

SUPREME COURT OF NORTH CAROLINA

\*\*\*\*\*

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

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., )  
Respondent-Appellees. )

From: Wake County  
No. 05 CVS 8378  
No. COA06-1258

\*\*\*\*\*

**RESPONSE TO PETITION FOR DISCRETIONARY REVIEW  
Under G.S. 7A-31(b) and Appellate Rule 15**

\*\*\*\*\*

SUBJECT INDEX

TABLE OF AUTHORITIES ..... iii

FACTS ..... 2

    PROCEDURAL FACTS ..... 2

    HISTORICAL FACTS ..... 4

REASONS WHY DISCRETIONARY REVIEW SHOULD  
NOT BE GRANTED ..... 7

    A.    PLAINTIFFS’ PUBLIC PURPOSE CLAIMS ARE GOVERNED BY  
          *MAREADY V. CITY OF WINSTON-SALEM* ..... 9

    B.    PLAINTIFFS HAVE RAISED NO SIGNIFICANT CLAIMS OF VIOLATION  
          OF ARTICLE I, SECTION 32 OF THE CONSTITUTION OF NORTH  
          CAROLINA PROHIBITING EXCLUSIVE EMOLUMENTS ..... 14

    C.    PLAINTIFFS HAVE NO STANDING TO RAISE THEIR COMMERCE  
          CLAUSE CHALLENGE ..... 15

    D.    PLAINTIFFS HAVE NO CLAIM CHALLENGING THE INCENTIVES  
          ON THE BASIS OF LACK OF UNIFORMITY IN TAXATION ..... 18

    E.    PLAINTIFFS’ STANDING THEORIES ..... 19

CONCLUSION ..... 20

**TABLE OF AUTHORITIES**

**CASES**

*Appeal of Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974) ..... 17, 19

*Daimler Chrysler Corp. v. Cuno*, \_\_\_ U.S. \_\_\_, 164 L. Ed. 2d 589 (2006) .. 16, 17

*Deadwood, Inc. v. N.C. Dep't of Revenue*, 356 N.C. 407,  
572 S.E.2d 103 (2002) ..... 18

*Dunn v. Pate*, 334 N.C. 115, 431 S.E.2d 178 (1993) ..... 17

*GMC v. Tracy*, 519 U.S. 278, 136 L. Ed. 2d 761 (1997) ..... 15

*Leete v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995) ..... 14

*Madison Cablevision, Inc. v. Morganton*, 325 N.C. 634,  
386 S.E.2d 200 (1989) ..... 12, 14

*Maready v. City of Winston-Salem*, 342 N.C. 708,  
467 S.E.2d 615 (1996) ..... 9, 10, 11, 13

*Oregon Waste Systems v. Department of Environmental Quality*,  
511 U.S. 93, 128 L. Ed. 2d 13 (1994) ..... 16

*Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336,  
554 S.E.2d 331 (2001), *cert. denied*, 535 U.S. 971,  
152 L. Ed. 2d 381 (2002) ..... 12, 13

*State v. Trantham*, 230 N.C. 641, 55 S.E.2d 198 (1949) ..... 17

*Town of Emerald Isle v. State*, 320 N.C. 640, 360 S.E.2d 756 (1987) ..... 14, 15

**CONSTITUTIONAL AND STATUTORY AUTHORITY**

U.S. CONST. art. V, § 2(1) ..... 9

N.C. CONST. art I, § 32 ..... 14

SUPREME COURT OF NORTH CAROLINA

\*\*\*\*\*

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

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., )
Respondent-Appellees. )

From: Wake County
No. 05 CVS 8378
No. COA06-1258

\*\*\*\*\*

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW
Under G.S. 7A-31(b) and Appellate Rule 15

\*\*\*\*\*

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COME Respondent-appellees State of North Carolina and James T.
Fain, III, Secretary of the North Carolina Department of Commerce, in his official

capacity, hereafter the “State defendants,” by and through their undersigned counsel, and respond in opposition to the plaintiff-petitioners’ (hereafter “plaintiffs”) Petition for Discretionary Review Under G.S. 7A-31(b) (hereafter the “Petition”) and Appellate Rule 15.

