

NORTH CAROLINA SUPREME COURT

CHARLES HEATHERLY, et al.,)

Plaintiffs,)

WILLIS WILLIAMS, et al.)

Plaintiff-Intervenors,)

v.)

STATE OF NORTH CAROLINA, *et*)

al.,)

Defendants.)

From Wake County

DEFENDANT-APPELLEES' NEW BRIEF

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QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S JUDGMENT FOR DEFENDANTS ON THE GROUNDS THAT THE LOTTERY ACT DOES NOT CONSTITUTE LEGISLATION WITHIN THE PURVIEW AND MANDATES OF ARTICLE II, SECTION 23 OF THE CONSTITUTION OF NORTH CAROLINA?

II. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S ASSESSMENT OF COSTS AGAINST PLAINTIFFS AND PLAINTIFF-INTERVENORS?

STATEMENT OF THE CASE

This matter is before the Court on plaintiff-appellants' and plaintiff-intervenors' appeals from a divided decision of the Court of Appeals in *Heatherly v. State*, 658 S.E.2d 11 (N.C. Ct. App. 2008) (hereafter "*Heatherly*") affirming the trial court's entry of judgment for defendants. By its Order of 21 March 2006 in the Wake County Superior Court, the Honorable Henry W. Hight, Jr., presiding, the trial court entered judgment for defendants on the merits of plaintiffs' claims, dismissed for lack of standing the claims of the non-individual plaintiffs and plaintiff-intervenors, and assessed costs against plaintiffs. (R pp. 1, 446-57) The matter was heard on the merits because defendants' motion to dismiss as to most counts had been denied earlier. (R pp. 279-82) The trial court had also previously denied plaintiffs' motion for preliminary injunction. (R pp. 276-78)

The original plaintiffs brought this action on 15 December 2005 seeking to have the trial court declare unconstitutional, and enjoin the implementation of, the North Carolina Lottery provisions, Chapter 344 of the 2005 North Carolina Session Laws (hereafter the "Lottery Act"), amended by Part XXXI of Chapter 276 of the 2005 Session Laws. The original plaintiffs are three citizens and residents of Wake County, one citizen and resident of Union County, plus two non-profit organizations, the Wake

County Taxpayers Association and the North Carolina Family Policy Council. (R pp. 3-25 & exhibits pp. 26-107)

Plaintiffs claim the Lottery Act was enacted in violation of Article II, Section 23 of the Constitution of North Carolina, requiring that bills raising money on the credit of the State, pledging the faith of the State, or imposing a tax, be read in the General Assembly on three separate days. Plaintiffs originally claimed also that the Lottery Act violated Article V, Section 7 of the North Carolina Constitution by providing for the drawing of money from the State Treasury without the necessary appropriation having been made by law. (R pp. 15-23)

Defendants – the State itself and the North Carolina Lottery Commission, plus seven Lottery Commission members, the Executive Director of the Lottery, the Governor, and the State Treasurer, all sued in their official capacities – answered the original complaint on 3 March 2006. Defendants denied that the Lottery Act was in any way within the scope of Article II, Section 23 of the Constitution or that the Act was enacted or implemented in violation of the Constitution. Defendants further raised affirmative defenses, including the defense of laches. (R pp. 283-302 & exhibits pp. 303-96)

On 14 February 2005, the trial court allowed intervention in this action by three plaintiff-intervenors, including a citizen and resident of Martin County, plus North

Carolina Fair Share and North Carolina Common Sense Foundation, two non-profit organizations. (R pp. 174-75) In their complaint in intervention, the plaintiff-intervenors raised claims essentially identical to those of plaintiffs. (R pp. 176-99 & exhibits pp. 200-75) On 3 March 2006, defendants answered plaintiff-intervenors' complaint, denying that the Lottery Act was unconstitutionally enacted or implemented and raising the same defenses as they had against the original plaintiffs. (R pp. 397-417)

Plaintiffs moved on 15 March 2006 to amend their complaint with regard to the allegations as to one of the plaintiffs, plaintiff Spampinato. (R pp. 418-22) The motion was allowed orally in open court on 20 March 2006. (T p. 3) Defendants' oral motion to have the amended complaint (R pp. 423-45) be deemed answered in the same manner as the original complaint, except to admit the new allegation concerning plaintiff Spampinato, was allowed. (T p. 4)¹

On 29 March 2006 plaintiffs gave timely notice of appeal from the trial court's 21 March 2006 Order and judgment. (R pp. 458-60) On 4 April 2006 plaintiff-intervenors gave timely notice of appeal from the 21 March 2006 Order.

¹ Defendants will cite to the original complaint throughout this Brief, unless otherwise indicated. The amended complaint, which was not allowed until the hearing on the merits, is identical to the original complaint except for an allegation about one plaintiff that is not material to this appeal. Additionally, the exhibits to plaintiffs' complaint follow the original complaint, not the amended complaint, in the Record on Appeal.

(R pp. 461-63) On 10 April 2006 defendants gave notice of appeal from the 15 February 2006 order denying their motion to dismiss. (R pp. 464-66)

On 30 May 2006 the parties stipulated to the Record on Appeal. The Record on Appeal was filed in the Court of Appeals on 8 June 2006 and docketed on 15 June 2006. Also on 15 June 2006, plaintiffs and plaintiff-intervenors filed in the Supreme Court of North Carolina a Petition for Discretionary Review Under G.S. 7A-31(b) and Appellate Rule 15, seeking review by the Supreme Court prior to determination by the Court of Appeals. That petition was denied by the Supreme Court on 15 December 2006. On 10 January 2007, the defendants filed in the Court of Appeals a withdrawal of their notice of appeal. The Court of Appeals entered an order on 16 January 2006 allowing the withdrawal of defendants' notice of appeal.

The matter was heard in the Court of Appeals on 22 May 2007, and the Court of Appeals filed its opinion affirming the trial court on 18 March 2008. *Heatherly*, 658 S.E.2d at 13. The majority in the Court of Appeals held that the Lottery Act did not fall within the scope of Article II, Section 23 because it “neither pledges the faith of the State for payment of a debt nor attempts to raise money on the credit of the State,” nor constitutes an implicit tax. *Heatherly*, 658 S.E.2d at 14, 17-18. The majority deemed it unnecessary to address the question whether the trial court erred in dismissing the claims of the corporate or non-profit organizational plaintiffs. *Id.*

at 18. The Court of Appeals also upheld the trial court's decision to assess costs against the plaintiffs. *Id.* at 19. Judge Calabria dissented, concluding that the Lottery Act is a revenue bill that should have been enacted pursuant to the requirements of Article II, Section 23 of the Constitution, both on the grounds that it is an implicit tax and that it pledges the faith of the State and raises money on the credit of the State, and also disagreeing with the majority as to the appropriateness of the trial court's assessing costs against plaintiffs. *Id.* at 19, 21-23 (Calabria, J., dissenting).

On 18 April 2008, plaintiffs and plaintiff-intervenors (hereafter collectively "plaintiffs" unless the context indicates otherwise) filed their notice of appeal pursuant to N.C.G.S. § 7A-30(2), based on the dissenting opinion in the Court of Appeals. On 19 May 2008, the Tax Foundation moved the Court for permission to file a brief as *amicus curiae*. On 27 May 2008 the Supreme Court allowed the Tax Foundation's motion for leave to appear *amicus curiae*.

