

SUPREME COURT OF NORTH CAROLINA

W. D. GOLDSTON, JR., JAMES E.)
HARRINGTON, and citizens, taxpayers)
and bondholders similarly situated,)
Plaintiffs,)

v.)

STATE OF NORTH CAROLINA and)
MICHAEL F. EASLEY, Governor,)
individually and in his official)
capacity,)
Defendants.)

From Wake County
02 CVS 015253
COA04-593

PLAINTIFF APPELLANTS' NEW BRIEF

RECEIVED
OFFICE OF THE CLERK
OF THE SUPREME COURT
OF NORTH CAROLINA
JAN 11 2002
11:13 AM

INDEX

TABLE OF CASES AND AUTHORITIES.....	ii
QUESTION PRESENTED.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW.....	4
STATEMENT OF THE FACTS.....	4
INTRODUCTION TO ARGUMENT.....	6
THREE ARGUMENTS ON THE ISSUE OF "STANDING"	8
I. CONSTITUTIONAL STANDING.....	12
II. DIRECT STANDING.....	21
III. DERIVATIVE STANDING.....	25
CONCLUSION.....	28
CERTIFICATE OF SERVICE.....	31

TABLE OF CASES AND AUTHORITIES

Cases

Branch, et al. v. Bd. of Educ., et al., 233 N.C. 623,
65 S.E.2d 124 (1951), *disc. review denied*,
345 N.C. 753, 458 S.E.2d 52-53 (1997).....25, 26

Dennis, et al. v. Raleigh, 253 N.C. 400,
116 S.E.2d 923 (1960).....18

*E.D. Latta, Jr., Ex'r and Tr. of the Will of E.D. Latta
v. L.L. Jenkins, Treasurer, et al.*,
200 N.C. 255, 156 S.E. 857 (1931).....20

Freeman, et al. v. Bd. of Comm'rs of Madison County,
217 N.C. 209, 7 S.E.2d 354 (1940).....22

Fuller v. Easley, et al., 145 N.C. App. 391,
553 S.E.2d 43 (2001).....23

*G.G. Dixon, et al. v. Bd. of County Comm'rs of
Pitt County*, 200 N.C. 215, 156 S.E. 852 (1931).....20

Goldston v. State, ___ N.C. App. ___, 618 S.E.2d 785
2005).....3, 16, 24, 25

Green v. Eure, 27 N.C. App. 605, 220 S.E.2d 102 (1975).....24

Guilford County Bd. of Comm'rs v. Trogdon,
124 N.C. App. 741, 478 S.E.2d 643 (1996).....25, 28

Kitchin v. Wood, 154 N.C. 565, 70 S.E. 995 (1911).....13

In the Matter of the Appeal of Martin, 286 N.C. 66,
209 S.E.2d 766 (1974).....23

In the Matter of the Appeal of the Univ. of N.C., et al.,
300 N.C. 563, 268 S.E.2d 472 (1980).....20

Lewis, et al. v. White, et al., 287 N.C. 625,
216 S.E.2d 134 (1975).....16, 19, 22

Martin, et al. v. N.C. Hous. Corp., et al., 277 N.C. 29,
175 S.E.2d 665 (1970).....18

<i>McClees, et al. v. Treasurer of Tyrell County,</i> 117 N.C. 34, 23 S.E. 99 (1895).....	13, 20
<i>McIntyre, et al. v. Clarkson, et al.,</i> 254 N.C. 510, 119 S.E.2d 888 (1961).....	18
<i>Mitchell, et al. v. N.C. Indus. Dev. Fin. Auth., et al.,</i> 273 N.C. 137, 159 S.E.2d 745 (1968).....	18
<i>N.C. ex rel., Horne, et al. v. Chafin, et al.,</i> 62 N.C. 95, 302 S.E.2d 281 (1983).....	20
<i>N.C. School Bd. Ass'n, et al. v. Richard H. Moore, State Treasurer, et al.,</i> 160 N.C. App. 253, 585 S.E.2d 418 (2003).....	21
<i>Nicholson v. State Educ. Assistance Auth.,</i> 275 N.C. 439, 168 S.E.2d 401 (1969).....	19, 23
<i>Parker, et al. v. Comm'rs of Johnston County,</i> 178 N.C. 92, 100 S.E. 244 (1919).....	20
<i>Piedmont Memorial Hosp. v. Guilford County,</i> 218 N.C. 673, 12 S.E.2d 265 (1940).....	20
<i>Property Rights Advocacy Group v. Town of Long Beach,</i> ____ N.C. App. ____, 617 S.E.2d 715 (2005) (Hunter, J., dissenting) (<i>aff'd per curiam</i> ____ N.C. ____, 2006 Lexis 41, May 5, 2006).....	23-24
<i>Raleigh Cemetery Ass'n v. City of Raleigh,</i> 235 N.C. 509, 70 S.E.2d 506 (1952).....	20
<i>Redevelopment Comm'n of High Point v. Guilford County,</i> <i>et al.,</i> 274 N.C. 585, 164 S.E.2d 476 (1968).....	20
<i>R.L. Hammond v. D.K. McRae, et al.,</i> 182 N.C. 747, 110 S.E. 102 (1921).....	20
<i>S. R. Co. v. Cherokee County,</i> 177 N.C. 86, 97 S.E. 758 (1919).....	10, 23
<i>S. R. Co. v. Comm'rs of Mecklenburg County,</i> 148 N.C. 220, 61 S.E. 690 (1908).....	14, 20
<i>Salisbury Hosp., Inc. v. Rowan County,</i> 205 N.C. 8, 169 S.E. 805 (1933).....	21

