

STATE OF NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
07 CVS 11756

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 Budge 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. )

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

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CERTIFICATE OF SERVICE

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**STATE DEFENDANTS’  
MEMORANDUM OF LAW  
IN SUPPORT OF  
THEIR MOTION TO DISMISS**

NOW COME the State of North Carolina, James T. Fain, III, Reginald Hinton, David McCoy, and Michael F. Easley (hereafter collectively referred to as the “State defendants”), and serve this Reply Brief in support of their motion to dismiss. The State defendants urge the Court to dismiss plaintiffs’ action as against the State defendants in its entirety, for the reasons set out in the State Defendants’ original memorandum of law in support of their motion to dismiss and in this Reply Brief, as well as the reasons set out in the other defendants’ briefs. The State Defendants submit that their original memorandum of law, as well as this Reply Brief, along with the briefs of the other defendants, establish without question that plaintiffs’ complaint should be dismissed as to each and every claim against all defendants.

## ARGUMENT

### I. NO INCENTIVES AVAILABLE TO GOOGLE VIOLATE THE PUBLIC PURPOSE CLAUSE OF THE NORTH CAROLINA CONSTITUTION.

Plaintiffs argue that the sales and use tax exemption for internet data centers, contained in N.C.G.S. §§ 105-164.3(8e) and 105-164.13(55), as well as the possible Job Development Investment Grant (“JDIG”) which has been approved for Google<sup>1</sup> pursuant to N.C.G.S. §§ 143B-437.50 *et seq.*, but never finalized, violate the “public purpose” clause of Article V, Section 2(1) and Article V, Section 2(7) of the Constitution of North Carolina. To support their argument, plaintiffs promote what is, at the very least, an extremely narrow interpretation of the decision in *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996), and an equally narrow, if not clearly erroneous, interpretation of *Blinson v. State*, \_\_ N.C. App. \_\_, 651 S.E.2d 268 (2007), *appeal dismissed* and *disc. review denied*, 2008 N.C. LEXIS 453-57 (April 10, 2008). To further buttress their argument, plaintiffs ask the Court to rely on earlier cases, such as *Madison Cablevision, Inc. v. Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989), which present less directly analogous situations than do *Maready* and *Blinson*. Moreover, plaintiffs also ask the Court to focus on still earlier cases, including *Mitchell v. North Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 159 S.E.2d 745 (1968), and *Stanley v. Department of Conservation & Dev.*, 284 N.C. 15, 199 S.E.2d 641 (1973), and other cases which, if not overruled, have certainly had their luster tarnished by the decision in *Maready* and later cases. This Court should reject plaintiffs’ invitation to re-write *Maready* and *Blinson* and to disregard their teachings by harkening back to an earlier approach to interpreting and applying the public purpose concept.

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<sup>1</sup> “Google” is used throughout this brief to refer collectively to defendants Google Inc, and Madras Integration, LLC.

The most startling aspect of plaintiffs' argument before this Court is that somehow they conclude that *Maready*, the most recent and significant North Carolina Supreme Court case dealing with economic incentives and the public purpose clauses of the Constitution, is not controlling. Even more amazingly, plaintiffs dismiss *Maready* as "not even useful to the Court's decision here." (Pls.' Br. at 20) Plaintiffs try to limit the significance of *Maready*, in part, by contending that it stands only for the proposition that N.C.G.S. § 158-7.1 is facially constitutional. They ignore the fact that *Maready* specifically noted that twenty-four economic development incentive projects were challenged in that case. *Maready*, 342 N.C. at 712, 467 S.E.2d at 618. Thus, the Court did not uphold § 158-7.1 in a vacuum when it approved the expenditures authorized by that section. *Id.* at 723-24, 467 S.E.2d at 625. Indeed, in dissenting from the majority opinion, then-Justice Orr commented, "[i]f it is an acceptable public purpose to spend tax dollars specifically for relocation expenses to benefit the spouses of corporate executives moving to the community in finding new jobs or for parking decks that benefit only the employees of the favored company, then what can a government not do if the end result will entice a company to produce new jobs and raise the tax base?" *Id.* at 741-42, 467 S.E.2d at 635-36 (Orr, J., dissenting). The dissenting opinion further declared that "N.C.G.S. § 158-7.1, as broadly interpreted and applied by the majority, is unconstitutional on its face and as applied." *Id.* at 742, 467 S.E.2d at 636 (Orr, J., dissenting) (emphasis added). Clearly, while the holding in *Maready* was that § 158-7.1 is constitutional, both the majority and the dissenters addressed that question of the statute's constitutionality in the context of particular incentives offered pursuant to specific economic development projects challenged by

