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INTRODUCTION

“Today, every state provides tax and other economic incentives as an inducement to local industrial location and expansion.” *Blinson v. State*, 186 N.C.App. 328, 651 S.E.2d 268, 271 (2007), *appeal dismissed and rev. denied*, 362 N.C. 355, 661 S.E.2d 240 (2008). Plaintiffs, however, believe that such incentives are bad public policy. But instead of petitioning the Legislature for a change in policy, they have brought a facial challenge to legislation providing economic development incentives. Although their suit is ostensibly aimed at the tax and other economic incentives that Google allegedly receives for investing in a massive new facility in the State of North Carolina, Plaintiffs’ constitutional theories would subject to judicial scrutiny, and ultimately render unconstitutional, scores of tax credits and exemptions available to business interests, since nearly all tax incentives provide financial benefits to certain private interests for operating their businesses, to the exclusion of others. This would put North Carolina at a competitive disadvantage vis-à-vis its sister states (not to mention foreign nations) which offer economic incentives to attract new businesses. *See Maready v. City of Winston-Salem*, 342 N.C. 708, 727, 467 S.E.2d 615, 627 (1996) (North Carolina is “competing with inducements to industry offered ... in other jurisdictions”).

Plaintiffs’ theories and the role they would assign to the judiciary are foreign to this State’s system of constitutional government, where the separation of powers

is fundamental. N.C. Const., Art. I, § 6. Our courts have long recognized “the *preponderant power* has always rested with the legislature,” Orth, THE NORTH CAROLINA STATE CONSTITUTION, A REFERENCE GUIDE 42 (1993) (emphasis added), as “the lawmaking agent of the people.” *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989).

Not only are Plaintiffs inviting the courts to intervene in a quintessentially political controversy, they are seeking to defy controlling precedent. Based on settled precedent, this Court and the Supreme Court recently rejected a nearly identical lawsuit advanced by the same organization that is pursuing this one, the N.C. Institute for Constitutional Law (“NCICL”). *Blinson, supra*. *Blinson* was a taxpayer challenge filed by NCICL to test the constitutionality of tax legislation and other incentives used to entice Dell Inc. (“Dell”) to locate a new facility in North Carolina. (R p. 92-124) In *Blinson*, Judge Hobgood (R p. 196) and this Court unanimously agreed that the lawsuit had to be dismissed under Rule 12(b). 186 N.C.App. at 341-42, 651 S.E.2d at 278-79. The same disposition is required here. NCICL’s attempt to have the judicial branch eliminate tax and other economic incentives enacted by the General Assembly in the cause of economic development should be rejected out of hand.

STATEMENT OF FACTS

The following facts are alleged or revealed in the exhibits to the Amended Complaint ("Complaint"). Additional laws, of which this Court may take judicial notice, are discussed by way of background and context. *See Hinkle v. Hartsell*, 131 N.C.App. 833, 836, 509 S.E.2d 455, 457 (1998).

I. THE GENERAL ASSEMBLY ENACTED A TARGETED TAX EXEMPTION FOR ELIGIBLE INTERNET DATA CENTERS

A. To The Laundry List Of Exemptions From The Sales And Use Tax, The General Assembly Added One For Eligible Internet Data Centers

North Carolina has a sales and use tax. G.S. Ch. 105, Art. 5. North Carolina has also historically maintained an extensive list of dozens of exemptions from that tax. G.S. § 105-164.13. Those exemptions range from wrapping paper and drinking straws, to ink and computer software, to telecommunications services, to dozens of agricultural items. *Id.* The exemptions promote a number of industries, including but not limited to agriculture, manufacturing, fisheries, motion pictures, forestry, telecommunications, recycling, software, and air carriage. *Id.* The exemptions promote these businesses by exempting their purchases and use of equipment, supplies, and energy. *See id.* In addition to the exemptions, the sales/use tax code provides to a number of industries a full refund of sales/use taxes paid by them for equipment, supplies, materials, and fixtures. G.S. § 105-

164.14(j). The industries include air courier service and aircraft, computer, motor vehicle, and pharmaceutical manufacturing. *Id.*

This lawsuit arises from legislation adopted by the General Assembly on July 6, 2006 to add two more exemptions to that existing list (the "Legislation"). The exemptions are for electricity and eligible business property sold to or used by eligible "internet data centers." (R p. 64-66) As shown below, what the General Assembly has done, in effect, is treat data centers like manufacturers for purposes of the sales and use tax.

An eligible "internet data center," as defined by the Legislation, is a newly constructed facility that is used primarily by a business that is engaged in "Internet service providers and Web search portals industry" and that satisfies several other requirements. (R p. 65-66) To be eligible for the exemption, the applicant must invest at least \$250,000,000 in eligible property within the first five years after construction of the new facility begins. (R p. 66)

The exemption for eligible business property applies if the property is capitalized and used (i) for internet or web search portal services; (ii) for electricity generation, transformation, transmission, distribution, or management; or (iii) to provide computer engineering or computer science research. *Id.* If the business property is not located and used at the eligible internet data center, then the exemption for that property is forfeited. *Id.* Similarly, the exemption for

electricity is forfeited if any portion of the electricity is not used at an eligible data center. *Id.* A taxpayer that forfeits an exemption is liable for all past taxes avoided as a result of the forfeited exemption. (R pp. 66-67)

B. The Legislation Is Consistent With The State's Treatment Of Manufacturing Facilities, And It Is Consistent With The State's Policy Of Encouraging The Development And Relocation Of Data Centers

As explained below, the tax code as a whole reveals that, in the information-based economy, the General Assembly has decided to treat data centers and manufacturing facilities alike for purposes of taxation.

In the context of the sales and use tax, the General Assembly has long given special treatment to *electricity*.¹ It has historically subjected electricity sales to a lower rate of taxation and has varied the rate across industries. G.S. § 105-164.4(a), (1f), (4a) (general sales tax rate of 4.5% is not applicable to electricity; general rate for electricity is 3%; rate for electricity sold to aluminum smelting facilities through October 1, 2007 was 0.17%). The General Assembly has also exempted electricity sales from taxation when it has deemed it appropriate. G.S. § 105-164.13(10a) (exemption for electricity used at major recycling facilities).

