

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR DIVISION

05 CVS 8378

WAKE COUNTY

DELMA BLINSON, JERRY R. JOHNSON, )  
KELLIENE FISHER, DONALD R. REID, )  
BRIAN GOSSAGE, WILFORD R. DOWE, and )  
KENT MISEGADES, )

Plaintiffs, )

v. )

STATE OF NORTH CAROLINA; JAMES T. )  
FAIN, III, Secretary of the N.C. Department of )  
Commerce, in his official capacity; CITY OF )  
WINSTON-SALEM, NORTH CAROLINA and )  
ALLEN JOINES, Mayor of Winston-Salem, in his )  
official capacity; FORSYTH COUNTY, NORTH )  
CAROLINA and GLORIA D. WHISENHUNT, )  
Chairperson of the Board of Commissioners of )  
Forsyth County, in her official capacity; THE )  
MILLENNIUM FUND; WINSTON-SALEM )  
BUSINESS, INC.; THE WINSTON-SALEM )  
ALLIANCE; and DELL, INC., )

Defendants. )

**STATE DEFENDANTS’  
REPLY BRIEF  
IN SUPPORT OF  
THEIR MOTION TO DISMISS**

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WHISENHUNT, Chairperson of the Board of )  
Commissioners of Forsyth County, in her official )  
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WINSTON-SALEM BUSINESS, INC.; THE )  
WINSTON-SALEM ALLIANCE; and DELL, )  
INC., )

Defendants. )

**STATE DEFENDANTS’  
REPLY BRIEF  
IN SUPPORT OF  
THEIR MOTION TO DISMISS**

NOW COME defendants State of North Carolina and James T. Fain, III, Secretary of the North Carolina Department of Commerce (hereinafter jointly referred to as “State Defendants”), and file this Reply Brief in support of their motion to dismiss. The State Defendants urge the Court to dismiss plaintiffs’ action as against the State Defendants in its entirety, for the reasons set out in the State Defendants’ original memorandum of law in support of their motion to dismiss and in this Reply Brief, as well as the reasons set out in the other defendants’ briefs. The State Defendants will respond only to those arguments in Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motions to Dismiss (hereinafter “Plaintiffs’ Brief”) to which the State Defendants deem a reply necessary. Some of plaintiffs’ arguments may not have reply arguments

here because the nature of a particular argument is such that no reply is necessary (Plaintiffs' Brief, Args. I, XIII) or because defendants have no stake in the issue (Plaintiffs' Brief, Arg. XI). Other plaintiffs' arguments are not addressed in this Reply Brief because plaintiffs' arguments create no need for a reply in addition to what the State Defendants, as well as the other defendants, argued in their original memoranda of law (Plaintiffs' Brief, Args. VI, IX, X, XII). The State Defendants consider these arguments equally important as some of the others, but see no reason in this Reply Brief simply to repeat or summarize arguments already made when the State Defendants' and other defendants' opening memoranda of law fully anticipated the arguments plaintiffs would make. For the Court's convenience, the State Defendants have numbered the arguments in this Reply Brief to correspond to the arguments in Plaintiffs' Brief, resulting in the omission of numbers reflecting the arguments to which the State Defendants deemed it unnecessary to reply. The State Defendants submit that its original memorandum of law, as well as this Reply Brief, along with the briefs of the other defendants, establish without question that plaintiffs' complaint should be dismissed as to each and every claim against all defendants.

## **II. PLAINTIFFS DO NOT HAVE STANDING AS TAXPAYERS TO ASSERT THE CONSTITUTIONAL CLAIMS ALLEGED IN THE COMPLAINT.**

Plaintiffs boldly declare that they have adequate standing to pursue each and every one of their federal and state constitutional challenges to Session Law 2004-204 Extra Session, hereinafter referred to as "Chapter 204," as well as the local incentives against all named defendants, and that their claims are entitled to be decided on the merits. (Plaintiff's Brief, p. 36) This untenable conclusion is attainable only by overstating the holdings of various cases in an

imprecise and confusing mix of arguments purportedly addressing the legal requirements for parties bringing specific types of actions against particular governmental entities. Plaintiffs' assertions blur the fundamental distinction between cases in which taxpayers challenge legislation directly requiring the expenditure of public monies for allegedly unauthorized or unconstitutional purposes from those in which plaintiffs bring discrimination-type claims against legislation from which they suffer direct, personal harms.

What plaintiffs seek to establish is an extraordinary version of standing that would allow any taxpayer in this State to comb through the tax laws and challenge any tax provision that they claim is discriminatory in any form, under the negative Commerce Clause, equal protection, and uniformity provisions as well as under their expansive theory that allegedly discriminatory taxes fall within the scope of general taxpayer claims. Yet, plaintiffs do not cite a single case which stands for the proposition that taxpayers generally have standing to bring constitutional challenges against the State over legislation establishing tax credits and tax refunds for a particular class of businesses. Instead, they exalt tightly edited statements without context from various cases involving matters very different from their claims to extrapolate their unprecedented and broad concept that taxpayers have standing to challenge legislation creating State and local economic development incentives and subsidies without the necessity of showing direct injury or that they are members of the class allegedly suffering discriminatory treatment. Even if some prior cases demonstrate that some parties may have standing to bring some claims similar to those asserted here against some defendants, that does not buttress plaintiffs' position that they have standing as to all claims against all defendants for:

[S]tanding is not dispensed in gross. If the right to complain of one administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law.

*Lewis v. Casey*, 518 U.S. 343, 358 n.6, 116 S. Ct. 2174, 2183 n.6, 135 L. Ed. 2d 606, 622 n.6 (1996). Plaintiffs must therefore satisfy their burden of establishing requisite standing as to each of their alleged constitutional claims against each named defendant.

**A. PLAINTIFFS’ COMPLAINT ALLEGES AN INSUFFICIENT BASIS FOR STANDING.**

The starting point for analyzing plaintiffs’ standing is necessarily the basis upon which they claim an interest sufficient to initiate the litigation. Here, plaintiffs allege that they are aggrieved by the sales tax refund provisions of Chapter 204 because, as state and local taxpayers, they “are deprived of the benefits that would accrue absent such a refund to the taxpayer” (Compl. ¶ 54), and “are directly injured” in that such refunds “unlawfully deplete[] the funds of the State and Forsyth and Winston-Salem governments . . . , thereby diminishing the funds available for lawful purposes and imposing disproportionate burdens on the Plaintiff taxpayers” in violation of the Commerce Clause of the United States Constitution (Compl. ¶ 87). Plaintiffs further allege that the method of determining the amount of allowable tax credits under Chapter 204 “deprives Plaintiffs, as non-beneficiaries under the statute, of their right to equal protection of the laws” as guaranteed by the United States Constitution (Compl. ¶¶ 91, 94) and the North Carolina Constitution (Compl. ¶¶ 100, 103).

In connection with claims that Chapter 204 and the local resolutions unconstitutionally surrender, suspend and contract away the power of taxation, plaintiffs allege that the tax credits, sales tax refunds and local incentives deny State and local taxpayers “the benefits of Dell’s tax

liability and increases the burden on Plaintiffs and other State and local taxpayers.” (Compl. ¶¶ 115, 127) Similarly, in their claim that the City and County Resolutions violate the Equal Protection Clause and the Law of the Land Clause of the North Carolina Constitution, plaintiffs allege that the subsidies provided burden the plaintiffs “by unlawfully diminishing the tax revenue available to the City and County . . . and potentially increasing the current property tax liability for plaintiffs” and other City and County taxpayers. (Compl. ¶ 120)

Plaintiffs’ claims are nothing more than a generalized grievance, available to any citizen, about the uses to which the Legislature has allocated its revenues. Here, the case for taxpayer standing is weaker than usual because plaintiffs complain not that the State imposes a discriminatory tax on them but that credits and refunds against various taxes, many of which they do not pay, somehow could reduce the State’s overall revenues. Plaintiffs do not claim that they are paying an unconstitutional tax, that they will obtain a refund or related remedy if they prevail in this litigation, or even that they are the customers of taxpayers who pay taxes at discriminatory rates and therefore suffer indirectly from the assertedly unconstitutional discrimination. Plaintiffs are not out-of-state entities who pay the challenged tax or competitors of taxpaying entities who allegedly obtain favorable tax treatment from an allegedly discriminatory taxing regime.

Instead, plaintiffs are residents of the taxing State who would like for the State to collect more tax from companies expanding their in-state business. They are not in any meaningful way burdened by the enactment of Chapter 204, nor will they benefit in any concrete manner from its abolition. Rather than seeking a remedy to a cognizable injury they have suffered, they seek to save the State and local governments from themselves by precluding the use of tax incentives to

compete for business development. Separate and apart from the question of whether the use of public funds in this manner is appropriate as a matter of public policy, state taxpayers who are unhappy with the legislative actions of their elected officials designed to stimulate economic activity in their State have no standing to bring such challenges.

