

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
05 CVS 17197

CHARLES HEATHERLY; THOMAS)
SPAMPINATO; W. EDWARD GOODALL, JR.;)
PAUL STAM; WAKE COUNTY TAXPAYERS)
ASSOCIATION; and THE NORTH CAROLINA)
FAMILY POLICY COUNCIL,)

Plaintiffs,)

WILLIS WILLIAMS, NORTH CAROLINA)
FAIR SHARE, and NORTH CAROLINA)
COMMON SENSE FOUNDATION,)

Proposed Plaintiff-Intervenors,)

v.)

STATE OF NORTH CAROLINA; CHARLES A.)
SANDERS, BRYAN E. BEATTY, LINDA)
CARLISLE, ROBERT A. FARRIS, JR., JOHN R.)
MCARTHUR, JIM WOODWARD, and)
ROBERT W. APPLETON, Members of the North)
Carolina Lottery Commission, in their official)
capacity; NORTH CAROLINA LOTTERY)
COMMISSION; THOMAS N. SHAHEEN,)
Executive Director of the North Carolina)
Education Lottery, in his official capacity;)
MICHAEL F. EASLEY, Governor of the State of)
North Carolina, in his official capacity;)
RICHARD H. MOORE, Treasurer of the State of)
North Carolina, in his official capacity,)

Defendants.)

**DEFENDANTS'
MOTION TO DISMISS
PURSUANT TO
N.C.G.S. § 1A-1,
RULE 12(b)(1), (2), and (6)
[DISM]**

NOW COME all the defendants to this action, by and through their undersigned counsel, and move this Court to dismiss the case in its entirety as to all defendants. Defendants make this motion pursuant to N.C.G.S. § 1A-1, Rule 12 (b) (1), (2), and (6) on the following grounds:

1. Defendants move to dismiss this action, in its entirety and as against all defendants, pursuant to Rule 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure because plaintiffs have not alleged, and cannot allege, any redressable harm to the plaintiffs or any basis upon which the plaintiffs are entitled to bring this action; therefore, their allegations do not, and cannot, allege a claim upon which relief may be granted, and plaintiffs lack standing to bring this action;

2. Defendants move to dismiss this action, in its entirety and as against all defendants, pursuant to Rule 12(b)(1) and/or (2) of the North Carolina Rules of Civil Procedure because this action is against the State, its agencies, and officials in their official capacities, and it is barred by the doctrine of sovereign immunity inasmuch as (a) the complaint does not allege any facts that, taken as true, are sufficient to establish a waiver by the State of its sovereign immunity, and (b) neither the State, its agencies nor its officials in their official capacities have consented to this suit, explicitly or implicitly, and no law authorizes this suit to be brought by these plaintiffs against any of these defendants;

3. Defendants move to dismiss this action, in its entirety and as against all defendants, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure because the factual allegations of the complaint, even if true, fail to establish a claim upon which relief may be granted, and as a matter of law defendants are entitled to judgment against plaintiffs;


4. Defendants move to dismiss this action, and particularly Counts 3 through 5 of the Complaint, as against all defendants, pursuant to Rule 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure on the grounds that, based on plaintiffs' own allegations, they are seeking to prevent the collection of a tax in contravention of N.C.G.S. § 105-267. If in fact plaintiffs were correct that the legislation in question imposes an unconstitutional tax, or imposes a tax

unconstitutionally, then plaintiffs could challenge that tax, or its validity, only if they paid the tax and pursued their remedies under N.C.G.S. § 105-267;


WHEREFORE, all defendants move to dismiss this action in its entirety, for judgment against all plaintiffs in favor of all defendants, and for costs to be taxed to plaintiffs.

Respectfully submitted, this the 18th day of January, 2006.

ROY COOPER
Attorney General



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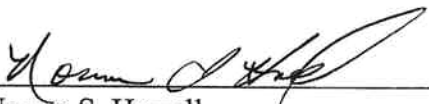
CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing **DEFENDANTS' MOTION TO DISMISS PURSUANT TO N.C.G.S. § 1A-1, RULE 12(b)(1), (2), and (6)** on plaintiffs by depositing copies in the United States Mail, postage prepaid, addressed as follows:

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This the 18th day of January, 2006.



Norma S. Harrell
Special Deputy Attorney General