STATEMENT OF THE FACTS

The Lottery Act was proposed in House Bill 1023 of the 2005 General Assembly. A Committee Substitute was given a favorable report in the House of Representatives on 6 April 2005, and it passed its second and third readings in the House on that day. On 11 August 2005 the General Assembly enacted Senate Bill 622, the Current Operations Appropriations Act, Chapter 276 of the 2005 Session

Laws; in Part XXXI of Chapter 276, the General Assembly amended House Bill 1023, so that if and when House Bill 1023 was ratified, it would be as amended by Chapter 276 (the “Budget Act”). On 30 August 2005 the Senate considered the Committee Substitute of House Bill 1023, and it passed its second and third readings that day. (R pp. 9-10, 288-89) Thus, the ratified House Bill 1023, as amended by Part XXXI of Chapter 276, is the Lottery Act which plaintiffs seek to de-rail in this litigation.

The Lottery Act establishes the North Carolina State Lottery Fund as an enterprise fund within the State Treasury. N.C.G.S. § 18C-160 (2008). Overseeing the Lottery is a Lottery Commission, located within the Department of Commerce for budgetary purposes, but otherwise functioning as “an independent, self-supporting, and revenue-raising agency of the State.” N.C.G.S. § 18C-110 (2008). The Commission appoints a Director, who operates and administers the Lottery and serves as Secretary to the Commission. N.C.G.S. § 18C-120 (2008). The Commission may choose from a variety of types of lottery games to be used in the North Carolina Lottery, other than ones using certain types of video gaming machines. N.C.G.S. § 18C-130 (2008); *see also* N.C.G.S. § 18C-103(4) (2008). Lottery revenues are to be allocated fifty percent (50%) to prizes, at least thirty-five percent (35%) to the Education Lottery Fund, no more than eight percent (8%) to Lottery expenses, and no more than seven percent (7%) to Lottery retailers. N.C.G.S. § 18C-162 (2008). From

the Education Lottery Fund, five percent (5%) goes to the Education Lottery Reserve Fund. Of the rest, fifty percent (50%) goes to reduction of class sizes in early grades and pre-kindergarten programs for at-risk four-year-olds, forty percent (40%) goes to the Public School Building Capital Fund, and ten percent (10%) goes to the State Educational Assistance Authority for college and university scholarships. N.C.G.S. § 18C-164(b)-(c) (2008). The Lottery Commission is required to withhold for state income tax purposes seven percent (7%) from winnings reportable to the Internal Revenue Service, and revenue laws have been amended to make it clear that Lottery winnings are taxable income for non-residents winning Lottery prizes in North Carolina. N.C.G.S. §§ 105-134(2), 105-134.5(b), 105-163.2B (2008). The State Treasurer was directed to lend up to \$10 million to the Lottery Commission for start-up expenses, at an interest rate comparable to private market short-term rates, with all loan money to be repaid within twenty-four months from the effective day of the Act. 2005 N.C. Sess. Law 344 § 15.

Plaintiffs brought this action contending that the Lottery Act was enacted in violation of Article II, Section 23 of the Constitution of North Carolina. Article II, Section 23 reads as follows:

Sec. 23. Revenue bills.

No law shall be enacted to raise money on the credit of the State, or to pledge the faith of the State directly or indirectly for

the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and shall have been agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal.

Specifically, plaintiffs claimed that the Lottery Act raises money on the credit of the State (Count One), pledges the faith of the State for payment of the Lottery debts (Count Two), imposes an “implicit tax” by providing that Lottery funds would be spent thirty-five percent (35%) for funding education and fifteen percent (15%) for operation of the Lottery (Count Three), imposes an express tax on residents by requiring withholding of seven percent (7%) of Lottery winnings for State income tax (Count Four), and creates an express tax on nonresidents by requiring them to pay North Carolina income tax on Lottery prizes (Count Five). As to each of these counts, plaintiffs alleged that the Lottery Act is unconstitutional because it was not read on three separate days in each house of the General Assembly as is required for legislative acts that fall within the scope of Article II, Section 23. (R pp. 15-23, 187-98) Only Counts One through Three were pursued by plaintiffs on appeal.²

² Plaintiffs also alleged a Count Six, contending that the transfer of funds on loan to the Lottery Commission constituted the drawing of money from the State treasury without an appropriation in violation of Article V, Section 7 of the Constitution of North Carolina. That claim was rejected by the trial court (R pp. 454-56) and was not made the subject of any appellate argument by plaintiffs.

Defendants do not contend that the Lottery Act itself was enacted in accordance with the procedural requirements of Article II, Section 23; instead, defendants deny that the Lottery Act is within the scope of Article II, Section 23. Defendants further deny that the Lottery Act itself or any actions taken pursuant to the Lottery Act violate Article II, Section 23. Moreover, in their Answers to plaintiffs' complaint and to plaintiff-intervenors' complaint, defendants noted that the Budget Act was read three separate times on three separate days in each house and that the yeas and nays on the second and third readings were recorded in both journals for the Budget Act. (R pp. 295-98, 409-13) Some of the language which became part of the Lottery Act, such as provisions regarding income tax, were contained only in the Budget Act. *See* §§ 31.1(aa), 31.1(bb), 31.1(dd) of Chapter 276 of the 2005 Session Laws & N.C.G.S. §§ 105-134(2), 105-134.5(b), 105-163.2B. The trial court dismissed plaintiffs' and plaintiff-intervenors' Fourth and Fifth claims for relief in granting defendants' motion to dismiss (R pp. 281-82) and ultimately rejected all plaintiffs', and plaintiff-intervenors', claims as being without merit (R pp. 446-57).

STANDARD OF REVIEW

Plaintiffs cite to this Court the standard of review for a dismissal pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) or (6), contending that the question should be determined according to "whether, as a matter of law, the allegations of the complaint,

treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.” (Pls.’ New Br., p. 8 citing *Stein v. Sheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006)). This case, however, is not in the appellate courts based on the granting of a dismissal pursuant to Rule 12(b)(6). The trial court heard defendants’ 12(b)(6) motion and denied it except for two claims which plaintiffs did not pursue on appeal. (R pp. 279-82) The trial court then heard and decided the case on the merits, making findings of fact and conclusions of law in its order entering judgment for defendants. (R pp. 446-56) While there were no live witnesses in this case, the trial court nevertheless decided the case as the result of a bench trial. Consequently, it is a decision on the merits, not a decision on a 12(b)(6) motion, that was before the Court of Appeals and that is before this Court. Accordingly, the standard of review is whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment. *Quick v. Quick*, 305 N.C. 446, 450-51, 290 S.E.2d 653, 657 (1982). The “findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence,” and the “[c]onclusions of law drawn by the trial court from its findings of fact are reviewable de novo on appeal.” *Tillman v. Commer. Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008) (citations omitted). Additionally, the constitutional issues are determined by this Court de novo.

Piedmont Triad Airport Auth. v. Urbine, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001), *cert. denied*, 535 U.S. 971, 152 L. Ed. 2d 381 (2002).