**B. PLAINTIFFS DO NOT HAVE GENERAL STANDING TO ASSERT THEIR CONSTITUTIONAL CLAIMS.**

**1. The *Town of Emerald Isle* Decision Does Not Authorize The Expansive Concept Of Standing Which Plaintiffs Attribute To It.**

Plaintiffs claim that “in constitutional challenges, a state or municipal taxpayer has standing to challenge legislatively approved expenditures of State funds as well as the expenditures of their municipalities.” (Plaintiffs’ Brief, p. 21) The primary support offered for this expansive proposition is *Town of Emerald Isle v. State of North Carolina*, 320 N.C. 640, 360 S.E.2d 756 (1987), which plaintiffs argue “serves as the seminal case” establishing taxpayer standing. (Plaintiffs’ Brief, pp. 21-22) Plaintiffs reach their unprecedented conclusion regarding generalized taxpayer standing arising from *Emerald Isle* based upon assertions that “by not expressly limiting its holding on standing either to State expenditures or to local expenditures, the Court intended that its language concerning standing pertain to claims concerning *either* local or state actions” (Plaintiffs’ Brief, p. 21), and that the absence of any discussion by the Court of demonstrable injury suffered by the persons bringing the lawsuit means that, “[i]n the context of a challenge to the constitutionality of public expenditures, injury is simply not part of the standing calculus” (Plaintiffs’ Brief, p. 22).

Plaintiffs' expansive use of *Emerald Isle* cannot withstand scrutiny. That case concerned legislation which directed the State to acquire real property to provide public pedestrian beach access in the vicinity of Bogue Inlet and which specifically provided that the Town of Emerald Isle "shall be responsible for maintaining the facility." 320 N.C. at 643, 360 S.E.2d at 758. The legislation further provided that after the pedestrian beach access facility was opened, motor vehicular access to the beach in the vicinity of the facility was prohibited. *Id.* at 643, 360 S.E.2d at 758-59. A declaratory judgment action was brought by the Town and four individual property owners and taxpayers of the Town, "two of whom possess beach access permits issued by the Town authorizing vehicular access to the ocean and inlet beaches." *Id.* at 644, 360 S.E.2d at 759. The constitutional issues raised included the prohibition against local acts, the granting of an exclusive emolument, and the taking of property without due process of law.

The *Emerald Isle* Court began its discussion of the issues presented by noting that "[d]enials of property rights or fundamental human rights, in violation of constitutional guarantees, also may be challenged in a declaratory judgment action when a specific provision of a statute is challenged by a person *directly and adversely affected thereby.*" *Id.* at 646, 360 S.E.2d at 760 (citation omitted) (emphasis added). On the issue of standing, the Court held that "the Town of Emerald Isle has standing to challenge the act here, since the act provides that the Town shall be responsible for maintaining facilities for the provision of public pedestrian beach access." *Id.*

As to the standing of the individual plaintiffs, the Court stated that:

The act, in directing the Town to maintain the facility, appears to require the expenditure of public funds. A taxpayer in this State has standing to challenge the

validity of an act which requires the expenditure of public funds on grounds that the act violates the North Carolina Constitution.

*Id.* at 647, 360 S.E.2d at 760.

Therefore, in proper context, the holding in *Emerald Isle* that individual taxpayers have standing to bring constitutional challenges was rendered after the Court had already determined that another party (the Town of Emerald Isle) had unquestioned standing to bring the action, found that the act in question expressly required the expenditure of public funds by the Town, and determined that the individual municipal taxpayers had property interests adversely affected by the legislation in question. The potential injury to the individual municipal taxpayers resulting from the legislation was direct and clear, both in terms of the obligation to fund the maintenance of the facility as well as the impact on individual property rights. Nothing in the result reached in *Emerald Isle* supports plaintiffs' claim that State or municipal taxpayers have standing to bring constitutional challenges based upon the asserted deprivation of benefits that would accrue if additional tax monies were collected from certain types of business entities, or the asserted burden of a potential increase in tax obligations resulting from the diminution of tax revenues available for other public purposes.

**2. Plaintiffs Find Support In Cases Only By Broadly Expanding The Holdings And Opinions of Those Cases Beyond Their Legitimate Scope.**

Other cases cited by plaintiffs (Plaintiffs' Brief, pp. 23-24) similarly do not stand for the proposition that a taxpayer's general interest in avoiding unfair tax burdens has been recognized as a basis for standing to sue. Reliance upon *Piedmont Canteen Service, Inc. v. Johnson*, 256 N.C. 155, 123 S.E.2d 582 (1962), is misplaced in light of the Court's explicit holding that "[o]n

this record plaintiff is in no position to challenge the constitutionality of the sales tax law” on due process and equal protection grounds before declaring that “[o]nly those persons may call into question the validity of a statute who have been injuriously affected thereby in their persons, property or constitutional rights.” 256 N.C. at 166, 123 S.E.2d at 589. *Stanley v. Dep’t of Conservation & Dev.*, 284 N.C. 15, 199 S.E.2d 641 (1973), involved a challenge to legislation which created county authorities for the purpose of issuing tax-exempt revenue bonds to finance pollution control measures at private industrial facilities brought by individuals who were owners or shareholders of businesses that would not receive the special tax-exempt financing. In *Stanley* the Court explicitly grounded its finding of standing to bring a public purpose challenge on a recognition of direct, demonstrable injury from a complete exemption from taxation of the bonds established by the legislation:

Petitioners have alleged, *inter alia*, that in G.S. 159A-8 the Act unconstitutionally purports to authorize the issuance of bonds which are exempt from all taxes except inheritance and gift taxes. If this purported exemption is unconstitutional petitioners will be injured unless its invalidity is judicially declared for the exemption of any property from its fair share of the public burden, to that extent, increases the burden imposed upon all other taxable property.

284 N.C. at 30, 199 S.E.2d at 650-51. The Court went on to find that “the public interest requires that we now decide whether the Act is constitutional in whole or in part,” particularly because the Act provided that unless the approval of the bonds was challenged within thirty days after notice of such approval, the legality of an Authority’s power would be conclusively presumed “and no court shall have authority to inquire into such matters.” 284 N.C. at 30, 199 S.E.2d at 651. The litigants in *Stanley* plainly had a direct interest arising from the legislation because they were in the class of persons discriminated against by the tax exemption; here,

plaintiffs have only a generalized and indirect connection with the tax credits and refund provisions established by Chapter 204 for eligible entities that build and operate computer manufacturing facilities.

Similarly *Kloster v. Region D Council of Governments*, 36 N.C. App. 421, 245 S.E.2d 180, *disc. rev. denied*, 295 N.C. 466, 246 S.E.2d 215 (1978), a case involving the powers of local governments under Article VII of the North Carolina Constitution, does not support plaintiffs' claim of general taxpayer standing to challenge government actions. *Kloster* specifically qualified its holding that a taxpayer has standing to sue a regional council of governments where local monies will be necessary for the future upkeep of an office building upon the finding that "[w]e do not believe that the General Assembly, in establishing the framework for such councils, intended that it would be a means by which local governmental functions would be isolated from local taxpayer suits designed to contest the legality of council action." 36 N.C. App. at 427, 245 S.E.2d at 184. As was the case in *Emerald Isle*, the finding of standing came in the context of a local taxpayer challenge to the required expenditure of local tax monies for future property maintenance. The assertion that in *Kloster* "the plaintiff showed no individualized or imminent harm beyond that applicable to all local taxpayers" (Plaintiffs' Brief, p. 24) does not fairly arise from that decision and the holding does not support plaintiffs' claimed standing to bring the constitutional challenges to Chapter 204 set forth in the Complaint.

Furthermore, plaintiffs' citation to *Texfi Industries, Inc. v. City of Fayetteville*, 44 N.C. App. 268, 261 S.E.2d 21 (1979), *aff'd*, 301 N.C. 1, 269 S.E.2d 142 (1980), is wholly inappropriate. (Plaintiffs' Brief, p. 24) The case involved a challenge under Article VII of the North Carolina Constitution to a municipal annexation of a tract upon which a corporation's

industrial enterprise was located. The corporation challenged the annexation statute on its face because it gave resident voters, but not corporations in the area proposed for annexation, a right to approve or reject the annexation by referendum. 44 N.C. App. at 270, 261 S.E.2d at 23. While holding that the corporation's equal protection and procedural due process claims failed to state claims upon which relief could be granted, the Court noted that the corporation had standing to "assert[] that its own constitutional rights have been injured" and found that an annexation "is subject to attack by anyone having a sufficient personal interest in the litigation" before stating that "[n]o direct economic injury need be shown in order to have standing to assert that one's constitutional rights have been violated." *Id.* Plainly, the plaintiff in *Texfi* had a direct, cognizable property interest at stake in its constitutional challenge to the annexation statute irrespective of any direct economic injury. Nothing in that decision fairly supports plaintiffs' claimed entitlement to bring a general taxpayer challenge to Chapter 204, or the local government incentives, without a showing of direct economic injury.