the plaintiffs in that litigation.<sup>2</sup> Plaintiffs' attempt to dismiss *Maready* on the theory that it decided only the facial validity of N.C.G.S. § 158-7.1 should be rejected by this Court the same way a similar argument was rejected by the Court of Appeals in *Blinson*, 651 S.E.2d at 276.<sup>3</sup>

In plaintiffs' view, *Maready* was not directly on point. Consequently, according to plaintiffs, the Court should look at earlier case law, despite the fact that those earlier cases were even less on point or were, in some instances, rendered questionable by the decision in *Maready*. To advance their argument, plaintiffs urge the indisputable principle that

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

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<sup>2</sup> Plaintiffs rely, in part, on the issues raised in the brief filed by the State in that case, which addressed only the facial validity of the statute. (Pls' Br. at 19) As plaintiffs' citation to the State's *Maready* brief reflects, the State was an intervenor in that litigation, participating for the limited purpose of defending the statute. *See Maready*, 342 N.C. at 712-13, 467 S.E.2d at 618 ("The State of North Carolina, ex rel. Michael F. Easley, Attorney General, is a party defendant by way of voluntary intervention as a matter of right pursuant to Rule 24(a)(1) of the North Carolina Rules of Civil Procedure and N.C.G.S. § 1-260, in that the action seeks to have an act of the General Assembly of the State of North Carolina declared unconstitutional.")

<sup>3</sup> Plaintiffs denigrate the relevance of *Blinson* by selectively citing from it and describing it as being "little more than an application of Supreme Court precedent by the Court of Appeals." (Pls.' Br. at 18) In their selective citations from *Blinson*, plaintiffs rely on portions dealing with the local incentives at issue in that case. *See Blinson*, 651 S.E.2d at 276. Plaintiffs largely ignore the more significant portion of the *Blinson* public purpose analysis, which dealt with state legislation providing tax credits and refunds to certain computer facilities, legislation which the Court of Appeals upheld as being enacted for a public purpose in the face of a challenge characterizing it as being exclusively for the benefit of Dell, Inc. *See id.* at 276-78.

must be the public's as contradistinguished from that of an individual or private entity.

*Madison Cablevision*, 325 N.C. at 645-46, 386 S.E.2d at 207, originally in *Mitchell*, 273 N.C. at 144, 159 S.E.2d at 750 (citations omitted), *quoted in Maready*, 342 N.C. at 716, 467 S.E.2d at 620-21. Next, plaintiffs rely on the equally indisputable principle that the Supreme Court follows certain guidelines in determining whether an expenditure is, in fact, for a public purpose. “Two guiding principles have been established for determining that a particular undertaking by a municipality is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the particular municipality; and (2) the activity benefits the public generally, as opposed to special interests or persons.” *Madison Cablevision*, 325 N.C. at 646, 386 S.E.2d at 207 (upholding city’s decision to build and operate exclusive cablevision franchise pursuant to statutory authorization) (citations omitted), *quoted in Maready*, 324 N.C. at 722, 467 S.E.2d at 624, and in *Blinson*, 651 S.E.2d at 276.