Although plaintiffs reference a dismissal pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) in their Standard of Review, there is no issue before this Court concerning a dismissal pursuant to Rule 12(b)(1). The only dismissal pursuant to Rule 12(b)(1) related to certain organizational plaintiffs. (R p. 455) That issue was not decided by the Court of Appeals, and no issue concerning their dismissal from the litigation is before this Court. *See Heatherly*, 658 S.E.2d at 18.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE TRIAL COURT'S JUDGMENT FOR DEFENDANTS ON THE GROUNDS THAT THE LOTTERY ACT DOES NOT CONSTITUTE LEGISLATION WITHIN THE PURVIEW AND MANDATES OF ARTICLE II, SECTION 23 OF THE CONSTITUTION OF NORTH CAROLINA.

ASSIGNMENT OF ERROR NOS. 9-14, 16-20 (R pp. 469-70, 471-2)

Plaintiffs contend that the Lottery Act constitutes legislation imposing a tax, raising money on the credit of the State, and pledging the faith of the State for payment of a debt. If accurate, this characterization of the Lottery Act would mean that it should have been enacted according to the procedural restrictions contained in Article II, Section 23 of the Constitution. However, plaintiffs are wrong – as both the

trial court and the Court of Appeals concluded, the Lottery Act does not impose a tax, raise money on the credit of the State, or pledge the faith of the State for payment of a debt. Thus, Article II, Section 23 does not apply, and the Court of Appeals did not err in affirming the trial court's entry of judgment for defendants.

Plaintiffs face a heavy burden in pursuing their claims challenging the validity of the Lottery Act. Indeed, it is often said that “[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.” *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (alteration in original) (quoting *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967)). Our courts “give[] acts of the General Assembly great deference, and a statute will not be declared unconstitutional under our Constitution unless the Constitution clearly prohibits that statute.” *In re Spivey*, 345 N.C. 404, 413, 480 S.E.2d 693, 698 (1997); *accord Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004). In North Carolina, more so than in some jurisdictions, the decisions of the General Assembly are entitled to great weight because the people act through their General Assembly by enacting legislation. This is so because

our State Constitution is not a grant of power. *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961). All 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. *Id.* See *Lassiter v. Board of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958); *Airport Authority v. Johnson*, 226 N.C. 1, 8, 36 S.E.2d 803, 809 (1946).

State ex rel. Martin v. Preston, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989); accord *Baker*, 330 N.C. at 337-38, 410 S.E.2d at 891. Moreover, “[i]f there is any doubt as to the Legislature’s power to act in any given case, the doubt should be resolved in favor of the Legislature’s action.” *Id.* at 338, 410 S.E.2d at 891 (quoting *County of Fresno v. State of California*, 268 Cal. Rptr. 266, 270 (Cal. App. 5th Dist. 1990), *judgment aff’d*, 808 P.2d 235 (1991)). See also *Maready v. City of Winston-Salem*, 342 N.C. 708, 714, 467 S.E.2d 615, 619 (1996) (“The Constitution restricts powers, and powers not surrendered inhere in the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, its wisdom and expediency are for legislative, not judicial, decision.”). It is the General Assembly, not the courts, entrusted with the responsibility of making policy decisions through its legislative enactments. *Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970) In this case, plaintiffs hope to have the courts replace the judgment and policy determinations of the General Assembly based on the strained contention that the Lottery Act should have been enacted as a revenue bill pursuant to the constraints of Article II, Section 23 of the Constitution of North Carolina.

Because plaintiffs' arguments lack merit, this Court should affirm the decision of the Court of Appeals.

A. ARTICLE II, SECTION 23 IMPOSES MANDATORY PROCEDURES, BUT THOSE PROCEDURES ARE IRRELEVANT TO THIS LITIGATION.

The focus of plaintiffs' complaint is that the Lottery Act falls within the category of legislation addressed by Article II, Section 23 of the Constitution and that it is mandatory that the General Assembly follow the procedural requirements dictated by that provision for the enactment of legislation. Plaintiffs are right that legislation falling within the scope of Article II, Section 23 must be enacted as the Constitution directs in order for the legislation to be valid. The rule is that "if the entry of the ayes and nays is not actually made on the journal, the Constitution, speaking with absolute clearness, says that the failure of such entry is *absolutely* fatal to the validity of the act." *Comm'rs v. Snuggs*, 121 N.C. 394, 399, 28 S.E. 539, 541 (1897). Thus, "a literal compliance with the language of that section is a condition precedent and one which must be performed in its entirety before the bill can ever become a law." *Id.* (citing *Bank v. Comm'rs*, 119 N.C. 214, 25 S.E. 966 (1896)).

In its opinion in this case, the Court of Appeals recognized that revenue bills, within the meaning of Article II, Section 23, must be enacted according to the conditions set out there and, in fact, that all parties agreed that the Lottery Act was not enacted according to those conditions. *Heatherly*, 658 S.E.2d at 14-15. Nevertheless,

plaintiffs' argument is to no avail. That the Lottery Act was not enacted in accordance with the procedures prescribed by Article II, Section 23 is irrelevant because the Lottery Act is not within the scope of Article II, Section 23. *See Heatherly*, 658 S.E.2d at 15-18.

B. THE LOTTERY ACT DOES NOT IMPOSE A TAX.

The heart of plaintiffs' case is their insistence that the Lottery Act imposes a tax on purchasers of Lottery tickets. To the contrary, the Lottery Act does not impose a tax. It simply permits individuals who choose to do so to purchase Lottery tickets in exchange for the possibility of winning prizes, with the "profit" from such sales being used to provide part of the funding for education in North Carolina. Therefore, the trial court correctly determined that the General Assembly was not required to enact the Lottery Act pursuant to Article II, Section 23, and the Court of Appeals properly affirmed the trial court's judgment. *Heatherly*, 658 S.E.2d at 15-18, 19.

According to plaintiffs, the Lottery Act necessarily creates a tax because it is intended to raise money for education. However, a tax is not defined that easily. For constitutional purposes, the courts should not lightly conclude that every act providing for the payment of a charge or fee of some sort imposes a tax. As explained by this Court, "[r]evenue bills, as defined by law, are those that levy taxes *in the strict sense of the word* and are not bills for other purposes which may incidentally create

revenue.” *Hart v. Bd. of Comm’rs*, 192 N.C. 161, 164, 134 S.E. 403, 404 (1926) (emphasis added). *Accord Heatherly*, 658 S.E.2d at 17; *N.C. Eastern Mun. Power Agency v. Wake County*, 100 N.C. App. 693, 699, 398 S.E.2d 486, 490 (1990) (quoting *Hart*), *disc. review denied & appeal dismissed*, 329 N.C. 270, 407 S.E.2d 838 (1991).³

The mere fact that Lottery funds are used to support governmental purposes, specifically the education of North Carolina students, does not somehow convert the Lottery into a tax or levy. This Court has described “a tax as ‘a charge’ levied and collected as a contribution to the maintenance of the general government [It is] imposed upon the citizens in common at regularly recurring periods for the purpose