Plaintiffs' attempt to distinguish and claim compliance with the decisions of *Fuller v. Easley*, 145 N.C. App. 391, 553 S.E.2d 43 (2001), and *Goldston v. State*, 618 S.E.2d 785 (N.C. Ct. App. 2005), is curious and unpersuasive. In each case the Court of Appeals held that the plaintiffs did not have standing as taxpayers to challenge various governmental actions on constitutional grounds. The assertion that "the plaintiffs in this case meet the standing requirements articulated in *Goldston* for an action brought 'directly as injured taxpayers' and under the 'constitutional standing' analysis" (Plaintiffs' Brief, p. 26) cannot withstand scrutiny. Acknowledging that in some circumstances "if the governing authorities [are] preparing to put public property to an unauthorized use, citizens and taxpayers have the right to seek equitable

relief,” *Goldston* rejected the idea that the plaintiffs in that case had standing. 618 S.E.2d at 789 (quoting *Wishart v. Lumberton*, 254 N.C. 94, 96, 118 S.E.2d 35, 36 (1961)). Indeed, it explicitly held that “plaintiffs lack[] standing to bring their action directly as injured taxpayers” where they challenged the use of taxpayer money that “affected the present plaintiffs in the same way that it affected all citizens and taxpayers of this state.” 618 S.E.2d at 789. This is precisely the basis upon which plaintiffs here assert standing to challenge the tax credits and reimbursements set forth in Chapter 204.

What *Goldston* does is illustrate the flaw in plaintiffs’ standing claim, especially as it relates to Chapter 204. Plaintiffs do not challenge the use of money for an unauthorized or illegal purpose. Nothing about providing tax credits or refunds is an unauthorized or illegal expenditure of money; indeed, what plaintiffs are challenging with regard to Chapter 204 is the failure of the State to collect more money rather than an expenditure. Nor is the situation like *Stanley* in that *Stanley* involved a total exemption from taxation. Even assuming that *Stanley* is still relevant on standing grounds, in that case the exemption from taxation was on an unconstitutional basis, thereby necessarily depriving the government of taxes which should be collected. Here, plaintiffs are challenging the nature and extent of particular refund and credit provisions, as well as incentives, to entities for which refunds and credits, and even incentives, can validly be given. They are not challenging the expenditure of tax money or the exemption from taxes for unconstitutional purposes, but instead the details of specific credits, refunds, and incentives for purposes which are unquestionably constitutional. This Court should not accept plaintiffs’ vision of standing, which is simply an invitation to extend standing to any taxpayer who wishes to challenge any tax provision on any grounds.

### 3. *Hoke County In No Way Supports Plaintiffs' Standing.*

Plaintiffs additionally have incorrectly contended to this Court that they should be entitled to standing based on the decision in *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004). According to plaintiffs, *Hoke County* creates an expanded concept of standing based on the “zone of interest” to be protected by a particular constitutional provision. (Plaintiffs’ Brief, pp. 27-28). In plaintiffs’ view, that expanded “zone of interest” concept applies equally to this case to establish standing for the named plaintiffs. Plaintiffs are wrong because *Hoke County* did not address standing, or at least not the initial standing of plaintiffs to bring a lawsuit, and the circumstances of this case are not at all comparable to those in *Hoke County*.

The question in *Hoke County* was not standing, but whether, ten years after the litigation began, the Court should consider evidence relating to the failure of Hoke County to provide a constitutionally required education without limiting itself to specific failures or harms suffered by the named plaintiffs. As the Court explained, *Hoke County* was a continuation of the Court’s decision in *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997), in which the Court established the legislative and executive branches’ “duty to provide all the children of North Carolina the opportunity for a sound basic education.” *Hoke County*, 358 N.C. at 609, 599 S.E.2d at 373. On remand, “the ensuing trial lasted approximately fourteen months and resulted in over fifty boxes of exhibits and transcripts, an eight-volume record on appeal, and a memorandum of decision that exceeds 400 pages.” *Id.* at 610, 599 S.E.2d at 374. The preliminary issue on appeal was whether the evidence that went beyond the two named plaintiff-schoolchildren from Hoke County, “pertain[ing] to the circumstances of Hoke County’s student population in general,” was “relevant to the question of whether the named plaintiffs have been

denied their right to an opportunity to obtain a sound basic education.” *Id.* at 615, 599 S.E.2d at 376. The Court concluded that not only “the nature of a declaratory judgment action,” but also “the mandate of *Leandro* combine to afford the trial court and the participating parties greater evidentiary leeway than in a conventional civil action.” *Id.* Only in this context did the Court utilize the “zone of interest” as a framework for considering and evaluating the evidence presented in a trial involving plaintiffs who had standing to bring suit. Moreover, the Court emphasized “*the unique procedural posture* and substantive importance” of the case, declaring that “[t]he children of North Carolina are our state’s most valuable renewable resource” and further observing that the case had already been going on for ten years. *Id.* at 616, 599 S.E.2d at 377 (emphasis added). Based on these circumstances and the number of classes of students moving through the State’s school systems with no relief, the Court concluded that “*for this case*” the plaintiffs were properly permitted to present evidence beyond their individual harms. *Id.* (emphasis added).

Plaintiffs in this case can take no solace from *Hoke County*. It is not addressed to standing. It says nothing about whether a plaintiff is entitled to bring a lawsuit or raise a particular claim in the first place. Plaintiffs’ attempt to establish parallels between this case and *Hoke County* strays far afield in that plaintiffs are not asserting the denial of individual constitutional guarantees of the type in *Hoke County*, and this case is certainly not in the “unique procedural posture” the Court addressed in *Hoke County*. This Court should reject plaintiffs’ efforts to expand the evidentiary ruling of *Hoke County* to one that would somehow confer standing on the plaintiffs in this case simply because it involves a matter of significant public interest.

**C. PLAINTIFFS' TAXPAYER STATUS DOES NOT CREATE STANDING TO ASSERT COMMERCE CLAUSE CLAIMS.**

With regard to their Commerce Clause claims, plaintiffs argue that their status as state and local taxpayers creates “standing in State Court to bring their Federal and State Constitutional challenges alleged in the complaint” (Plaintiffs’ Brief, p. 29), and they dismiss as “simply not useful here” defendants’ citation of federal cases discussing standing requirements. (Plaintiffs’ Brief, p. 30)<sup>1</sup> Their assertion that they would have standing “[e]ven if the standards in North Carolina were as stringent as those for federal taxpayers” (Plaintiffs’ Brief, p. 30) cannot withstand analysis.

Plaintiffs’ use of *Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968), as support for a finding of their purported standing as taxpayers to bring their claims is unpersuasive. The holding in *Flast*, an Establishment Clause case, has never been extended to a negative Commerce Clause claim, and plaintiffs’ attempt to analogize as a permissible basis for standing a claim involving the “loss of specific tax revenues” in a Commerce Clause context to the “competition among religions” in an Establishment Clause context is wholly unpersuasive. (Plaintiffs’ Brief, pp. 30-33) The case relied upon by plaintiffs in support of this argued analogy, *Wyoming v. Oklahoma*, 502 U.S. 437, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992), was before the Court pursuant to its original jurisdiction over a controversy between two States. The Court adopted with approval the Special Master’s conclusion that Wyoming had standing because the matter “involved a direct injury in the form of a loss of specific tax revenues” resulting from

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<sup>1</sup> It should be noted that 13 cases – all federal court decisions – are cited in the next five pages of the Plaintiffs’ Brief concerning their asserted standing to bring Commerce Clause challenges in state court.

Oklahoma’s statutory enactment mandating Oklahoma utilities to purchase a minimum of 10% of their coal from Oklahoma providers. 502 U.S. at 448, 112 S. Ct. at 797, 117 L. Ed. 2d at 18. Nothing in that decision, which was explicitly grounded upon a finding of direct, actual injury, supports plaintiffs’ assertion that “state taxpayers should be found to have standing to challenge measures claimed to violate the Commerce Clause’s core neutrality principle.” (Plaintiffs’ Brief, p. 33)

Plaintiffs’ entire Commerce Clause standing argument ignores the difference in the negative Commerce Clause claims brought here and cases brought under the federal Constitution’s Establishment Clause or Taxing and Spending Clause. The negative Commerce Clause claims put forward a type of discrimination claim, and courts have routinely limited standing to those challengers who could show direct injury from the alleged discriminatory treatment. (*See* State Defendants’ Opening Brief, pp. 10-12.) Courts generally require that a lawsuit be based on an actual direct injury in discrimination claims in part because the remedy in such cases is not necessarily the elimination of the provisions supposedly resulting in discrimination, but instead the equalization of treatment between those affected by the alleged discrimination and those benefitting from the allegedly discriminatory legislation. The “State might refund the additional taxes imposed upon the victims of its discrimination or, to the extent consistent with other constitutional provisions (notably due process), retroactively impose equal burdens on the tax’s former beneficiaries” or “combine these two approaches.” *Fulton Corp. v. Faulkner*, 516 U.S. 325, 346, 116 S. Ct. 848, 861, 133 L. Ed. 2d 796, 815 (1996) (addressing unconstitutional discrimination under the Commerce Clause by North Carolina’s intangibles tax provisions). Because the allegedly discriminatory provisions in such cases are not necessarily

invalid except to the extent they improperly disadvantage others, they do not offend the Constitution except in the context of the harm suffered by persons against whom the discrimination occurs. Moreover, plaintiffs complain that the harm to them is the loss of tax revenues resulting in a greater burden on them, but the remedy in such cases may be one of extending the favorable tax treatment to others similarly situated and thus increasing the relative tax burden on persons such as plaintiffs not directly affected either way by the allegedly discriminatory legislation. This Court should reject plaintiffs' effort to manufacture a broad-based standing that would permit them to pursue their negative Commerce Clause claims, or any of their discrimination-based claims, solely on the grounds of taxpayer status.