Shaw, et al. v. City of Asheville, et al., 269 N.C. 90,
152 S.E.2d 139 (1967)..... 16, 19

Styers, et al. v. Phillips, et al., 277 N.C. 460,
178 S.E.2d 583 (1971).....22

Teer v. Jordan, 232 N.C. 48, 59 S.E.2d 359 (1950).....19, 22

Texfi Indus., Inc. v. City of Fayetteville,
44 N.C. App. 268, 261 S.E.2d 21 (1979),
disc. review allowed in part and denied in part,
299 N.C. 741, 267 S.E.2d 671, *aff'd*, 301 N.C. 1,
269 S.E.2d 142 (1980).....21, 23, 24

Town of Andrews, et al. v. Clay County, et al.,
200 N.C. 280, 156 S.E.2d 855 (1931).....20

*Town of Emerald Isle, by and through its Mayor,
Richard Smith, et al. v. State, et al.*,
320 N.C. 640, 360 S.E.2d 756 (1987).....18

VanHorne's Lessee v. Dorrance,
2 Dall (U.S.) 304 (1795).....10, 12

Williams v. Blue Cross Blue Shield of N.C.,
357 N.C. 170, 581 S.E.2d 415 (2003)..... 18

Wishart, et al. v. City of Lumberton, 254 N.C. 94,
118 S.E.2d 35 (1961)..... 16, 19

*Wynn, et al. v. Trs. of the Charlotte Cmty. Coll. Sys.,
et al.*, 255 N.C. 594, 122 S.E.2d 404 (1961).....22

North Carolina Constitutional Provisions

Art. I, Sec. 2.....10

Art. III, Sec. 5(3).....23, 28

Art. V.....19

Art. V, Finance.....12

Art. V, Sec. 5.....2, 3, 5, 7, 9, 15, 23, 28

Art. V, Sec. 7 (1868 Constitution).....2, 9, 13, 14
Sec. 9(10).....9

North Carolina Statutes

N.C. Gen. Stat. § 1-253, *et seq*.....4, 29
N.C. Gen. Stat. § 7A-31.....4

Other Authorities

Executive Order 19.....2

STATEMENT OF THE CASE

The Constitutional provision regarding a limitation on spending tax monies for purposes other than the special objects set forth by the legislative branch in the taxing statutes was first approved by majority vote of the People in April 1868 (then Art. V, Sec. 7).

This Section and others of the Constitution of 1868 were revised and approved by the People in November 1970. Now, as Article V, Sec. 5 of the "Constitution of 1971," the words of the limitation on spending are identical except for the heading.

Art. V, Sec. 5. Acts levying taxes to state objects. Every Act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose.

N.C. Const. Art. V, Sec. 5.

In 1989, following extensive efforts by the named Plaintiffs herein, the General Assembly enacted the "Highway Trust Fund Act of 1989." The Act set forth tax levies stating special objects to which various highway use taxes are to be applied.

In February 2002, the Executive Branch issued Executive Order No. 19 (exhibit 4 to Record on Appeal) which caused \$80,000,000.00 in tax monies collected from the Plaintiffs and other highway using taxpayers to be taken from the Trust Fund and applied to other purposes, namely appropriated expenditures

of the 2001-2 General Fund. (R pp. 8 - 18) The Executive Order threatened to divert additional Trust Fund taxes to other purposes.

On 14 November 2002, the named Plaintiff taxpayers who paid, were paying and would in the future pay gasoline and other highway use taxes filed this action for themselves and all other taxpayers of highway use taxes. Plaintiffs sought an injunction and a Declaratory Judgment regarding the constitutionality of government action that violates the precise commands of Article V, Sec. 5. (R pp. 8 - 18)

Following a hearing on 25 November 2003, the Wake County Superior Court allowed the State's motion for summary judgment and denied the taxpayers' motion for summary judgment without comment on 29 January 2004. (R pp. 53-55) Plaintiffs timely appealed on 4 February 2005. (R p. 58)¹

On 29 April 2004, Plaintiffs docketed their appeal in the North Carolina Court of Appeals.

On 5 April 2005, the Court of Appeals dismissed Plaintiffs' action for "lack of standing" to seek a Declaratory Judgment or injunctive relief pursuant to the equitable authority of the Judicial Branch. *Goldston v. State*, ___ N.C.App. ___, 618 S.E.2d 785 (2005).

¹ R p. ___ refers to Plaintiffs' Record on Appeal docketed in the North Carolina Court of Appeals on 29 April 2004.

Plaintiffs petitioned this Court for discretionary review and also appealed the constitutional questions. This Court granted Plaintiffs' Petition for Discretionary Review on 3 March 2006 on the issue of "standing."

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This case is before the Supreme Court of North Carolina pursuant to the authority granted by N.C. Gen. Stat. § 7A-31 to review an opinion and judgment of the Court of Appeals and decide as final authority issues of public interest or jurisprudential significance. That is to say, this Court will review and decide the right of taxpayers to seek relief regarding government spending of their tax money as a matter of constitutional law, the Declaratory Judgment Act (N.C. Gen. Stat. § 1-253) and application of general equitable jurisprudence allowing injunctive relief.

STATEMENT OF THE FACTS

As of April 2006 there are approximately 7 million licensed drivers and more than 7.5 million vehicles registered in North Carolina: Cars: 4,916,525 Trucks: 1,696,542 Buses: 8,089 Trailers: 779,458 Motorcycles: 134,096 Mobile homes: 350 Tractor/trailer trucks: 58,600 Special mobile equipment: 1,828; Wreckers: 3,137 and RV's: 21,850.