## **FACTS**

### **PROCEDURAL FACTS:**

Plaintiffs are appealing from the decision of the Wake County Superior Court, the Honorable Robert H. Hobgood, Superior Court Judge presiding, dismissing plaintiffs’ action on the grounds of lack of standing and failure to state a claim upon which relief may be granted. Plaintiffs brought this action initially as seven individual taxpayers, two of whom are residents of Forsyth County; the remaining plaintiffs are from various other counties. (Compl. ¶¶ 4-10, R pp. 44-46) The original complaint was filed on 23 June 2005 challenging on federal and state constitutional grounds the enactment by the North Carolina General Assembly of Session Law 2004-204 Extra Session (hereafter “Chapter 204”), relating to tax incentives for major computer manufacturing businesses. Plaintiffs’ complaint also challenged, under federal and state constitutional provisions as well as N.C.G.S. § 158-7.1, local incentives granted by Forsyth County and the City of Winston-Salem to Dell computer manufacturing company. (R pp. 2, 3-34) The defendants include the State defendants, Dell, Inc., Forsyth County, the City of Winston-Salem, and local non-profit organizations.

(Compl. ¶¶ 11-12, 14-21, R pp. 47-49)

The initial pleading filed on 23 June 2005 was supplanted by an “Amended Complaint and Petition for Declaratory Judgment” (hereafter referred to as the “Complaint”) filed on 9 September 2005. (R pp. 41-146) Each of the named defendants filed a motion to dismiss the Complaint pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure. (R pp. 147-53, 154-58, 159-72) The matter was designated by the Chief Justice of North Carolina as an “exceptional” case pursuant to Rule 2.1 of the General Rules of Practice and assigned to the Honorable Robert H. Hobgood, Superior Court Judge. (R pp. 173-75) The trial court filed its order on 12 May 2006 dismissing all of plaintiffs’ claims as to all the defendants. (R pp. 1, 194-209) Each of the twenty-two claims was dismissed based on N.C.G.S. § 1A-1, Rule 12(b)(1) of the Rules of Civil Procedure because plaintiffs lacked standing or based on N.C.G.S. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim upon which relief may be granted or, in most instances, on both grounds.

On 23 May 2006 plaintiffs filed their Notice of Appeal. (R pp. 210-13) Plaintiffs obtained from the Superior Court an extension of time until 27 July 2006 to serve the proposed record on appeal. (R p. 218) The proposed record on appeal was served on 27 July 2006. The record was settled by stipulation and was filed in the Court of Appeals on 19 September 2006. It was docketed in the Court of Appeals on

29 September 2006. (R p. 1) Plaintiffs filed their Petition for Discretionary Review Under G.S. 7A-31(b) and Appellate Rule 15 on 16 October 2006.

**HISTORICAL FACTS:**

Plaintiffs brought this action in order to make various constitutional challenges to the economic incentives and tax credits granted to major computer manufacturing facilities as provided in Chapter 204. Additionally, actions by the City of Winston-Salem and Forsyth County to provide economic development incentives and tax benefits to encourage Dell to locate, construct and operate a computer manufacturing facility in Winston-Salem are challenged as violative of the North Carolina Constitution. (R pp. 43-75)

The reasons for creating the “Tax Incentives for Major Computer Manufacturing Facilities” established in Chapter 204 are delineated in N.C.G.S. § 105-129.60, where the General Assembly found that it is the policy of the State to stimulate economic activity and to create and maintain sustainable jobs for citizens of the State in strategically important industries. The General Assembly noted that manufacturing employment has been disproportionately affected by national trade policies and global economic trends, resulting in the loss of many jobs in the State’s industrial workforce, and that the computer manufacturing and distribution industry will remain a vital part of the future national, world, and State economy as society becomes more dependent on advanced technology. The General Assembly declared

that “it is the intent of the State to encourage the sustainability of this industry cluster in this State and to encourage the maintenance and growth of computer manufacturing and distribution employment in the State through tax policies, investments in training capacity, and other policies and programs.” N.C.G.S. § 105-129.60(6) (2005).

Plaintiffs alleged that their action arose from the General Assembly’s enactment of Chapter 204. (Compl. ¶ 2, R p. 44) Section 1 of that legislation added a new Article 3G to Chapter 105 of the General Statutes entitled "Tax Incentives for Major Computer Manufacturing Facilities." (Compl. Ex. A at § 1, R p. 76) The legislation allowed tax credits against corporate franchise taxes and corporate income taxes for an eligible taxpayer that is found by the Secretary of Commerce to expect to invest at least \$100,000,000 to construct a computer manufacturing and distribution facility over a five-year period and that expects to have an increased employment level at such facility of at least 1,200 within five years after the facility is first put into use. (Compl. Ex. A p. 3, § 105-129.62(a), R p. 78)