**D. PLAINTIFFS' TAXPAYER STATUS DOES NOT CREATE STANDING TO ASSERT EQUAL PROTECTION CLAIMS.**

Plaintiffs' final attempt to establish standing asserts an entitlement to bring their Equal Protection claims on behalf of the third-party class of corporate and computer manufacturing entities who are subject to the allegedly discriminatory tax treatment occasioned by Chapter 204. (Plaintiffs' Brief, pp. 38-42) The lack of standing for plaintiffs to litigate Equal Protection claims on behalf of a class of persons to which they do not belong was addressed in the State Defendants' opening brief at pages 24-26.

Plaintiffs have failed to establish the predicate showing that they have incurred an injury in fact, as detailed above. Additionally, their assertion of "a sufficiently close relationship to corporations and computer manufacturers" such that the "common interest among Plaintiffs and the corporate and computer manufacturing taxpayers who suffer discrimination under the legislation in question is sufficient to ensure that the Plaintiffs will be an effective proponent of

the rights of these corporate and computer manufacturing taxpayers” (Plaintiffs’ Brief, p. 40) is unsupported by fact or logic. The disconnect between seven persons proceeding “individually,” each identified as a North Carolina “citizen, resident and taxpayer” (Compl. ¶¶ 4-10) and major national and multi-national corporate computer manufacturers is facially apparent. That disconnect is illustrated by the fact that plaintiffs seek to have the provisions of Chapter 204 stricken whereas other computer or corporate taxpayers would likely wish to have the benefits provided by Chapter 204 extended to them.

Furthermore, plaintiffs have not shown, and cannot show, a reason to conclude that a third-party challenge to the legislation is improbable on the basis that no member of the class subject to the alleged discrimination is in a position to raise the constitutional question or because members of the class are hindered in their ability to protect their own interests is not tenable. A plaintiff does not satisfy North Carolina’s standing requirement to litigate on behalf of third parties where “taxpayers of this State who are members of this class are under no disability to challenge this statute as discriminating against them.” *In re Appeal of Barbour*, 112 N.C. App. 368, 374, 436 S.E.2d 169, 173 (1993). Federal cases provide that in order to have standing to assert the rights of another there must be some “genuine obstacle” to the third party challenging the legislation to protect its own interests. *Singleton v. Wulff*, 428 U.S. 106, 116, 96 S. Ct. 2868, 2875, 49 L. Ed. 2d 826, 834 (1976). Here, plaintiffs cannot establish that “the corporate and computer manufacturing taxpayers who suffer discrimination under the legislation in question” (Plaintiffs’ Brief, p. 40) are under a disability sufficient to prevent them from bringing suit, or that a “genuine obstacle” exists creating a legitimate barrier for members of the class to litigate their own interests. Plaintiffs have proffered no viable basis for this Court to

conclude they have standing to pursue their Equal Protection claims or, indeed, any of the claims they assert in this litigation.

### **III. CHAPTER 204 DOES NOT BURDEN INTERSTATE COMMERCE.**

Plaintiffs argue that the legislation at issue facially discriminates in favor of in-state investment by the use of tax credits that “are the functional equivalent of a tariff” because they “excuse those computer manufacturers who locate their manufacturing activity in North Carolina” from tax liability. (Plaintiffs’ Brief, p. 45) They assert that North Carolina’s retention of corporate income tax and franchise tax liability for corporations that choose to invest in manufacturing facilities out-of-state burdens the company, “effectively acting as a tariff” (Plaintiffs’ Brief, p. 47), and thereby “‘forecloses tax-neutral decisions’ in violation of the Commerce Clause” (Plaintiffs’ Brief, p. 49). They further claim that “the Bill Lee Act Enhancements clearly treat in-state and out-of-state economic activities differently, benefitting the former and burdening the latter” (Plaintiffs’ Brief, p. 51), and assert that the “relevant discrimination here is between companies that do and don’t ultimately become North Carolina manufacturers” (Plaintiffs’ Brief, p. 53). Plaintiffs contend that this is because the tax credits at issue have the effect of coercing businesses subject to North Carolina’s franchise tax to expand locally rather than out-of-state, in violation of the Commerce Clause. (Plaintiffs’ Brief, p. 55)

As previously delineated, plaintiffs have not and cannot allege facts which, if proven, would establish a Commerce Clause violation. (State’s Opening Brief, pp. 13-18) Instead, they set out a collection of citations to various cases for the established (and uncontroverted) propositions that discriminatory burdens on interstate commerce are prohibited and that taxes which provide a direct competitive advantage to local businesses are discriminatory, and

therefore conclude that the tax incentive provisions of Chapter 204 are unconstitutional. This oversimplification is illustrated by plaintiffs' statement that "although the franchise and income taxes may be neutral, the New Tax Credit facially discriminates in favor of a company that builds a manufacturing facility in-state and thereby 'forecloses tax-neutral decisions' in violation of the Commerce Clause." (Plaintiffs' Brief, p. 49) Plaintiffs' assertion conflates the prohibition against discriminatory burdens on out-of-state goods or competition with the untenable proposition that North Carolina cannot seek to affect the investment decisions of multi-state companies through the use of state tax credits because all such decisions are required by the Commerce Clause to be "tax neutral."

Decisions concerning the manner in which the Commerce Clause functions as a limit on the taxing authority of a State provide guidance when analyzing the plaintiffs' "tax neutral" claim. A State's tax policies are necessarily connected to activities occurring within its borders. Due process concerns require "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," and that "income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." *Quill Corp. v. North Dakota*, 504 U.S. 298, 306, 112 S. Ct. 1904, 1909-10, 119 L. Ed. 2d 91, 102 (1992) (citations omitted). Furthermore, "a state tax will be sustained as constitutional under the Commerce Clause so long as the 'tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.'" *Navistar Fin. Corp. v. Tolson*, 625 S.E.2d 852, 857 (N.C. Ct. App. 2006) (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 1079, 51 L. Ed. 2d 326, 331 (1977)).

The tax incentives created by Chapter 204 are explicitly and rationally related to matters occurring with North Carolina's borders, and are offered in connection with new business activity anticipated to produce additional revenue. As recognized by plaintiffs, the apportionment formula used in determining the amount of corporate income tax and corporate franchise tax owed includes factors for the taxpayers' property, payroll, and sales located within North Carolina. (Plaintiffs' Brief, pp. 45-46) Credits against such taxes attainable by taxpayers, whether domestic or foreign corporations, for activity occurring within the State is no more of a discriminatory burden on interstate commerce than the taxes themselves. Corporate taxpayers that locate new manufacturing facilities in North Carolina increase the basis for North Carolina tax liability; the credits at issue here are logically linked to the business activity that triggers such increased tax liability.

A prerequisite for discrimination analysis under the dormant Commerce Clause is that the underlying state tax burdens interstate commerce. A tax program that places no burdens on out-of-state actors cannot be said to regulate interstate commerce. A state regulates interstate commerce only when it places regulatory or financial burdens on interstate commerce because the Commerce Clause prohibits "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. v. Limbach*, 486 U.S. 269, 273, 108 S. Ct. 1803, 1807, 100 L. Ed. 2d 302, 308 (1988). A state tax triggers dormant Commerce Clause scrutiny only when it burdens interstate commerce by imposing a cost on the conduct of business out-of-state or with out-of-state actors.

Commerce Clause cases provide that States cannot erect barriers that make it more difficult either for out-of-state products, services or businesses to come into the State, or for in-

state products, services or competitors to leave the State. Nothing suggests that a State cannot adopt policies designed to encourage growth and development in commerce and industry that will provide jobs to its citizens. In prior dormant Commerce Clause cases the state levied taxes upon interstate transactions or transactions with out-of-state actors, with the direct effect of increasing the cost of doing business interstate. Plaintiffs here ask the court to hold that the conferral of a tax benefit on domestic industry itself fixes a burden on interstate commerce.

As previously shown, the matters complained about here do not fix an actual burden on interstate commerce and therefore cannot act as a tariff. The tax credits being challenged are not levied against the out-of-state conduct supposedly being discriminated against but instead amount simply to a subsidy to in-state investments, an exercise of the State's police power never before questioned under the Commerce Clause. North Carolina treats equally qualifying companies making the required investment in North Carolina regardless of where the company is domiciled, regardless of whether the company has invested in North Carolina in the past, regardless of where its sales and other actual commercial transactions occur, and regardless of its other activities outside of the State. If the company chooses not to locate its investment in North Carolina, it merely loses the opportunity to qualify for the tax credits available for investment in the State.

Chapter 204 does not increase the cost of out-of-state investments; it merely reduces the costs of capital investment within North Carolina. Because capital investment outside the State will reduce the in-state property and payroll factors used in calculating the North Carolina apportionment value, the percentage of a business's net income allocated to North Carolina for franchise tax purposes will be reduced by any out-of-state investments. Thus, a business decision

to invest outside of North Carolina will not have any effect other than the lost opportunity to take advantage of the subsidy offered in the form of a tax credit for in-state investment.