Shortly after enacting the Legislation challenged in this lawsuit, the General Assembly enacted legislation to phase out altogether the sales and use tax for

¹ Many states, including neighboring states, exempt businesses from sales/use taxes on electricity. *See, e.g.*, S.C. Code § 12-36-2120(19),(26),(43),(44),(50)(b),(66); Tenn. Code Ann. § 67-6-206(b)(3).

electricity sold to manufacturing facilities and farmers. S.L. 2007-397. Then at 1.8%, the rate dropped to 1.4% in 2008 and, in steps, will be eliminated entirely by July 1, 2010. *Id.* The General Assembly has decided, by enacting the Legislation here, that *both* eligible manufacturing facilities *and* eligible internet data centers should have their electricity purchases exempt from tax.

Similar treatment also extends to their purchases of *business equipment*. Manufacturers enjoy an exemption from the sales-and-use tax for qualifying machinery, parts, and accessories. G.S. §§ 105-164.13(5a), 105-187.51, 105-187.51A. The Legislation challenged here provides a similar exemption for equipment located at eligible internet data centers. (R p. 66)

This is part of a broader strategy undertaken by the State to treat data centers like manufacturing facilities with respect to the taxation of business equipment. Shortly after it passed the legislation challenged in this lawsuit, the General Assembly passed additional legislation—not challenged in this lawsuit—that grants to eligible “data centers” (a construct broader than internet data centers) a sales-tax exemption for purchases of machinery and equipment located and used at their facilities. S.L. 2007-323, § 31.22; G.S. §§ 105-164.13(5a), 105-187.51C. Under the data center exemption, data center equipment purchases are instead subject to a privilege tax that cannot exceed \$80.00 per article, which is precisely how manufacturing facilities are taxed with respect to their machinery and

equipment. S.L. 2007-323, § 31.22; G.S. §§ 105-187.50, 105-187.51(b), 105-187.51C(b). The exemption applies to data centers other than those internet data centers that are exempt from the sales and use tax under the Legislation challenged in this lawsuit. G.S. § 105-187.51C(a). Thus, under the 2007 data center legislation which is not challenged in this case, data centers that do not constitute internet data centers may qualify for a separate exemption.

In sum, in the information age, the General Assembly has decided to treat data centers like manufacturing facilities for purposes of the sales and use tax.²

C. Although Luring Google To North Carolina May Have Been The Impetus For The Legislation, The Tax Exemption Is Not Limited To Google

The alleged impetus for the Legislation was California-based Google's decision to construct and operate a new data center facility in North Carolina; the State allegedly used the Legislation to entice Google to build and operate the facility in North Carolina, as opposed to another state. (R pp. 10-11 (¶¶ 20-28), 15 (¶ 43)) However, while Google may have been the impetus for the Legislation, the Legislation is not limited to Google, and indeed does not mention Google. (R pp.

² The Legislation puts North Carolina on equal footing with other States, including its neighbors. South Carolina grants a similar sales/use tax exemption to internet data centers, for electricity and business equipment. S.C. Code §§ 12-6-3360(M)(14)(b), 12-36-2120(65)-(66). *See also* Tenn. Code Ann. §§ 67-6-102(42)(K), 67-6-102(52)-(53), 67-6-206(a) (exempting equipment used in a "qualified data center"); N.Y. Tax Law, §§ 1115(a)(37), 1115(y) (exemption from sales/ use tax for equipment located or installed at an "internet data center").

64-67) Under the terms of the Legislation, any internet data center satisfying the statutory requirements is eligible for the tax exemption. *Id.*

D. The Job Development Investment Grant Program

The General Assembly enacted the Job Development Investment Grant (or “JDIG”) program in 2002, to authorize annual grants available to new and expanding businesses. (R p. 43 (¶39)) In enacting the program, the General Assembly found, among other things, that “[i]t is the policy of the State of North Carolina to stimulate economic activity and to create new jobs for the citizens of the State by encouraging and promoting the expansion of existing business and industry within the State and by recruiting and attracting new business and industry to the State”; that “economic trends” and “the decline in the State's traditional industries” have made “the State's economic development policy and programs both more critical and more challenging” and “inhibit the State’s ability to sustain or attract new and expanding businesses”; and that the JDIG program “is necessary to stimulate the economy, facilitate economic recovery, and create new jobs in North Carolina.” G.S. § 143B-437.50.

The Complaint alleges that, with the support of the General Assembly and the Governor, “[o]n or about December 28, 2006, the State’s Economic Development Investment Committee voted unanimously to award a Job Development Investment Grant to Google in connection with Google’s

construction and operation of an internet data center in Lenoir, North Carolina.” (R p. 44 (¶ 43)) According to the Complaint, the JDIG will equal “75 percent of the state personal income withholding taxes derived from the creation of new jobs,” *id.*, a percentage that falls within the range prescribed by statute. G.S. § 143B-437.56(a). But while the Complaint alleges the Committee voted in December 2006 to award a JDIG to Google, presumably based on job creation and economic development, the Complaint does not allege (nor could it) that the State and Google in fact have entered into a binding JDIG agreement executed by the parties and by the Attorney General.

II. PLAINTIFFS FILED THIS LAWSUIT TO CHALLENGE THE LEGISLATION AND JDIG INCENTIVES

Plaintiffs do not compete with Google. They are not business organizations at all. Rather, they are three individual taxpayers. (R pp. 35-36 (¶¶ 4-6))

Their Complaint contained 12 counts which mount a facial challenge to the Legislation. (R pp. 48-59) Their claims are based on various provisions of the North Carolina Constitution. In this appeal, however, Plaintiffs have abandoned most claims and are advancing only three conceptually-related and overlapping claims: Counts 7, 8, and 11. Count 7 invokes the principle in Article V, Section 2(1) that the “power of taxation shall be exercised in a just and equitable manner”; Count 8 invokes the Uniform Taxation Clause in Article V, Section 2(2); and Count 11 invokes the Law of the Land Clause in Article I, Section 19 to plead what

is essentially an equal protection claim. (R pp. 54-58) As to those claims, the trial court held that Plaintiffs lack standing to advance them because Plaintiffs are not part of the class potentially prejudiced by the Legislation. (R pp. 256-57)

STANDARD OF JUDICIAL REVIEW

Several principles of judicial review control cases in which plaintiffs ask courts to declare that the acts of elected officials are prohibited by the Constitution.