Section 2 of Chapter 204 provided that a taxpayer eligible for the tax credits established in Section 1 is also eligible under the Bill Lee Act for specific “major computer facility enhancements.” (Compl. Ex. A pp. 8-9, § 105-129.4(b7), R pp. 83-84 ) These “major computer facility enhancements” include the inapplicability of the wage standard requirement, an increased credit for creating jobs, and preferred credits

for investment in machinery, equipment, worker training and substantial investment in other property. (*Id.*)

Section 3 of Chapter 204 amended the eligibility for sales and use tax refunds to include computer manufacturing facilities at which the manufacture or assembly of peripheral equipment [such as storage devices, printers, monitors and terminals] occurs at “a facility or campus at which the taxpayer also manufactures or assembles electronic computers.” (Compl. Ex. A p. 10, § 105-164.14(j)(3)(d.), R p. 85)

Plaintiffs further alleged that their action arose from the decisions of the City of Winston-Salem and Forsyth County to provide economic development incentives and other assistance to “entice” Dell to locate a computer manufacturing facility in Winston-Salem. (Compl. ¶ 3, R p. 44) Specifically, Forsyth County and the City of Winston-Salem each adopted resolutions authorizing economic development incentives to Dell contingent on the expected capital investments and job creation by Dell. (Compl. Ex’s D&E, R pp. 90-110 (Compl. Ex. E, R pp. 99-110) Additionally, the City and County, along with the defendant non-profit corporations, entered into an Agreement by which Dell agreed to locate a computer manufacturing and distribution facility on a specified industrial park site to be purchased from the City for \$7,000,000 while the local defendants agreed to site preparation work, roadway infrastructure improvements, and annual cash incentive grants. (Compl. Ex. H pp. 1-9, R pp. 114-22) The resolutions of the local governments recited the goals or

purposes of the incentives offered to Dell as being to “stimulate the local economy, promote business, create new full-time jobs in the County, increase the property tax base and revenues and increase business prospects.” (Compl. Ex G, R p. 112; *see also* Ex’s F, R p. 90 & H (Recitals A-E), R pp. 114-15)

**REASONS WHY DISCRETIONARY REVIEW SHOULD NOT BE  
GRANTED**

This Court should deny the petition for discretionary review because plaintiffs cannot show that certification is justified under any of the criteria set out in N.C.G.S. § 7A-31(b). Plaintiffs claim that the case involves a matter of significant public interest and legal principles of major significance to the jurisprudence of the State. The flaw in plaintiffs’ argument is that, given the issues raised by plaintiffs, the precedents governing those issues, and the capable handling of this matter by the trial court, the questions plaintiffs raise are ones that can be addressed routinely by the Court of Appeals in the normal course of events.

Regardless of plaintiffs’ contention that the case involves a matter of significant public interest, certification of a matter on the grounds of significant public interest is appropriate only when there are also legal issues worthy of this Court's attention. While the state legislation and local incentives that led to Dell’s building its facility in Forsyth County may have sparked public attention, there is no legal matter of substance here regardless of whether the issue is or was one of

significant public interest. Similarly, while plaintiffs and others may object politically or philosophically to the practice of governmental entities offering incentives to encourage economic development, those objections do not elevate the legal questions raised by this case to the jurisprudential level warranting this Court's review. Precedents from this Court and the United States Supreme Court sufficiently govern the issues raised by plaintiffs so that those issues, in reality, do not present legal principles of major significance to the jurisprudence of this State.

Nor will delay at this point cause any great harm. The Dell facility that plaintiffs sought to stop is up and operating. Plaintiffs also suggest that supporters and opponents of incentives, including governmental agencies and businesses, need to know the constitutional limitations of such incentives. Not only does existing case law already establish the validity of governmental incentives in principle, but plaintiffs' complaint makes no effort to challenge incentives *per se* or specific legislation such as the Bill Lee Act. Rather, plaintiffs in their complaint have attacked only Chapter 204 and the local incentives provided Dell. Thus, plaintiffs cannot demonstrate any urgent need for this Court to address the issues raised in this case.

Instead, the Court of Appeals should be allowed to handle in the normal course of appellate proceedings what are, as demonstrated below, legal questions to which existing precedents dictate the answers.