Only by obliterating the distinction between benefits for in-state investment and burdens on interstate conduct could Chapter 204 be invalidated. At risk, under plaintiffs view, would not be just cash subsidies but also infrastructure improvements and educational actions that result in a more highly skilled workforce never before determined to implicate or violate the dormant Commerce Clause. Virtually any improvement a State undertakes could be characterized as “benefitting” in-state companies; enacting an across-the-board reduction in corporate tax rates, or eliminating such taxes altogether, would undoubtedly benefit North Carolina’s corporate taxpayers but not in equal measure out-of-state companies.

The tax incentives contained in Chapter 204 do not impede the free market “whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply. The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such.” *GMC v. Tracy*, 519 U.S. 278, 300, 117 S. Ct. 811, 825, 136 L. Ed. 2d 761, 781 (1997). Plaintiffs’ dormant Commerce Clause claims, therefore, must be dismissed.

#### **IV. THE INCENTIVES PROVIDED TO DELL DO NOT VIOLATE THE PUBLIC PURPOSE CLAUSE OF THE NORTH CAROLINA CONSTITUTION.**

Plaintiffs argue that the incentives provided by the local governments to Dell, as well as the legislative enactments contained in Chapter 204 all violate the “public purpose” clause of Article V, Section 2(1) of the Constitution of North Carolina. To support their argument, plaintiffs promote what is, at the very least, an extremely narrow interpretation of the decision in

*Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996). To further buttress their argument, plaintiffs ask the Court to rely on earlier cases, such as *Mitchell v. North Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 159 S.E.2d 745 (1968), and *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 199 S.E.2d 641 (1973), cases which, if not overruled, have certainly had their luster tarnished by the decision in *Maready* and later cases. This Court should reject plaintiffs' invitation to re-write *Maready* and to disregard its teachings by harkening back to an earlier approach to interpreting and applying the public purpose concept.

Plaintiffs claim that *Maready* stands only for the proposition that N.C.G.S. § 158-7.1 is facially constitutional. (Plaintiffs' Brief, p. 57) They ignore the fact that *Maready* specifically noted that twenty-four economic development incentive projects were challenged in that case. *Maready*, 342 N.C. at 712, 467 S.E.2d at 618. Thus, the Court did not uphold § 158-7.1 in a vacuum when it approved the expenditures authorized by that section. *Id.* at 723-24, 467 S.E.2d at 625. Indeed, in dissenting from the majority opinion, plaintiffs' lead counsel, as a member of the Supreme Court, commented, "[i]f it is an acceptable public purpose to spend tax dollars specifically for relocation expenses to benefit the spouses of corporate executives moving to the community in finding new jobs or for parking decks that benefit only the employees of the favored company, then what can a government not do if the end result will entice a company to produce new jobs and raise the tax base?" *Id.* at 741-42, 467 S.E.2d at 635-36 (Orr, J., dissenting). Clearly, while the holding of the case was that N.C.G.S. § 158-7.1 is constitutional, the Court addressed that question in the context of specific incentives offered pursuant to the challenged economic development projects.

Plaintiffs argue that the Court must assess each local incentive and the provisions of Chapter 204 to determine whether they run afoul of the public purpose clause, at least as to whether those incentives unconstitutionally benefit Dell rather than the public. To advance their argument, plaintiffs urge the indisputable principle that

[a] slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities which were once considered exclusively private enterprises, and necessitates the expenditure of tax funds for purposes which, in an earlier day, were not classified as public. Often public and private interests are so co-mingled that it is difficult to determine which predominates. It is clear, however, that for a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity.

*Mitchell*, 273 N.C. at 144, 159 S.E.2d at 750 (citations omitted), *quoted in Maready*, 342 N.C. at 716, 467 S.E.2d at 620-21. Next, plaintiffs rely on the equally indisputable principle that the Supreme Court follows certain guidelines in determining whether an expenditure is in fact for a public purpose. “Two guiding principles have been established for determining that a particular undertaking by a municipality is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the particular municipality; and (2) the activity benefits the public generally, as opposed to special interests or persons.” *Madison Cablevision, Inc. v. Morganton*, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989) (citations omitted), *quoted in Maready*, 324 N.C. at 722, 467 S.E.2d at 624.

Plaintiffs somewhat grudgingly acknowledge that economic development and job creation meet the first prong of the public purpose test. See Plaintiffs’ Brief (p. 57), in which plaintiffs recognize that this Court is bound by *Maready*’s holding to this effect, and Plaintiffs’

Brief (p. 60), in which plaintiffs “conced[e] only for purposes of discussion that job creation and economic development could meet the first prong of the *Madison Cablevision* test.” Plaintiffs could hardly do otherwise since the Court noted in *Maready* that “[e]conomic development has long been recognized as a proper governmental function” and that the Court had previously “declared that stimulation of the economy involves a public purpose.” *Maready*, 342 N.C. at 723, 467 S.E.2d at 624, 625. Additionally the Court stated that its cases

reflect a trend toward broadening the scope of what constitutes a valid public purpose that permits the expenditure of public revenues. The General Assembly may provide for, inter alia, roads, schools, housing, health care, transportation, and occupational training. It would be anomalous to now hold that a government which expends large sums to alleviate the problems of its citizens through multiple humanitarian and social programs is proscribed from promoting the provision of jobs for the unemployed, an increase in the tax base, and the prevention of economic stagnation.

*Id.* at 722, 467 S.E.2d at 624. There can be no doubt that the purposes for which Chapter 204 was enacted, and the local resolutions and agreement were effected, constitute public purposes under modern constitutional analysis.

Plaintiffs contend that the specific activities here do not meet the second prong of the public purpose test because, in plaintiffs’ view, they benefit Dell rather than the public generally. As plaintiffs acknowledge (Plaintiffs’ Brief, p. 59), *Maready* concluded that “even the most innovative activities” permitted under N.C.G.S. § 158-7.1 are constitutional because “they are directly aimed at furthering the general economic welfare of the people of the communities affected. While private actors will necessarily benefit from the expenditures authorized, such benefit is merely incidental.” *Maready*, 342 N.C. at 724, 725, 467 S.E.2d at 625. Yet, plaintiffs argue that somehow the incentives offered by the local governments here, as well as the

provisions of Chapter 204, differ from those at issue in *Maready* and are for the benefit of Dell rather than the public interest.

In their efforts to portray the incentives and statutory provisions here as failing the public purpose test, plaintiffs ask this Court to review older cases such as *Briggs v. City of Raleigh*, 195 N.C. 223, 141 S.E. 597 (1928), and *Nash v. Town of Tarboro*, 227 N.C. 283, 42 S.E.2d 209 (1947), as well as the relatively more recent decision in *Mitchell*. Plaintiffs then attempt to use these cases, as well as selected quotes from *Maready* and *Madison Cablevision*, to argue that the challenged actions here benefit Dell, not the public, for public purposes analysis.

What plaintiffs omit from their argument is the recognition in *Maready* that application of the analysis is different in modern times even if the general principles have remained largely the same.

While *Mitchell* and its progeny remain pivotal in the development of the doctrine, they do not purport to establish a permanent test for determining the existence of a public purpose. The majority in *Mitchell* posed the question: “Is it today a proper function of government for the State to provide a site and equip a plant for private industrial enterprise?” *Mitchell*, 273 N.C. at 145, 159 S.E.2d at 751 (emphasis added). This explicit recognition of the importance of contemporary circumstances in assessing the public purpose of governmental endeavors highlights the essential fluidity of the concept. While the *Mitchell* majority answered the question in the negative, the passage of time and accompanying societal changes now suggest a positive response.

*Maready*, 342 N.C. at 720, 467 S.E.2d at 623. Moreover, the Court observed that “an expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose.” *Id.* at 724, 467 S.E.2d at 625. Additionally, the Court pointed out that economic development incentives had been upheld in forty-six other states, and “it would be

unrealistic to assume that the State will not suffer economically in the future if the incentive programs created pursuant to N.C.G.S. § 158-7.1 are discontinued.” *Id.* at 726-27, 467 S.E.2d at 627.

*Maready*, in effect, interprets the public purpose test, and especially the public vs. private benefit prong, at a different angle from that employed in many older cases. Older cases seemingly focused more on the benefit to private individuals or entities whereas *Maready* and more recent cases look more to the public motive and expected benefit to determine whether a particular action was for a public purpose in constitutional terms. Where the public benefit is the motivation for the enactment, the benefit to private individuals is incidental, even though substantial. Thus, the Court upheld a condemnation of land by an airport authority as being for public use against a challenge based on the contention that the land would be used for the construction by Federal Express of a facility that it would then rent from the airport. Despite the argument that the condemnation was for the private benefit of Federal Express, the Court concluded that

[t]he arrangement advances the primary goal of giving effect to the people's general desire for better seaports and airports. As such, the greater benefits flow to the people, as they have constitutionally directed, with their understanding that there will be incidental benefits to private companies involved. Under these facts, the legislative declarations of public purpose, and the constitutional directives of the people, we are persuaded that both prongs of our analysis are satisfied.

*Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 343, 554 S.E.2d 331, 335 (2001), *cert. denied*, 535 U.S. 971, 122 S. Ct. 1438, 152 L. Ed. 2d 381 (2002). *See also Peacock v. Shinn*, 139 N.C. App. 487, 494-95, 533 S.E.2d 842, 848, *disc. rev. denied*, 353 N.C. 267, 546 S.E.2d 110 (2000) (upholding trial court's dismissal of lawsuit on the grounds, in part, that agreements

between the City of Charlotte and a coliseum authority, on the one hand, and the Charlotte Hornets and its owners, including George Shinn, on the other, were for a public purpose, and served a primary public goal, despite the fact that amendments to the original agreements obligated the City to pay the defendants a percentage of Coliseum profits regardless of whether those profits resulted from Hornets games).

Plaintiffs urge the Court to give *Maready* a very limited interpretation, noting that *Maready* attempted to distinguish *Mitchell* and *Stanley*, and insisting that those cases are still good law. Plaintiffs' approach is directly contrary to that taken by plaintiffs' lead counsel when, as a member of the Supreme Court, he dissented in *Maready*, contending that *Mitchell* and *Stanley* were not in fact distinguishable. At that time, plaintiffs' lead counsel advanced the theory that the majority in *Maready* had ignored the law as set out in those prior cases and that the incentives approved in *Maready* were unconstitutional under the Court's precedents. *Maready*, 342 N.C. at 633-35, 467 S.E.2d at 738-41 (Orr, J., dissenting). Apparently he viewed *Maready* as authorizing virtually any type of incentive so long as the ultimate goal was the attraction of business for economic development.

If a potential corporate entity is considering a move to Winston-Salem but will only come if country club memberships are provided for its executives, do we sanction the use of tax revenue to facilitate the move? I would hope not, but under the holding of the majority opinion, I see no grounds for challenging such an expenditure provided that, as a result of such a grant, the company promises to create new jobs, and an increased tax base is projected.

*Id.* at 742, 467 S.E.2d at 636 (Orr, J., dissenting). Indeed, he asserted that

[t]he logic upon which the majority opinion rests its conclusion that the expenditure of these funds was for a public purpose can be stated as follows: The creation of new jobs and an increase in the tax base ipso facto benefits the general public. Therefore, local government expenditure of tax dollars to a private

business for its private benefit in order to induce the business to either expand or locate in the community is for a public purpose if it creates new jobs and increases the tax base.

*Id.* at 734, 467 S.E.2d at 631 (Orr, J., dissenting). Thus, plaintiffs' counsel expressed his concern "that little remains of the public purpose constitutional restraint on governmental power to spend tax revenues collected from the public." *Id.* Defendants submit that plaintiffs' counsel was at least closer to the truth when he argued that *Maready* should be viewed as a broad endorsement of economic incentives and an implicit rejection of *Mitchell* and *Stanley* than he is in promoting the narrow construction for which he now advocates.

In sum, plaintiffs have put forth no viable argument that the provisions of Chapter 204 or the local incentives violate the public purpose provisions of Article V, Section 2(1) of the Constitution of North Carolina. This Court should reject plaintiffs' claims that Chapter 204 and the local incentives are unconstitutional private benefits.

**V. THE SUBSIDIES AT ISSUE DO NOT VIOLATE ARTICLE I, SECTION 32 OF THE CONSTITUTION.**

Plaintiffs contend that the provisions of Chapter 204, as well as the local subsidies, violate Article I, Section 32 of the Constitution, which directs that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." According to plaintiffs, the defendants erroneously relied on a test set out in *Town of Emerald Isle v. State*, 320 N.C. 640, 653, 360 S.E.2d 756, 764 (1987), as an appropriate method of assessing an exclusive emoluments claim. As explained in *Town of Emerald Isle*, "a statute which confers an exemption that benefits a particular group of persons is not an exclusive emolument or privilege within the meaning of Article I, section 32, if: (1) the

exemption is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest.” *Id.* at 654, 360 S.E.2d 764. *Accord Peacock v. Shinn*, 139 N.C. App. 487, 495, 533 S.E.2d 842, 848, *disc. rev. denied*, 353 N.C. 267, 546 S.E.2d 110 (2000). Plaintiffs argue that this test is based on earlier cases such as *State v. Knight*, 269 N.C. 100, 108, 152 S.E.2d 179, 184 (1967), and that this test is no longer applicable.

According to plaintiffs, the Supreme Court followed a different approach to Article I, Section 32 questions in later cases such as *Madison Cablevision, Inc. v. Morganton*, 325 N.C. 634, 654-55, 386 S.E.2d 200, 212 (1989), and *Leete v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995). Based on such cases, plaintiffs contend the focus in an exclusive emoluments analysis must be on the public service, or lack thereof, by the recipient of the alleged exclusive emolument. Plaintiffs outline what they conceive as the appropriate test for an exclusive emoluments question: “(1) was there a grant by the community to others, (2) was that grant in consideration of ‘public services’ and (3) was the grant an alienation of powers that were exclusive or separate emoluments or privileges?” (Plaintiffs’ Brief, p. 72) Plaintiffs’ test may be appropriate in some cases, but their insistence on it and its concern with public services is misplaced in a case such as this. When the action at issue is clearly not an exclusive emolument, then there is no need to address whether a grant or payment or, as in this case, incentives are awarded for public services. The test cited by defendants, based on *Town of Emerald Isle*, is still good law and appropriate for exclusive emoluments analysis in this case, in which there is no need to consider the “public services” aspect of Article I, Section 32.

Because Article I, Section 32 forbids “exclusive or separate emoluments or privileges from the community but in consideration of public services,” the constitutional prohibition is violated only if the Court can determine first that there is an “exclusive or separate emolument[] or privilege[] from the community” and, second, that that emolument or privilege was not “in consideration of public services.” In a case such as *Leete*, the shortened *Knight/Town of Emerald Isle* test does not go far enough because the Court in *Leete* concluded that severance payments provided to a resigning town manager were an exclusive emolument. Having reached that conclusion, it was then necessary for the Court to determine whether the payments voted on at the time of the county manager’s voluntary resignation were for public services rendered. The Court necessarily addressed both portions of the constitutional directive in holding that the severance payments violated Article I, Section 32. *Leete*, 341 N.C. 116, 462 S.E.2d 476. On the other hand, in *Madison Cablevision*, cited and quoted by plaintiffs, the Supreme Court found it convenient to evaluate the city’s assuming the cablevision service by looking at the “public services” question. The Court explained, “it is clear that article I, section 32 contemplates that exclusive emoluments or privileges may be granted if ‘in consideration of public services.’” *Madison Cablevision*, 325 N.C. at 654, 386 S.E.2d at 212. The Court gave no hint that it meant to overrule or discredit the test used in *Town of Emerald Isle*, as plaintiffs would have us believe the Court intended. Instead, the Court simply employed a different method of analysis according to the circumstances of the case before it. Thus, it concluded that the city “by definition falls within the exception for corporations providing ‘public services’ and thus cannot violate the provisions of article I, section 32.” *Id.*

Where, as here, the Court can apply the test used in cases such as *Town of Emerald Isle* to hold that no exclusive emoluments have been awarded by the State or local governments, then the Court need not reach the question of whether the provisions of Chapter 204 and the local incentives were for public services rendered. Thus, in *Peacock*, the Court of Appeals analyzed an Article I, Section 32 challenge by reference to the *Town of Emerald Isle* test and concluded that the Charlotte Coliseum Agreement “was intended to promote the public benefit and plaintiff’s second claim must fail on its face, even though a benefit resulted, as well, to the Shinn defendants.” *Peacock*, 139 N.C. App. at 496, 533 S.E.2d at 848. Similarly, in *Town of Highlands v. Hendricks*, 164 N.C. App. 474, 596 S.E.2d 440, *disc. rev. denied*, 359 N.C. 75, 605 S.E.2d 149 (2004), the Court of Appeals addressed an exclusive emoluments claim in which plaintiffs complained that the Town of Highlands had relinquished its condemnation authority to a group of private citizens. The Court of Appeals quoted *Peacock* for the test used, the same test which plaintiffs here portray as outdated. Relying on that test, the Court of Appeals rejected the plaintiffs’ claims because “the primary purpose was the promotion of the general public welfare and not a private interest.” *Town of Highlands*, 164 N.C. App. at 479-80, 596 S.E.2d at 445.

Plaintiffs’ view that the Court must use a different test from that applied in cases such as *Town of Emerald Isle* ignores the fact that the Court need not address the public services component of Article I, Section 32 unless there is an exclusive emoluments or privilege in the first place, or unless it is easier to skip over the first part of the analysis to go directly to the public services component. If a governmental action is to be held unconstitutional under Article I, Section 32, a court must address both aspects of the constitutional restriction. But where, as here, the governmental actions of both the State and the local governments are outside the scope

of Article I, Section 32's concern with exclusive or separate emoluments or privileges, then the public services question never arises. For the reasons argued here and in the State defendants' opening brief, neither Chapter 204 nor the local incentives constitute exclusive emoluments or privileges within the meaning of Article I, Section 32, and this Court should reject both plaintiffs' analysis and their challenge under Article I, Section 32.