First, the judiciary in this State has long held that the power to declare an act unconstitutional “should be exercised sparingly,” *Kornegay v. City of Goldsboro*, 180 N.C. 441, 105 S.E. 187, 189 (1920), so sparingly that a challenger must establish unconstitutionality “beyond a reasonable doubt,” and must demonstrate that the act is “clearly prohibit[ed]” by the Constitution. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004); *Rowlette v. State*, 188 N.C.App. 712, 714-15, 656 S.E.2d 619, 621 (2008) (“burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground.”). Thus, “[i]f there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.” *Sutton v. Phillips*, 116 N.C. 502, 504, 21 S.E. 968, 968 (1895); accord *City of New Bern v. New Bern-Craven Cty. Bd. of Educ.*, 338 N.C. 430, 435, 450 S.E.2d 735, 738 (1994).

The beyond-a-reasonable-doubt rule of judicial review “is founded upon a proper respect for” the Legislature, “which derives its authority from, and is responsible to, the people of the State.” *State v. Brockwell*, 209 N.C. 209, 212, 183 S.E. 378, 379 (1936). The Legislature is presumed to know how its acts might affect “all the diversified interests of society,” and, as the representative of the people, is itself competent to interpret the Constitution to determine what it does not permit. *Hoke v. Henderson*, 15 N.C. (Dev.) 1, 8, 1833 WL 45, *6, *overruled on other grounds*, *Mial v. Ellington*, 134 N.C. 131, 46 S.E.2d 961 (1903).

This principle of judicial restraint has even greater force where, as here, a challenge is grounded on a dispute over economic public policy. (R p. 57 (¶ 85-89) Because the legislative branch is the policy-making organ of State government, the judiciary does not intervene in policy disputes even if it believes that the Legislature has acted contrary to the best interests of the State and its citizens. *See e.g., Rhyne*, 358 N.C. at 169, 594 S.E.2d at 8; *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C.App. 110, 118, 574 S.E.2d 48, 54 (2002) (“Wisely, the citizens of this state have not granted judges wide latitude to dictate public policy. It is critical for our purposes to remain focused on North Carolina’s timeless separation of powers doctrine rather than be distracted by public policy debate embedded in an ephemeral issue of a case.”); *Freeman v. Bd. of Comm’rs of Madison County*, 217 N.C. 209, 216, 7 S.E.2d 354, 359 (1940) (courts should not

extend constitutional prohibitions “by reading into them conceptions of public policy that the particular Court may happen to entertain”). “It is not for [any] Court to say whether the Legislature made a good or a bad bargain,” *Bank of Newbern v. Taylor*, 6 N.C. 266, 1813 WL 124, *1 (1813), a point that seems lost on Plaintiffs here.

Finally, that Plaintiffs are raising a facial challenge to the Legislation is all the more problematic for them, since “[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully.” *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 485 (2005). To prevail, Plaintiffs “must establish that no set of circumstances exists under which the [a]ct would be valid,” not simply that it “might operate unconstitutionally under some conceivable set of circumstances.” *Id.*, 614 S.E.2d at 486.

ARGUMENT

As explained below in Part I, Plaintiffs have no standing to advance their three tax-favoritism claims: their claims alleging violations of (i) the preamble of Article V, § 2 of the Constitution stating that taxation must be “fair and equitable;” (ii) the Uniformity of Taxation Clause in Article V, § 2(2); and (iii) the Law of the Land Clause in Article I, § 19. These are discrimination-based claims complaining that Google or internet data centers are receiving favorable tax treatment that other taxpayers are not receiving. As shown in Part II, even if the Court were to exercise

jurisdiction over these claims, they must be dismissed under Rule 12(b)(6) because Plaintiffs cannot show that the State had no conceivable rational basis for enacting the Legislation.

At the outset we address the faulty conclusion underlying Plaintiffs' claims: that only Google may claim an exemption under the Legislation, an interpretation entitled to no deference under Rule 12(b)(6). *See Good Hope Hosp., Inc. v. N.C. Dep't of Health and Human Servs.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005) (court does not accept as true allegations that are "conclusory, unwarranted deductions of fact, or unreasonable inferences"); *Dalenko v. Wake Cty. Dep't of Human Serv.*, 157 N.C.App. 49, 56, 578 S.E.2d 599, 604 (2003) (same with respect to legal conclusions). The text of the Legislation is not limited to Google. While a desire to entice Google to locate and maintain a new facility in North Carolina may have been the impetus for the Legislation, to conclude that, therefore, the Legislation applies to Google alone is an unwarranted inference. By its plain meaning, the Legislation provides a tax credit to *any* internet data center that satisfies the statutory eligibility criteria.

It bears noting that in *Blinson* the plaintiffs made the same assertion with respect to the tax credit legislation challenged there—that it was enacted with only Dell in mind and was "exclusively" for Dell's benefit. But this Court disagreed with the plaintiffs' characterization of the legislation as "exclusive" to Dell,

because the legislation did not mention Dell: “we do not read the legislation as narrowly as plaintiffs,” the Court said. *Blinson*, 186 N.C. at 340, 651 S.E.2d at 277. Likewise here: the Court cannot reasonably interpret the Legislation as narrowly as do Plaintiffs without doing violence to the statute.

Finally, the notion that Google alone receives an exemption from the sales/use tax is all the more fictitious in light of the laundry list of exemptions from that tax, *see* pp. 3-4, *supra*, including exemptions (or refunds) for business property bought or used by a wide array of industries, including all eligible “data centers,” a class that is broader than “internet data centers.” *Id.* Thus, one would have to ignore reality to conclude, as Plaintiffs do, that Google alone receives favorable sales/use tax treatment with respect to the purchase or use of business property and energy.