³ Plaintiffs quote in their brief language from *North Carolina Eastern Municipal Power Agency v. Wake County* indicating that Article II, Section 23 “focuses on the purpose of the statute,” not its result, in assessing whether an enactment constitutes a tax. 100 N.C. App. at 698, 398 S.E.2d at 490 (quoted in Plaintiff Appellants’ New Brief, p. 14). What plaintiffs omit is the context of that statement. The issue in *North Carolina Eastern Municipal Power Agency* involved changes in property tax revaluation provisions and in methods of calculation of special reductions for public utilities, as well as the interaction of those two. The Court of Appeals held that the changes did not constitute an act within the scope of Article II, Section 23 even though the plaintiff was assessed a special add-in amount in his property tax assessment in 1988 pursuant to the legislature’s provisions attempting to adjust for the interactions of the various enactments. In other words, the statute dealt directly with taxes and resulted in an increased tax assessment against the plaintiff, and in that context the Court of Appeals held the statute did not fall within the reach of Article II, Section 23 because it was not intended as a tax-levying enactment. That case provides absolutely no guidance for this case except as an illustration of the principle that “[r]evenue bills, as defined by law, are those that levy taxes *in the strict sense of the word*.” *Hart*, 192 N.C. at 164, 134 S.E. at 404 (emphasis added).

of providing a continuous revenue.” *State ex rel. Utils. Comm’n v. Carolina Utils. Customers Ass’n*, 336 N.C. 657, 683, 446 S.E.2d 332, 347 (1994) (citations omitted). A “tax” is “a pecuniary charge or levy enforced by government to raise money for the maintenance and expense of government.” *Heatherly*, 658 S.E.2d at 16 (quoting *N.C. Ass’n of ABC Bds. v. Hunt*, 76 N.C. App. 290, 292, 332 S.E.2d 693, 694, *disc. review denied*, 314 N.C. 667, 336 S.E.2d 400 (1985)). As noted by Professor Orth in his book on the North Carolina Constitution, “[a] tax is a *forced* contribution to government.” JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION* 88 (1993) (emphasis added).

Common sense alone dictates that the Lottery Act does not create a tax. It is not a *levy* of taxes; nor does it *force contributions* to the government. It is not *imposed* upon North Carolina citizens. It is not a “charge levied upon the general citizenry for the general maintenance of the government.” *See Carolina Util. Customers Ass’n*, 336 N.C. at 683, 446 S.E.2d at 347 (quoted in *Heatherly*, 658 S.E.2d at 17). No one is required to purchase a lottery ticket; instead, one may do so purely out of personal desire or amusement. If individuals do purchase tickets, they will receive benefits in the form of opportunities to win prizes. It is this receipt of a

special benefit, as a *quid pro quo*, so to speak, that distinguishes taxes from non-regulatory charges such as the price to purchase lottery tickets.⁴

The price of a Lottery ticket is analogous to the turnpike tolls which this Court held were not taxes for purposes of what was then Article II, Section 14 of the Constitution. “Tolls are not taxes. A person uses a toll road at his option; if he does not use it, he pays no toll.” *N.C. Turnpike Author. v. Pine Island, Inc.*, 265 N.C. 109, 116-17, 143 S.E.2d 319, 325 (1965). In other words, in both instances, an individual chooses to engage in a totally voluntary activity for which he pays a fee.

Plaintiffs argue that the Lottery Act is distinguishable from the turnpike provisions because, in considering the turnpike charges, the Court noted that “[t]axes

⁴ Plaintiffs and the *amicus curiae*, as well as the dissenting opinion in the Court of Appeals, cite this Court to a line of cases distinguishing between regulatory fees and regulatory taxes on the grounds that taxes are for the benefit of the general good whereas regulatory fees are for the regulation of the persons or entities paying the fees. *See San Juan Cellular Tel. Co. v. Public Serv. Comm’n of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992); *State Farm Mut. Auto. Ins. Co. v. Long*, 129 N.C. App. 164, 497 S.E.2d 451 (1998), *aff’d per curiam*, 350 N.C. 84, 511 S.E.2d 303 (1999); *see also* Plaintiff Appellants’ New Brief, pp. 27-28, Brief *Amicus Curiae* of the Tax Foundation, pp. 3-6; *Heatherly*, 658 S.E.2d at 21 (Calabria, J., dissenting). No inferences can be drawn from the reasoning of those cases, however, because they reflect the courts’ efforts to determine whether particular instances of regulatory charges are taxes or other types of charges, such as fees. *See State Farm*, 129 N.C. App. at 167, 497 S.E.2d at 453 (“The key issue here is whether the regulatory charge is a tax” and “comparing taxes with regulatory fees”). *See also Heatherly*, 658 S.E.2d at 17 n.5, pointing out that *State Farm* involved a compulsory tax and that the court in this case was “not considering here whether the lottery is a regulatory fee or a tax; we are determining only whether it is a tax.” The *San Juan Cellular/State Farm* test is simply irrelevant.

are levied for the support of government. . . . [t]olls are the compensation for the use of another's property or improvements made." *Turnpike Author.*, 265 N.C. at 117, 143 S.E.2d at 325. *See* Plaintiff Appellants' New Brief, p. 17. What plaintiffs fail to mention is that the quoted language is from an Indiana decision addressing a similar issue. *See Ennis v. State Highway Comm'n*, 231 Ind. 311, 323, 108 N.E.2d 687, 693 (1952).

In *Ennis*, the Indiana Supreme Court held that its toll road act was not a bill for raising revenue within the meaning of its state constitution. In so doing, the court observed that "[t]he payment of a tax is compulsory and not optional, and it entitles the taxpayer to receive nothing in return, other than the rights of government which are enjoyed by all citizens alike." 231 Ind. at 323, 108 N.E.2d at 693. Thus, the Indiana court focused on the toll payment as one for which the payor received a benefit in return, a *quid pro quo* different from the act of simply satisfying one's tax obligations. Since the Court in *Turnpike Authority* was quoting *Ennis* in the language emphasized by plaintiffs, this Court surely intended to communicate the same principle as did the *Ennis* court: the voluntary nature of the toll payment made in exchange for receiving a benefit different from simply paying one's taxes established the toll payment as something separate from a tax.

The Lottery Act establishes the same type of *quid pro quo* based on a voluntary payment for which one receives a benefit entirely different from satisfying a tax obligation imposed by the government. The Court of Appeals found “the payment of a toll to be analogous to the purchase of a lottery ticket.” *Heatherly*, 658 S.E.2d at 17. As a result, it correctly concluded that a “citizen – and any other who purchases a ticket – receives the exclusive benefit of the right to a chance of winning the lottery prizes, a benefit that is not conferred upon the general population of the State through the disbursement of state funds.” *Id.* The majority recognized that the language of Article II, Section 23 answers the question of whether the Lottery Act imposes a tax because the constitutional provision is concerned with bills that “*impose any tax.*” *Id.* at 18 (emphasis added in opinion) The question must be answered “no.” “Given the voluntary nature of participation in the lottery, we find that the Lottery Act does not impose any tax upon the people of the State.” *Id.* at 17-18.