For many years since 1989, taxpayer Plaintiffs Harrington, Goldston and the millions of citizens similarly situated have

paid and will in future years pay gasoline and other highway use taxes for the privilege of using tens of thousands of miles and rights of way of North Carolina's transportation system. The "special objects" for which these Plaintiffs and other taxpayers paid and continue to pay billions of dollars into the Highway Trust Fund have been partly ignored. Their money paid into "trust" has been diverted to "purposes" other than the ones for which their taxes were required to be applied under the Constitution and by specific tax Acts of the General Assembly.

Taxes are the property of the taxpayers. The roads and highways belong to all citizens. These Plaintiffs and other taxpayers have a unique and special interest in the use by government officials of the taxes they pay in "trust" to be held and that are required to be used for the highway system. They are entitled to be heard on this action to prevent illegal expenditures of the public trust funds. They are entitled to seek Declaratory Judgment for a judicial interpretation, of People's rights under the mandates of their 1868 and 1971 Constitution:

Art. V, Sec. 5. Acts levying taxes to state objects.

Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose.

N.C. Const. Art. V, Sec. 5.

Since 1989 and thereafter various Acts of the General Assembly were enacted levying on Plaintiffs and other citizens specific gasoline and other highway use taxes. Each taxing Act specified the purpose of the tax, that is, the tax shall be deposited to the "Highway Trust Fund" to be used according to a list of specifically identified roads and highways and urban loops around seven named municipalities.

For the next twelve years these highway use tax proceeds were held by the Treasury in a "trust account." Plaintiffs' money was used over the years for the special objects and purposes stated in the various Acts.

During the 2001-2 fiscal budget year, the executive branch without legislative authority and, as Plaintiffs contend contrary to the Constitution, diverted \$80 million and threatened to divert another \$215 million of these trust funds for "general fund expenditures."

Plaintiffs filed this action for Injunctive and Declaratory Judgment relief. (R pp. 8 - 18)

INTRODUCTION TO ARGUMENT

This appeal relates to the issue of "standing" of the named plaintiffs and millions of other people who buy gasoline, pay highway use taxes, and benefit from North Carolina's system of roads, highways and urban loops. Specifically, the issue is do taxpayers have a constitutional right to challenge government's

expenditure of tax dollars in violation of Article V, Sec. 5 of the North Carolina Constitution? The constitutional limitation is that public money can be spent only for the special objects and purposes set forth in the taxing statute. N.C. Const. Art. V, Sec. 5.

Three grounds as a matter of law exist in support of their right to judicial review of this substantial question of spending tax revenues collected for specific highway use purposes but by executive branch discretion diverted for payment of general fund obligations. (1) Private taxpayers, commercial corporations, municipal corporation and eleemosynary entities have constitutional standing to challenge judicially, enjoin and have Declaratory judgment on the violation of a "self-executing" provision of the Constitution. (2) Citizens against whom taxes are levied and paid have direct standing as they are injured and it is their money and their public funds being misspent. (3) When no other person, entity, state official or agency moves to protect the People's constitutional rights and the public purse, Plaintiffs here have derivative standing to do so.

[DISCLAIMER: It is not possible to argue "standing" without discussing the origin and purpose of Article V, Sec. 5. Plaintiffs understand the only issue before this Court is "standing to sue." Plaintiffs do not intend to discuss a perceived conflict between the two provisions of the

Constitution that give rise to the substantive question of Executive Branch action taken in a fiscal year "budget crisis." Resolution of that issue between the parties has not yet been considered by the Appellate Division. It is not intended to be argued here.]

THREE ARGUMENTS ON THE ISSUE OF "STANDING"

Taxes come from the property of the taxpayer/citizens of North Carolina and when paid become public funds. The roads and highways belong to everyone. Their use is a privilege granted and enjoyed by all. Even travelers from other states and nations use our highways and pay the tax when they buy gasoline in North Carolina. Even citizens who do not pay highway use taxes benefit from the transportation of people, goods and services. They too have the right to insist public monies be applied according to Acts of the General Assembly and, at least equally important, according to the People's Laws - the Constitution.

The named Plaintiffs and all taxpayers have a unique and special interest in government officials' use of the taxes they pay into a "trust fund," here money which is required to be used for the highway system. Surely those who pay are entitled to be heard in an action to prevent illegal expenditures of their money - the public's money. The Declaratory Judgment Act exists

to guarantee judicial interpretation of the People's rights under the 1868 and 1971 Constitutions² of North Carolina:

Art. V, Sec. 5. Acts levying taxes to state objects.

Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose.³

N.C. Const. Art. V, Sec. 5.

This constitutional mandate has two parts. Its two commands are mandatory. The authority given government to tax allows no discretionary actions regarding (1) the People's requirement that tax laws must specifically state the public purpose for which the tax is imposed and (2) the People give no discretion to government officials regarding how public funds when collected must be spent. No further legislation as to either requirement is needed. Therefore, Article V, Sec. 5, is self-executing.

It is appropriate to apply to this appeal an understanding of the basic purpose of our Constitution - what it says, whom it governs, how it must be obeyed and the consequences of

²Section 7 of the 1868 Constitution.

