is essential for self-definition and self-expression).

89. *See* LEE BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA § 9, at 9–10 (1986) (noting that free speech promotes self-restraint in an effort to allow individuals to express their opinions and feelings).

90. *See supra* notes 63–66 and accompanying text.

manner restriction, it will face the intermediate scrutiny of *United States v. O'Brien*.[91] If the trigger is content-based, it will be presumptively invalid and must clear the high hurdle of strict scrutiny.[92] Resolving the issue of content neutrality is decisive.[93]

A content-based regulation is a regulation which "restrict[s] expression because of its message, its ideas, its subject matter or its content."[94] In other words, a content-based regulation penalizes speech on the basis of its viewpoint or subject matter.[95] Because the *Daggett* court did not find the rescue fund trigger to be a burden on speech, it did not reach the issue of content neutrality. Nevertheless, a cogent argument can be advanced in support of content-neutrality.

Rescue fund triggers generally apply equally to all speakers. Regardless of the viewpoint or content of the independent entity's message, an attacked candidate is eligible for an increase in spending authorization or public subsidy. In discerning the content-neutrality of such circumstances, the Court's "secondary effects" analysis advanced in *City of Renton v. Playtime Theaters*[96] is especially helpful. In *Renton*, a city ordinance singled out adult theaters by requiring that they be allowed to operate only in certain districts separated from residential areas.[97] The ordinance clearly targeted the theatres because of their sexual subject matter, but the Court ruled that the restriction was not content-based. Rather, the Court held that the ordinance was targeted to control the

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91. *See* 391 U.S. 367 (1968). A content-neutral restriction will be upheld if "it furthers an important or substantial governmental interest; if the interest is unrelated to the suppression of free expression; and if the restriction of alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377; *see also* Ward v. Rock Against Racism, 491 U.S. 781 (1989) (modifying the intermediate scrutiny analysis of *O'Brien*).

92. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

93. *See generally* Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) (discussing the nuances of regulation of speech content).

94. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

95. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

96. 475 U.S. 41 (1986).

97. *Id.* at 46–49.

"secondary effects" of adult theaters on the surrounding community (e.g. crime).[98] In the case of rescue fund triggers, it can be argued that the speech of independent interest groups is restricted because of its harmful secondary effects on attacked candidates (that is, undermining the integrity of the campaign reform statute). Thus, one possible conclusion is that the rescue fund triggers operate as content-neutral restrictions and should be permissible under *Renton*.

The *Day* court came to the opposite conclusion, finding that the rescue fund trigger restricted speech based on its election-oriented subject matter. A consistent line of cases supports this conclusion. In *Carey v. Brown*, a city ordinance prohibited labor picketing in residential neighborhoods.[99] The Court found this regulation to be content-based, even though it did not discriminate between viewpoints, because the restriction prohibited labor-oriented speech and no other.[100] Similarly, *Burson v. Freeman*[101] held that a restriction on all political campaigning (by any candidate) within 100 feet of an election polling site was a content-based restriction because it regulated only political speech.[102]

The subject matter restriction in *Burson* is closely analogous to restrictions imposed by rescue fund triggers—rescue fund triggers regulate only political speech. As the Court announced in Burson:

> Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech .... This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to

98. *Id.* at 47.

99. 447 U.S. 455 (1988).

100. *See id.* at 462.

101. 504 U.S. 191 (1992).

102. *Id.* at 197. The Court, however, upheld the restriction because the protection of the fundamental right to cast a ballot free from the reach of intimidation was deemed a compelling interest. *Id.* at 198–99.

> a prohibition of public discussion of an entire topic.[103]

Although the restriction in *Burson* applied equally to all speakers within one hundred feet of a polling site, the restriction operated as a bar only to political speech and was thus held to be content-based. The speech restrictions imposed by rescue fund triggers, although evenly applied, necessarily target political speech. They are therefore likely to be deemed content-based and subject to strict scrutiny.[104]

The Nature of The State Interest

A third and final issue in the rescue fund trigger debate is the nature of the asserted state interest and the means chosen to accomplish that interest. Because strict scrutiny is likely to apply, the state interest supporting rescue funds must be deemed compelling and the means chosen to achieve it must be narrowly tailored for the provision to survive constitutional scrutiny.[105] Cogent arguments have been advanced on both sides of the issue.