I. THE TAX-FAVORITISM CLAIMS MUST BE DISMISSED FOR LACK OF STANDING

Plaintiffs have pleaded three discrimination claims, alleging favoritism for Google and correspondingly unequal treatment for those allegedly similarly situated: Counts 7, 8, and 11. (R pp. 54-58) Count 8 invokes the Uniformity of Taxation Clause in Article V, Section 2(2) of the State Constitution, complaining that the Legislation is not “uniformly applicable to all businesses.” (R p. 55 (¶ 78)) Count 7 (*id.* ¶ 76) claims a violation of the redundant principle that “[t]he power of taxation shall be exercised in a just and equitable manner.” N.C. Const. Art. V,

§ 2(1). In a similar vein, Count 11 invokes the Law of the Land Clause in Article I, § 19 of the Constitution, alleging that Google is receiving benefits while others “do not receive such benefits and do not qualify among the eligible.” (R pp. 57-58 (¶¶84-91))

As the party invoking jurisdiction, Plaintiffs have the burden of establishing the elements of standing. *Blinson*, 186 N.C.App. at 333, 651 S.E.2d at 273. This they cannot do. Standing is determined on a claim-by-claim basis, *id.*, and Plaintiffs do not have standing to advance their discrimination-based claims challenging the tax exemption because Plaintiffs, who are not businesses or corporate taxpayers, are not similarly situated to Google or any internet data center.

Because *Blinson* forecloses Plaintiffs’ argument that they have taxpayer standing to advance the discrimination-based claims, 186 N.C.App. at 333-35, 651 S.E.2d at 273-74, an extended discussion of *Blinson* is warranted.

Blinson arose from tax credit legislation allegedly enacted to entice Dell to locate a new facility in North Carolina granting subsidies allegedly totaling \$242,000,000. (R p. 92-93) The tax credit legislation challenged in *Blinson* was adopted in November 2004 in a special session, and it added a new article to the tax code entitled, “Tax Incentives for Major Computer Manufacturing Facilities.” (*Id.* at 99-100) The legislation provided a tax credit against income and franchise

taxes for locating a major computer manufacturing facility in North Carolina, S.L. 2004-204, §§ 1-2, and also provided a refund of certain sales and use taxes. *Id.*, §3. The *Blinson* complaint prepared by NCICL alleged that the General Assembly, with little debate, met in a special session to pass legislation that would benefit a single company, Dell, and contended the “legislation was in fact for the direct benefit of Dell alone.” (R p. 99 (¶¶ 25-27)) NCICL referred to it as the “Dell legislation” (*id.*), just as the Complaint in this case refers to the “Google legislation.” NCICL alleged that the tax credits and other subsidies benefiting Dell violated various constitutional provisions—the same constitutional provisions invoked by Plaintiffs in the Complaint in this case. In *Blinson* the plaintiffs contended that “their status as taxpayers, suffering an increased tax burden as a result of the Dell incentives, [wa]s sufficient to provide plaintiffs with standing” to advance claims alleging discrimination or unequal treatment under the Uniformity Clause of the State Constitution, as well as under other constitutional provisions. *Blinson*, 186 N.C.App. at 334, 651 S.E.2d at 273.

Judge Hobgood dismissed the *Blinson* complaint. Plaintiffs’ discrimination-based claims—including their Uniformity Clause claim—were dismissed under Rule 12(b)(1) on the ground that the plaintiffs, as taxpayers, did not have standing to advance these claims. (R pp. 202-04, 207, 209, 211).

This Court affirmed the holding that plaintiffs lacked standing to advance the Uniformity Clause and other discrimination-based claims because they were not similarly situated to Dell and thus did not “belong to a class that is prejudiced by the operation of the Computer Legislation.” *Blinson*, 186 N.C.App. at 334-35, 651 S.E.2d at 273-74. This Court acknowledged the Supreme Court’s then-recent decision in *Goldston v. State*, 361 N.C. 26, 637 S.E.2d 876 (2006), but deemed *Goldston* inapplicable because in a Uniformity Clause case the “plaintiffs must demonstrate that they “belong[] to the class which is prejudiced by the statute.”” *Id.* at 335, 651 S.E.2d at 274 (quoting *In re Appeal of Barbour*, 112 N.C.App. 368, 373, 436 S.E.2d 169, 173 (1993), in turn quoting *In re Appeal of Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974)). In other words, this Court held that the *Blinson* plaintiffs had no standing because they could not demonstrate that *they* were prejudiced by the discriminatory aspects of the Dell incentives, and that the plaintiffs’ allegation that the incentives would diminish treasury revenues was not sufficient to establish standing.

The *Blinson* plaintiffs then appealed to the Supreme Court, filing a purported appeal as of right along with a petition for discretionary review. *Blinson v. State*, No. 546P06-2, Notice of Appeal as of Right and Petition for Discretionary Review

(filed Nov. 19, 2007).³ The plaintiffs contended that the tax incentives for Dell violated the Uniformity Clause and that this Court erred in holding that the plaintiffs lacked taxpayer standing to advance their Uniformity Clause claim. *Id.* at 7, 10-11, 14, 16-17, 26-29. They complained that “the Dell legislation is a special taxing scheme created for Dell and only Dell will likely be able to qualify,” and that there “is no rational reason why a multibillion dollar corporation should be handpicked for special treatment.” *Id.* at 27. They contended that this Court’s rejection of taxpayer standing was “in conflict with” and “in violation of Supreme Court precedent” on taxpayer standing, namely *Goldston*, which they urged should be read to include Uniformity Clause challenges, and which they argued this Court read “too narrowly.” *Id.* at 7, 10-11, 14, 16-17, 27-28. They further protested that this Court’s decision “effectively eliminates the Uniformity Clause in that virtually no one would have standing to seek judicial review of a taxing scheme which grants unique exemptions to a selected entity.” *Id.* at 11.

The *Blinson* defendants moved to dismiss the appeal and opposed discretionary review, arguing that the case was controlled by settled precedent and thus did not truly present any substantial constitutional question. *See* G.S. 7A-30.

³ The *Blinson* plaintiffs filed two petitions for discretionary review (PDRs): an initial PDR seeking to bypass this Court (R p. 219), and second PDR after this Court issued its decision in *Blinson*. We refer to latter PDR in the text immediately following this note. It is a publicly filed document available on the courts’ website. http://www.ncappellatecourts.org/nc_main_1.nsf. The Court may take judicial notice of this publicly filed document. (See R p. 87)

The Supreme Court evidently agreed: not only did it deny discretionary review, the Court also dismissed the appeal, meaning the Court must have concluded that the appeal did not present a “substantial” constitutional question permitting an appeal as a matter of right. *Blinson*, 362 N.C. 355, 661 S.E.2d 240 (2008).