**VII. CHAPTER 204 AND THE LOCAL SUBSIDIES GIVEN TO DELL DO NOT VIOLATE THE REQUIREMENT OF UNIFORMITY OF TAXATION.**

Plaintiffs argue extensively that Chapter 204 and the local subsidies given to Dell violate the provisions of Article V, Section 2 of the Constitution, requiring uniformity of taxation.<sup>2</sup> Plaintiffs recognize, as do defendants, that the test for passing the uniformity provision is that a classification must be rational rather than unreasonable or arbitrary. "A tax is uniform when it imposes an equal tax burden upon all members of a particular class. As long as a classification is not arbitrary or capricious, but rather founded upon a rational basis, the distinction will be upheld by the Court." *Broadwell Realty Corp. v. Coble*, 291 N.C. 608, 617, 231 S.E.2d 656, 662 (1977) (citations omitted). Indeed, "[t]he requirements of 'uniformity,' 'equal protection,' and 'due process,' are, for all practical purposes, the same under both the State and Federal Constitutions." *Id.* (citations omitted). Where plaintiffs go astray is their insistence that Chapter 204 and the local subsidies are arbitrary and unreasonable.

Plaintiffs cite numerous cases to illustrate arbitrary and unreasonable or irrational classifications under Article V, Section 2 or its predecessor. They also declare that cases cited by

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<sup>2</sup> Actually, the heading in Argument VII of Plaintiffs' Brief (p. 76), indicates that plaintiffs challenge both Chapter 204 and the local subsidies on uniformity of taxation grounds. The body of the argument, however, is concerned with Chapter 204.

defendant Dell upholding legislation against uniformity challenges are distinguishable. In reality, there are no North Carolina cases similar to this one. None of the cases plaintiffs cite present legislation remotely comparable to Chapter 204 because no prior case has interpreted legislation at all like this for uniformity of taxation purposes.

What the Court must consider in assessing plaintiffs' uniformity challenge are the principles our appellate courts have established for such an analysis. It is for the General Assembly to determine the classifications, and the General Assembly may make fine distinctions and tax different industries under different standards.

“The Legislature is sole judge of what subjects it shall select for taxation . . . , and the exercise of its discretion is not subject to the approval of the judicial department of the State.” *Lacy v. Armour Packing Co.*, 134 N.C. 567, 573, 47 S.E. 53, 55 (1904), *aff'd*, 200 U.S. 226, 50 L. Ed. 451, 26 S. Ct. 232 (1906). In selecting subjects for taxation,

narrow distinctions are sometimes invoked, and if 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.

*Deadwood, Inc. v. N.C. Dep't of Revenue*, 356 N.C. 407, 410, 572 S.E.2d 103, 105 (2002) (upholding the taxation of live entertainment differently from “moving picture shows”) (quoting *Leonard v. Maxwell*, 216 N.C. 89, 96, 3 S.E.2d 316, 322 (1939)). The Court “has sustained numerous tax classifications which rested on subtle distinctions.” *Id.* at 414, 572 S.E.2d at 107 (listing various examples).

[T]his constitutional provision does not prohibit reasonable flexibility and variety appropriate to reasonable schemes of State taxation. “*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 a precise, scientific uniformity with reference to composition, use or value.” *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 3 L.

Ed. 2d 480, 79 S. Ct. 437 (1959) (resident-nonresident classifications in tax statute). While the General Assembly may not establish a classification that is arbitrary or capricious, a classification is constitutional if founded upon a reasonable distinction or difference and bears a substantial relation to the object of the legislation. *Ohio Oil Co. v. Conway*, 281 U.S. 146, 74 L. Ed. 775, 50 S. Ct. 310 (1930); *cf. State ex rel. Bernhard Stern & Sons v. Bodden*, 165 Wis. 75, 160 N.W. 1077 (1917) (public warehouse-private warehouse classifications in tax statute).

*Appeal of Martin*, 286 N.C. 66, 75-76, 209 S.E.2d 766, 773 (1974) (emphasis added).

There can be no doubt that the General Assembly set out extensive legislative findings in Chapter 204 that establish a rational basis for the tax incentives provided by that legislation. *See* N.C.G.S. § 105-129.60 (2005). Plaintiffs, however, snipe at particular aspects of the Chapter 204 provisions in an effort to depict them as irrational. For example, plaintiffs somehow view the requirements of a minimum one hundred million dollar investment and employment of at least 120 workers as arbitrary and “matters of details” without any relation to the classification and goal of stimulating economic activity and creating and maintaining sustainable jobs. *See* Plaintiffs’ Brief, p. 80; N.C.G.S. § 105-129.60. Surely, some minimum investment in money and jobs is logically related to the goal of stimulating economy and new jobs by providing tax incentives in Chapter 204. Similarly, plaintiffs complain that the purpose of creating and maintaining sustainable jobs is not furthered by the legislation because, plaintiffs argue, the jobs to be created are expected to average only \$28,000.00 in wages and the legislation requires that the employer pay only half the basic health care coverage of employees. Yet, plaintiffs offer no evidence or basis for the Court to assume that such jobs, and even 50% payment of health care benefits, are not major attractions for many potential employees as well as providing economic stimuli to the area of the major computer manufacturing plant and even the State itself. That

plaintiffs can quibble with particular lines drawn in the classification is irrelevant to the constitutionality of Chapter 204. By comparison, it is well-established in equal protection law, and should be equally applicable to uniformity cases, that classifications need not be perfect, but instead may be overinclusive or underinclusive, without rendering legislating irrational or arbitrary. *See Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 435, 302 S.E.2d 868, 877 (1983); *Vance v. Bradley*, 440 U.S. 93, 108, 99 S. Ct. 939, 948, 59 L. Ed. 2d 171, 183 (1979).

Plaintiffs further attack Chapter 204 by complaining that the Bill Lee Act Enhancements are unjustified and that it is irrational to provide Bill Lee Act type benefits in Chapter 204 without regard to the tier level of the county, that ties pre-existing Bill Lee Act enhancements proportionately to the tier level, based on the distressed or non-distress status of the county. Plaintiffs fail to acknowledge that new legislation, based on different circumstances and different industries, need not be comparable to prior legislation. The General Assembly made a judgment that short-term and long-term economic trends had increased the difficulty in retaining jobs in this State, that manufacturing jobs had been disproportionately affected by external policies and trends, that computer manufacturing had been important to this State's economy, and that the State should adopt policies to encourage the maintenance and growth of this industry in North Carolina. N.C.G.S. § 105-129.60. Plaintiffs cannot simply say it is arbitrary or irrational for the State to enact different provisions from those previously made available to other companies in other industries when the State has outlined reasons why this industry is so important at this time and requires special provisions to encourage its growth and maintenance, thus demonstrating why the different actions under different circumstances are entirely rational.

Our Supreme Court has acknowledged that the business of government now includes competing with other states to attract industry by offering inducements to that industry. *Maready v. City of Winston-Salem*, 342 N.C. 708, 727, 467 S.E.2d 615, 627 (1996) (quoting *Mitchell v. North Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 164, 159 S.E.2d 745, 764 (1968) (Parker, C.J., dissenting)). When the General Assembly determines that a particular type of inducement is appropriate based on current economic factors and the nature of a particular industry, plaintiffs cannot establish a violation of the uniformity of taxation policy simply by saying other companies, that are not in fact similarly situated, do not get the same benefits or by disagreeing with specific details, such as whether requiring the payment of half an employee's health care benefits, rather than full benefits, is rationally related to creating sustainable jobs. What plaintiffs are really expressing is their disagreement with the entire economic incentive approach to encouraging industry. The fact that plaintiffs dislike the incentives in no way establishes that those incentives violate the uniformity provision. To the contrary, just as our public purpose jurisprudence recognizes the changing times, the need for economic incentives, and the broadening of the definition of what constitutes a public purpose, so, too, our uniformity jurisprudence must recognize that differences in timing, the nature of the industry, and economic circumstances, including competitors, create real differences that may validly underlie the classifications made for legislation such as Chapter 204. Because plaintiffs have made no showing that Chapter 204, or the local incentives, violate Article V, Section 2(2), this Court should reject plaintiffs' uniformity of taxation challenge.

**VIII. CHAPTER 204 AND THE LOCAL RESOLUTIONS DO NOT UNCONSTITUTIONALLY SURRENDER, SUSPEND OR CONTRACT AWAY THE POWER OF TAXATION.**

Plaintiffs argue that Chapter 204 and the local incentives unconstitutionally surrender, suspend and contract away the power of taxation in violation of Article V, Section 2(1) of the Constitution. Despite the fact that the State has not in fact entered into a contract with Dell or any other manufacturer based on Chapter 204, plaintiffs somehow assume that legislation surrenders, suspends, or contracts away the power of taxation. Additionally, plaintiffs contend the agreements with the local defendants constitute contracts for the surrender, suspension, or contracting away of the power of taxation despite the fact that the agreements do not provide tax exemptions or rebates, impose conditions on the incentive payments based on Dell's meeting certain criteria, and merely cap the amount of certain incentive payments at no more than the amount of property taxes paid. Moreover, to support their argument, plaintiffs found it necessary to deal with the case of *Bailey v. State*, 348 N.C. 130, 148, 500 S.E.2d 54, 64 (1998), which held, among other matters, that contracts for tax exemptions are permissible so long as they are for public purposes. This Court should reject plaintiffs' creative interpretation of *Bailey* as well as their attempts to find contracts or the surrender of the power of taxation where none exist.