**A. PLAINTIFFS' PUBLIC PURPOSE CLAIMS ARE GOVERNED BY *MAREADY V. CITY OF WINSTON-SALEM*.**

At the heart of plaintiffs' case is their contention that Chapter 204 and the local incentives violate the "public purpose" restriction of Article V, Section 2(1) of the Constitution of North Carolina. That section, in relevant part, directs that "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only ." Despite plaintiffs' protestations, the actions of the defendants in this case, and Chapter 204, fall well within the range of public purposes under Article V, Section 2(1). As this Court noted in *Maready*, "[e]conomic development has long been recognized as a proper governmental function"; in fact, the Court had previously "declared that stimulation of the economy involves a public purpose." *Maready v. City of Winston-Salem*, 342 N.C. 708, 723, 467 S.E.2d 615, 624-25 (1996). 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 seek to avoid the effect of *Maready* by advocating a revisionist interpretation of that decision. They contend that *Maready* addressed only a facial challenge to N.C.G.S. § 158-7.1, ignoring 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, this 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, then a member of the Supreme Court, commented on particular aspects of the incentives at issue:

[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). As a result, the dissenting opinion authored by plaintiffs' counsel concluded that "N.C.G.S. § 158-7.1, as broadly interpreted and applied by the majority, is unconstitutional on its face and *as applied.*" *Id.* at 742, 467 S.E.2d at 636 (Orr, J., dissenting) (emphasis added). Clearly, while the holding in *Maready* was that N.C.G.S. § 158-7.1 is constitutional, both the majority and the dissenters addressed that question in the context of

particular incentives offered pursuant to specific economic development projects challenged by the plaintiffs in that litigation.

Not only are plaintiffs here mistaken in contending that *Maready* involved only a determination of the facial validity of N.C.G.S. § 158-7.1, they seek to have this Court engraft an unrealistically narrow interpretation on the ruling in *Maready*. Plaintiffs characterize defendants and the trial court as ascribing to a theory that *Maready* “stands for the proposition that as long as the expenditure of public tax dollars can be shown to have some connection to job creation and economic development, then the ‘public purpose’ test has been met.” ( Petition p. 9) Plaintiffs assert that the *Maready* holding was much narrower. Yet, it is plaintiffs’ lead counsel who described the *Maready* holding in terms strikingly similar to the interpretation of which he now accuses defendants and the trial court. Indeed, as a dissenting member of the Court, 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). The interpretation of *Maready* by the trial court and defendants is no broader than that previously voiced by plaintiffs’ counsel, and it does not present any erroneous misconstruction of *Maready* that

would somehow justify this Court's accepting this case for review before determination by the Court of Appeals.

Plaintiffs argue that the Court must assess each local incentive and the provisions of Chapter 204 to determine whether those incentives 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” and point out that the Court has recently relied on the case of *Madison Cablevision, Inc. v. Morganton*, 325 N.C. 634, 645, 386 S.E.2d 200, 207 (1989), in addressing the standards for determining when the “public purpose” requirement has been violated. (Petition pp. 10-11 (citing *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 339, 554 S.E.2d 331, 333 (2001), *cert. denied*, 535 U.S. 971, 152 L. Ed. 2d 381 (2002))) Significantly, the *Piedmont Triad* case adopted a broad view of the “public purpose” concept in upholding 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. The Court explained 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. at 343, 554 S.E.2d at 335. In other words, this Court has in recent years taken a broad view of the public purpose requirement, directly contrary to the narrow interpretation plaintiffs urge upon this Court. The incentives offered by the State in Chapter 204 and the local governments in their resolutions and agreement, for the purposes of stimulating the economy and similar reasons, fall squarely within the teachings of *Maready* that “even the most innovative activities” permitted under N.C.G.S. § 158-7.1, or in this case under Chapter 204 or the local incentives, 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 724-25, 467 S.E.2d at 625.

Plaintiffs’ efforts to manufacture a significant legal issue should be of no avail. The incentives at issue in this case are squarely governed by *Maready* and *Piedmont Triad*, and plaintiffs have shown no justification for this Court to grant discretionary review based on plaintiffs’ attempts to re-write the law governing the public purpose requirement of Article V, Section 2(1).

**B. PLAINTIFFS HAVE RAISED NO SIGNIFICANT CLAIMS OF VIOLATION OF ARTICLE I, SECTION 32 OF THE CONSTITUTION OF NORTH CAROLINA PROHIBITING EXCLUSIVE EMOLUMENTS.**

Plaintiffs argue that incentives provided under Chapter 204 and the local agreements and resolutions constitute exclusive emoluments in violation of Article I, Section 32 of the Constitution of North Carolina. That section provides: “No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.” As this Court has explained,

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.