Blinson is binding precedent here. Just as the *Blinson* plaintiffs could not demonstrate that *they* were prejudiced by the non-uniform aspects of the Dell incentives, even though they alleged the tax credits would diminish treasury revenues, Plaintiffs here are not similarly situated to Google and therefore are not prejudiced by the tax incentives they challenge. They are not internet data centers excluded by the eligibility requirements, and they are not business organizations. Because they are not business organizations, they do not have “business property” to exempt, and they do not use electricity to power business equipment. And, because Plaintiffs are not business organizations, Plaintiffs are not within the class that receive JDIG incentives, which are available to businesses that create jobs.

The fact that Plaintiffs allege that they, too, pay sales taxes is not material. In *Blinson* the plaintiffs were challenging a corporate income tax credit for computer manufacturers, and they alleged that they, too, pay income taxes. (R pp. 93-95 (¶¶ 4-10)) They also challenged an alleged ad valorem property tax refund for Dell and alleged that they, too, pay property taxes. (R pp. 93-95, 106, 119, 120, 121 (¶¶ 4-10, 60, 120, 123, 127, 129)) In fact, the *Blinson* plaintiffs also

challenged a sales/use tax incentive that was part of what they alone called the “Dell legislation,” a refund from the sales/use tax. S.L. 2004-204 § 3.⁴ And the plaintiffs alleged that they, too, pay sales taxes. (R pp. 93-95, 104-05 (¶¶4-10, 51-54)) Yet this Court held that they lacked standing to bring such discrimination-based claims because they were not similarly situated to major computer manufacturers, and thus they were not within the class of those who they claimed were victims of discrimination.

Plaintiffs take issue with the characterization of their claims as discrimination based. But that is exactly what they are. They are complaining that the Legislation is not uniform or fair or consistent with the law of the land because, they say, it is an act of favoritism. They contend that the classifications required to qualify for the tax breaks discriminate in an allegedly irrational way by favoring Google or internet data centers that meet the Legislation’s eligibility requirements of an investment of \$250,000,000. (R p. 55 (¶78) (uniformity claim is based on assertion that the exemptions are not extended “to other similarly situated taxpayers”)); R p. 57 (¶¶ 84-85) (law of the land claim rests on alleged “governmental favoritism for Google, relative to other persons and entities” who are not “eligible”)) As their brief argues in support of the merits of their claims,

⁴ The *Blinson* complaint, in count 3, specifically pleaded a discrimination-based claim based on that sales/use tax refund, and discrimination was also implicit in their other claims. (R pp. 111-12)

Plaintiffs contend that the Legislation singles out Google for preferential tax treatment and that the Legislation's eligibility criteria are arbitrary. (Plfs'. Br. 30-36) In short, their claims of unequal treatment allege that the General Assembly is discriminating in favor of some vis-à-vis others similarly situated. Therefore, as in *Blinson*, Plaintiffs are required to show that they are similarly situated in order to have standing. This they cannot do and therefore Counts 7, 8, and 11 must be dismissed.

II. EVEN IF PLAINTIFFS HAD STANDING, THE CLAIMS SHOULD BE DISMISSED

As explained below, moreover, even if the Court were to exercise jurisdiction over these claims, dismissal is required under Rule 12(b)(6), because Plaintiffs' discrimination-based claims have no merit. The trial court's Order stated that each of Plaintiffs' claims "numbered 1 through 12 of the Complaint are DISMISSED as to all Defendants pursuant to North Carolina Rule of Civil Procedure 12(b)(6)" and then added, stating it disjunctively, that "in the case of Claims for Relief 7, 8 and 11, Rule 12(b)(1)." (R p. 258) Thus, the court found that Plaintiffs had standing with respect to nine of their claims, dismissed three on standing grounds, but found that all twelve claims were substantively lacking under Rule 12(b)(6). Therefore, even if this Court were to find that Plaintiffs had

standing with respect to one or more of Claims 7, 8 or 11, this Court may still affirm the dismissal of those claims under Rule 12(b)(6).⁵

As discussed more fully below, the relevant inquiry as to each of the three claims is the same: whether Plaintiffs have pleaded facts showing that the State could not have conceivably had a rational basis for enacting the Legislation or approving JDIG benefits for Google. The answer is no. Plaintiffs cannot meet their heavy burden of demonstrating beyond a reasonable doubt that the State has acted arbitrarily without any conceivable rational basis. Plaintiffs are asking the Court to second-guess elected representatives by substituting *its* judgment for theirs. The plea must be rejected.

A common theme running through Plaintiffs' "arbitrariness" argument is that the Legislation singles out internet data centers, as opposed to other unidentified industries. This argument ignores reality. As noted above, within the sales/use tax code the General Assembly has exempted or provided full refunds to

⁵ Indeed, our appellate courts are empowered to affirm dismissals based on different grounds from those stated by the trial court (or lower appellate court). *E.g.*, *Whitmire v. Cooper*, 153 N.C.App. 730, 735, 570 S.E.2d 908, 911-12 (2002) (affirming dismissal with prejudice on grounds of lack of standing rather than lack of *in rem* jurisdiction); *Estate of Fennell v. Stephenson*, 354 N.C. 327, 334, 554 S.E.2d 629, 633 (2001) (affirming dismissal on grounds of statute of limitations rather than sovereign immunity); *Stanback v. Stanback*, 297 N.C. 181, 204, 254 S.E.2d 611, 626 (affirming dismissal of malicious prosecution claim on grounds other than those found by the court of appeals). Thus, even if the trial court's order determined to dismiss Claims 7, 8 and 11 only on standing grounds, this Court may affirm dismissal if the complaint fails to state a claim under Rule 12(b)(6) with respect to those claims.

dozens of industries, not just internet data centers. G.S. §§ 105-164.13, 105-164.14, 105-187.51, 105-187.51A. But even if one ignores the laundry list of exemptions and refunds for other industries and views the Legislation in a vacuum, it was hardly arbitrary for the Legislature to create an incentive to lure new internet data centers. “The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain precise, scientific uniformity with reference to composition, use or value.” *Martin*, 286 N.C. at 75-76, 209 S.E.2d at 773. Here the General Assembly may have rationally concluded that any new internet data center facility investing \$250,000,000 in private funds within five years after construction begins would provide a substantial economic return vis-à-vis other potential candidates in today’s increasingly technology-based economy, by stimulating and diversifying the economy, creating jobs, increasing the tax base, establishing a marketable workforce with transferable skills, and enhancing the State’s image as a technology-oriented destination for business and skilled workers looking to relocate.