In their efforts to portray the incentives here as failing the public purpose test, plaintiffs look to still older cases such as *Briggs v. City of Raleigh*, 195 N.C. 223, 141 S.E. 597 (1928), and *Nash v. Town of Tarboro*, 227 N.C. 283, 42 S.E.2d 209 (1947). *Briggs* concluded that an appropriation for the State Fair was for a public purpose. *Nash* concluded that the acquisition or construction and ownership of a hotel by a municipality was not for a public purpose. From these cases, plaintiffs leap to the conclusion that establishment of an internet data center would not be for a public purpose and therefore the State cannot “subsidize” one through economic encouragement. (Pls.’ Br. at 24)

It is difficult to understand how these older, less directly comparable cases are more relevant to this Court’s analysis than *Maready* and *Blinson*. As the Court of Appeals said in *Blinson*, “[a]ny consideration of the constitutionality of economic development incentives must start with the

Supreme Court's decision in *Maready*.” 651 S.E.2d at 275. With regard to the first prong of the *Madison Cablevision* test, the Court in *Maready* observed that “whether 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.” *Maready*, 342 N.C. at 722, 467 S.E.2d at 624. On that point, the Court noted that “[e]conomic development has long been recognized as a proper governmental function” and that the Court had previously “declared that stimulation of the economy involves a public purpose.” *Maready*, 342 N.C. at 723, 467 S.E.2d at 624, 625. Additionally, the Court stated that its cases

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

*Id.* at 722, 467 S.E.2d at 624. “Thus, under *Maready*, the need to offer economic incentive programs to attract industry that will replace lost jobs is *necessarily* a public purpose.” *Blinson*, 651 S.E.2d at 276 (emphasis added).

There can be no doubt that the tax exemption for internet data centers is designed to stimulate the economy and promote the creation of new jobs. Otherwise, there would be no reason to limit the exemption to facilities which, among other requirements, are accompanied by investments of at least two hundred fifty million dollars (\$250,000,000) within five years after the construction of the facility begins, as certified by the Secretary of Commerce. N.C.G.S. § 105-164.3(8e)d. Similarly, JDIG grants are plainly designed for economic stimulation as the General

Assembly set out detailed findings which make it indisputable that the legislature created these grants from a desire to stimulate economic activity, create new jobs, enlarge the tax base, expand and diversify the industrial base, and create an increase in revenue for the State and its political subdivisions. N.C.G.S. § 143B-437.50. Despite plaintiffs' protestations to the contrary, the purposes for which the internet data center tax exemption was enacted, and the possible JDIG agreement might be executed, are highly similar to those approved in *Maready* and *Blinson*. Therefore, they constitute public purposes under modern constitutional analysis.

Plaintiffs also contend that the internet data center tax exemption, and the potential JDIG agreement, fail the second prong of the public purpose test because, in plaintiffs' view, the exemption and potential JDIG agreement primarily, or even exclusively, benefit Google. As plaintiffs acknowledge (Pls.' Br. at 25), *Maready* concluded that "even the most innovative activities" permitted under N.C.G.S. § 158-7.1 are constitutional because "they are directly aimed at furthering the general economic welfare of the people of the communities affected. While private actors will necessarily benefit from the expenditures authorized, such benefit is merely incidental." *Maready*, 342 N.C. at 724, 725, 467 S.E.2d at 625. Yet, plaintiffs argue that somehow the incentives offered by the State in this case differ from those at issue in *Maready* or *Blinson* and are for the benefit of Google rather than the public interest.

To reach their conclusion, plaintiffs promote the application of the analysis employed by the Court in *Mitchell*. What plaintiffs omit from their argument is the recognition in *Maready* that application of that analysis is different in modern times even if the general principles have remained largely the same.

While *Mitchell* and its progeny remain pivotal in the development of the doctrine, they do not purport to establish a permanent test for determining the

existence of a public purpose. The majority in *Mitchell* posed the question: “Is it today a proper function of government for the State to provide a site and equip a plant for private industrial enterprise?” *Mitchell*, 273 N.C. at 145, 159 S.E.2d at 751 (emphasis added). This explicit recognition of the importance of contemporary circumstances in assessing the public purpose of governmental endeavors highlights the essential fluidity of the concept. While the *Mitchell* majority answered the question in the negative, the passage of time and accompanying societal changes now suggest a positive response.

