

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

COUNTY OF WAKE

07 CVS 011756

MICHAEL C. MUNGER)
BARBARA HOWE, and)
MARK WHITELEY CARES,)

Plaintiffs,)

v.)

STATE OF NORTH CAROLINA;)
JAMES T. FAIN III, Secretary of the)
North Carolina Department of Commerce,)
in his official capacity; REGINALD)
HINTON, Acting Secretary of the North)
Carolina Department of Revenue, in his)
official capacity; DAVID T. MCCOY,)
State Budget Officer for the Office of State)
Budget and Management, in his official)
capacity; MICHAEL F. EASLEY,)
Governor of the State of North Carolina,)
in his official capacity; GOOGLE INC.; and)
MADRAS INTEGRATION, LLC,)

Defendants.)

**PLAINTIFFS' MEMORANDUM
OF LAW IN OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS**

NOW COME Plaintiffs, Michael C. Munger, Barbara Howe and Mark Whiteley Cares (hereinafter jointly referred to as "Plaintiffs"), by and through undersigned counsel, and urge the Court to deny the defendants' various Motions to Dismiss, for the reasons set out below.

INTRODUCTION

Many of the state constitutional provisions at issue in this case have been a part of North Carolina's heritage since our first Constitution in 1776 and added to over the years either by amendment or by virtue of the Constitution of 1868 and Revision of 1971. While a debate over the public policy questions related to corporate "incentives" may go on around this case, the heart of the issues rests squarely on the time honored concept that the Constitution is the cornerstone of all law and that any act of the Legislature inconsistent with that Constitution must fail. Plaintiffs neither ask this Court to intervene in any political controversy nor offer "broad" or "sweeping" constitutional theories. Instead, these taxpayers have resorted to the very constitutional rights afforded them as citizens and taxpayers to challenge the acts of the Legislature. Plaintiffs ask only that this Court give meaning to a truism put forth nearly eighty years ago in *Great Atl. & Pac. Tea Co. v. Maxwell*, 199 N.C. 433, 154 S.E. 838 (1930): "The principle of equal rights to all, and special privileges to none," is fundamental. *Id.* at 438-39, 154 S.E. at 841.

STATEMENT OF THE CASE

This civil action for declaratory and injunctive relief seeks to prohibit the State of North Carolina from providing unconstitutional economic incentives to corporate giant Google, Inc. ("Google"). The action arises out of legislation adopted by the General Assembly and signed into law on July 10, 2006, to encourage Google to build an internet data server farm in Caldwell County, North Carolina ("Google legislation"). (Compl. ¶ 2)

Plaintiffs Michael Munger, Barbara Howe, and Mark Whiteley Cares are tax-paying citizens of the State of North Carolina. (Compl. ¶¶ 4-10) Plaintiffs filed their

Complaint and Petition for Declaratory Judgment on July 25, 2007. Plaintiffs filed an Amended Complaint and Petition for Declaratory Judgment (“Complaint”) on August 16, 2007.

Plaintiffs’ Complaint alleges violations of the Exclusive Emoluments, Public Purposes, Uniformity of Taxation, Law of the Land, and Fair and Equitable Taxation Clauses of the North Carolina Constitution.

The named Defendants are divided into two groups: 1) the State of North Carolina, the Secretary of the N.C. Department of Commerce, the Acting Secretary of the N.C. Department of Revenue, the State Budget Officer and the Governor (collectively “the State”), and 2) Google, Inc., and Madras Integration, LLC (collectively “Google”).

Upon recommendation of the Senior Resident Superior Court Judge for Wake County, this matter was designated as an “exceptional” case pursuant to Rule 2.1 of the General Rules of Practice and assigned to the Honorable Paul C. Ridgeway.

Each of group of Defendants filed a separate Motion to Dismiss for failure to state a claim upon which relief may be granted and/or for lack of standing.

STATEMENT OF THE FACTS

The following facts are alleged in the Complaint or are found in exhibits attached and expressly incorporated into the Complaint.

PARTIES

(Plaintiffs)

Plaintiffs Michael C. Munger, Barbara Howe, and Mark Whiteley Cares are three North Carolina citizens suing in their individual capacities as residents and taxpayers of the State of North Carolina. All Plaintiffs pay ad valorem taxes imposed on real and

personal property by the County in which their properties are located. No Plaintiff has received abatement or exemption from this legal obligation. In addition, all Plaintiffs pay all other requisite taxes, including state and local sales taxes on items purchased as well as state income taxes. (Compl. ¶¶4-6)

(Defendants)

Defendant State of North Carolina is a general purpose state government which is capable of being sued, and which is being sued, for authorizing and/or granting tax subsidies and other so-called economic development subsidies through the General Assembly to Google. (Compl. ¶8)

Defendant James T. Fain, III, Secretary of the North Carolina Department of Commerce, is sued in his official capacity only. Secretary Fain was tasked with making a written determination that threshold investment levels “have been or will be invested” in real property or eligible business property. N.C. Gen. Stat. § 105-164.3(8e)d. (Compl. ¶9)

Defendant Reginald Hinton, Acting Secretary of the North Carolina Department of Revenue; Defendant David T. McCoy, State Budget Officer for the defendant State’s Office of State Budget and Management; and Defendant Michael F. Easley, Governor of the State of North Carolina, are each sued in his official capacity only for their respective roles in administering the State budget and collecting tax revenues to fund State operations.

Defendant Google is a for-profit, duly chartered corporation, incorporated in the State of Delaware; Google’s principal office, as well as the North American headquarters of Google, is located in Mountain View, California. Google is licensed to do business in

North Carolina. Defendant Madras Integration, LLC, is a limited liability company, formed and/or incorporated in the State of Delaware; its principal office is located in Wilmington, Delaware. Madras Integration, LLC is licensed to do business in North Carolina. Defendant Google is the ultimate parent company of Defendant Madras Integration, LLC. Defendant Google and/or defendant Madras Integration, LLC (collectively, “Google”) will have or have had an internet data center built for the operation of an internet server facility in Lenoir, Caldwell County, North Carolina (Compl. ¶¶13, 15-16)

The Google Legislation

Beginning on or about December 8, 2005, representatives and agents of Google met in Raleigh and Charlotte, North Carolina with State officials, including employees of the Departments of Commerce and Revenue, and representatives and agents of Burke, Caldwell, McDowell, Cleveland, and Rutherford Counties. As alleged in the Complaint, the purpose of the meetings was to discuss the establishment of a Google internet server facility in North Carolina by Google. Later, on or about February 2, 2006, State officials, including employees of the Department of Commerce, again met with representatives and agents of Caldwell County. Again, as alleged in the Complaint, the purpose of this meeting was to tour a possible site for a Google internet server facility in Caldwell County, North Carolina. (Compl. ¶¶20-24)

On or about February 8, 2006, the Caldwell County Commission and Lenoir City Council made an enhanced grant proposal to Google regarding the construction of an internet server facility in Caldwell County, North Carolina. Following that proposal,

from February through April of 2006, representatives and agents of Google met with State officials, including Defendant Fain, employees of the Departments of Commerce and Revenue, representatives of Duke Power, and representatives of the City of Lenoir and Caldwell County. As alleged in the Complaint, the purpose of the meetings was to further discuss the site for the proposed internet server facility to be established in Caldwell County, North Carolina by Google. (Compl. ¶¶ 25-27)

Shortly after, and as a result of, these discussions about the proposed data center and incentives, on or about May 24, 2006, a bill was introduced in the House chamber of the North Carolina General Assembly to exempt certain internet server facility from sales and use taxes. (HB 2645). A substantially similar bill was introduced in the Senate on May 25, 2006. (SB 1964). Both HB 2645 and SB 1964 proposed amendments to N.C.G.S. §§ 105-164.3 and 105-164.13. The substantive provisions of HB 2645/SB 1964 were added to the Current Operations and Capital Improvements Appropriations Act of 2006, SB 1741/S.L.2006-66, at section 24.17(a) (only this section of legislation is hereinafter referred to as the “Google Legislation”). The Current Operations and Capital Improvements Appropriations Act of 2006, SB 1741/S.L.2006-66 was ratified on July 6, 2006, and signed into law by Defendant Governor Easley on July 10, 2006. (Compl. ¶¶ 28-29 & 38)

The Google Legislation creates certain tax exemptions for an “eligible internet data center” and defines the same as a facility that is used primarily by a business engaged in the Internet service providers and web search portals industry, as defined by the North American Industry Classification System adopted by the United States Office of Management and Budget. The eligible internet data center must also be in either an

enterprise tier one, two, or three area pursuant to G.S. § 105-129.3, regardless of any subsequent change in county enterprise tier status. In addition, at least two hundred fifty million dollars (\$250,000,000) in private funds has to be invested in real property at the facility within five years after the commencement of construction of the facility. (Compl. ¶30)

The Google Legislation specifically exempted from the retail sales and use tax sales of electricity and eligible business property to be used and located at an eligible Internet data center and defined “eligible business property” as “property that is capitalized for tax purposes under the Code and is used either:

- (a) For the provision of Internet service or web search portal services as contemplated by G.S. 105-164.3 (8e)a, including equipment cooling systems for managing the performance of the property.
- (b) For the generation, transformation, transmission, distribution, or management of electricity, including exterior substations and other business personal property used for these purposes.
- (c) To provide related computer engineering or computer science research.” (Compl. ¶31)

The Google legislation contains provisions calling for a taxpayer to forfeit the retail sales and use tax exemptions under certain, limited circumstances. G.S. § 105-164.13(55). (Compl. ¶¶32, 33) A taxpayer that forfeits an exemption under N.C.G.S. § 105-164.13(55) is liable for past taxes avoided as a result of the forfeited exemption. (Compl. ¶33)