³Even the 1861 Constitution of the "Confederate States of America" addressed part one of the current mandate. " Sec. 9 (10) All bills appropriating money shall specify in Federal currency the exact amount of each appropriation and **the purposes for which it is made;. . .**" After the war, the 1868 Constitution further limited governmental taxation authority by providing "**and it (the tax) shall be applied to no other purpose.**" The People's limit on government taxing authority is consistent for 138 years.

substantial violation by government of the People's Law. "The Constitution is the sun of the political system, around which all legislative, executive and judicial bodies must revolve." *VanHorne's Lessee v. Dorrance*, 2 Dall (U.S.) 304, 309 (1795).⁴ The People are the sovereign. N.C. Const. Art. I, Sec. 2.⁵ The Constitution is the creator, government the creature.

The Constitution is the ultimate law. Our North Carolina Constitution is ordained and established by the people, and all judges are sworn to support it. When the constitutionality of an act of the General Assembly or executive branch is questioned, the courts place the act by the side of the Constitution, with the purpose and the desire to uphold it if it can be reasonably done, but under the obligation, if there is an irreconcilable conflict, to sustain the will of the people as expressed in the Constitution, and not the will of the legislators or executive, who are but agents of the people. *S. R. Co. v. Cherokee County*, 177 N.C. 86, 97 S.E. 758 (1919).

⁴"It is the form of government, delineated by the mighty hand of the People, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the People, and is the Supreme Law of Authority who made it. . . . The Constitution fixes limits to the exercise of the legislative authority, and prescribes the orbit within which it must move. The Constitution is the work or will of the People themselves, in their derivative and subordinate capacity. The Constitution is the work of the Creator. The three branches of government are the creatures." *VanHorne's Lessee, Id.*

⁵Art. I, Sec. 2. *Sovereignty of the people*. All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

This Supreme Court cannot limit the rights of the People to complain and react to clearly unconstitutional efforts by the executive branch.

Two centuries of case decisions apply here as to actions taken by three branches of government that directly affected personal, constitutional rights of citizens. People harmed by government violation of their Constitutional rights are the only ones harmed and are, therefore, the proper plaintiffs.

Governments do not pay taxes; only citizens pay them. Government does not sue itself for disobedience of its own statutes or of constitutional laws. The General Assembly does not sue the executive branch nor will the executive branch sue the legislature. Likewise, the authority of the Judicial Branch does not include initiation of litigation even when there is an obvious violation of the Constitution. Only the People, or those representing them, are proper parties to this type litigation. It is the People who created the "laws" of the Constitution. It is the People as taxpayers who are injured by its violation.

There is a wide range of decisions by this Court that confirm the right, or "standing," of taxpayers to judicial enforcement and declaration of their constitutional rights. Precedents confirming the "standing" of plaintiffs to demand by litigation compliance with constitutional mandates are hereafter cited. Many go back to a time even before ratification of the

United States Constitution. North Carolina's first Constitution preceded the federal constitution it by 13 years. One of the earliest cases was *VanHorne's Lessee, supra*.

Plaintiff taxpayer quests for court rulings confirming their basic personal rights are brought for clarification as to both meaning and application and for resolution to the single possible authority under the Constitution - the Judicial Branch. Decisions for centuries are overwhelmingly consistent. The right of citizens to oppose violations by government officials of "the People's law," - the Constitution - has never been denied when one of three simple premises is shown.

I. CONSTITUTIONAL STANDING

For taxpayers facing an illegal tax levy or who have suffered payment of an unconstitutional, impermissible tax or wrongful expenditure of tax money, the first inquiry is whether the alleged constitutional provision violated is "self-executing." The Court first examines the parameters of the statutory authority for the tax and then determines whether a taxing prohibition or spending limitation is being obeyed as intended by the People and according to Article V, *Finance*, of their Constitution.

If constitutional words and phrases, selected by the Framers and thereafter adopted by popular vote of the People, are clear and unambiguous and require no additional legislation,

this Court says the constitutional clause, is "self-executing." *Kitchin v. Wood*, 154 N.C. 565, 70 S.E. 995 (1911). When a constitutional right is self-executing, there is no need for legislation or enactment of statutory procedures for taxpayers faced with loss of their constitutional rights. *Id.* A "self-executing" constitutional provision when violated by officials in other branches of government can be, should be and must be brought to the attention of the Court.

The instant case is not one of first impression as to the constitutional prohibition put on government that limits spending of taxes to only those "purposes" stated in the Act of the General Assembly.

In 1895, a Tyrell County citizen/taxpayer B. V. McCless along with a group of fellow taxpayers had "standing to challenge local government officials who were about to apply a special tax fund levied for the purpose of payment of bonds to expenditures of the general fund of the County. This Court said:

We are of the opinion that the Act of 1895 is without effect, because it is against the provisions of Article V, section 7, [now 5] of the Constitution, which is in these words: Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose.

McCless, et al. v. Treasurer of Tyrell County, 117 N.C. 34, 23 S.E. 99 (1895).

Thirteen years later in 1908, this Court acknowledged the standing of a corporate citizen/taxpayer to challenge government expenditures of tax money for purposes other than those objects stated in the law. Holding the constitutional clause in Article V, Sec. 7 (now 5) was violated, this Court said:

We do not concur with the suggestion that the commissioners have the power to levy and collect a tax for a specific purpose and apply any part of it to another purpose. This would be in violation of the express prohibition of section 7, Article V of the Constitution.

- and -

While we cannot sustain his Honor's judgment enjoining the entire levy, we are of the opinion that plaintiff, if so advised, is entitled to an order enjoining the appropriation of any part of the excess over the interest on the bonds to any other purpose. It may be held to meet the interest accruing for the coming year or for a sinking fund, as the provision of the act under which the bonds were issued may provide. No more should be taken from the citizen, either natural or corporate, by way of taxation than is reasonably necessary, and what is taken must be applied to the purpose for which it is so taken, and "no other."