Plaintiffs, as well as the *amicus curiae*, argue that the voluntariness of the transaction is not significant. They strain to compare the profit component of the Lottery ticket to a sales, excise or use tax paid by a purchaser in a voluntary transaction. They cite to numerous cases that they contend show that voluntariness is irrelevant. *See* Plaintiff Appellants’ New Brief, pp. 24-26; Brief *Amicus Curiae* of the Tax Foundation, pp. 19-20. Those cases are not relevant because, if they are not

entirely concerned with a different issue, they either involve taxes or fees *imposed* by the government on a voluntary transaction between non-governmental parties or taxes/fees *imposed* by the government on an otherwise voluntary activity of an individual who is not receiving any additional benefit from the government except complying with the payment exacted as a result of the tax or fee. Plaintiffs thus are trying to compare apples and oranges. If Jane Doe buys candy from the drugstore, she engages in a voluntary transaction with the drugstore. However, the mandatory sales tax is imposed and exacted by the State, a non-party to the transaction, even though it is collected by the vendor. Jane Doe's voluntary transaction is with the drugstore, and any benefit she receives is from the drugstore. In contrast, when Jane Doe buys a Lottery ticket, the ultimate seller is the State, and she pays the price charged by the State. The benefit of receiving a Lottery ticket, and the opportunity to receive winnings from that ticket, come from the State as the result of her voluntary purchase. The part of the purchase price that ultimately ends up being used for education comprises the profit component of the purchase price. The State is allowed, when selling Lottery tickets, to make a profit.

Other courts have taken into consideration the significance of the benefit to the individual in determining whether particular charges constituted taxes for various constitutional provisions. For example, in 1875 the Circuit Court for the Southern

District of New York recognized a fundamental aspect of a tax or revenue-raising bill when it ruled that a bill to raise postage rates was not a bill for raising revenue that was required to originate in the house of representatives:

Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, either directly or indirectly, or lay duties, imposts or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens of the benefit of good government. It is this feature which characterizes bills for raising revenue. They draw money from the citizen; they give no direct equivalent in return.

United States ex rel. Michels v. James, 26 F. Cas. 577, 578 (S.D.N.Y. 1875).

Similarly, the Oregon Supreme Court in 1895 was faced with the question whether a bill which included fees to be paid to government officials, such as court fees, was a revenue raising bill required to originate in the state house of representatives rather than the senate.

A law which requires a fee to be paid to an officer, and finally covered into the treasury of a county, for which the party paying the fee receives some equivalent in return, other than the benefit of good government, which is enjoyed by the whole community, and which the party may pay and obtain the benefits under the law, or let it alone, as he chooses, does not come within the category of an act for raising revenue, and hence the objection made under this clause of the constitution is not well taken.

Northern Counties Trust v. Sears, 30 Ore. 388, 403, 41 P. 931, 936 (1895).

Because the Lottery Act allows persons to purchase lottery tickets and receive a benefit in return, a benefit not conferred upon citizens generally, the Lottery Act does not impose a tax. This Court itself has recognized the significance of this feature in distinguishing taxes from other types of charges. For example, in holding that municipal corporations could be held liable for assessments imposed for public improvements, despite their constitutional exemption from taxes, the Court explained:

It is true that local assessments may be a species of tax, and that the authority to levy them is generally referred to the taxing power, but they are not taxes within the meaning of that term as generally understood in constitutional restrictions and exemptions. They are not levied and collected as a contribution to the maintenance of the general government, but are made a charge upon property on which are conferred benefits entirely different from those received by the general public. They are not imposed upon the citizens in common at regularly recurring periods for the purpose of providing a continuous revenue, but upon a limited class in return for a special benefit.

Town of Tarboro v. Forbes, 185 N.C. 59, 61, 116 S.E. 81, 82 (1923). *Accord Raleigh Cemetery Ass'n v. City of Raleigh*, 235 N.C. 509, 70 S.E.2d 506 (1952) (following *Town of Tarboro's* reasoning in ruling that burial association's charter exempting it from assessment and taxes did not exempt it from assessments for street improvements). Because the government may charge for benefits received by the persons paying such charges, sewerage fees have been held not to constitute taxes. *Covington v. City of Rockingham*, 266 N.C. 507, 146 S.E.2d 420 (1966). Similarly,

the North Carolina Court of Appeals has followed this Court's reasoning in holding that landfill fees charged by a county "are neither taxes nor assessments, but are tolls or rents for benefits received by the use of the [landfill]." *Barnhill Sanitation Serv. v. Gaston County*, 87 N.C. App. 532, 541, 362 S.E.2d 161, 167 (1987) (quoting *Covington*, 266 N.C. at 511-12, 146 S.E.2d at 423 (1966)), *disc. review denied*, 321 N.C. 742, 366 S.E.2d 856 (1988).

Plaintiffs try to escape the principle that a governmental fee or other charge in exchange for conferring a benefit does not constitute a tax by attempting to separate the benefit from the "profit" component. According to plaintiffs, the purchaser of a Lottery ticket receives a benefit from any Lottery winnings, but not from the statutory provisions that allot the "profit" portion of the Lottery to educational purposes. In other words, plaintiffs are complaining not about the sale of the Lottery tickets *per se*, but about the fact that the Lottery makes a profit and provides funds for educational purposes. Other courts have rejected analogous arguments.⁵

⁵ Plaintiffs and *amicus curiae* both cite this Court to a case that they contend held that video lottery charges constituted a tax. *See Club Ass'n of West Virginia, Inc. v. Wise*, 156 F. Supp. 2d 599 (S.D. W. Va. 2001), *aff'd per curiam*, 293 F.3d 723 (4th Cir. 2002). That case actually dealt not with the Lottery charges themselves, but rather with licensing fees that were required of persons manufacturing, selling, servicing or operating video lottery games pursuant to the West Virginia lottery laws. The tax at issue in that case was a license tax to engage in any of the activities listed above and was totally unrelated to the purchase of tickets by lottery participants.

Not only is it clear that the government may charge for benefits received, but it may also in effect make a profit, and use those profits for general governmental purposes, without such charges being converted into taxes. This principle has been repeatedly recognized with regard to utility charges. Thus, a federal district court concluded that the City of Rocky Mount could deliberately set water, sewer, gas and electricity charges at a rate high enough to produce additional revenues to be transferred into its general fund for general governmental purposes. *Gen. Textile Printing & Processing Corp. v. City of Rocky Mount*, 908 F. Supp. 1295 (E.D.N.C. 1995). In that case, the court ruled that Rocky Mount's collection of a profit component in its utility rates did not convert the charges into taxes; consequently, the plaintiff's claim that it had been subjected to discriminatory taxation in violation of Article V, Section 2(1) of the North Carolina Constitution was rejected. *Id.* at 1310-11. Similarly, New Mexico recognizes that sewer and water charges may properly include a profit component to be provided to the general revenue fund of a city without converting the charges, or even the "profit" component, into taxes. *Apodaca v. Wilson*, 86 N.M. 516, 525 P.2d 876 (1974). See also *United States v. City of Columbia*, 914 F.2d 151, 155-56 (8th Cir. 1990) (City of Columbia could charge United States for water and electricity, including an intentional profit component paid

into the general revenue fund, without converting fees into taxes, for which the United States could not be charged).

Clearly, courts have recognized that the sale by the government of a service or benefit to a citizen does not constitute a tax, even if the governmental entity effectively makes a profit from the transaction. As stated in *City of Columbia*:

While the payment of a tax does not transfer ownership, the payment of a purchase price . . . transfers ownership of water and electricity. And, while failure to pay a tax results in civil and sometimes criminal penalties, the failure to pay a portion of a utility rate results in termination of services. The United States' obligation to pay the [charge] arises only from its consensual purchase of the City's property; it does not arise automatically, as does tax liability, from the United States' status as a property owner, resident, or income earner. When the United States purchases water, electricity, and related services, and then pays the utility bill, it does so as a vendee pursuant to its voluntary, contractual relationship with the City. The City imposes the charge not in its capacity as a sovereign, but as a vendor of goods and services.