No debate on provisions related to any tax exemption for internet data center facilities occurred while the Appropriations Act/SB 1741 was under consideration on the floor of the Senate and no fiscal note accompanying SB 1741 referenced any tax exemption for internet data center facilities. (Compl. ¶¶34-35)

The General Assembly's package for Google totals tens of millions of dollars. While the legislation does not specifically reference Google, it was acknowledged by representatives of the State of North Carolina after enactment of S.L. 2006-66 that the subsidies at issue were specifically intended for Google. The Google legislation was, as conceded by those acknowledgments, for the direct and sole benefit of Google. (Compl. ¶¶36-37)

Job Development Investment Grant to Google

The Job Development Investment Grant (JDIG) is administered by the State's Economic Investment Committee ("EIC"), which is comprised of five members: the Secretary of Commerce, the Secretary of Revenue, the Director of the Office of State Budget and Management, and two private sector members appointed by the General Assembly. The JDIG program consists of sustained annual grants, which the State provides in its discretion, to certain new and expanding businesses. The amount of the grant is determined, in part, by the amount of withholding taxes paid by the grantee's new employees. The EIC is authorized to award up to 25 grants in a single grant year. These grants can result in payments to a business for up to 12 years. Each year, the total amount paid out may reach \$15 million, meaning that the EIC has the ability to provide up to \$180 million in benefits to businesses over a 12-year period. A final Community

Economic Development agreement between the State and a JDIG grantee must be reviewed and signed by the Attorney General. (Compl. ¶¶39-42)

On or about December 28, 2006, the State's EIC voted unanimously to award a JDIG grant to Google in connection with Google's construction and operation of an internet data center in Lenoir, North Carolina. Under the terms of the JDIG agreement, approved by the ECI, a 12-year grant will be established. Pursuant to the JDIG agreement, for each year that the company meets the required performance targets, the State will provide a grant equal to seventy-five percent (75%) of the State's personal income withholding taxes derived from the creation of new jobs. (Compl. ¶43)

Google Incentives Announcement and its Aftermath

On January 19, 2007, the "State of North Carolina [,] Office of the Governor," issued a news release. That news release, among other things, reported Google's plans to locate an internet server facility in North Carolina, and further that in connection with the Google project, the State awarded a JDIG worth as much as \$4.8 million. (Compl. ¶47)

On March 7, 2007, the North Carolina Senate Finance Committee ("Finance Committee") conducted a hearing regarding the Google project and the tax benefits for Google. At that hearing, the Finance Committee distributed a document with the heading "Elements of the State & Local Recruiting Package/Google Internet Data Center/Caldwell County – Tier 1." Among other things, that document described the aforementioned JDIG grant for Google and referred to what it called a "State Incentive Package," which included a "Sales Tax Exemption on Machinery & Equipment and Electricity" for Google, provided by the State. Pursuant to that exemption, the State

exempts Google from having to pay certain retail sales and/or use taxes in connection with Google's purchase of certain machinery, equipment, and electricity. (Compl. ¶48)

The Google Legislation and the tax benefits for Google were put into place in connection with and for the Google project. Prior to negotiations with Google, the General Assembly had nothing similar to this legislation underway or in mind. In fact, the only potential beneficiary of the Google Legislation was and remains Google. And while it had only Google in mind, the Google legislation contains no recitation that the Google project in Caldwell County would not have gone forward were it not for the Google legislation. (Compl. ¶¶50-51 & 54)

Through this legislation, Google receives privileged status and is heralded as being good for the North Carolina public when the profit-making intentions and objectives of Google are similar to the profit-making intentions and objectives of numerous other businesses in North Carolina, businesses that will not receive such incentives. Google's operation of the facility in question in Lenoir, Caldwell County, North Carolina will not be for the provision of public social services or public infrastructure or public amenities. Rather, the Google facility is a facility created to enable Google to satisfy its own customers. (Compl. ¶55)

As alleged in the Complaint, through the present time, Defendant State does not plan to provide any person or entity, other than Google, tax exemptions, grants, and subsidies pursuant to the Google legislation. Plaintiffs are not eligible for and have not received any tax forbearance or subsidies or grants similar to the tax benefits for Google. Plaintiffs are, have been and will be directly injured by the tax benefits for Google in that those benefits unlawfully deplete the funds of the State to which the Plaintiffs contribute

through their tax payments, thereby diminishing the funds available for lawful purposes and imposing disproportionate, additional, and increased financial burdens on the Plaintiff taxpayers. (Compl. ¶¶57-59)

STANDARDS OF JUDICIAL REVIEW AND
CONSTITUTIONAL INTERPRETATION

“When reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), a trial court may consider and weigh matters outside the pleadings.” *Department of Transp. v. Blue*, 147 N.C.App. 596, 603, 556 S.E.2d 609, 617 (2001), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

When considering a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the Court must accept all well-pleaded factual allegations of the Complaint as true and the Complaint must be construed in the light most favorable to the plaintiffs. *Ford v. Peaches Entertainment Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986), *cert. denied*, 318 N.C. 694, 351 S.E.2d 746 (1987). Dismissal of the complaint is proper only when it is clear that the plaintiff could prove no set of facts which would entitle him or her to relief. *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997).

Pursuant to this doctrine, it is a long-standing principle in North Carolina law that “[a]ll power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution.” *State ex rel. Martin v. Preston*,

325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989) (citing *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961)).

While it is true that the legislature serves “as the lawmaking agent of the people,” *Martin*, 325 N.C. at 448, 385 S.E.2d at 478, this affirmation of the legislature’s responsibility is consistently coupled with the mandate that any law enacted must be valid *pursuant to* North Carolina’s State Constitution. In fact, the judiciary has the power and the duty to declare a legislative act unconstitutional when such is “plainly and clearly the case.” *Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, 647, 360 S.E.2d 756, 761 (1987) (quoting *Glenn v. Board of Education*, 210 N.C. 525, 529, 187 S.E. 781, 784 (1936)); *see also Kornegay v. Goldsboro*, 180 N.C. 441, 445-46, 105 S.E. 187, 189 (1920) (discussing scope of judicial review of legislative acts).

In determining whether an act of the legislature is valid under the State Constitution, North Carolina law has firmly established that “issues concerning the proper construction and application of North Carolina laws and the Constitution of North Carolina can only be answered with finality by [the North Carolina Supreme Court].” *Martin*, 325 N.C. at 449, 385 S.E.2d at 479 (citing *State v. Arrington*, 311 N.C. 633, 643, 319 S.E. 2d 254, 260 (1984)). In a brief review of North Carolina’s history of state constitutional jurisprudence, the Court noted the immemorial significance of the doctrine of judicial review:

Prior to the creation of the United States of America by the ratification of the Constitution of the United States, North Carolina courts applied the doctrine of judicial review to strike down a legislative act as contrary to the Constitution of North Carolina. *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). Thus, approximately sixteen years before *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 135 (1803), North Carolina’s courts were among the first to recognize the doctrine of judicial review.

Martin, 325 N.C. at 448, 385 S.E.2d at 478. Further emphasizing this crucial judiciary duty, the Court stated in *Moore v. Knightdale Bd. Of Elections*, 331 N.C.1, 413 S.E.2d 541 (1992):

[I]t is not only within the power, but . . . it is the duty, of the courts in proper cases to declare an act of the Legislature unconstitutional, and this obligation arises from the duty imposed upon the courts to declare what the law is.

The Constitution is the supreme law. It 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 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, who are but agents of the people.

Id., 331 N.C. at 4, 413 S.E.2d at 543 (citing *State v. Knight*, 169 N.C. 333, 351-52, 85 S.E. 418, 427 (1915)).

To determine whether an act of the General Assembly conflicts with the State Constitution, the Court is typically guided by the principle that a statute is presumed valid. *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E.2d 887, 889 (1991). Nevertheless, “[t]he presumption of constitutionality is not . . . and should not be conclusive.” *Moore*, 331 N.C.at 4, 413 S.E.2d at 543.

The inconclusive nature of the “presumption of constitutionality” of a legislative act, *see Moore*, 331 N.C. at 4, 413 S.E.2d at 543, was highlighted by *Corum v. Univ. of N. C., et al.*, 330 N.C. 761, 413 S.E.2d 276 (1992), in which the Court stated:

It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation . . . is as old as the State. Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens. We give our Constitution a liberal interpretation in favor of its citizens with respect to

those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.

Corum, 330 N.C. at 784, 413 S.E.2d at 290 (internal citations omitted).

Thus, the Court has a clearly established duty to “ascertain and declare the intent of the framers of the Constitution and to reject any legislative act which is in conflict therewith.” *Mitchell v. N.C. Indus. Dev. Fin. Auth.*, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968).

In the present case, an “irreconcilable conflict” exists between the Google legislation and the State Constitution. *See Moore*, 331 N.C. at 4, 413 S.E.2d at 543. The Google legislation is contrary to the express terms of Article I, §§ 19, and 32, and Article V, §§ 2(1), 2(2), and 2(7) of North Carolina’s State Constitution. Consequently, the General Assembly “exceed[ed] its limitations,” *see Harris*, 216 N.C. at 764, 6 S.E. 2d at 866; Plaintiffs’ rights have thereby been infringed upon; and it is imperative, therefore, for the Court to exercise its duty to declare the legislation unconstitutional.