Incredibly, plaintiffs argue that the *Bailey* court resolved the Article V, Section 2(1) question on estoppel grounds and anything regarding the interpretation of that provision was mere dictum. In *Bailey*, the Court said it would be unfair for the State to accept the retirement contributions of employees who relied on the tax exemptions and then deny the exemptions, and the Court noted the rule that one who benefits from a statute cannot subsequently question its constitutionality. *Bailey*, 348 N.C. at 147, 150, 500 S.E.2d at 64, 66. The Court, however, did

not simply resolve the issue on fairness or estoppel or quasi-estoppel; indeed, it never mentioned estoppel. What it did was to comment that “[t]he State’s attempt to find shelter under the North Carolina Constitution must be compelling indeed after such a long history of accepting the benefits of the extension of the exemption in question. We find no such compelling case here.” *Id.* at 147, 500 S.E.2d at 64.

With its fairness concerns as background, the *Bailey* Court explicitly analyzed and ruled on the defendants’ contention that there was not and could not be a permanent, irrevocable contract for tax exemptions because such a contract would violate Article V, Section 2(1).

Upon examination of the circumstances surrounding this case and the Act at issue, we must conclude that the State has failed to establish that the tax exemption is an unconstitutional contracting away of the power to tax. *A thorough reading of Article V, Section 2 of the state Constitution reveals that the State is empowered to enter into contracts for tax exemptions.* As well as ensuring that the power of taxation may never be contracted away, Article V, Section 2 also contains other provisions regarding taxing and contracting by the State. Subsection (6) provides that, regarding income taxes, “there shall be allowed . . . exemptions.” N.C. Const. art. V, § 2(6). Subsection (3) further provides that “no taxing authority other than the General Assembly may grant exemptions, and the General Assembly shall not delegate the powers accorded to it.” N.C. Const. art. V, § 2(3) (emphasis added). Section 2 also establishes that the “State . . . may contract with . . . any person . . . for the accomplishment of public purposes only.” N.C. Const. art. V, § 2(7). We cannot read subsection (1) in isolation as the State would have us do. Isolated interpretations of statutory and constitutional provisions are contrary to the jurisprudence of North Carolina. *See, e.g., State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944). In light of the interplay between subsections (3), (6) and (1), it is apparent that the granting of an exemption is not the same thing as relinquishing the “power” of taxation. If it were, no exemptions would be possible--a result incongruous with express provisions of the Constitution. Combining these subsections with the power to make contracts granted in subsection (7), *it is clear that the State may make contracts for exemptions without contracting away the “power” of taxation as long as the contract is for a public purpose.*

*Bailey*, 348 N.C. at 147-48, 500 S.E.2d at 64 (emphasis added). The Court could not have expressed itself any plainer. It addressed the issue the *Bailey* defendants raised concerning the prohibition on surrendering, suspending, or contracting away the power of taxation, and it concluded that the State may enter into contracts for tax exemptions if they are for public purposes. Rather than being dicta, as plaintiffs suggest, this analysis dealt squarely with the issue presented. The Court made it even clearer that the Article V, Section 2(1) interpretation was the holding, not dictum, when it subsequently summed up that section of its opinion by stating, “[w]e therefore hold that the relationship between the Retirement Systems and employees vested in the system is contractual in nature, the right to benefits exempt from state taxation is a term of such contract, and such exemption does not constitute an unconstitutional contracting away of the State’s sovereign power of taxation.” *Id.* at 150, 500 S.E.2d at 66 (emphasis added).

Plaintiffs seek to persuade this Court to ignore the *Bailey* holding on the grounds that interpreting that case according to what it actually said would be contrary to the purpose and language of Article V, Section 2(1). To support this notion, plaintiffs provide a great deal of background about the constitutional provision itself and cite numerous cases which, in a vacuum, might well be persuasive as to the effect of Article V, Section 2(1). The problem is that such arguments and cases did not persuade the *Bailey* court in 1998.<sup>3</sup> This Court is not free to decide that *Bailey* could not have meant what it said on the theory that what it said deprives Article V,

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<sup>3</sup> The State Defendants do not wish to attach anything to their brief for fear of causing the motion to dismiss to be converted into a motion for summary judgment. However, should the Court wish to check the public records containing the briefs before the Supreme Court in the *Bailey* case and take judicial notice of those briefs, the State Defendants suggest that the Court would find very similar arguments, with most of the same cases, cited to support the *Bailey* defendants’ contention that Article V, Section 2(1) would not permit a contract for a tax exemption.

Section 2(1) of its intended meaning or the idea that the *Bailey* court could have avoided the holding on the grounds of estoppel or some other basis.<sup>4</sup> *Bailey* unequivocally held that the State may enter into contracts for tax exemptions and that such contracts are valid if they are for public purposes. Since the incentives in Chapter 204 and the local agreements were in fact for public purposes, plaintiffs have no support for their contention that Chapter 204 and the local agreements violate Article V, Section 2(1).

Even if plaintiffs could get around the *Bailey* holding, they cannot escape the reality that neither Chapter 204 nor the local agreements in fact surrender, suspend, or contract away the power of taxation. Plaintiffs have no authority for their contentions that the provisions of Chapter 204 or the local agreements somehow surrender, suspend, or contract away the power of taxation, and the defendants' opening briefs established that such is not the case. Accordingly, this Court should reject plaintiffs' claims under Article V, Section 2(1).

### CONCLUSION

For all the reasons discussed above, and in the State Defendants' opening brief along with the briefs of the other defendants, the Court should grant the State Defendants' motion to dismiss

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<sup>4</sup> Plaintiffs also argue that *Bailey* did not need to worry about the effect on municipal bonds if the Court concluded that contracts for tax exemptions violated Article V, Section 2(1). According to plaintiffs, old cases established a theory that would have avoided the Article V, Section 2(1) issue as to municipal bonds, under the idea that taxes were effectively paid on municipal bonds in lower interest rates, and the same theory could have been employed to uphold the tax exemptions for state retirees. (Plaintiffs' Brief, pp. 88-90) Even assuming the *Bailey* court could have avoided the municipal bond issue on grounds such as plaintiffs suggest, it did not do so. Moreover, the municipal bonds part of the *Bailey* opinion does not affect the applicability of the *Bailey* holding on Article V, Section 2(1) to this case. The fact that the Court could have done something else does not change, for purposes of this Court's decision, what in fact the *Bailey* Court actually did.

(as well as the motions of the other defendants), and plaintiffs' action should be dismissed in its entirety.

Respectfully submitted this the 17<sup>th</sup> day of April, 2006.

ROY COOPER  
Attorney General

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Grayson G. Kelley  
Chief Deputy Attorney General  
N.C. State Bar No. 8349  
gkelley@ncdoj.com

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Norma S. Harrell  
Special Deputy Attorney General  
N.C. State Bar No. 6654  
nharrell@ncdoj.com

---

John F. Maddrey  
Assistant Solicitor General  
State Bar No. 8890  
jmaddrey@ncdoj.com

N.C. Department of Justice  
P.O. Box 629  
Raleigh, North Carolina 27602  
Telephone: (919) 716-6900  
Facsimile: (919) 716-6763

*Attorneys for Defendants State of North Carolina  
and James T. Fain, III, Secretary of the  
North Carolina Department of Commerce*

## CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **STATE DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS** in the above titled action upon all other parties to this cause by:

Hand delivering a copy hereof to each said party or to the attorney thereof;

Transmitting a copy hereof to each said party via facsimile transmittal or e-mail;  
and/or

Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

Robert F. Orr  
Pamela B. Cashwell  
Jeanette Doran Brooks  
North Carolina Institute for Constitutional Law  
225 Hillsborough Street, Suite 280  
Raleigh, NC 27619  
*Attorneys for Plaintiffs*

By Hand Delivery

J. Robert Elster  
Adam H. Charnes  
KILPATRICK STOCKTON LLP  
1001 West Fourth Street  
Winston-Salem, NC 27101-2400

By E-mail and Mail

*Attorneys for Local Government Defendants and Non-Profit Defendants*

Ronald G. Seeber  
Winston-Salem City Attorney  
Post Office Box 2511  
Winston-Salem, NC 27102  
*Attorney for the City of Winston-Salem and  
Allen Joines, Mayor of Winston-Salem*

By E-mail and Mail

Davida W. Martin  
Forsyth County Attorney  
201 North Chestnut Street  
Government Center, 5<sup>th</sup> Floor  
Winston-Salem, NC 27101

By E-mail and Mail

*Attorney for Forsyth County and  
Gloria D. Whisenhunt, Chairperson of Forsyth County Board of Commissioners*

Burley B. Mitchell, Jr.  
Pressly M. Millen  
WOMBLE CARLYLE SANDRIDGE & RICE, PLLC  
Post Office Box 831  
Raleigh, NC 27602  
*Attorneys for Defendant Dell, Inc.*

By Hand Delivery

This the 17<sup>th</sup> day of April, 2006

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Norma S. Harrell  
Special Deputy Attorney General