914 F.2d at 155-56. *Accord Stop Exploiting Taxpayers v. Jones*, 211 Ariz. 576, 579, 125 P.3d 396, 399 (2005) (rejecting contention that city's increase of utility rates constituted a tax increase, even if the utility rates included a profit component designed to fund general municipal budget needs).

In this case, plaintiffs complain about voluntary purchases of Lottery tickets for which the Lottery Commission charges an amount that includes a profit component. No tax is being levied or imposed; instead, the Lottery engages in a voluntary

transaction with individuals who are willing to pay for the chance of winning money from the Lottery. The Lottery and the State collect funds not as a sovereign imposing taxes, but as a vendor of Lottery tickets. Because the Lottery Act does not impose a tax, the General Assembly was not required to enact the Lottery Act pursuant to the restrictions of Article II, Section 23 of the Constitution. The trial court properly entered judgment for defendants on plaintiffs' "implicit tax" claim in Count Three of their complaint, and the Court of Appeals correctly determined "that the Lottery Act does not 'impose any tax upon the people of the State.'" *Heatherly*, 658 S.E.2d at 17-18.

C. THE LOTTERY ACT NEITHER PLEDGES THE FAITH OF THE STATE FOR PAYMENT OF A DEBT NOT ATTEMPTS TO RAISE MONEY ON THE CREDIT OF THE STATE.

Plaintiffs argue that the Lottery Act also comes within the scope of Article II, Section 23 by raising money on the credit of the State and pledging the faith of the State. Plaintiffs are wrong. The Lottery Act was not "enacted to raise money on the credit of the State, or to pledge the faith of the State directly or indirectly for the payment of any debt." N.C. CONST. art. II, § 23. Instead, it merely provides for the implementation of the Lottery, including the payment of winnings according to the terms of the Lottery games. Such provisions have nothing to do with the credit of the State or pledging the faith of the State for payment of a debt. The majority of the

Court of Appeals correctly held that “the Lottery Act neither pledges the faith of the State for payment of a debt nor attempts to raise money on the credit of the State,” *Heatherly*, 658 S.E.2d at 16, and this Court should affirm.

As explained by Professor Orth, “[r]aising money on the credit of the state or pledging its faith implicates borrowing – that is, securing money in the present by promising future repayment, usually with interest.” JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION 88. Generating funds by selling tickets and paying a percentage of those funds as winnings has nothing to do with borrowing money, which is the focus of Article II, Section 23. If plaintiffs’ reasoning and that of the dissent in *Heatherly* were correct, then every statute that provided for the State to pay money for any purpose would fall within the scope of Article II, Section 23. *See id.* at 19-21 (Calabria, J., dissenting) As pointed out long ago by the Supreme Court of Mississippi in addressing the applicability of a similar constitutional provision:

It will certainly not be contended, that an act passed by the legislature for the purpose of authorizing contracts to be made in behalf of the State, for the purchase of property, for the erection of public buildings, or for the construction of works of internal improvement, or for many other purposes, by the terms of which the State would be bound for the payment of money, can be considered a law passed to pledge the faith of the State “for the payment or redemption of a debt,” and, therefore, within the operation of the constitutional provision.

State v. Johnson, 25 Miss. 625, 742, 1853 Miss. LEXIS 34, * 209 (1852) (quoting MISS. CONST. art. 7, § 9). Article II, Section 23 cannot and should not be distorted to apply to every piece of legislation that provides for the State to pay money.

This Court, too, has ruled on previous occasions that various acts providing for the payment of money did not come within Article II, Section 23 or its predecessors. In *Battle v. Lacy*, 150 N.C. 573, 64 S.E. 505 (1909), the Court rejected the idea that an act providing for the payment of money to an estate in settlement of a claim fell within the scope of what was then Article II, Section 14 of the Constitution. “It is not pledging the faith of the State for the General Assembly to order the State Treasurer to pay a debt with money.” *Id.* at 575, 64 S.E. at 506. Similarly, “a lease made for an adequate consideration is not a loan of the credit of the state or of the agency making such lease.” *N.C. State Ports Auth. v. First-Citizens Bank & Trust Co.*, 242 N.C. 416, 424, 88 S.E.2d 109, 114 (1955). In other words, the Court has recognized that Article II, Section 23 is not directed to legislation which merely provides for the payment of money under certain circumstances, but instead is aimed at legislation providing for the borrowing of money or pledging the State’s liability for payment of debts. The Lottery Act does neither.

Should there be any doubt about the applicability of Article II, Section 23, the General Assembly dispelled such doubt by specifying that the Lottery “Commission

shall be located in the Department of Commerce for budgetary purposes only; otherwise, the Commission shall be an independent, self-supporting, and revenue-raising agency of the State. The Commission shall reimburse other governmental entities that provide services to the Commission.” N.C.G.S. § 18C-110 (2008). The status of the Lottery Fund as separate from other state funds financially was reinforced by the General Assembly in N.C.G.S. § 18C-160. That section declares that “[a]n enterprise fund, to be known as the North Carolina State Lottery Fund, is created within the State treasury. The North Carolina State Lottery Fund is appropriated to the Commission and may be expended without further action of the General Assembly for the purposes of operating the Commission and the lottery games.” By this language, the General Assembly made it very clear that the Lottery and the Lottery Fund are separate and independent financially. Contrary to plaintiffs’ argument, Chapter 18C cannot be read to authorize payment of Lottery prizes from other State funds.

Because the Lottery Act makes the Lottery an independent and self-supporting agency, plaintiffs have no claim under Article II, Section 23. *See Turnpike Author.*, 265 N.C. at 117, 143 S.E.2d at 325 (holding that the credit of the State was not pledged by the issuance of turnpike authority bonds because the bonds were “payable solely from revenues from the turnpike” and the enabling legislation made it clear that

they were not issued on the credit of the State). *See also Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 54, 175 S.E.2d 665, 679 (1970) (where housing authority legislation specified that obligations did not create a debt or pledge faith and credit of the State, but were payable from the assets and revenues of the Corporation, no debt was created within the meaning of the Constitution).

In a case instructive on the question of what language the Court deems sufficient to insulate the State from any claim under Article II, Section 23, *Foster v. N.C. Med. Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973), the Court addressed legislation providing for lease agreements for hospital facilities. In *Foster*, the Court noted that, “[h]ad this provision of the Act made such obligation of the lessee payable only from revenues derived from the leased facilities, the above cited decisions [such as the *Turnpike Authority* case and *Martin v. N.C. Hous. Corp.*] relating to what constitutes a debt of the State would be applicable.” *Foster*, 283 N.C. at 122, 195 S.E.2d at 526. Nowhere in *Foster* does the Court suggest that any language is necessary beyond the very kind of language contained in the Lottery Act.