ARGUMENT

I. THE INCENTIVES PROVIDED TO GOOGLE VIOLATE THE PUBLIC PURPOSE CLAUSE OF THE NORTH CAROLINA CONSTITUTION

Lawyers and law students are often counseled to put their arguments in plain language, to avoid “legalese,” and to use simple terms and everyday expressions; all suggestions geared toward making the advocate a more succinct and effective communicator. Although always sage, such advice is particularly instructive here where public relations rhetoric, political prowess and fancy lawyering collide to obscure the rather straight forward provision which is the Public Purpose Clause. In short, the Public Purpose Clause allows the government to tax and spend only for a public purpose. But,

boiled down to their simplest terms, Defendants' interpretations would render the Public Purpose Clause completely meaningless.

Article V, § 2(1) of the North Carolina Constitution is but 26 words long. It states simply:

The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.

A second and related "public purpose clause" appears in the constitution at Article V, § 2(7) which states:

The General Assembly may enact laws whereby the State, any county, city or town, and any other public corporations may contract with and appropriate money to any person, association, or corporations for the accomplishment of public purposes only.

These succinct constitutional provisions require little more than commonsense application. Plaintiffs have alleged facts sufficient to state a claim upon which relief may be granted when one considers both the language of the Constitution itself and a host of well-established precedent discussed below. Defendants, however, ignore the language of the Constitution as a whole and elect, instead, to emphasize two carefully selected cases.

Defendants would have this Court believe that the Public Purpose Clause is a toothless appendage to the Constitution, a matter satisfied by mere lip service and violated only by a proclamation of transgression. Apparently, accordingly to Defendants' logic (and their interpretations of *Blinson* and *Maready*, as discussed below), an example of one of the few and only violations of the "for public purposes only" clauses would be legislation which states:

We legislators are doing this only for our own private reasons and because we only want to help *A*, *B*, and *C* and do not care about the people, and **we conceive of no public purpose** for this legislation, and,

therefore, pursuant to that legislation, taxes are levied and related appropriations are made to private individuals *A*, *B*, and *C*.

If, however, the "for public purposes only" clause were so limited, it would essentially have no meaning whatsoever as it is virtually inconceivable that a legislature would be as egregious as in the above-quoted example. Or, perhaps Defendants would confer upon the Public Purpose Clause a slightly broader, though still profoundly meaningless, level of stringency, such that the following legislative statements of intent would also evidence a violation of the Public Purpose Clause:

We legislators are doing this because we think **this legislation might have some net public benefit, but we know that the greater likelihood is that no such net public benefit will result**, and, therefore, pursuant to this legislation, taxes are levied and related appropriations are made to private individuals *A*, *B*, and *C*.

Or, even:

We legislators are doing this primarily to confer private benefits upon private individuals *A*, *B*, and *C*, **but we also think this legislation might have some incidental net public benefit**, and, therefore, pursuant to this legislation, taxes are levied and related appropriations are made to private individuals *A*, *B*, and *C*.

Even under examples above, the Public Purpose Clause would hardly have any conceivable purpose or application—practically speaking. The examples set out above may seem comic, but taken to its logical conclusion, Defendants' interpretation of the Public Purpose Clause would require just such a statement from the legislature in order for a Public Purpose challenge to survive a motion to dismiss. Enforcement of the true meaning of the Public Purpose Clause would be virtually impossible and the clause would be rendered meaningless. While a meaningless interpretation of the Public Purpose

Clause may be convenient for lobbyists and their corporate giant clientele, that inconvenience is, in fact, a constitutional limitation of the power of the State to tax and spend. It is a limitation imposed by the People on the government *they* created and support. More importantly, the Public Purpose Clause is the supreme law of the land, as such, compliance with it is mandatory.

A. Neither the *Blinson* nor the *Maready* Decisions Controls the Decision on This Issue.¹

In addressing whether the Google incentives violate the Public Purpose Clause the threshold question to be resolved is how broadly or narrowly the cases of *Blinson v. State*, ___ N.C.App. ___, 651 S.E.2d 268 (2007). and *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996), should be interpreted. Defendants would have this Court believe that both cases held that so-called economic development incentives are, as a matter of law, *always* for a public purpose and so *never* unconstitutional. That excessively generous interpretation is without support.

Applying *Blinson* and *Maready* requires consideration of two threshold questions:

- (1) what are the actual holdings in *Blinson* and *Maready*, as opposed to mere dicta? And
- (2) do the benefits given by the State accrue primarily to the benefit of Google?

(1) Blinson holds only that Maready is still precedent.

Despite sweeping interpretations afforded by Defendants, *Blinson* held simply:

¹ Out the outset of any discussion of *Blinson*, counsel for Plaintiffs is compelled to point out that Defendants both spent significant portions of their respective memoranda of law discussing, emphasizing, even complaining that Plaintiffs counsel, specifically the North Carolina Institute for Constitutional Law (“NCICL”) represented the plaintiffs in *Blinson*. Defendants also emphasize that the plaintiffs lost that case. Plaintiffs here will not engage in personal attacks or to respond to the same. However, to the extent that Defendants seek to point out that NCICL has not won every case it has pursued, or that public interest litigation often requires pursuit of constitutional ideals for years before those ideals are widely accepted, or that the State continues to give away multimillion dollar corporate handouts, Plaintiffs acknowledge the same.

[P]laintiffs provide no theory under which economic development incentives *properly adopted under § 158-7.1 . . .* would nonetheless be unconstitutional as violative of the Public Purpose Clauses. *In the absence of a showing of some distinction between the incentives in this case and the incentives the Maready case*, we hold that the trial court properly concluded that the [incentives] did not violate the Public Purpose Clauses.

Blinson, at ___, 651 S.E.2d at 276 (emphasis added).

Blinson, therefore, was little more than an application of Supreme Court precedent by the Court of Appeals. Indeed, the Court of Appeals in *Blinson* observed early in its opinion that it was “bound” by *Maready*, then proceeded to apply not only *Maready*, but also the landmark Public Purpose case employed by the Supreme Court in *Maready, Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989). *Blinson*, ___ N.C. App. ___, 651 S.E.2d at 271.

The *Blinson* court affirmed dismissal because the plaintiffs there had not alleged “some distinction” between the incentives they challenged and those challenged in *Maready*. Unlike the plaintiffs in *Blinson*, Plaintiffs here have alleged a distinction between the Google incentives and those of *Maready*. In particular, Plaintiffs have claimed that the Google incentives are provided “merely for [Google] operating its own private business” (Comp. ¶¶ 62, 64, 66) and are in fact “contrary” to the achievement of a public purpose. (Comp. ¶ 73(h)). To that end, Plaintiffs have alleged that the challenged Google incentives were awarded at the remote State level, unlike the “local” incentives at issue in *Maready*, and that the Google legislation does not state that it is for a public purpose or that the public will receive any benefit. (Comp. ¶ 54).

(2) *Maready* holds only that N.C.G.S. § 158-7.1 is facially constitutional.

In *Maready*, the trial court entered four conclusions of law, only one of which is pertinent here. It is:

1. North Carolina General Statute §158-7.1 is unconstitutional in that it allows the expenditure of public funds for private purposes in violation of the North Carolina Constitution.

The State’s brief to the Supreme Court in *Maready* contained only two “questions presented,” again, only one of which applies to the argument here:

- I. Did the Trial Court commit error in holding that N.C.G.S. § 158-7.1 impermissibly allows the expenditure of public funds for private purposes in violation of the North Carolina Constitution?

Defendant-Intervenor-Appellant State of North Carolina’s Brief at 2, *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996).

In light of the question presented, the Supreme Court majority opinion written by Justice Whichard states: “We therefore hold that N.C.G.S. § 158-7.1 which permits the expenditure of public moneys for economic development incentive programs does not violate the public purpose clause of the North Carolina Constitution.” *Maready v. City of Winston-Salem*, 342 N.C. at 760, 467 S.E.2d at 628.

Therefore, the point is that *Maready* stands for but a single principle: N.C.G.S. § 158-7.1 is facially constitutional. At no time does the case specifically address the constitutionality of N.C.G.S. § 158-7.1 as applied to each of the individual grants or subsidies. *See Wisconsin Right to Life, Inc. v. Federal Election Comm’n*, 546 U.S. 410, 126 S.Ct. 1016, 1018 (2006) (*per curiam*) (upholding legislation against a facial challenge, but not “purport[ing] to resolve future as-applied challenges”). More importantly for purposes of this litigation, *Maready* did not address the constitutionality of all economic development incentives; rather, that case considered those incentives authorized by N.C.G.S. § 158-7.1, a statute not contested in this case. The Google

incentives at issue in the case presently before the Court stem from distinct legislation and so are their unconstitutionality does not rise and fall on the tide of *Maready* or N.C.G.S. § 158-7.1, but must be analyzed independently under the Public Purpose Clause. Just as the Supreme Court relied on *Madison Cablevision* in its analysis in *Maready*, so too should this Court rely on *Madison Cablevision*, in its analysis of the unconstitutionality of the Google incentives.

B. Application of the Correct Controlling Precedent Shows that the Google Incentives Violate the Public Purpose Clause.

Plaintiffs acknowledge that a court would be bound by the holding in *Maready* had Plaintiffs sought to challenge economic development programs pursuant to N.C.G.S. § 158-7.1 or even a challenge to incentives given by a local government, but that is not the action Plaintiffs have brought, notwithstanding Defendants' efforts to mischaracterize this lawsuit as a carbon copy of *Blinson*. Accordingly, *Maready* does not control and is not even useful to the Court's decision here. This Court must utilize the test in *Madison Cablevision*.

In *Madison Cablevision*, Justice Meyer writing for a unanimous court quoted with approval a review of how the Court had addressed the question of what constitutes a public purpose, noting that “[o]ur reports contain extensive philosophizing . . . on the subject.” *Madison Cablevision*, 325 N.C. at 645, 386 S.E.2d 207 (citations omitted). Justice Meyer continued by stating, “[t]he results of these endeavors is perhaps best summarized in a 1970 opinion of this Court by Bobbitt, C.J.:

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.”