The *Day* court held that the rescue fund provision did not stand up to strict scrutiny.[106] The interest asserted by the state there was " 'enhancing the public's confidence in the political process by ensuring the viability of the legislature's statutory scheme designed to encourage candidates to accept the voluntary campaign expenditures . . . and the accompanying public subsidies.' "[107] The court noted that the rate of voluntary participation in the publicly funded election scheme was at ninety-seven percent before enactment of the statute.[108] On this basis, *Day* held that the asserted interest supporting the rescue fund trigger was not

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103. *Id.* at 197.

104. *See* Boos v. Barry, 485 U.S. 312, 321 (1988) (requiring content-based restrictions to be struck unless the restriction is narrowly tailored to support a compelling state interest).

105. *See id.*

106. Day v. Holahan, 34 F.3d 1356, 1361–62 (1994).

107. *Id.* at 1361 (citations omitted).

108. *See id.* In the years prior, the level of voluntary participation was similarly high, at eighty-nine percent in 1988 and ninety-six percent in 1990. *Id.*

sufficiently compelling to justify upholding the statute. "Clearly, the campaign reform legislation was not necessary to encourage candidates' involvement in public campaign financing . . . ."[109] The court found that the means were not narrowly tailored for a similar reason: "it occurs to us that no statute that infringes on First Amendment rights can be considered 'narrowly tailored' to meet the state's purported interest" in circumstances where that interest is adequately achieved without the statute.[110]

Critics have charged the *Day* court with misconstruing the state interest underlying rescue fund triggers.[111] They argue the interest advanced by rescue fund triggers is not to encourage participation in a publicly funded campaign financing scheme, but generally to preserve the integrity of the election process and to encourage greater political debate in the marketplace of ideas than there is at present due to the overbearing influence of wealthy candidates.[112] In this light, rescue fund triggers are viewed as nearly identical to the public financing scheme upheld in *Buckley*.[113] The broad public financing statute in *Buckley* was upheld because it attempted to provide candidates with an amount of funding sufficient to remain competitive against non-publicly funded candidates, and rescue fund triggers are purported to accomplish the same objective.[114] The only difference is timing—the *Buckley*

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109. *Id.* The court also noted that with participation rates at nearly one hundred percent without the current restrictions, "[o]ne hardly could be faulted for concluding that this 'compelling' state interest was contrived for purposes of this litigation." *Id.*

110. *Id.*

111. *See, e.g.*, Tanenbaum, *supra* note 61, at 151 (attacking the *Day* decision).

112. *Id.* Other decisions of the Court have also recognized that wealth can lead to distortion of political debate and a skewing of the marketplace of ideas. *See, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 659 (1990) (citing the prevention of political corruption as compelling state interest); Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986) (citing need to protect the marketplace of ideas); Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985) (citing prevention of political corruption as a compelling state interest).

113. *See* Weine, *supra* note 12, at 235–36.

114. *See id.* at 236.

system offers competitive funding at the beginning of the campaign, a rescue fund trigger offers competitive funding as the campaign progresses.[115] Thus, rescue fund triggers are reputed to protect the same interests of open debate and political non-corruption as *Buckley*.

> The underlying goal of the Minnesota Legislature [in enacting the rescue fund trigger] appeared to be aimed at balancing constitutional regulation of campaign financing with maintenance of a fair political process and open debate. By implementing the limit increase provision, the Minnesota Legislature attempted to avert the unintended consequences of voluntary spending limits—a candidate being restrained from responding to unforeseen expenditures made against him, causing an unfair advantage to accrue to his opponents.[116]

With these compelling interests in place, allowing publicly funded candidates to respond to attacks is asserted to be a narrowly tailored interest. The rescue fund trigger remedies exactly the targeted ill—allowing an attacked candidate to defend himself or herself during the course of an election.[117]

The *Day* Court did not fully address this argument. Instead, it leaned heavily on the high percentage of current participation in the public funding program as support both for the illegitimacy of the state interest and the means employed to achieve it.[118] The *Day* court may have been correct in asserting that the "independent expenditure" portion of the statute was aimed at encouraging candidates to accept the voluntary campaign expenditures.[119] Yet, even if the state interest could legitimately have been characterized as protecting against political corruption, there remain analytical

115. *See id.*
116. Tanenbaum, *supra* note 61, at 171.
117. *See id.* at 174–75.
118. *See* Day v. Holahan, 34 F.3d 1356, 1361–63 (1994).
119. *See id.* at 1361.

problems in the means chosen to achieve this end.