Plaintiffs argue, however, that the language in the Lottery Act is insufficient because it fails to state expressly that the Lottery provisions shall not be deemed a debt of the State or a pledge of the faith or credit of the State, in contrast to the language at issue in decisions such as the *Turnpike Authority* and *Ports Authority*

cases. In those cases, and most others addressing Article II, Section 23's provisions regarding the credit of the State or pledging the faith of the State for any debt, the issuance of some sort of bonds has been central to the decision. Thus, the State was in fact borrowing money when it sold the bonds. Yet, even in those cases, the Court found Article II, Section 23 inapplicable if sufficient care had been taken to spell out that the State would not be liable beyond the sources of revenue expressly dedicated to payment of the bonds. Here, no bonds are involved, and the transaction between the Lottery and the Lottery ticket purchaser is fundamentally different from that of a bond purchaser, who is effectively loaning money to the State. *See Heatherly*, 658 S.E.2d at 15.⁶

Even if one could analogize the sale of a Lottery ticket to the issuance of a bond, surely the relationship would most closely resemble that created by revenue bonds. Under those circumstances, the State's credit is not pledged, and the bonds are not considered debts of the agency issuing them. *See N.C. State Ports Auth. v. First-*

⁶ The dissenting opinion in the Court of Appeals suggests the General Assembly could have added to Chapter 18C of the General Statutes language such as that found in N.C.G.S. § 157-14 specifying that housing authority bonds should not be city or State debts and shall not function as an indebtedness of the State for purposes of any constitutional or statutory debt restriction. *See Heatherly*, 658 S.E.2d at 20-21 (Calabria, J., dissenting). The fact that such language was included in a statute relating to bonds, which are in fact a form of borrowing, does not mean that it was necessary to include that language as to those bonds, and certainly says nothing about the sale of a Lottery ticket, which does not involve the borrowing that is by definition included in the sale of bonds.

Citizens Bank & Trust Co., 242 N.C. 416, 424, 88 S.E.2d 109, 114 (1955) (“such revenue bonds do not constitute ‘debts’ of the State agency by which they are issued”) (citing *Brockenbrough v. Board of Water Comm’rs*, 134 N.C. 1, 46 S.E. 28 (1903) and *Williamson v. High Point*, 213 N.C. 96, 195 S.E. 90 (1938)) (quoted in *Heatherly*, 658 S.E.2d at 15). Moreover, as the majority observed below, this Court has focused on “[w]hat is being pledged as security [as] the constitutionally significant factor” in determining whether Article II, Section 23 applies. *Heatherly*, 658 S.E.2d at 16 (quoting *Wayne County Citizens Ass’n for Better Tax Control v. Wayne County Bd. of Comm’rs*, 328 N.C. 24, 31, 399 S.E.2d 311, 316 (1991)). Indeed, the Court has observed that “[t]he possibility that appropriations which might include income from tax revenues will be used to repay the indebtedness under the contract is not a constitutionally significant factor.” *Wayne County Citizens*, 328 N.C. at 31, 399 S.E.2d at 316 (quoted in *Heatherly*, 658 S.E.2d at 16). In this case, at most, only the revenues from sales of Lottery tickets have been pledged, and no constitutionally significant pledge or revenues to pay Lottery tickets has occurred. See *Heatherly*, 658 S.E.2d at 16.

In the Court of Appeals, the dissenting opinion took the position that the State had made itself vulnerable to claims against the general funds of the State by selling Lottery tickets. The dissent did so partly by a peculiar construction of N.C.G.S.

§ 18C-162 (2006). That section, which was slightly amended in 2007, *see* N.C.G.S. § 18C-162 (2008) is captioned “Allocation of revenues.” In the pre-amendment version, discussed in the Court of Appeals’ dissent, the introductory language of N.C.G.S. § 18C-162(a) directs that, “[t]o the extent practicable, the Commission shall allocate revenues to the North Carolina State Lottery Fund in the following manner,” and the remaining paragraphs specify that at least fifty percent (50%) must go to prizes, at least thirty-five percent (35%) to the Education Lottery Fund, no more than eight percent (8%) to Lottery expenses, and no more than seven percent (7%) to Lottery retailers. N.C.G.S. § 18C-162(a) (2006). After the amendment, the introductory paragraph provides that “[t]he Commission shall allocate revenues to the North Carolina State Lottery Fund in order to increase and maximize the available revenues for education purposes, and to the extent practicable, shall adhere to the following guidelines,” and then lays out the same percentages as in the pre-amendment version. N.C.G.S. § 18C-162(a) (2008). In either version, the General Assembly tells the Commission how to allocate “revenues,” with the proviso that the Commission must follow the percentages set out in the statute “to the extent practicable.” It is that last language which, according to the dissenting opinion below, somehow “makes it clear that while the State intends to pay lottery winners from lottery revenues, it has not expressly limited its liability to lottery revenues.”

Heatherly, 658 S.E.2d at 19-20 (Calabria, J., dissenting). The dissent assumes that the section means that lottery proceeds will be used to pay prizes “to the extent practicable,” but does not bar prize winners from asserting claims in the event that Lottery revenues are inadequate to pay all prizes. *Id.* at 20. In reality, that section speaks only to how Lottery revenues will be divided among different accounts, not to payments from those accounts. “[T]o the extent practicable” may take into account that prize money might not be fully claimed, expenses in a particular year might be much higher or lower than normal, or some other occurrence might limit the ability of the Lottery to meet those percentages precisely in making deposits. But the language says only that “to the extent practicable,” the money *received* will be *allocated* in the specified manner in *deposits*. Additionally, as the majority pointed out below, the notion that somehow prize winners will be making claims against the State, even if they could, is highly unlikely since a minimum of fifty percent (50%) of the revenues is set aside for prizes. *Heatherly*, 658 S.E.2d at 16. Significantly, no transfer is made to the Education Lottery Fund for educational purposes until all prizes and expenses have been accrued, and the transfer for educational purposes is only of the net revenues after taking into consideration revenues, prize obligations, and expenses. N.C.G.S. § 18C-164 (2008). The *Heatherly* dissent’s assumption that somehow the statutory scheme allows the possibility that the State will be obligated

to pay prizes apart from the Lottery revenues reflects a misreading or misunderstanding of the statutory scheme. Finally, as the majority points out, should this highly unlikely hypothetical occur, “[i]t is unclear under what legal theory a prize winner could bring a successful claims against the State for payment out of other state funds.” *Heatherly*, 658 S.E.2d at 16 n.3.

Contrary to plaintiffs’ arguments, simply selling a Lottery ticket does not constitute an attempt to raise money on the credit of the State or a pledge of the faith of the State for the payment of any debt. Plaintiffs are simply wrong in contending that the Lottery Act falls within Article II, Section 23’s provisions concerning raising money on the credit of the State or pledging the faith of the State for the payment of a debt. This Court should affirm the Court of Appeals decision affirming the trial court’s order and judgment in favor of defendants.

II. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE TRIAL COURT’S ASSESSMENT OF COSTS AGAINST PLAINTIFFS AND PLAINTIFF-INTERVENORS.

**ASSIGNMENT OF ERROR NOS. 3-8, 23-24
(R pp. 468-69, 472)**

Plaintiffs contend that the trial court improperly assessed costs against both plaintiffs and plaintiff-intervenors. They claim that the trial court abused its discretion and erred as a matter of law in doing so. Plaintiffs are wrong. The Court of Appeals

correctly affirmed the trial court's award of costs to defendants, and this Court should affirm as well. *See Heatherly*, 658 S.E.2d at 18-19.