Id. at 645-646, 386 S.E.2d at 207 (quoting *Martin v. Housing Corp.*, 277 N.C. 29, 43, 175 S.E.2d 665, 672-72 (1970)) (internal citations omitted).

Justice Meyer then set out the test which is still applicable today:

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, *Airport Authority v. Johnson*, 226 N.C. 1, 36 S.E.2d 803 (1946); and (2) the activity benefits the public generally, as opposed to special interests or persons, *Martin v. Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665. This has been our traditional test, and we continue to adhere to it.

Id.

The *Blinson* court also focused on the “motivation, aim or intent” of the government in analyzing whether the challenged legislation was for a public purpose. *Blison*, ___ N.C. App. ___, 651 S.E.2d at 278. In fact, the *Blison* court summarized its holding thusly: “In short, to put forth a claim for relief, plaintiffs were required to plead facts demonstrating that the motivation, aim, or intent of the [incentives] was not a public one.” Plaintiffs here have specifically alleged that the Google legislation does not even contain a “recitation to indicate that it is for a public purpose or that the public will receive any direct, primary, or non-incidental benefit from it.” (Comp. ¶ 61) In short, the General Assembly did not so much as give lip service to the requirement that an incentive be “directly aimed at furthering the general economic welfare of the people.” *See Maready*, 342 N.C. at 725, 467 S.E.2d at 625-26.

The continued viability of *Madison Cablevision* in the post-*Maready* context is without doubt. Not only did the Court of Appeals apply it in *Blinson*, but the Supreme Court applied it to an economic development incentives appeal which the Court heard 5 years after *Maready*. In the most recent Supreme Court case to address this area of the law, *Piedmont Triad Airport Authority v. Urbine*, 354 N.C. 336, 554 S.E.2d 331 (2001), a unanimous Supreme Court cited *Maready* and went on to adopt and apply *Madison Cablevision's* two-part test to the facts alleged. *Id.* at 339, 554 S.E.2d at 333. Thus, *Piedmont Triad* reinforces that “public purpose” must be determined on a case-by-case basis and requires the application of the two prong analysis of *Madison Cablevision*.

Applying the aforementioned test to this case, it is clear the Google incentives are not for a public purpose.

(1) The Google Incentives are Not Reasonably Connected to the Convenience and Necessity of Government

In *Maready*, the majority not only acknowledged the two part test in *Madison Cablevision*, but also utilized that test in resolving the issue before the Court, as the *Blinson* court discussed. As to the first prong of the test, the *Maready* majority stated:

[W]hether an activity is within the appropriate scope of governmental involvement and is reasonably related to communal needs may be evaluated by determining how similar the activity is to others which this Court has held to be within the permissible realm of governmental action. We conclude that the activities N.C.G.S. § 158-7.1 authorizes are in keeping with those accepted as within the scope of permissible governmental action.

Maready, 342 N.C. at 722-723, 467 S.E.2d at 624.

Determining whether multimillion dollar handouts and special tax exemptions are reasonably connected to the convenience and necessity of government requires a brief review of relevant case law.

Briggs v. City of Raleigh, et al., 195 N.C. 223, 141 S.E. 597 (1928), decided the question of whether an appropriation for the North Carolina State Fair was a public purpose. The opinion written by Justice Stacy expounded at length about the means by which that question should be answered and what constituted benefit for the public versus private interests.

Indeed, it is well settled by all the decisions on the subject, with none to the contrary, that the power of taxation may not be employed for the purpose of establishing, aiding, or maintaining private business enterprises, whose sole object is the individual gain of the proprietors, no matter how beneficial to the community such enterprises may be. The attempted exercise of the taxing power for such purposes was long ago characterized as taxation to load the tables of the few with bounty that the many may partake of the crumbs that fall therefrom. However important it may be to the community that individual citizens should prosper in their industrial enterprises, it is not the business of government to aid them with its means.

Id. at 227, 141 S.E. at 600 (internal quotations and citations omitted). Thus, as far back as 1928, the Supreme Court recognized that while the general community could benefit from the success of private businesses, the government could not use its taxing power to aid those privileged businesses. The Court then continued:

The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the state, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary.

Id. at 227- 228, 141 S.E. at 600-601 (1928).

The Court again recognized that even though the resulting good to the public was substantial, it was still an incidental advantage and concluded with the assertion of a

violation of constitutional rights for government to use public funds for the benefit of a private enterprise. The Court explained:

The individual, by reason of his capacity, enterprise, or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community, to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. In this view, it might be shown to be for the public good to take from the unenterprising and thriftless their unemployed capital and intrust it to others who will use it to better advantage for the interests of the community. But it needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation.

Id. at 227- 229, 141 S.E. at 600-601 (1928) (quoting *Lowell v. City of Boston*, 111 Mass. 454, 15 Am. Rep. 39).

In *Nash v. Town of Tarboro*, 227 N.C. 283, 42 S.E.2d 209 (1947), the Court determined:

We deem it unnecessary to cite or discuss the long list of decisions of this Court, dealing with the many things which have been held to fall within the definition of a 'public purpose', such as streets, sidewalks, bridges, water, light and sewerage plants, market houses, abattoirs, municipal buildings, auditoriums, hospitals, playgrounds, parks, railroads, armories, fairs and airports. Those decisions, in our opinion, do not support the contention that the cost of constructing and maintaining a hotel by a municipality is a public purpose within the meaning of our Constitution. ... "Certainly, a tax could not be constitutionally levied to aid one in building or conducting a hotel; and to exempt the keeper from the payment of the tax thereon is but doing indirectly what cannot be done directly." *Lancaster v. Clayton*, 86 Ky. 373, 5 S.W. 866.

Id. at 287-288, 42 S.E.2d 212-213.

Just as the construction of a hotel is not a proper enterprise of government, so too is the establishment of an internet server facility not part of the proper role of government. The possible economic merits of encouraging development do not allow the State to subsidize the same.

(2) The Specific Subsidies Involved Primarily, If Not Exclusively, Benefit Google and Violate the *Madison Cablevision* Test.

The second prong of *Madison Cablevision*'s test asks whether the activities benefit the public generally, as opposed to special interests or persons. *Maready*, 342 N.C. 722, 467 S.E.2d at 624; *Madison Cablevision*, 325 N.C. at 645, 386 S.E.2d at 207. As to the second prong of the *Madison Cablevision* test, the *Maready* Court states: "... under the expanded understanding of public purpose, even the most innovative activities N.C.G.S. § 158-7.1 permits are constitutional so long as they primarily benefit the public and not a private party." *Id.* at 724, 467 S.E.2d at 625 (emphasis added). The majority, however, answered the question posed by the second prong of *Madison Cablevision* by concluding:

The public advantages are not indirect, remote, or incidental; rather, 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.*

Id. at 725, 467 S.E.2d at 625 (emphasis added.) Thus, the second prong was answered in the context of the statute and N.C.G.S. § 158-7.1 was deemed constitutional.

Here, the Google incentives from the State, exclusive of those incentives awarded by local government, are worth more than \$90 million. All of these handouts and tax exemptions go directly to Google or its subsidiaries inure to Google's sole benefit.

Even if it was conceded, solely for the purposes of argument, that these expenditures could somehow have a "reasonable connection" with the "convenience and necessity" of the local governments, they still unquestionably would fail the second prong of *Madison Cablevision* because they primarily benefit Google, not the public. As alleged in the Amended Complaint and as shown by the documents attached thereto, all of the

benefits of the expenditures directly and exclusively benefit Google. Every dollar given in grants and every dollar saved by tax exemptions goes straight to Google's corporate bottom line.

The Court's consideration of the second prong of *Madison Cablevision* would be informed by a review of *Mitchell v. North Carolina Industrial Development Financing Authority*, 273 N.C. 137, 159 S.E.2d 745 (1968). Holding that the Industrial Development Financing Act, which attempted to authorize the use of tax funds for the operation of an agency to acquire sites and construct development sites for private industry, was unconstitutional as a violation of the Public Purpose Clause, the Supreme Court explained 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. 144, 159 S.E.2d 750 (citing *City of Raleigh*, 195 N.C. 223, 141 N.E. 597).

The *Mitchell* Court continued:

Our organic law prohibits the expenditure of public money for a private purpose. It does not matter whether the money is derived by ad valorem taxes, by gift, or otherwise. It is public money and under our organic law public money cannot be appropriated for a private purpose or used for the purpose of acquiring property for the benefit of a private concern. It does not matter what such undertakings may be called or how worthwhile they may appear to be at the passing moment. The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system. Experience has shown that such encroachments will lead inevitably to the ultimate destruction of the private enterprise system. *State v. Town of North Miami*, 59 So.2d 779, 784-785 (1952).

Mitchell, 273 N.C. 152, 159 S.E.2d 755.

If public purpose is now to include State or municipal ownership and operation of the means of production--even on an interim basis; if we are to bait corporations which refuse to become industrial citizens of North Carolina unless the State gives them a subsidy, the people themselves must so declare. Such

fundamental departures from well established constitutional principles can be accomplished in this State only by a constitutional amendment.

Id. at 159, 159 S.E.2d at 760.

In *Maready*, the plaintiffs argued that the issue fell squarely within the purview of the *Mitchell* decision. *Maready* 342 N.C. at 717, 467 S.E.2d at 621. The majority of the Court disagreed and, while finding *Mitchell* distinguishable, did not overrule it. Thus, *Mitchell* stands as good law and binding precedent on the constitutional issue of applying the Public Purpose Clause to the subsidies under the Google legislation and the JDIG.