*Town of Emerald Isle v. State*, 320 N.C. 640, 654, 360 S.E.2d 756, 764 (1987).

According to plaintiffs, however, the test to be applied should be found in cases such as *Madison Cablevision*, 325 N.C. at 654-55, 386 S.E.2d at 212, and *Leete v. County of Warren*, 341 N.C. 116, 122, 462 S.E.2d 476, 480 (1995), which focus on whether any grant at issue was in consideration for “public services.” The problem with plaintiffs’ approach is that it ignores the fact that Article I, Section 32 requires a multi-part test. An exclusive emolument violates the Constitution if it is not “in consideration of public services.” However, if the incentives here are not exclusive

emoluments in the first place, there is no need to determine whether they are for “public services.” Because “the purpose of the [incentives] is the promotion of the general welfare, as distinguished from the benefit of the individual, and [because] there is a reasonable basis for the Legislature to conclude that the granting of the [incentives] would be in the public interest,” there is no violation of the prohibition on exclusive emoluments. *Town of Emerald Isle*, 320 N.C. at 653, 360 S.E.2d at 764. Plaintiffs’ efforts to re-define or restrict the test for exclusive emoluments cannot get around the fact that their exclusive emoluments issue presents no question of major significance to the jurisprudence of the State. Instead, the question calls for the application of well-established legal principles that should be addressed, in the first instance, in the Court of Appeals.

**C. PLAINTIFFS HAVE NO STANDING TO RAISE THEIR COMMERCE CLAUSE CHALLENGE.**

Plaintiffs also argue that Chapter 204 violates the Commerce Clause of the Constitution of the United States. Plaintiffs rely on what is termed “negative” or “dormant” Commerce Clause jurisprudence. “The negative or dormant implication of the Commerce Clause prohibits state taxation, or regulation, that discriminates against or unduly burdens interstate commerce and thereby imped[es] free private trade in the national marketplace.” *GMC v. Tracy*, 519 U.S. 278, 287, 136 L. Ed. 2d 761, 773 (1997) (citations and internal quotations omitted). In this context,

“‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former *and burdens the latter.*” *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93, 99, 128 L. Ed. 2d 13, 21 (1994) (emphasis added). In other words, plaintiffs are attempting to raise a claim of discrimination as between in-state and out-of-state commerce with regard to whether major computer manufacturers or corporations are willing to invest in an in-state manufacturing facility. Plaintiffs, who are all individual taxpayers, have no standing to raise this issue.

Plaintiffs have made no allegations, and cannot make any allegations, that would support their right to bring a negative Commerce Clause claim based on Chapter 204. Significantly, they have not alleged any way in which they have personally been harmed, or will be harmed, by any Commerce Clause violations they contend exist as a result of Chapter 204. Rather, they are asserting claims of discrimination against hypothetical or imaginary corporations whose interests may well be very different from theirs. The United States Supreme Court has held that taxpayers do not have standing as taxpayers to bring a negative or dormant Commerce Clause claim against state and local incentives granted to certain corporations. *Daimler Chrysler Corp. v. Cuno*, \_\_\_ U.S. \_\_\_, 164 L. Ed. 2d 589 (2006). In that case, the Supreme Court concluded that the taxpayers could not establish a “concrete and particularized” injury to them as taxpayers. *Daimler*

*Chrysler*, 164 L. Ed. 2d at 603. Nor could they establish standing on the grounds that the tax incentives increased their tax burdens: (1) the point of the incentives was to increase revenues overall and thus it was not at all clear that the economic incentives in that case did not increase overall tax revenues; and (2) even if the incentives were invalidated or terminated, there was no assurance whatsoever that the result would be to reduce taxes for plaintiffs. *Id.* at 603-05.

While standing is determined in state courts by state law, the *Daimler Chrysler* case is instructive in that it demonstrates that standing in a negative Commerce Clause case cannot be assumed. Moreover, the negative or dormant Commerce Clause is at its foundation simply a form of discrimination claim. Under North Carolina law, one cannot bring a discrimination claim unless one is a member of the class that is the subject of the discrimination or at least has suffered direct harm from the discriminatory classification. *See State v. Trantham*, 230 N.C. 641, 644, 55 S.E.2d 198, 200-01 (1949) (“He who seeks to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is discriminated against.”). *See also Appeal of Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 772 (1974) (holding that county did not have standing to challenge statutory provisions under Article V, Section 2 uniformity rule); *Dunn v. Pate*, 334 N.C. 115, 119, 431 S.E.2d 178, 181 (1993)(in order to succeed in equal protection case, plaintiffs “must allege [they have] sustained an ‘injury in fact’ as a direct result

of” the challenged actions). In other words, plaintiffs have no basis whatsoever for raising their Commerce Clause claim, and their attempts to do so cannot support this Court’s granting discretionary review.