Pursuant to N.C.G.S. § 1-263, the trial “court may make such award of costs as may seem equitable and just” in a declaratory judgment proceeding. Accordingly, “[i]t was within the trial court's discretion under this statute to apportion costs as it deemed equitable.” *City of New Bern v. New Bern-Craven County Bd. of Educ.*, 338 N.C. 430, 444, 450 S.E.2d 735, 743 (1994). The trial court's exercise of discretion is reversible only upon a showing that its decision is “manifestly unsupported by reason.” *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (cited in *Heatherly*, 658 S.E.2d at 18). The majority below further pointed out that, “under longstanding precedent of the North Carolina courts, if nothing in the record appears to the contrary, we will presume that the trial court exercised discretion in awarding such costs.” *Heatherly*, 658 S.E.2d at 18 (citation omitted). *See also Castle McCulloch, Inc. v. Freedman*, 169 N.C. App. 497, 504, 610 S.E.2d 416, 422 (“[w]here the court has taxed costs in a discretionary manner its decision is not reviewable”) (citation omitted), *aff'd per curiam*, 360 N.C. 57, 620 S.E.2d 674 (2005).

In this case, plaintiffs have made no showing that the trial court abused its discretion or that it erred as a matter of law. No specific costs have been submitted and awarded, so this appeal does not present the Court with any question as to the

appropriateness of a particular type of cost. Contrary to the heading in the dissent in the Court of Appeals, which is labeled “Attorneys’ Fees,” attorney’s fees are not at issue here. *See Heatherly*, 658 S.E.2d at 22 (Calabria, J., dissenting) In reality, the trial court made a routine assessment of ordinary costs to be paid by the losing parties, pursuant to its statutory authority, and plaintiffs have brought forward no reason why this assessment should be set aside.

Plaintiffs, however, have chosen to argue about specific findings the trial court made, including findings that the trial court actually made with regard to the defendants’ claim of laches. In particular, the trial court determined that “no justification has been shown for the delay in initiating this litigation in December 2005.” (Finding of Fact No. 49, R p. 451) Other findings of fact included the reliance by the defendants on the existence of the Lottery Act in expending money, entering into contracts, and hiring employees, some of whom relied on the Lottery Act in altering their positions, and that plaintiffs had actual or constructive knowledge of their own claims and efforts to implement the Lottery Act prior to the filing of their complaints. (Findings of Fact Nos. 42-48, R p. 451) The findings establishing the implementation of the Lottery act were well-supported by the affidavit of Thomas Shaheen, Executive Director of the Lottery. (R pp. 391-94) As the Court of Appeals observed, plaintiffs did not really challenge the validity of the trial court’s findings

concerning the hiring of employees, entrance into contracts and other expenses, the fact those expenditures could not be undone, and the fact that various persons, including employees and contractors, had relied on the Lottery Act. *Heatherly*, 658 S.E.2d at 21-22. Plaintiffs and the dissent below mainly disagree with the significance of the trial court's findings, primarily because they say defendants were notified of the plaintiffs' position and also that plaintiffs were not aware of specific provisions of the Lottery Act in time to mount a challenge more quickly after the Lottery Act was enacted on 31 August 2005. *See* Plaintiff Appellants' New Brief, pp. 36-38; *Heatherly*, 658 S.E.2d at 23 (Calabria, J., dissenting).

Plaintiffs and the dissenting opinion seem to assume that the defendants could have simply ignored the mandate of the Lottery Act and refrained from implementing it because plaintiffs threatened to sue or even after suit, in the absence of a preliminary injunction. (R pp. 276-78) It is not up to state officials to determine the constitutionality of legislation, and the defendants were not authorized to refrain from taking the steps necessary to have the Lottery in effect by the schedule set out in the enacting legislation. *See Bailey v. State*, 330 N.C. 227, 245-46, 412 S.E.2d 295, 306-07 (1991).

Nor can plaintiffs hide behind the need to wait until the Lottery Act was enacted, and its terms finalized, even to begin work on their lawsuit. *See* Plaintiff

Appellant's New Brief, p. 36. According to the affidavit of plaintiff Paul Stam, as a member of the North Carolina House of Representatives he was present on 6 April 2005 when the House voted on H.B. 1023; prior to the vote, he personally objected under Article II, Section 23 of the North Carolina Constitution. (R pp. 142-47) According to the affidavit of plaintiff W. Edward Goodall, Jr., as a member of the North Carolina Senate, he was present on 30 August 2005 when Senator Forrester raised a point of order about the failure of the House bill to meet the requirements of Article II, Section 23 of the North Carolina Constitution, and plaintiff Goodall then made an objection to the third reading of the bill in the Senate on the same grounds. (R pp. 135-41) According to the original plaintiffs' complaint, plaintiff North Carolina Family Policy Council "was actively engaged in lobbying against the Lottery Act." (Complaint ¶ 9, R p. 6) Clearly, plaintiffs were fully aware of the issues concerning the Lottery Act prior to its enactment, as far back as April of 2005 according to plaintiff Stam's affidavit. (R p. 144) They were not entitled to stand back and wait to bring suit when the provisions of the Lottery Act necessarily required defendants to act promptly in preparing to implement the Act.

Plaintiffs suggest that costs should never be charged against plaintiffs bringing constitutional challenges "because such an award creates a chilling effect upon the people's right to access to the courts." (Pls.' New Br., p. 39) *See also Heatherly,*

658 S.E.2d at 23 (Calabria, J., dissenting). In support of this theory, plaintiffs cite *Minor v. Michigan Education Assoc.*, 127 Mich. App. 196, 202 n.2, 328 N.W.2d 913, 917 n.2 (1983) for the proposition that the assessment of costs may serve as a deterrent to a party's seeking relief. *Minor*, however, involved attorney's fees, not just ordinary costs. Since attorney's fees are not at issue here, *Minor* is of little relevance. Plaintiffs have no authority for the principle that they should be exempt from the assessment of costs simply because they brought a lawsuit asserting a constitutional challenge.

All involved agree that the decision to assess costs is a matter for the trial court's discretion subject to review only for abuse of that discretion. *See Heatherly*, 658 S.E.2d at 18; 658 S.E.2d at 22 (Calabria, J., dissenting). *See also* Plaintiff Appellants' New Brief, p. 35. Plaintiffs have shown no abuse of that discretion. Indeed, the exercise of that discretion to award costs is amply supported by the fact that the trial court determined "[t]hat all of the allegations of the complaints of both the plaintiffs and the plaintiff-intervenors alleging that the General Assembly violated Article II, Section 23 and Article V, Section 7 of the Constitution of North Carolina are without merit and should be dismissed." (R p. 456) The Court of Appeals properly rejected plaintiffs' appeal from the trial court's award of costs to defendants, and this Court should affirm.

CONCLUSION

For all the reasons discussed above, the defendants submit that the Court of Appeals properly affirmed the trial court's judgment for defendants and assessment of costs against plaintiffs. Accordingly, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted, this the 23rd day of June, 2008.

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N.C. App. R. 33(b) Certification: I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing DEFENDANT-APPELLEES' NEW BRIEF in the above-captioned action upon all parties by depositing a copy of the same in the United States mail, first-class postage prepaid, addressed as follows:

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