The majority attempted to distinguish *Maready* from *Mitchell* in two respects: first in *Mitchell*, the General Assembly had unenthusiastically passed the legislation, which was not the case in *Maready*. *Id.* at 717-18, 467 S.E.2d at 621-22. Secondly, "... the holding in *Mitchell* clearly indicates that the Court considered private industry to be the primary benefactor of the legislation and considered any benefit to the public purely incidental." *Id.* at 718, 467 S.E.2d 622. However, the *Maready* majority then states that "[t]he Court *rightly* concluded that direct state aid to a private enterprise, with only limited benefit accruing to the public, contravenes fundamental constitutional precepts." *Id.* (emphasis added). Thus, as the *Maready* court correctly observed, direct aid to a private business with only limited public benefit is unconstitutional. Plaintiffs here have alleged precisely that: direct aid to Google with little, if any, public benefit.

In *Stanley v. Department of Conservation and Development*, 284 N.C. 15, 199 S.E.2d 641 (1973), upon which the plaintiffs in *Maready* also relied, it was noted that "in determining what is a public purpose the courts look not only to the end sought to be attained but also 'to the means to be used.'" 284 at 34, 199 S.E.2d at 656 (quoting *Turner v. Reidsville*, 224 N.C. 42, 44, 29 S.E.2d 211, 213 (1944)). Accordingly, one should

consider not only whether economic development is a public purpose but also whether a particular subsidy is a permissible means of accomplishing that supposed purpose. The *Maready* majority attempted to explain this away by relying on Article V, § 2(7) of the North Carolina Constitution which was adopted in 1973, as discussed in *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1971). As *Hughey* concluded, “Under subsection (7), *direct_disbursement* of public funds to private entities is a constitutionally permissible *means* of accomplishing a public purpose provided there is statutory authority to make such appropriation.” *Hughey v. Cloninger*, 297 N.C. at 95, 253 S.E.2d at 904. Nothing in *Hughey* eroded the fundamental public purpose inquiry; *Hughey* addressed on the question of what *may* constitute a permissible means of achieving a public purpose.

Neither Article V, § 2(7) nor *Hughey*, can salvage the Google incentives. This is not a situation where contracts are being entered into whereby a private entity, for example, a garbage collection company, is performing a public purpose and being compensated for it or an appropriation to a Chamber of Commerce made to assist in corporate recruitment. *See Horner v. Chamber of Commerce*, 235 N.C. 77, 68 S.E.2d 660 (1951) Thus, the observation in *Maready* that “the constitutional problem under the public purpose doctrine that the Court perceived in *Mitchell* and *Stanley* no longer exists” simply is dicta. *Maready*, 342 N.C. at 720, 467 S.E.2d at 623. In fact, the *Maready* opinion acknowledges the efficacy of *Mitchell* and its progeny by stating that while they “remain pivotal in the development of the doctrine, they do not purport to establish a permanent test.” *Id.* Though not establishing a permanent and irrevocable test applicable

in every circumstance, the law in those cases remains binding precedent and valid in analyzing the constitutionality of the Google incentives at issue here.

While Defendants argue that the location of Google's data server farm benefits the public by creating jobs and expanding the tax base, at best, any benefit is incidental to the public welfare. Google is not some Depression era public works project intended to create jobs. Google is a for profit corporation. It hires employees so that it can carry out the business it was established to do in order to make money for its shareholders. To the extent Defendants can argue that the location of the plant expands the tax base to the general benefit of the public, the argument is speculative at best. Defendants' arguments do nothing more than guess at a possible benefit which, even if an accurate prediction, is still nothing more than an incidental benefit.

II. THE GOOGLE INCENTIVES ARE UNCONSTITUTIONAL EXCLUSIVE EMOLUMENTS IN VIOLATION OF ARTICLE I, SECTION 32 OF THE NORTH CAROLINA CONSTITUTION

The North Carolina Constitution states: "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." N.C. Const. art. I, sec. 32.

Defendants collectively rely on their arguments about "public purpose" and contend that the Exclusive Emoluments provision's applicability must follow the line of reasoning applicable to Article V, § 2(1). To do so, however, would be to deny the dramatically different historical context in which those constitutional provisions were adopted and the specific difference in terms used.

The North Carolina Supreme Court has held that not every classification that favors a particular group of persons is an exclusive or separate emolument or privilege within the meaning of the constitutional prohibition.” *Town of Emerald Isle v. State*, 320 N.C. 640, 652, 360 S.E.2d 756, 764 (1987). *See also Blinson v. State*, -- N.C. App.--, 651 S.E.2d 268, 278 (2007). The courts have articulated a two part test to determine whether a benefit is constitutional: (1) “the exemption [or benefit] 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 [or benefit] serves the public interest.” *Town of Emerald Isle v. State*, 320 N.C. at 652, 360 S.E.2d at 764. If the test is satisfied, “[e]xemptions [or benefits] in favor of a specified group of persons are not an exclusive emolument or privilege.” *Id.* The test remains the same whether a court is considering a direct benefit or an exemption.

Defendants argue primarily that the analysis for exclusive emoluments is virtually indistinguishable from that of the public purpose doctrine. Relying on *Blinson*, Defendants argue that because the incentives are for a public purpose, they are necessarily not an exclusive emolument. Plaintiffs acknowledge that *Blinson* appears to blur the lines between exclusive emoluments and public purpose analyses. However, controlling precedent from the Supreme Court and a careful review of *Blinson* reveal that a favorable ruling on the public purpose question does not *ipso facto* resolve the exclusive emoluments issues. As set out below, the Supreme Court has an established test for evaluating an exclusive emoluments challenge. The Court of Appeals in *Blinson* or elsewhere is not free to revisit the wisdom of the highest court. Moreover, *Blinson* merely concluded that, *in that case*, its analysis of plaintiffs public purpose claims applied

equally to analysiing the exclusive emoluments claims. *Blinson*, ___ N.C. App. ___, 651 S.E.2d at 278 (“[T]he incentives and subsidies provided [] are intended to promote the general economic welfare of the communities involved, rather than to solely benefit [the defendant], and, accordingly, do not amount to exclusive emoluments.”). The *Blinson* court noted an overlap between the public purpose doctrine and the exclusive emoluments test discussed below, but it did not conclude that the analyses are indistinguishable.

The test for emoluments is similar, though not identical, to that for the public purpose doctrine. *See generally, Peacock v. Shinn*, 139 N.C. App. 487, 533 S.E.2d 842 (2000). The independence of each clause is as important as the interplay between them. The drafters of the Constitution would not have included both the Public Purpose Clause and the Exclusive Emoluments Clause if analysis for the latter were to be subsumed by analysis of the former. Generally the Constitution, like a statute, is to be construed to give meaning to each of its parts. “[A] statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.” *R.J. Reynolds Tobacco Co. v. N.C. Dep’t of Env’t & Natural Res.*, 148 N.C. App. 610, 616, 560 S.E.2d 163, 168 (2002) (quoting *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981)) (internal quotations and citations omitted). Constitutional provisions are no different because it is “[a]n elementary rule of construction... that, if possible, effect should be given to every part and every word of a constitution, and that no portion of the fundamental law should be treated as meaningless or superfluous.” 16 Am. Jur. 2d

Constitutional Law § 61 (citing *State ex rel Stephan v. Finney*, 254 Kan. 632, 867 P.2d 1034 (1994)). This concept is a basic principle of constitutional interpretation because “every clause has been inserted for some useful purpose.” *Id.* (citing *Davenport v. City of Rock Hill*, 315 S.C. 114, 432 S.E.2d 451 (1993)).

As stated above, the Exclusive Emolument Clause requires courts to determine whether a challenged expenditure meets “the fundamental democratic principle: ‘Equal rights and opportunities to all, special privileges to none.’” *State v. Felton* 239 N.C. 575, 587, 80 S.E.2d 625, 635 (1954). Largely, the determination hinges on whether the expenditure is “in consideration of public services.” *See* N.C. Const. art. I, sec. 32.

In addition to their argument that the exclusive emoluments issue is resolved by the public purpose analysis, Defendants apparently rely on a line of cases in which the so-called “Knight Rule” (arising from *State v. Knight*, 269 N.C. 100, 108, 152 S.E.2d 179, 184 (1967)) is articulated as: “In sum, 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 of North Carolina*, 320 N.C. at 654, 360 S.E.2d at 764.

However, a comprehensive examination of case law in North Carolina applying Article I, § 32 shows an inconsistent and often times contradictory use of the *Knight* test, with recent cases not even applying it. In *Madison Cablevision*, the test was not utilized in examining the Article I, § 32 challenge. *Madison Cablevision*, 325 N.C. 634, 386 S.E.2d 200. Rather, the Court set out the three criteria to be considered.

Article I, section 32 prohibits the grant of exclusive separate emoluments or privileges to any person or persons by the community unless in consideration for *public services*. First, the prohibition of this section contemplates a grant by "the community" to others.

Second, it is clear that Article I, section 32 contemplates that exclusive emoluments or privileges may be granted if "in consideration of public services." Franchises granted to public service companies come directly within the words and meaning of the constitutional exception. *Reid v. R.R.*, 162 N.C. 355, 78 S.E. 306 (1913).

...

Third, the purpose of the constitutional provision was not to prevent "the community" from exercising legislatively authorized powers to operate public enterprises but to prevent "the community" from surrendering its power to another "person or set of persons" by grant of exclusive or separate emoluments or privileges unless they are granted "in consideration of public services."