- and finally,-

When these well-defined limits are disregarded, taxes become oppressive. The increase in wealth and in valuation should result in decrease in the rate of taxation; otherwise we will have neither.

S. R. Co. v. Comm'rs of Mecklenburg County, 148 N.C. 220, 61 S.E. 690 (1908).

These two precedents, directly on point recognize citizens' right to sue to enjoin a constitutional violation. They are followed by many other cases in which this Court defines similar clauses of the Constitution to be "self-executing." This means no further legislation or interpretation is needed to authorize the taxpayer's right to challenge clearly impermissible, unconstitutional government official's actions.

Therefore, the Article V, Sec. 5 provision as to "the special object or purpose of every tax law" and "the mandatory application or appropriation of those public tax funds when collected pursuant to that specific tax law" is "self-executing." The executive branch does not pay taxes and does not call upon the Attorney General or any of its officers to challenge its own actions. The General Assembly is not a taxpayer and does not engage in litigation to enforce its own laws. Only citizens and taxpayers are directly, and sometimes indirectly, harmed by constitutional violations. They alone have "standing" to enforce their Constitution.

The instant case is one of first impression as to the precise clause that Plaintiffs question here about expenditures of taxes must be for the special objects stated in the tax law because of the more recent constitutional amendment regarding expenditure of legislative appropriations in a fiscal year "budget crisis." Someday, there will be another such "crisis."

A corrosive precedent set by the Court of Appeals in this case is that Mr. Harrington, Senator Goldston and millions of other taxpaying users of streets, roads, urban loops and highways of North Carolina are barred from even raising an objection to future government action in violation of a "self-executing" constitutional provision.

The Court of Appeals, however, correctly states that the present Plaintiffs claim to have standing under the principles of direct and derivative standing and also by virtue of a doctrine of constitutional standing. *Goldston v. State*, ___ N.C.App. ___, ___, 618 S.E.2d 785, 789 (2005).

The Court of Appeals opinion acknowledges that the case of *Wishart, et al. v. City of Lumberton*, 254 N.C. 94, 96, 118 S.E.2d 35, 36 (1961) provides that "[i]f the governing authorities [are] preparing to put public property to an unauthorized use, citizens and taxpayers ha[ve] the right to seek equitable relief." The Supreme Court case *Lewis, et al. v. White, et al.*, 287 N.C. 625, 216 S.E.2d 134 (1975) specifically holds that citizens may bring an action to prevent the building commission from constructing an authorized building with tax funds appropriated for the purpose of building an art museum. Moreover, *Shaw, et al. v. City of Asheville, et al.*, 269 N.C. 90, 96, 152 S.E. 2d 139, 144 (1967) holds that citizens and taxpayers of a municipality had standing to challenge the

validity of an agreement between a municipality and private company which authorized the company to lay cables under municipal streets and set cable poles because the taxpayers could incur significant expense if the agreement was later adjudged void. These precedents clearly authorize citizens to sue for a court declaration that past government action and threatened recurrences are unlawful.

Plaintiffs here specifically alleged past actions as well future threatened recurrences were unlawful: "The Defendant . . . threatens to withdraw by appropriation of \$80,000,000 . . . and "the Defendant State . . . threatens to withdraw \$125,000,000 from the Highway Trust Fund in the form of a purported "loan. . . ." (R p. 12, paragraphs 18 and 19)

Thus, this Declaratory Judgment action includes a claim for an interpretation of the Constitution relating to the previous and future transfers as well as prospective equitable Injunctive relief to guard against future acts. Plaintiffs do not merely seek an advisory opinion. There is no evidence that money taken from Trust was ever returned to the Highway Trust Fund.

The government will face economic crises in the future. Government officials will again some day underestimate the revenue from taxes imposed upon the People and will again be tempted to spend in excess our public money rather than economize for the time being.

The Court of Appeals opinion here mistakenly or inadvertently states Plaintiffs did not allege a "recurrence of the alleged misconduct was imminent." To the contrary, Plaintiffs specifically sought equitable injunctive relief and a Declaratory Judgment to guide future government conduct. The Complaint also alleges similar misconduct was imminent and would continue by "future misappropriations." (R p. 12, paragraphs 18 and 19; R p. 13, paragraph 20; and R p. 14, paragraph 25)

This Court has ruled several times that "[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." See among others, *Town of Emerald Isle, by and through its Mayor, Richard Smith, et al. v. State, et al.*, 320 N.C. 640, 647, 360 S.E. 2d 756, 760-61 (1987); *Williams v. Blue Cross Blue Shield of N. C.*, 357 N.C. 170, 581 S.E. 2d 415 (2003) (citing *Martin, et al. v. N.C. Hous. Corp., et al.*, 277 N.C. 29, 175 S.E. 2d 665 (1970); *Mitchell, et al. v. N.C. Indus. Dev. Fin. Auth., et al.*, 273 N.C. 137, 159 S.E. 2d 745 (1968); *McIntyre, et al. v. Clarkson, et al.*, 254 N.C. 510, 119 S.E. 2d 888 (1961); *Dennis, et al. v. Raleigh*, 253 N.C. 400, 116 S.E. 2d 923 (1960).