Nor is the Legislation’s investment requirement arbitrary. Requiring at least \$250,000,000 in private funds is rationally related to the goals of stimulating and diversifying the economy and promoting long-term job creation. Putting aside the permissible inference that a larger capital investment means a larger facility, the

General Assembly could have rationally concluded that the investment requirement promotes retention, on the belief that a company making such a substantial investment in this State poses a lesser risk of leaving. In short, the General Assembly could rationally conclude that a company making such a substantial capital investment in North Carolina is more valuable to the State. *Cf. Clark v. Maxwell*, 197 N.C. 604, 150 S.E. 190 (1929) (upholding tax classification based on whether delivery truck traveled more than 50 miles, because Legislature could conclude that trucks delivering at that distance imposes “a greater cost to the State”), *aff’d per curiam*, 282 U.S. 811 (1931).

The tax code is filled with similar examples of line-drawing. For example, in the sales/use tax code, a full refund is available to numerous industrial facilities, and eligibility is based on a required investment of private funds:

If the facility is located in a development tier one area . . . the required amount is fifty million dollars (\$50,000,000). For all other facilities, the required amount is one hundred million dollars (\$100,000,000).

G.S. § 105-164.14(j)(2)(b). In fact, the tax-credit legislation upheld in *Blinson* (the so-called “Dell Legislation”) has a \$100,000,000 investment requirement. *Id.* § 105-129.62(a). Where the investment line should be drawn (*e.g.*, \$250,000,000 or some other number) is a matter committed to legislative judgment. *See Clark*, 150 S.E. at 192 (quoting Justice Holmes’s statement that, “when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it

precisely, the decision of the Legislature must be accepted, unless we can say that it is very wide of any reasonable mark”).

A. Plaintiffs Have Failed to State a Valid “Law Of The Land” Claim

“The term ‘law of the land’ . . . is synonymous with ‘due process of law’ as used in . . . the Federal Constitution.” *Rhyne*, 358 N.C. at 180, 594 S.E.2d at 15. Under the Law of the Land Clause, the extraordinarily deferential “rational basis” review applies to claims, like the one here, where no “suspect class” or “fundamental right” is alleged to be burdened. *N.C. Bd. of Mortuary Sci. v. Crown Mem. Park, LLC*, 162 N.C.App. 316, 321, 590 S.E.2d 467, 471-72 (2004). This is the same rational-basis test used by federal courts in federal due process and equal protection challenges under the U.S. Constitution. *Bacon v. Lee*, 353 N.C. 696, 719, n.11, 549 S.E.2d 840, 856, *cert. denied*, 533 U.S. 975 (2001); *Richardson v. N.C. Dep’t of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996). Thus, tax classifications require only a rational basis to pass constitutional muster. Indeed, because taxation inherently requires legislatures to make classifications, “in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.” *Madden v. Kentucky*, 309 U.S. 83, 88 (1940); *accord Deadwood, Inc. v. N.C. Dep’t of Revenue*, 356 N.C. 407, 410-11, 572 S.E.2d 103, 105-07 (2002).

A plaintiff can prevail under the rational-basis test *only* if he can “negative every conceivable basis which might support” the classification. *In re Appeals of Certain Timber Companies*, 98 N.C.App. 412, 420, 391 S.E.2d 503, 508 (1990) (emphasis in original) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). The plaintiff must do so “by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.” *Id.* (quoting *Lehnhausen*, 410 U.S. at 364). Thus, on rational-basis review, the State prevails if any state of facts reasonably may be conceived to justify the classification. *See Rhyne*, 358 N.C. at 181, 594 S.E.2d at 16; *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 336 N.C. 657, 681, 446 S.E.2d 332, 346 (1994) (under rational-basis standard, the inquiry is whether the “challenged classification bears *any* reasonable relation to the purpose of the statute”) (emphasis in original).

On rational-basis review, the State has no obligation to produce evidence to sustain the rationality of a statutory classification and need not articulate the purpose or rationale supporting its classification. *See Deadwood*, 356 N.C. at 411, 572 S.E.2d at 106 (“The Legislature is not required to . . . disclose the principles upon which [its classifications] are made. It is sufficient if the Court, upon review, may find them supported by justifiable reasoning”); *Huntington Prop., LLC v. Currituck County*, 153 N.C.App. 218, 230-31, 569 S.E.2d 695, 703-04 (2002)

(standard is “so deferential that even if the government’s actual purpose in creating classifications is not rational, a court can uphold the regulation if the court can *envision* some rational basis for the classification.”) (emphasis in original).

Here, the Legislation draws lines in establishing eligibility for the tax exemption (as does nearly all tax legislation). Such line-drawing is firmly committed to the Legislature’s discretion. Line-drawing “inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.” *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (citation omitted); *see also Leonard v. Maxwell*, 216 N.C. 89, 96, 3 S.E.2d 316, 322-23 (1939). Under rational basis review, a challenge based on legislative line-drawing is almost impossible to sustain. All that is required to satisfy rational-basis review is some minimal fit between the act and a legitimate governmental interest. As shown below, that fit is easily met here.

“Economic development has long been recognized as a proper governmental function,” *Maready*, 342 N.C. at 723, 467 S.E.2d at 624, and attracting new industry to the State is “clearly the business of government.” *Id.* at 727, 467 S.E.2d at 627. Tax incentives may be used to that end. *See Carmichael v. S. Coal*

& Coke Co., 301 U.S. 495, 512 (1937) (“The legislature may withhold the burden of the tax in order to foster what it conceives to be a beneficent enterprise.”).

In this case, the General Assembly rationally could determine that the legitimate governmental interests in economic development and job creation would be promoted by the Legislation, which provides a tax incentive for investing at least \$250,000,000 to construct a new internet data center in this State. The Legislation is all the more rational when one appreciates the competition the State faces from incentives offered by other states and indeed other nations. As noted, other states have enacted similar tax exemptions for internet data centers. *See* note 3, *supra*. Thus, the General Assembly reasonably may have believed it needed to offer similar tax incentives to attract the location of an internet data center to the State.