**D. PLAINTIFFS HAVE NO CLAIM CHALLENGING THE INCENTIVES ON THE BASIS OF LACK OF UNIFORMITY IN TAXATION.**

Plaintiffs also claim this Court should grant discretionary review in order to consider whether Chapter 204 violates the mandate of Article V, Section 2(2) of the Constitution of North Carolina for what is referred to as “uniformity in taxation.” Plaintiffs cannot show that this case presents any special issues justifying review based on their uniformity in taxation claim. The classifications established by the General Assembly in Chapter 204 fall well within the General Assembly’s discretion.

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. 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”) (citations omitted). Despite plaintiffs’ arguments, the classifications made

by the General Assembly in Chapter 204 are clearly rationally based. Moreover, plaintiffs lack any standing to raise this challenge because they are not a member of “the class which is prejudiced by the statute.” *Appeal of Martin*, 286 N.C. at 75, 209 S.E.2d at 773 (internal quotations omitted). There is nothing about plaintiffs’ uniformity challenge which establishes any reason that this Court should grant discretionary review prior to determination by the Court of Appeals.

**E. PLAINTIFFS’ STANDING THEORIES.**

Plaintiffs suggest that they have standing to bring these claims as taxpayers under three different theories. They liken the standing issues of this case in part to those before the Court in *Goldston v. State*, No. 328PA04-2, which is currently pending in this Court. This case is not like *Goldston*, in which the viability of the entire case rises or falls on a particular question of taxpayer standing. In contrast, as to some claims in this case, plaintiffs may have debatable standing arguments, but no substantial claim on the merits justifying this Court’s granting of discretionary review, *i.e.*, their “public purpose” and exclusive emoluments claims. On the other hand, plaintiffs may clearly lack standing under existing principles governing standing for discrimination-type claims, such as for their Commerce Clause and uniformity of taxation claims. While the State defendants believe that plaintiffs both lack standing and cannot prevail on the merits as to all those questions, it is obvious that the nature of the issues, and the substantiality of plaintiffs’ standing claims,

varies greatly from issue to issue. Plaintiffs have made no effort to detail their theories of standing or any reason why those unfocused theories should justify this Court's granting of discretionary review prior to determination by the Court of Appeals.

### **CONCLUSION**

For the reasons discussed above, plaintiffs have failed to show any justification or basis for this Court to grant their petition for discretionary review prior to determination by the Court of Appeals. Therefore, the petition should be denied, and this appeal should be heard initially in the North Carolina Court of Appeals pursuant to the normal appellate process.

Respectfully submitted this the 30<sup>th</sup> day of October, 2006.

ROY COOPER  
Attorney General

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

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

Electronically submitted

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

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  
**RESPONSE TO PETITION FOR DISCRETIONARY REVIEW Under G.S. 7A-31(b) and Appellate Rule 15** 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
- 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 245  
Raleigh, NC 27619  
*Attorneys for Plaintiffs*

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*

J. Robert Elster  
Adam H. Charnes  
KILPATRICK STOCKTON LLP  
1001 West Fourth Street  
Winston-Salem, NC 27101-2400  
*Attorneys for Local Government Defendants and Non-Profit Defendants*

Davida W. Martin  
Forsyth County Attorney  
201 North Chestnut Street  
Government Center, 5<sup>th</sup> Floor  
Winston-Salem, NC 27101  
*Attorney for Forsyth County and Gloria D. Whisenhunt, Chairperson of Forsyth County Board of Commissioners*

Burley B. Mitchell, Jr.  
Pressly M. Millen  
Sean E. Andrussier  
Melody C. Ray-Welborn  
WOMBLE CARLYLE SANDRIDGE & RICE  
Post Office Box 831  
Raleigh, NC 27602  
*Attorneys for Defendant Dell, Inc.*

This the 30<sup>th</sup> day of October, 2006.

Electronically submitted  
Norma S. Harrell  
Special Deputy Attorney General