Madison Cablevision, 325 N.C. at 654-655, 386 S.E.2d at 212 (emphasis added)

(internal citations omitted).

In *Leete v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995), the Court held that a payment by the County Commissioners to the former County Manager violated Article I, § 32. The Court struck down a six week severance package for a county employee who voluntarily resigned. 341 N.C. 116, 462 S.E.2d 476 (1995). The *Leete* Court in relevant part stated that a public office "is created for the purpose of carrying on the operations of government." The challenged emolument, however, was a benefit for an individual. *Id.* at 119, 462 S.E.2d at 477 (citing *De Marco v. Bd. of Chosen Freeholders*, 36 N.J. Super. 382, 386, 115 A.2d 635, 637 (1955), *aff'd*, 21 N.J. 136, 121 A.2d 396 (1956)). Moreover, the compensation authorized was not for *public service*. *Leete*, 341 N.C. at 122, 462 S.E.2d at 480. As a benefit for an individual, the severance package failed the first prong of the test and amounted to an exclusive emolument. The instant case is on all fours with *Leete*. As the Complaint alleges, Google is a private company and its relocation was not a responsibility of the State. The State, as a political

entity, was created for the purpose of government, not the benefit of a private company; and taxpayers pay taxes to carry out the operation of government, not to subsidize a private business. Here, the compensation authorized was not for *public service*. *Leete*, 341 N.C. at 122, 462 S.E.2d at 480. Again the Court in *Leete*, as in *Madison Cablevision*, makes no reference to, nor application of the test articulated in *Knight*. The focus is on *public service* which is the specific language in the Constitution. Even the dissent in *Leete* makes no reference to the *Knight* test, but instead frames the question as to “whether the government entity took such action in consideration of the recipient’s public service.” *Leete*, 341 N.C. at 124, 462 S.E.2d at 481 (citations omitted).

Thus *Madison Cablevision* and *Leete* correctly focus the Court’s attention on the factors to be utilized in analyzing the issue here: (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?

As to each question, based upon the allegations set forth in the Complaint, the answer is “Yes!” First, the tax exemptions and direct grants are available to Google. Although other companies may qualify in theory for some such exemptions, the clear intent of the State in enacting the Google legislation was to benefit Google and the practical import of the qualifiers is such that Google alone is likely to qualify. As for the JDIG incentives, admittedly those grants are available to a broader class of employers, but the exclusive emoluments clause prohibits emoluments to small, select groups as well as to individual recipients. Indeed, undersigned counsel has found no case in North Carolina in which the constitutionality of an alleged exclusive emolument turned on the number of recipients receiving the challenged benefit. Secondly, the grants have nothing

to do with “public service” and were not “in consideration of public service.” “Public service” is a function of the public sector -- to wit, “government.” Thirdly, the grants, particularly in the context of tax avoidance and the expenditure of public dollars constitute the type of alienation of power that Article I, § 32 was intended to prevent.

In the case of *State v. Felton*, 239 N.C. 575, 80 S.E.2d 625 (1954), Justice Bobbitt for a unanimous court addressed the constitutionality of a statute creating the Currituck County Racing Commission. The act purported “to authorize the grant of a franchise for the maintenance and operation on the dog track premises” of Pari Mutuel Machines and Appliances. *Felton*, 239 N.C. at 579, 80 S.E.2d at 628. In striking down the Act, the Court said, “[w]e state without elaboration that the special, exclusive privileges granted to this private corporation under the 1949 Currituck Act are not ‘in consideration of public services’ within the meaning of Art. I, sec. 7 [now section 32].” *Felton*, 239 N.C. at 587, 80 S.E.2d at 635. In concluding that the Act violated both Article I, § 7 (now §32) and Article I, § 31 of the North Carolina Constitution, Justice Bobbitt stated: “It is in conflict with that fundamental democratic principle: ‘Equal rights and opportunities to all, special privileges to none.’” *Felton*, 239 N.C. at 587, 80 S.E.2d at 634.

The facts as set out in the Complaint show a flagrant disregard for the constitutional prohibition on exclusive emoluments and the democratic ideals protected by that prohibition. Google, a multibillion dollar corporation, has received “special privileges” that virtually no other business or person in North Carolina receives. By virtue of direct grants and special tax exemptions, Google will reap a \$90 million windfall, subsidized and paid for by the taxpayers of North Carolina.

III. THE GOOGLE INCENTIVES VIOLATE CONSTITUTIONAL PROHIBITIONS ON UNFAIR AND INEQUITABLE TAXATION.

Plaintiffs have alleged violations of the requirement that taxation be “fair and equitable,” Article V, § 2(1) and that taxation be uniform, Article V, § 2(2). Plaintiffs further alleged a violation of the law of the lands provision of Article I, § 19. Defendants have described these claims collectively as “discrimination-based claims.” Characterizing them in such manner, Defendants have argued that Plaintiffs lack standing as to Counts 7, 8, and 11, and have failed to state a claim upon which relief may be granted. As explained below, these counts are better described as “fair tax claims.”

A. Plaintiffs Have Standing to Pursue Fair Tax Claims

Defendants have characterized Plaintiffs claims in Counts 7, 8, and 11 as “discrimination-based” in an apparent attempt to elevate the standing requirements necessary for Plaintiffs to proceed. According to Defendants, a plaintiff seeking to prosecute his so-called discrimination claim must jump a higher standing hurdle by demonstrating that he is in a class discriminated against by the allegedly discriminatory action. However, the seminal taxpayer standing case in North Carolina, *Goldston v. State*, 361 N.C. 26, 637 S.E.2d 876 (2006), makes no such distinction. The Supreme Court held: “. . . a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds.” *Id.* at 33, 637 S.E.2d at 881.

“If the governing authorities are preparing to put public property to an unauthorized use, citizens . . . have the right to seek equitable relief.” *Wishart v. Lumberton*, 254 N.C. 94, 96, 118 S.E.2d 35, 36 (1961). Standing to challenge the unconstitutional misuse or misappropriation of public funds was acknowledged and reaffirmed by our Supreme Court in *Goldston*. There the Supreme Court began its decision simply: “Our cases demonstrate that a taxpayer has standing to bring an action

against appropriate government officials for the alleged misuse or misappropriation of public funds.” *Goldston*, 361 N.C. 26, 637 S.E.2d 876. The Court made no distinction between so-called discrimination claims and other constitutional challenges.

Even assuming discrimination claims require a distinct showing for standing, Plaintiffs here have not raised a discrimination claim and so standing requirements would not bar Plaintiffs’ action. Plaintiffs have alleged throughout their Complaint, including at Counts 7, 8, and 11, that the State is preparing to put public money to an unauthorized, unconstitutional, and illegal purpose. Defendants’ semantics cannot morph Plaintiffs’ fair tax claims into discrimination claims requiring a higher level of standing. Defendants maintain Plaintiffs must show personal, direct injury in order to pursue their claims. That argument depends upon a characterization that Plaintiffs fair tax claims are really discrimination claims and further that standing in the context of discrimination claims required a discriminatory effect as injury.

Assuming for the sake of argument that Plaintiffs’ fair tax claims could be considered discrimination-based claims and that as such Plaintiffs must show a personal injury, Plaintiffs have alleged injury. Defendants, however, seem bent upon adding to the supposed injury requirement by arguing that Plaintiffs’ must allege a discriminatory effect as their injury. The law does not require as exacting an injury as Defendants would have this court believe. Plaintiffs have alleged an injury—Plaintiffs must pay taxes from which Google will be exempt.

North Carolina appellate jurisprudence has evolved over the last forty years to view taxpayers, generally, as having an interest in avoiding unfair tax burdens. The North Carolina Supreme Court has permitted taxpayers to mount such suits provided

litigants demonstrate a connection between the challenged statute and an injury to “persons, property, or constitutional rights.” However, that injury may amount to nothing more than a *de minimis* increase in the plaintiff’s tax burden. *Piedmont Canteen Service, Inc. v. Johnson*, 256 NC 155, 123 S.E.2d 582, 589 (1962); accord *Stanley v. Dept. of Conservation and Development*, 284 N.C. 15, 199 S.E.2d 641 (1973).

In *Stanley*, a case eerily similar to the instant case, Justice Sharp, writing for the North Carolina Supreme Court, enunciated a conception of standing in line with the United States Supreme Court’s holding in *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952 (1968) (question of standing is whether the party seeking relief has alleged such a personal stake in the outcome to assure the concrete adverseness which sharpens presentation of issues). *Stanley*, 284 N.C. at 28, 199 S.E.2d at 650. The *Stanley* plaintiffs mounted challenges to a tax-exempt State bond issue which was to finance construction of pollution-abatement facilities for the use of private paper mills. The *Stanley* plaintiffs argued that the bond issue amounted to a state subsidy for private enterprise in contravention of the North Carolina Constitution, and that exempting the bonds from tax yielded an unfair tax burden for all other North Carolina taxpayers. En route to agreeing with the plaintiffs’ public purpose argument on the merits, the Court held that the plaintiffs’ allegation of unfair tax burden based upon the exemption was sufficient for standing:

. . . petitioners will be injured unless [the statute’s] 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. ‘A taxpayer injuriously affected by a statute may generally attack its validity. Thus, he may attack a statute which . . . exempts person or property from taxation, or

imposes on him in its enforcement an additional financial burden, *however slight.*'

Stanley, 284 at 29, 199 S.E.2d at 650-51 (citation omitted)(emphasis added).