The General Assembly rationally could determine, moreover, that, in an economy increasingly based on information-based technology, data centers are, like computer manufacturing and distribution, a strategically important industry for this State. Recently, in the course of enacting tax credits for computer manufacturers—the legislation upheld in *Blinson*—the General Assembly made these findings: “[N]ational trade policies and the resulting impact on domestic competitiveness have made the retention of manufacturing jobs more difficult at a time of transition in the national, State, and regional economies”; “[m]anufacturing

employment in the State has been disproportionately affected by trade policies and global economic trends, resulting in the loss of jobs by many in the State's capable industrial workforce"; and "as society becomes more dependent on advanced computer technology," so too must the State's economy. S.L. 2004-204. Given those findings, one cannot plausibly maintain that the General Assembly's distinction between internet data centers and other industries is capricious, arbitrary, and unjustified by reason. *See Rosenbaum v. City of New Bern*, 118 N.C. 83, 85, 24 S.E. 1, 3 (1896) ("courts cannot question the honesty or the soundness of the discretion of the [Legislature] in subdividing a larger class of dealers into two or more, distinguished by the lines of goods sold by each").

Indeed, the General Assembly may rationally have concluded that such a new internet data center facility would provide a more substantial economic return to the State than other potential candidates for the reasons described above (at p. 23, *supra*), such as job creation and a more marketable workforce, an increased tax base, and an enhanced image for North Carolina as a destination for relocations. In addition, because the exemption is limited to eligible businesses that construct a *new facility* in the State, the General Assembly rationally could determine that using incentives to *attract new industry* would better achieve the goals of economic development than subsidizing *existing* businesses already located here.

Plaintiffs' fundamental complaint appears to be that the Legislation is under-inclusive in that similar benefits are not provided to "other persons and entities." (Cmplt. ¶85) To begin with, this claim is unsupportable because, as discussed in more detail below, *see* part II.C, *infra*, the tax code is rife with exemptions from the sales/use tax, including exemptions for other industries and business interests that are similar to those contained in the Legislation.

But more fundamentally, contrary to the apparent premise of Plaintiffs' claim, government is not required to choose between offering economic development incentives to *everyone* (which the State rightly could deem impossible, given its finite resources) or to *no one at all*. *See Ramsey v. N.C. Veterans Comm'n.*, 261 N.C. 645, 647-48, 135 S.E.2d 659, 661 (1964); *Nesbitt v. Gill*, 227 N.C. 174, 179, 41 S.E.2d 646, 650 (1947) ("One business may be taxed and another left untaxed."). Thus, "a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes" is not irrational. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528 (1959).

In short, it is permissible for a legislature to offer tax incentives or benefits on a less-than universal basis, and the pertinent precedent holds that it is not for the judiciary to make the policy judgments concerning which industries or groups should benefit, so long as the selection criteria are not invidious or irrational.

The Legislation rationally furthers legitimate government interests. Its distinctions are not drawn arbitrarily and Plaintiffs cannot carry their heavy burden of establishing that the State had no conceivable rational basis to offer incentives to lure new internet data centers generally or to recruit Google specifically. Therefore, Plaintiffs cannot establish a violation of the Law of the Land Clause, much less establish such a violation beyond a reasonable doubt.

C. Plaintiffs Fail To State A Valid Uniformity Clause Claim

An exceedingly deferential standard of review also applies under the Uniformity of Taxation Clause. *See Leonard*, 216 N.C. at 93, 3 S.E.2d at 320 (1939). Accordingly, for the reasons above, rejection of the Law of the Land Clause claim necessitates rejection of the Uniformity of Taxation Clause claim.

As the Supreme Court has long held in applying the Uniformity of Taxation Clause: the Legislature has “the power to classify the subjects of taxation, for the purpose of prescribing a different rule of taxation for each class, and of imposing upon such subjects falling with the several classes a different rate of taxation,” *Clark, supra*, 197 N.C. at 606, 150 S.E. at 192 (1929); the “power of the Legislature in this matter of classification is very broad and comprehensive, subject only to the limitation that it must appear to have been made upon some ‘reasonable ground,’” *id.*; and courts have “no right to weigh and determine legislative wisdom in selecting ... one class rather than another.” *Lenoir Fin. Co. v.*

Currie, 254 N.C. 129, 133, 118 S.E.2d 543, 546 (1961). These principles were emphasized by the Supreme Court in its most recent uniformity decision, where it reversed this Court for invalidating a tax classification. *Deadwood*, 356 N.C. at 410-14, 572 S.E.2d at 105-07. The Supreme Court admonished that “the right of classification is referred largely to the legislative will,” and if a classification is “founded on a rational basis and reasonably related to the object of the legislation, the courts will not say that a different result should have been reached or that the differentiation is arbitrary,” since the Legislature’s “exercise of its discretion is not subject to the approval of the judicial department of the State.” *Id.* at 410, 572 S.E.2d at 105. Again, “the widest latitude must be accorded to the Legislature in making the distinctions”; “they will not be disturbed unless capricious, arbitrary, and unjustified by reason.” *Id.* at 411, 572 S.E.2d at 106.

Applying this standard, the Supreme Court “has sustained numerous tax classifications which rested on subtle distinctions.” *Id.* at 414, 572 S.E.2d at 107.⁶

Moreover, the Supreme Court has upheld these subtle distinctions on the basis that

⁶ *E.g.*, *Deadwood*, *supra* (businesses showing “live entertainment” versus those showing “moving picture shows”); *Clark*, *supra* (classification based on whether a delivery vehicle traveled more or less than 50 miles); *Snyder v. Maxwell*, 217 N.C. 617, 9 S.E.2d 19 (1940) (upholding tax imposed on machines vending soft drinks versus other items); *Leonard*, *supra* (upholding tax exemption for retail merchants distinguished by articles); *Great Atl. & Pac. Tea Co. v. Maxwell*, 199 N.C. 433, 154 S.E. 838 (1930) (businesses with one store taxed differently from businesses with multiple stores); *Lenoir Fin.*, *supra* (installment paper dealers taxed differently than banks); *Rosenbaum*, *supra* 118 N.C. at 85, 24 S.E. at 3 (classification based on sales of second-hand clothing versus new clothing).

the Legislature *could have* had a rational basis for them. *See id.* at 411, 572 S.E.2d at 106 (classifications are sufficient if the Court “may find them supported by justifiable reasoning”).