It appears axiomatic that "[t]he proceeds of State tax levies appropriated by the General Assembly for one purpose may not lawfully be disbursed by State officers for a different

purpose and a citizen and taxpayer of the State may sue to restrain such illegal diversion of public funds." See, *Lewis*, 287 N.C. at 643-44, 216 S.E. 2d at 146. While a taxpayer may not have standing to attack the constitutionality of any and all general legislation, *Nicholson v. State Educ. Assistance Auth.*, 275 N.C. 439, 447, 168 S.E. 2d 401, 406 (1969), a taxpayer's standing to bring a suit to restrain a specific unauthorized use of public funds is well recognized. *Lewis*, 287 N.C. at 643-44, 216 S.E. 2d at 146; *Shaw*, 269 N.C. at 95, 152 S.E. 2d at 143 (where governing authorities put public property to an unauthorized use, citizens and taxpayers have standing to seek equitable relief); *Wishart*, 254 N.C. at 96, 118 S.E. 2d at 36 (stating "[i]f the governing authorities were preparing to put public property to an unauthorized use, citizens and taxpayers had the right to seek equitable relief"); *Teer v. Jordan*, 232 N.C. 48, 59 S.E. 2d 359 (1950).

A panoply of case precedents from this Court were brought by plaintiff taxpayers and whom this Court held had "standing" to pursue various "self-executing" clauses of the Constitution. Some include specifically Article V. Some involve tax levies, some expenditure of taxes when collected. Taxpayer plaintiffs exercising their right of judicial process regarding their Constitutional rights include:

A. Citizen taxpayer plaintiffs:

1. *G. G. Dixon, et al. v. Bd. of County Comm'rs of Pitt County*, 200 N.C. 215, 156 S.E. 852 (1931).

2. *N.C. ex rel., Horne, et al. v. Chafin, et al.*, 62 N.C. 95, 302 S.E.2d 281 (1983).

3. *E.D. Latta, Jr., Ex'r and Tr. of the Will of E.D. Latta v. L.L. Jenkins, Treasurer, et al.*, 200 N.C. 255, 156 S.E. 857 (1931).

4. *R.L. Hammond v. D.K. McRae, et al.*, 182 N.C. 747, 110 S.E. 102 (1921).

5. *Parker, et al. v. Comm'rs of Johnston County*, 178 N.C. 92, 100 S.E. 244 (1919).

6. *McCless et al. v. Treasurer of Tyrell County*, 117 N.C. 34, 23 S.E. 99 (1895).

B. Corporate taxpayer plaintiffs:

7. *S. Ry. Co. v. Comm'rs of Mecklenburg County*, 148 N.C. 220, 61 S.E. 690 (1908).

C. Municipal government taxpayer plaintiffs:

8. *Town of Andrews, et al. v. Clay County, et al.*, 200 N.C. 280, 156 S.E.2d 855 (1931).

9. *Redevelopment Comm'n of High Point v. Guilford County, et al.*, 274 N.C. 585, 164 S.E.2d 476 (1968).

D. State Educational Agency taxpayer plaintiff:

10. *In the Matter of the Appeal of the Univ. of N.C., et al.*, 300 N.C. 563, 268 S.E.2d 472 (1980).

E. Eleemosynary and Non-Profit taxpayer plaintiffs:

11. *Piedmont Memorial Hosp. v. Guilford County*, 218 N.C. 673, 12 S.E.2d 265 (1940).

12. *Raleigh Cemetery Ass'n v. City of Raleigh*, 235 N.C. 509, 70 S.E.2d 506 (1952).

13. *Salisbury Hosp., Inc. v. Rowan County*, 205 N.C. 8, 169 S.E. 805 (1933).

F. Plaintiff North Carolina Counties as public fund and tax recipients:

14. *N.C. School Bd. Ass'n, et al., v. Richard H. Moore, State Treasurer, et al.*, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

The questions unanswered are: If the millions of taxpayers who say money they have paid the government is not spent for the purposes for which they were taxed can have no recourse to challenge government action as violation of a self-executing provision of their Constitution, who does?

And who else will?

II. DIRECT STANDING.

The opinion correctly states that a taxpayer may have standing if he can demonstrate that [a] tax levied upon him is for an unconstitutional, illegal or unauthorized purpose. *Texfi Indus., Inc. v. City of Fayetteville*, 44 N.C. App. 268, 270, 261 S.E. 2d 21, 23 (1979) (citations omitted), *disc. review allowed in part and denied in part*, 299 N.C. 741, 267 S.E. 2d 671, *aff'd*, 301 N.C. 1, 269 S.E. 2d 142 (1980). In the case at bar, the Verified Complaint specifically alleges direct standing. "These Taxpayers have individual standing and the right to sue since a tax has been levied for an unconstitutional purpose, the challenged tax law will cause him or her to sustain personally a direct and irreparable injury, or the taxpayer is a member of a

class of plaintiffs prejudiced by the operation of a law or Executive Order having the force and effect of law." (R p. 9, paragraph 5) Plaintiffs also alleged in the Verified Complaint that a tax was levied upon them and used for an unconstitutional, illegal or unauthorized purpose. (R p. 9, paragraph 5; R p. 10, paragraph 7; R p. 11, paragraph 14)

It has long been the rule in North Carolina that citizens and taxpayers may seek equitable relief when taxes are levied against them for one purpose but thereafter are disbursed by government officials for another purpose. See Generally, *Lewis*, 287 N.C. at 644, 216 S.E. 2d at 146 and numerous cases cited therein. "It is the rule with us that an individual has standing to contest an allegedly illegal diversion of public funds which will injuriously affect his rights individually or as a citizen and taxpayer." *Styers, et al. v. Phillips, et al.*, 277 N.C. 460, 474, 178 S.E. 2d 583, 592 (1971) (emphasis added) (citing *Teer*, 232 N.C. 48, 59 S.E. 2d 359; *Freeman, et al. v. Bd. of Comm'rs of Madison County*, 217 N.C. 209, 7 S.E. 2d 354 (1940)).