A Court of Appeals case following *Stanley*, determined that a citizen, resident, and taxpayer had standing to contest the legality of actions of a regional government body “where such activities are funded by tax monies or property derived from local or federal sources, or where such activities may later require support by tax monies.” *Kloster v. Council of Governments*, 36 N.C. App. 421, 427, 245 S.E.2d 180, 184 (1979). It was enough in that case “that it [could] be inferred from the plaintiff’s complaint that local taxpayers’ monies will be necessary for future [use].” *Id.* Thus, the plaintiff showed no individualized or imminent harm beyond that applicable to all local taxpayers. In *Texfi Industries v. City of Fayetteville*, 44 N.C. App. 268, 261 S.E.2d 21 (1979), the Court of Appeals stated affirmatively, “[n]o direct economic injury need be shown in order to have standing to assert that one’s constitutional rights have been violated.” *Id.* at 270, 261 S.E.2d at 23 (emphasis added).

Plaintiffs have standing to pursue all their claims, including the fair tax claims at Counts 7, 8, and 11. *Goldston* provides a sweeping precedent allowing a taxpayer to challenge constitutional violations without demonstration of a specific, personal, direct injury. Even assuming that Plaintiffs must show an injury in order to pursue their fair tax claims, Plaintiffs have alleged that they face a greater tax burden as a consequence of Google receiving special tax exemptions. No greater injury need be alleged.

B. Fair Tax Provisions of the State Constitution Prohibit Special Tax Breaks for Google

The North Carolina Constitution has had a provision requiring the Legislature to tax in a uniform manner since 1868. Prior to the adoption of the current Constitution, Article V, § 3 provided: “Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise . . .” 1868 N.C. Constitution, art. V, § 3. That provision has been retained in the current Constitution under Article V, § 2(2) which states: “No class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.” N.C. Const. art. V, § 2(2). Likewise, a uniformity requirement was included in the Constitutional provision describing exemptions as well. “Every exemption shall be on a State-wide basis and shall be made by general law *uniformly* applicable in every county, city and town, and other unit of local government.” N.C. Const. art V, § 2(3).

The spirit of the Uniformity Clause is also apparent in Article V, § 2(1) which states: “The power of taxation shall be exercised in a just and equitable manner[.]” Even the Declaration of Rights communicates the same essence of fairness by government: “No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land.” Similar to a due process guarantee, the Law of the Land Clause guarantees safeguards fundamental to free and fair governance, including the requirement that government conduct be “rationally related to a substantial government purpose.” *Treants Enterprises, Inc. v. Onslow County*, 320 N.C. 776, 778-79, 360 S.E.2d 783, 785 (1987); *see also State v. Hedgebeth* 228 N.C. 259, 266, 45 S.E.2d 563, 568 (1947); *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004).

Read together, these clauses communicate an unequivocal mandate—taxation must be fair.

(1) The Classifications Required To Qualify For Tax Breaks In The Google Legislation Are Arbitrary And Capricious in Violation of the Uniformity Clause.

Courts have interpreted this Article V, § 2(2)—the Uniformity Clause—to mean that a classification made for purposes of taxation “must not be arbitrary, unreasonable or unjust.” *Great Atl. & Pac. Tea Co. v. Maxwell*, 199 N.C. 433, 440, 154 S.E. 838, 842 (1930). See *Smith v. State of North Carolina*, 349 N.C. 332, 341 507 S.E.2d 28, 33 (1998) (explaining that the uniformity rule from the 1868 Constitution was retained and that prior case law still applies to the interpretation of the corresponding provision in the current Constitution). Plaintiffs have stated a claim upon which relief may be granted as to Count 8, as a review of case law interpreting the Uniformity Clause will show.

As explained in *Snyder v. Maxwell*, 217 N.C. 617, 9 S.E.2d 19 (1940), the uniformity requirement has two levels of analysis. “First, the classification itself must be based upon a reasonable distinction. Second, the tax must apply equally to all those within the class defined.” *Id.* at 620, 9 S.E.2d at 21 (citations omitted). Plaintiffs allege that the Google legislation fails the first part of the test.

While Article V, § 2(2) explicitly requires uniform treatment among classifications for property tax purposes, based on principles of justice, the courts have extended this uniformity requirement to sales and use taxes, license taxes, franchise taxes, taxes on trades and professions and other forms of taxation. *Hajoca Corp. v. I. L. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971). “Although it is not expressly provided that the tax on trades, etc., shall be uniform, yet a tax not uniform, as properly understood, would be so inconsistent with natural justice, and with the intent which is

apparent in the section of the Constitution ... that it may be admitted that the collection of such a tax would be restricted as unconstitutional.” *Hajoca Corp.*, 277 N.C. at 568, 178 S.E.2d at 486.

The rule is so inherently just that taxes on trades, professions, franchises and incomes, although not subject to the rule, expressly, must be imposed, levied, and assessed in accordance therewith, to the end that there shall be no unjust or arbitrary discrimination in this State with respect to such taxes. The principle of ‘equal rights to all, and special privileges to none,’ is fundamental, and must be recognized as such in the levy, assessment and collection of all taxes in this State. A tax levied by the General Assembly on trades, professions, franchises or incomes in violation of the rule of uniformity, and resulting in unjust or arbitrary discriminations, would be so inconsistent with natural justice, that its collection would be restrained as unconstitutional, or, if paid, would be ordered refunded to the taxpayer, for the reason that he would thereby be deprived of the equal protection of the law.

Tea Co.v. Maxwell, 199 N.C. at 438-39, 154 S.E. at 841. See also *Smith*, 349 N.C. at 341, 507 S.E.2d at 33 (finding “the Constitution requires that laws shall be passed taxing real and personal property ... by uniform rule”) (quoting *Hajoca Corp.* 277 N.C. at 568, 178 S.E.2d at 486 (citations omitted)).

The North Carolina Supreme Court has indicated that a classification of taxpayers, if arbitrary, violates the rule of uniformity. *Hajoca Corp.* 277 N.C. at 568, 178 S.E.2d at 486. The Court must consider “whether a distinction ... may justify a further classification for the purpose of taxation, and whether such further classification is within the intent of the statute and has been therein effectively expressed. *Snyder v. Maxwell*, 217 N.C. 621, 9 S.E.2d 21. “Classification, to be valid, must rest on genuine distinction.” *Lenoir Finance Co. v. Currie*, 254 N.C. 129, 134, 118 S.E.2d 543, 547 (1961).

If a classification is arbitrary, unreasonable or unjust, then a taxing scheme cannot treat the classes of taxpayers differently, and if it does, it violates the uniformity

requirement by not levying the tax uniformly. *Great Atl. and Pac. Tea Co. v. Doughton*, 196 N.C. 145, 144 S.E. 701 (1928). The tax statute at issue in *Tea Co. v. Doughton* required a person operating six or more stores in North Carolina to pay a tax of \$50 for each store in the State. *Id.* at 148, 144 S.E. at 702. Consequently, merchants operating fewer than six stores were exempt. *Id.* The Court determined that the decision to tax merchants with six stores and to exempt merchants with five stores was an arbitrary classification. *Id.* at 150, 144 S.E. at 705.²

The classification made in the statute ... cannot be held as founded upon a real and substantial difference between the two classes. The classification attempted for the purpose of imposing a license tax ... is, we think, under the authorities, clearly arbitrary, and if enforced would result in depriving merchants within the ... [taxed] class, of equal protection of the laws of this state. ... Their business differs from the business of other merchants, not taxed by the statute, *only in matters of detail* and methods of buying and selling merchandise.

Id. (emphasis added). Thus, classifications among taxpayers are only valid when based upon a genuine distinction, rather than a mere “matter of detail.”

Continuing this rejection of arbitrary classifications that are discriminatory, the Court found that relieving taxpayers who paid a tax (subsequently held invalid) under protest but not those who paid without protest violated the uniformity requirement. *Smith v. State of North Carolina*, 349 N.C. 332, 507 S.E.2d 28 (1998). In *Smith*, the legislation

² In *Great Atl. And Pac. Tea Co. v. Maxwell*, 199 N.C. 433, 154 S.E. 838 (1930), the Court emphasized that its decision in *Tea Co. v. Doughton* rested on the fact that the tax was imposed on every person, firm or corporation engaged in the business with an exemption for those who maintained and operated five or fewer stores. *Tea Co. v. Maxwell*, 199 N.C. at 443, 154 S.E. at 843. This distinguished the taxing scheme in *Tea Co. v. Doughton* from a valid taxing classification pursuant to which a tax was imposed on merchants that had more than one store because that classified them as *branch* or *chain* store operators. Merchants who operated only one store were not considered branch or chain store operators and thereby, not subject to the tax.

at issue addressed the tax consequences for three groups of taxpayers: (1) it forgave intangibles tax on corporate stock for the group of taxpayers who had benefited from the taxable percentage deduction found unconstitutional by the U.S. Supreme Court; (2) it allowed refunds for those who paid the tax under protest; and (3) it did not refund those who paid the tax without protest. The court found the legislation drew a classification that “violate[d] the uniformity provision of the North Carolina Constitution.” *Smith*, 349 N.C. at 341, 507 S.E.2d at 33.

The Google Legislation creates certain tax exemptions for an “eligible internet data center” and defines the same as a facility that is used primarily by a business engaged in the Internet service providers and web search portals industry 51811, as defined by the North American Industry Classification System adopted by the United States Office of Management and Budget. The eligible internet data center must also be in either an enterprise tier one, two, or three area pursuant to G.S. § 105-129.3, regardless of any subsequent change in county enterprise tier status. In addition, at least two hundred fifty million dollars (\$250,000,000) in private funds has to be invested in real property at the facility within five years after the commencement of construction of the facility. (Compl. ¶30) The Google Legislation specifically exempted from the retail sales and use tax sales of electricity and eligible business property to be used and located at an eligible Internet data center and defined “eligible business property” as property that is capitalized for tax purposes under the Revenue Code and is used either for the provision of internet service or a web search portal or for the generation or management of electricity used for the provision of internet services.