As a starting point, it must be recognized that because publicly funded campaign financing systems burden the speech rights of candidates, the state may not compel participation in a campaign financing program which violates the speech rights of its citizens.[120] "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an *agreement by the candidate* to abide by specified expenditure limitations."[121] Therefore, campaign finance reformers seek to encourage *voluntary* participation in public financing programs.[122] And herein lies the problem. Even where the state interest advanced is "protection against corruption in the political process," that is not the specific evil targeted narrowly by a rescue fund trigger. Rather, a rescue fund trigger is intended to make the public financing scheme sufficiently attractive to encourage voluntary participation by candidates.[123] Thus, the State's interest is limiting

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120. *See* Republican Nat'l Comm. v. Fed. Election Comm'n, 487 F. Supp 280, 284 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980). "[A]s long as the candidate remains free to engage in unlimited private funding and spending instead of limited public funding, the law does not violate the First Amendment rights of the candidate or supporters." *Id.*; *see also* Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445, 467 (1st Cir. 2000) ("[G]overnment may create incentives for candidates to participate in a public funding system in exchange for their agreement not to rely on private contributions" (citations omitted)); Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 38 (1st Cir. 1993) ("[V]oluntariness has proven to be an important factor in judicial ratification of government-sponsored campaign financing schemes.").

121. Buckley v. Valeo, 424 U.S. 1, 57 n.65 (1976) (emphasis added).

122. *See Vote Choice*, 4 F.3d at 38.

123. *See* Weine, *supra* note 12, at 226.

> Unlike campaign systems with mandatory spending limits—where candidates have no choice as to whether or not to limit their spending—systems with voluntary limits will only have a significant equalizing impact if most candidates accept these limits. Accordingly, reformers have sought to identify and accommodate concerns of candidates that might deter them from accepting voluntary spending limits.

Id.

speech rights, and a rescue fund trigger is carefully crafted to achieve that interest. In one breath, the State has built a "voluntary" corral, into which candidates may be herded by a "compelling state interest." One candidate is enticed to give up his or her free speech rights so long as the speech rights of another candidate can be burdened, and the ironic justification offered is that such a policy increases "free and open debate."[124]

We are left with an analytical knot. If the State's interest is specifically defined as "participation in the statutory program," that interest is manifestly not compelling. If the State's interest is defined as "protection against corruption of the political process," the means are not narrowly tailored. Either way, the rescue fund trigger cannot escape the net of strict scrutiny.

IV. CONCLUSION

Rescue fund triggers such as the one enacted by North Carolina's Judicial Campaign Reform Act provide an enticement to participate in publicly funded elections. Would-be candidates who fear having their hands tied in the course of their campaign by outside attacks must be free to respond to those attacks. Toward this end, rescue fund triggers have legitimate reasons for their existence.

The problem, however, is that despite the legitimacy of the underlying policies, rescue fund triggers infringe on the liberties guaranteed to all citizens under the First Amendment. Political speech holds an exalted place under the First Amendment. If possible, issue advocacy speech holds a place even higher. By forcing independent interest groups, whose purpose for existence is to advocate or attack issues of their choosing, to become the sole instrument of facilitating a message they oppose, North Carolina has unconstitutionally burdened the speech of those entities.

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124. In upholding the rescue fund trigger, the district court decision in *Day* stated, "To the extent the statute provides for increased debate about issues of public concern raised by an independent expenditure, it promotes the free and open debate the First Amendment seeks to foster and protect." Day v. Hayes, 863 F. Supp. 940, 947 (D. Minn. 1994).

Whether North Carolina's rescue fund trigger is an integral and necessary part of the greater campaign financing reform machine is not the relevant constitutional question. Neither is asking whether the regulation creates more speech. The decisive inquiry is this: whether compelling one entity to become the facilitator of a message it necessarily opposes is First Amendment anathema. To that question, the policies, purposes, and precedents of the First Amendment answer yes with one accord.