An individual taxpayer has direct standing to bring a suit in the public interest and himself if he can satisfy any one of three conditions: (1) a tax levied upon him is for an unconstitutional, illegal or unauthorized purpose. See *Wynn, et al. v. Trs. of the Charlotte Cmty. Coll. Sys., et al.*, 255 N.C. 594, 122 S.E. 2d 404 (1961); (2) that the carrying out of a

challenged provision will cause him to sustain personally, a direct and irreparable injury, see *Nicholson*, 275 N.C. at 448, 168 S.E. 2d at 406; or (3) that he is a member of the class prejudiced by the operation of a statute, *In the Matter of the Appeal of Martin*, 286 N.C. 66, 209 S.E. 2d 766 (1974); *Fuller v. Easley, et al.*, 145 N.C. App. 391, 395-96, 553 S.E. 2d 43, 46-47 (2001); *Texfi Indus., Inc.*, 44 N.C. App. at 270, 261 S.E. 2d at 23.

The taxes levied against Plaintiffs in support of the Trust Fund were used for purposes not authorized according to the special objects set forth in the Highway Trust Fund Act. The Executive Branch's and General Assembly's use of the taxes collected directly violates the tax laws and, consequently, the Executive Branch violated Article III, Sec. 5(3) and Article V, Sec. 5 and the General Assembly violated Article V, Sec. 5 of the our Constitution. The Executive Branch and General Assembly spending of Highway Trust Fund taxes to fund unlawful purposes creates a justiciable controversy between Defendants and Plaintiffs, which may only be resolved by the Judicial Branch.

"The duty, therefore, to declare the law unconstitutional in a proper case cannot be declined, and must be performed in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question." *S. R. Co.*, 177 N.C. 86, 97 S.E. 758. See also, *Property Rights*

Advocacy Group v. Town of Long Beach, ___ N.C. App. ___, 617 S.E.2d 715 (2005) (Hunter, J., dissenting) (If conflict exists between statute and Constitution, this Court must review, as the Constitution is superior rule of law), *aff'd per curiam* ___ N.C. ___, 2006 Lexis 41, May 5, 2006).

Defendants have previously conceded that Plaintiffs and other taxpayers paid motor fuel taxes, driver license fees, auto title certificate fees, vehicle registration fees, and other taxes which by law were required to be and were initially deposited in the Highway Trust Fund. (See Defendants' Appellate Brief, p. 15) These taxes had to be used for the special objects of the Highway Trust Fund pursuant to the taxing acts. The amounts in question were spent for special objects other than highways and urban loops. The allegation in paragraphs 5(a) and 8 of Plaintiffs' Verified Complaint supports Plaintiffs' direct standing to pursue this constitutional challenge. (R p. 9)

The Court of Appeals opinion correctly notes that "generally a taxpayer has no standing to bring a suit in the public interest" *Goldston*, at ___, 618 S.E.2d at 788, but neglects to mention that this general rule articulated in *Green v. Eure*, 27 N.C. App. 605, 220 S.E. 2d 102 (1975) "**does not apply** where a taxpayer shows that the tax levied upon him is for an unconstitutional, illegal or unauthorized purpose." *Texfi Indus., Inc.*, 44 N.C. App. at 270, 261 S.E. 2d at 23 (emphasis

added). Plaintiffs possess direct taxpayer standing to maintain the current lawsuit.

III. DERIVATIVE STANDING

The Court of Appeals correctly states a taxpayer who otherwise lacks standing may, nevertheless, bring an action on behalf of a public agency or political subdivision, if "the proper authorities neglect or refuse to act." *Goldston* at ___, 618 S.E.2d at 789 (citing *Guilford County Bd. of Comm'rs v. Trogdon*, 124 N.C. App. 741, 747, 478 S.E. 2d 643, 647 (1996) (quoting *Branch, et al. v. Bd. of Educ., et al.*, 233 N.C. 623, 625, 65 S.E. 2d 124, 126 (1951), *disc. review denied*, 345 N.C. 753, 458 S.E. 2d 52-53 (1997))). The opinion further states:

To bring this type of action, taxpayers must show they are a taxpayer of the public agency or political subdivision and must further establish that either: 1) there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the agency or subdivision; or 2) a demand on the proper authorities would be useless.

Goldston at ___, 618 S.E.2d at 789.

Both grounds for derivative standing are present here. First, Plaintiffs properly alleged in the Verified Complaint that they are acting on behalf of a public agency or political subdivision and that the proper authorities had neglected or refused to act: "These Plaintiff Taxpayers have standing to bring a "taxpayer action" on behalf of a public agency or

political subdivision because the proper authorities wrongfully failed, neglected or refused to act" (R p. 9, paragraph 5(b)) Nothing to the contrary is shown by Defendants.

Also, in their Verified Complaint, Plaintiffs state that "[O]bjections to defendants' actions have been made and requests that corrective action be taken have been wrongfully ignored by defendants and other state officials. No officer or agent of the State has made any positive response to the objections and request." (R p. 10, paragraph 8) Thus, Plaintiffs properly asserted they made a demand on proper authorities to institute proceedings to protect the interests of the agency that controls the trust fund and were refused. No contrary evidence is proffered by Defendants.