Throughout their respective briefs, Defendants have argued that the purpose of the Google legislation was to provide new jobs. The Google legislation itself does not declare such a purpose. Assuming *arguendo*, that the purported purpose of the Google legislation is to promote new job development, the eligibility requirements of the statute are unconstitutionally arbitrary. The eligibility requirements focus on two criteria: first, the type of business, specifically an internet data search business; and second, a mandatory capital investment of \$250 million.

Defendants have cited a few cases where the Court has determined that the distinctions were rationally related so as to pass the uniformity requirement. These cases are distinguishable from the classification at issue because those permissible distinctions were genuine, not based on a mere matter of detail, and so they were rationally related to the attempt to define a class. Moreover, other cases discussed below illustrate what kinds of classifications are constitutional and what kinds are not.

In *Tea Co. v. Maxwell*, *supra*, the act taxed *chain* store operators and therefore the distinction between a merchant with one store and a merchant with more than one was permissible because the later defines a *chain* store operator. In *Deadwood, Inc. v. N.C. Dep't of Revenue*, 356 N.C. 407, 572 S.E.2d 103 (2002), a privilege tax was assessed against businesses operating facilities with “live entertainment” that was not applicable to facilities showing “moving picture shows.” In upholding the distinction, the Court found live performances to have many distinguishing features, including increased volume, higher concentration of attendees and the sale of alcohol, all of which created a greater burden on the local community and thereby justified different classifications. *Id.* at 412, 572 S.E.2d at 107.

In *Snyder v. Maxwell*, 217 N.C. 617, 9 S.E.2d 19, the Court upheld a tax on the privilege of operating soft drink vending machines that was distinct from the privilege tax on the operation of machines vending other items. The Court found distinguishing the contents of a vending machine to be a rational classification because the value of a privilege is rationally related to its expected profit. *Id.* at 621, 150 S.E.2d at 22. “These distinctions imply a difference in the commodities which may reasonably affect the value of the privilege because of the expectancy of its more profitable exercise.” *Id.*

In the Google legislation, the goal of the legislation was never articulated by the General Assembly. Assuming that Defendants’ theory that the purpose is job creation, by limiting the tax exemptions of the Google legislation to only those businesses that operate an internet search facility and invest \$250 million, the State has established narrow and arbitrary requirements which violate the uniformity requirement. Nothing suggests that only businesses operating an internet search facility and investing \$250 million might create new jobs or stimulate the economy. While the Google legislation creates a category of potential, eligible taxpayers, it was drafted specifically for Google and tailored to describe the agreement between the State and Google. Since it is so particular to the construction of Google’s internet data search facility, it is likely that only Google will be eligible³. The legislation was openly defended and supported in the name of

³ Defendants argue that the Google legislation applies equally within the class of eligible taxpayers. Their arguments, however, miss the mark. Plaintiffs have alleged that the eligibility requirements are themselves unconstitutional and that Plaintiffs themselves could never qualify for the tremendous tax break Google will enjoy. Plaintiffs are arguing that the classifications made in the Google legislation are arbitrary and capricious, especially when considering the circumstances surrounding the passage of the legislation and the specificity of the classification that indicate that Google is and will be the only taxpayer likely to qualify.

Google. The reason why the legislation was not restricted to Google, but classified more broadly was to avoid constitutional requirements.

The reality is that the Google legislation is a special taxing scheme created for Google and only Google will likely be able to qualify. Giving tens of millions of dollars tax breaks to only one taxpayer, Google, is precisely the type of legislative abuse the uniformity requirement is intended to prevent. The North Carolina legislature arbitrarily selected Google to be exempt from taxes, and there is no rational reason why a multibillion dollar corporation should not have to pay retail sales and use taxes or why it should receive any special tax treatment whatsoever. As quoted previously from *Tea Co. v. Maxwell*, 199 N.C. at 438-39, 154 S.E.2d at 841: “The principle of ‘equal rights to all, and special privileges to none,’ is fundamental, and must be recognized as such in the levy, assessment and collection of all taxes in this State.”

(2) The Google Incentives Violate the Law of the Land and Fair and Equitable Taxation Clauses of the State Constitution.

Plaintiffs acknowledge that encouraging job growth in the state is a legitimate government interest. Thus, the issue is whether the provisions of the Google legislation were genuinely intended to promote that interest and whether they are rationally related to achieving that goal. For the reasons discussed below, Plaintiffs believe that the Google legislation provides for an irrational and arbitrary means of achieving the goal of job growth in North Carolina. There is no fundamental difference between Google and any other taxpayer and yet the Google legislation, by its effect, singles out Google for preferential tax treatment. This disparity is repugnant to the administration of justice. As the Supreme Court explained more than a half century ago: The Law of the Land Clause of the North Carolina Constitution imposes upon law-making bodies the requirement that

any legislative classification “provide a reasonable means to a legitimate state objective.” *Powe v. Odell*, 312 N.C. 410, 412, 322 S.E.2d 762, 763 (1984). Further, in order to be constitutional, legislation may not categorize “arbitrarily either as between similarly situated persons, or groups of persons, or as between activities which are prohibited and those which are permitted.” *State v. Greenwood*, 280 N.C. 651, 657, 187 S.E.2d 8, 11-12 (quoting *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 666-667, 174 S.E.2d 542, 546 (1970)). The test is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation.” *Guthrie v. Taylor*, 279 N.C. 703, 714, 185 S.E.2d 193, 201 (1971) (*cert. denied*, 406 U.S. 920, 92 S.Ct. 1774, 32 L.Ed.2d 119 (1972) (citing *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E.2d 18 (1968))).

Acknowledging that our courts have traditionally deferred to legislative judgment in reviewing challenges of an economic nature, (*see, e.g., Powe v. Odell*, 312 N.C. at 412, 322 S.E.2d at 763), and doubts are resolved in support of the act, courts have not only the power, but also the *duty* to declare a legislative act unconstitutional when such is plainly and clearly the case. *City of New Bern v. New Bern – Craven County Bd. Of Educ.*, 338 N.C. 430, 435, 450 S.E.2d 735, 738 (1994) (*emphasis added*). When appropriate, our Supreme Court has “not hesitated to strike down business regulation on grounds of arbitrariness when no distinguishing feature of the business rationally related to the regulation could be discerned.” *Poor Richard’s, Inc. v. Stone*, 322 N.C. 61, 65, 366 S.E.2d 697, 699 (1988) (citing *Roller v. Allen*, 245 N.C. 516, 96 S.E.2d 851 (1957); *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949); and *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940)) (parentheticals omitted).

Although deference to the legislative branch is appropriate, judicial review is still a necessary and proper constitutional control. Whether the State's exercise of its authority “is a violation of the Law of the Land Clause or a valid exercise of the police power is a question of degree and of reasonableness in relation to the public good likely to result from it.” *In re Hospital*, 282 N.C. at 550, 193 S.E.2d at 735.

While the Law of the Land Clause is generally considered the functional equivalent of the Due Process Clause of the United States Constitution, it has its own jurisprudence and exacting standards. For cases in which the Law of the Land Clause arises outside the context of traditional due process, the Supreme Court has articulated a two-part test for determining the constitutionality of legislation:

Although this Court often considers the “law of the land” synonymous with “due process of law,” we have reserved the right to grant Section 19 relief against unreasonable and arbitrary state statutes in circumstances where relief might not be obtainable under the Fourteenth Amendment to the United States Constitution. Nonetheless, the two-fold constitutional inquiry under both the North Carolina and United States Constitutions is the same: (1) Does the regulation have a legitimate objective; and (2) if so, are the means chosen to implement that objective reasonable?

In re North Carolina Pesticide Bd. File Nos. IR94-128, IR94-151, IR94-155 349 N.C. 656, 671, 509 S.E.2d 165, 175 (1998)(internal citations omitted). Thus, the question for this Court is whether the Google incentives have a legitimate objective and, if so, whether the incentives are a reasonable means of achieving that objective.

As noted previously, the legislative intent behind the Google legislation is not specified in the statute. The purpose behind the JDIG program is job creation. Assuming that job creation is similarly the purported purpose behind the Google legislation, Plaintiffs acknowledge that job creation may be a legitimate objective. Nevertheless,

selective tax breaks and direct handouts to a corporate giant are not a legitimate means of achieving that objective.

XIII. PLAINTIFFS ARE ENTITLED TO DECLARATORY RELIEF PURSUANT TO THE DECLARATORY JUDGMENT ACT

In the final count of the Complaint, Plaintiffs bring a claim under the Declaratory Judgment Act which provides:

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

N.C.G.S. § 1-253.

Specifically, Plaintiffs here seek a declaration that the Google legislation and the JDIG award to Google, and any resulting contractual agreements are “unauthorized, unlawful, arbitrary and in violation of the State Constitution (Compl. ¶¶A, D). This claim is based on the constitutional claims brought in the preceding counts of the Complaint, which are the subject of this brief. For all the reasons stated above, Plaintiffs’ claims are valid and, accordingly, they are entitled to the prayed for declaration.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court DENY all Defendants' Motions to Dismiss.

This the _____ day of May, 2008.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that the Undersigned has this day served the foregoing Plaintiffs Memorandum of Law in Opposition to Defendants' Motions to Dismiss in the above titled action upon all other parties to this cause by transmitting a copy hereof to each party via e-mail and by depositing a copy hereof, first-class postage pre-paid in the United States Mail addressed as follows:

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This the _____ day of May, 2008

Jeanette K. Doran