With respect to the Legislation challenged here, as noted earlier in discussing the Law of the Land Clause challenge, the Legislature’s use of tax incentives to attract new industry reflects a reasonable legislative judgment, and certainly not an arbitrary one, particularly in an economy increasingly based on information-based technology. *See part II.A., supra.*

It is, moreover, implausible to contend that the General Assembly has singled out internet data centers for special treatment under the sales/use tax code. First, with respect to *business property*, the General Assembly has, in the interest of economic development, relieved many industries of the burden of a sales/use tax on their capital investments. It was not arbitrary for the General Assembly to determine that eligible internet data centers should be included on that list. Manufacturers and farmers, for example, enjoy a similar exemption for qualifying machinery, parts, and accessories. G.S. §§ 105-164.13(5a), 105-187.51, 105-187.51A. And, eligible “data centers,” a class broader than internet data centers, get a sales tax exemption for their purchases of machinery and equipment. S.L. 2007-323, § 31.22. What is more, numerous industries are eligible for a full refund of sales and use taxes. G.S. § 105-164.14(j). The Legislature rationally could

determine that there is a legitimate reason to treat internet data centers in the same manner.

Second, with respect to *electricity*, as noted at pp. 5-6, *supra*, the General Assembly has historically applied the sales/use tax unevenly with respect to electricity, taxing electricity sales at a lower rate, varying the rates across industries, and exempting electricity where appropriate—including, most recently, its decision to phase out altogether the sales/use tax for electricity bought or used by manufacturing facilities and farmers. S.L. 2007-397.

It bears noting that even if the General Assembly had provided to internet data centers alone an exemption for their electricity consumption, that would hardly be arbitrary or irrational, because the Legislature rationally could determine that internet data centers are not similarly situated to most other industries with respect to their consumption of electricity. Indeed, the General Assembly rationally could determine that electricity for an internet data center is like fuel for other industries; it is the energy source that powers the machinery and equipment. In light of the fact that the General Assembly has decided not to impose a sales/use tax on *fuel* used by a number of industries, including manufacturers, farmers, loggers, dry cleaners, recycling facilities, and railroads, G.S. § 105-164.13(1)(d), (4f), (5a), (10)(c), (11), (11a), (24), (57), it was not unreasonable for the General Assembly to exempt from taxation the electricity used by internet data centers.

In the final analysis, one cannot plausibly maintain that the General Assembly has drawn distinctions that are capricious, arbitrary, and unjustified by reason. The eligibility criteria are rationally related to the objectives of economic development and job creation. Lines invariably must be drawn; these lines are not arbitrary. *See Deadwood*, 356 N.C. at 412, 572 S.E.2d at 106. The State, with its finite resources, is not required to choose between offering economic development incentives to everyone within a class or to *no one at all*.

For these reasons, Plaintiffs cannot show that the Legislation violates the Uniformity Clause.

D. Plaintiffs' Claim Based On The Principle That "Taxation Must Be Fair And Equitable" Must Be Dismissed

Count 7 contains a single sentence: "The tax benefits for Google, and the purported laws, as applied for Google and/or on their face, constitute an unfair, inequitable, arbitrary, and capricious exercise of the power of taxation, and accordingly violate Article V, Section 2(1) of the North Carolina Constitution, which states, 'The power of taxation shall be exercised in a just and equitable manner'" (R pp. 54-55) This claim is deficiently pleaded because it fails to identify what aspect of the Legislation is not "just and equitable" or why that is so.

In any event, this claim adds nothing to the claim under the Uniformity Clause. The clause about "just and equitable" taxation is in the nature of a preamble to Article V, Section 2. It has never been read to add an independent

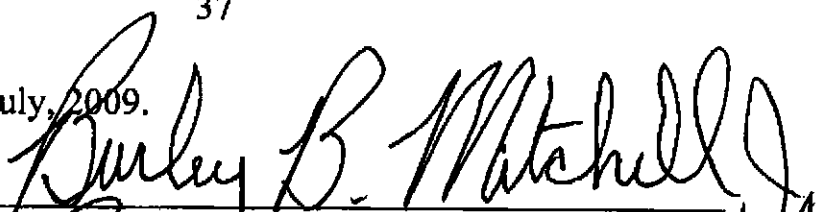
requirement beyond the Uniformity of Taxation Clause. In fact, courts have made clear that it simply entails, as do the Uniformity of Taxation and the Law of the Land Clauses, rational basis review, requiring a showing that the challenged act is arbitrary. *In re Assessment of Village Publ'g Corp.*, 312 N.C. 211, 223-24, 322 S.E.2d 155, 163 (1984) (“it is only those classifications which are arbitrary or capricious which violate Article V, section 2.”). In the context of a sales/use tax code that is rife with exemptions or full refunds for a host of industries, a wide range of business property, and a number of energy sources, it is fanciful to contend that the addition of yet another exemption, for internet data centers willing to invest \$250,000,000 in a new facility, is somehow arbitrary.

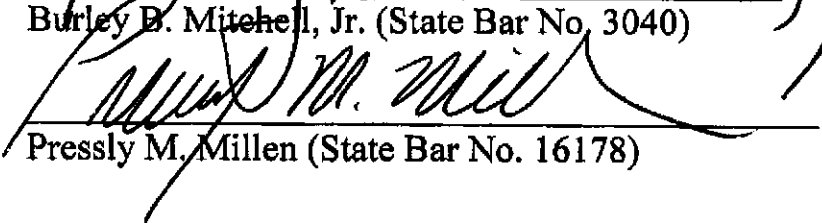
Because Plaintiffs cannot meet that heavy burden of establishing that the Legislation is arbitrary, much less beyond a reasonable doubt, Count 7, like Counts 8 & 11, must be dismissed, wholly aside from Plaintiffs’ lack of standing to bring it.

CONCLUSION

The trial court’s judgment should be affirmed.

This the 20th day of July, 2009.


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CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)(A)(2)

The undersigned attorney hereby certifies that this brief complies with the document length limitations of Rule 28(j)(2)(A)(2) of the North Carolina Rules of Appellate Procedure in that it contains fewer than 8,750 words as required by the Rule.



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **BRIEF OF DEFENDANT APPELLEE GOOGLE INC.** in the above-captioned action upon all parties by depositing a copy of same in the United States Mail, first-class postage prepaid as addressed below and via e-mail as follows:

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