As an alternative to a demand being made, it is sufficient for a plaintiff/taxpayer to show such a demand would be futile. The Court of Appeals, cited *Branch*, 233 N.C. at 626, 65 S.E.2d at 126-27. Plaintiffs alleged, and the allegation is deemed to be true as no evidence is submitted to the contrary, that a demand on the proper authorities in this would be useless and a vain effort: ". . . the proper authorities wrongfully failed, neglected or refused to act and a demand on such authorities to act was rendered useless." (R p. 9, paragraph 5(b))

The Verified Complaint also states: "[F]urther informal action to obtain proper compliance with the law and Constitution

is futile." (R p. 10, paragraph 8) The Court of Appeals opinion obviously ignores these paragraphs of the Verified Complaint. Moreover, the Executive Branch through the Attorney General in opposition here, clearly demonstrates that taxpayer citizens like these Plaintiffs alone remain the only ones to pursue this serious questions of right or wrong of the Peoples' constitutional freedoms.

Plaintiff taxpayers filed the specific allegation in the Verified Complaint that demand for action by the appropriate authorities had been refused and that future efforts were rendered useless. The opinion below states "we are unpersuaded (sic) that the record indicates that such a demand would have been futile." The Court of Appeals applies the wrong legal standard. All allegations in the Verified Complaint are deemed true in the absence of contrary evidence. On the motion for summary judgment, the State presented no evidence contradicting the Plaintiffs' allegation regarding a demand on the Attorney General to take action and/or the utter futility of such a demand. Plaintiffs made the specific, necessary and honest sworn allegations. Unrebutted, the allegations are deemed admitted. It would be feckless to hold otherwise.

The record indicates a demand was made and any future efforts were indeed futile. Thus Plaintiffs have derivative standing as taxpayers to sue on behalf of a recalcitrant public

agency or subdivision refusing to act pursuant to this Court's ruling in *Guilford Bd. of Comm'rs*, at 747, 478 S.E. 2d at 647.

IV. CONCLUSION

No Supreme Court precedent exists which specifically rules on whether the legislative and executive branches exceeded their constitutional powers in Article V, Sec. 5, and Article III, Sec. 5(3). In its long history, Highway Trust Fund tax proceeds have never been challenged as used for "other purposes" or to balance a fiscal year's budget. Therefore, this case is of utmost importance to protect taxpayers and all citizens of North Carolina.

Allowing as precedent Defendants' argument that taxpayers have no standing to complain when they pay taxes to maintain the highways only to have their money arbitrarily spent for another purpose and that diversion from a trust fund presents "no substantial constitutional question," will permit the legislative and executive branches henceforth to ignore the Constitution and the People's right to enforce their laws. If the legislative and executive branches are not constrained by the constitutional protection granted taxpayers, that says taxes can be levied only for a specific, stated purpose and can be used for no other purpose, it opens the door for the other two branches to completely ignore the Constitution and spend taxpayer money whenever and for whomever they wish.

If politicians of the future are given *carte blanc* to grab money from protected trust funds rather than cut state expenditures in order to create pork barrel projects, fund crooked charities, buy luxury automobiles with public funds, rob the cities and towns of their tax revenue, and deplete the budget of the third "co-equal" branch, they possess the unfettered and discretionary right to spend tax collections for anything they choose. It will also be the end of public trust in a government "trust" fund.

With no one allowed to challenge, the people's tax money can be used for any "pork barrel" or pet project despite the Constitution's clear mandate and self-executing provision that the government shall collect money for a specific purpose and shall use that money for no other purpose. Recent history supports such a conclusion.

The Court of Appeals opinion on "standing" is erroneous and not in accord with decisions of this Court. A long line of Supreme Court precedents for each of the three types of standing are ignored, as are the statutory Declaratory Judgment proceedings, N.C. Gen. Stat. § 1-253, *et seq.*

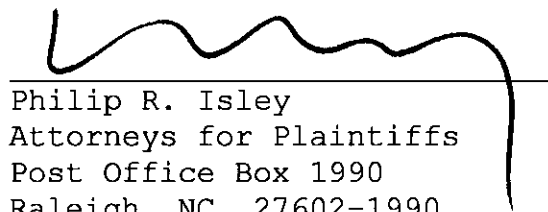
Plaintiffs respectfully request the Court reverse the dismissal of this case and order remand to the Court of Appeals with instructions to consider the substantive constitutional issues and any others.

Respectfully submitted this the 11th day of May, 2006.

Boyce & Isley, PLLC


G. Eugene Boyce


R. Daniel Boyce


Philip R. Isley
Attorneys for Plaintiffs
Post Office Box 1990
Raleigh, NC 27602-1990
Telephone: (919) 833-7373

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that I have served a copy of the forgoing **Plaintiffs' Brief** was served upon counsel of record in this action by depositing a copy thereof in the United States mail, postage prepaid, and addressed as follows:

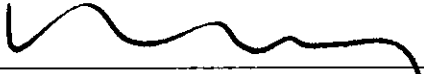
Mr. Grayson G. Kelley
Senior Deputy Attorney General
Mr. John F. Maddrey
Special Deputy Attorney General
Ms. Norma S. Harrell
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

Robert F. Orr
Amicus Curiae
North Carolina Institute of Constitutional Law
225 Hillsborough Street, Suite 280
Raleigh, NC 27605

Julia F. Youngman
Thomas H. Segars
Amicus Curiae
Ellis & Winters
Post Office Box 33550
Raleigh, NC 27636

This the 11th day of May, 2006.

Boyce & Isley, PLLC


Philip R. Isley
N.C. State Bar # 19094
Post Office Box 1990
Raleigh, North Carolina 27602
Telephone: (919) 833-7373
Facsimile: (919) 833-7536