*Maready*, 342 N.C. at 720, 467 S.E.2d at 623. Thus, while plaintiffs urge this Court to look to *Mitchell* as the arbiter of what constitutes a public purpose, the Court in *Maready* made it clear that even application of the *Mitchell* test requires a different answer in modern times from the answer by the Court in *Mitchell* itself. Indeed, the *Maready* Court quoted approvingly a long excerpt from the dissenting opinion of then-Chief Justice Parker in *Mitchell*:

North Carolina is no longer a predominantly agricultural community. We are developing from an agrarian economy to an agrarian and industrial economy. North Carolina is having to compete with the complex industrial, technical, and scientific communities that are more and more representative of a nation-wide trend. All men know that in our efforts to attract new industry we are competing with inducements to industry offered through legislative enactments in other jurisdictions as stated in the legislative findings and purposes of this challenged Act. It is manifest that the establishment of new industry in North Carolina will enrich a whole class of citizens who work for it, will increase the per capita income of our citizens, will mean more money for the public treasury, more money for our schools and for payment of our school teachers, more money for the operation of our hospitals like the John Umstead Hospital at Butner, and for other necessary expenses of government. This to my mind is clearly the business of government in the jet age in which we are living. Among factors to be considered in determining the effect of the challenged legislation here is the aggregate income it will make available for community distribution, the resulting security of their [sic] income, and the opportunities for more lucrative employment for those who desire to work for it.

*Mitchell*, 273 N.C. at 164, 159 S.E.2d at 764 (Parker, C.J., dissenting) (quoted in *Maready*, 342 N.C. at 727, 467 S.E.2d at 627. Additionally, the Court in *Maready* pointed out that economic

development incentives had been upheld in forty-six other states, and “it would be unrealistic to assume that the State will not suffer economically in the future if the incentive programs created pursuant to N.C.G.S. § 158-7.1 are discontinued.” *Maready*, 342 N.C. at 726-27, 467 S.E.2d at 627.

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

The logic upon which the majority opinion rests its conclusion that the expenditure of these funds was for a public purpose can be stated as follows: The creation of new jobs and an increase in the tax base *ipso facto* benefits the general public. Therefore, local government expenditure of tax dollars to a private business for its private benefit in order to induce the business to either expand or locate in the community is for a public purpose if it creates new jobs and increases the tax base.

*Id.* at 734, 467 S.E.2d at 631 (Orr, J., dissenting)

Plaintiffs, then, are in effect trying to roll back the clock as they persist in ignoring the fact that *Maready*, and later cases, interpret the public purpose test, and especially the public vs. private benefit prong, at a different angle from that employed in many older cases. While older cases focused on the benefit to private individuals or entities, *Maready*, and more recent cases, looked more to the public motive and expected benefit to determine whether a particular action was for a

public purpose in constitutional terms. Thus, not only did *Maready* uphold N.C.G.S. § 158-7.1, but *Blinson* upheld both local incentives and state legislation providing tax credits and refunds that the plaintiffs in that case futilely claimed were solely for the benefit of Dell, Inc. See *Blinson*, 651 S.E.2d at 277. See also *Peacock v. Shinn*, 139 N.C. App. 487, 494-95, 533 S.E.2d 842, 848, *disc. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000) (upholding trial court's dismissal of lawsuit, in part, on the grounds that agreements between the City of Charlotte and a coliseum authority, on the one hand, and the Charlotte Hornets and its owners, including George Shinn, on the other, were for a public purpose, and primarily served a public goal, despite the fact that amendments to the original agreements obligated the City to pay the defendants a percentage of Coliseum profits regardless of whether those profits resulted from Hornets games); *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 554 S.E.2d 331 (2001), *cert. denied*, 535 U.S. 971, 152 L. Ed. 2d 381 (2002) (applying *Madison Cablevision* test in upholding a condemnation of land by an airport authority as being for public use against a challenge based on the contention that the land would be used for the construction, by Federal Express, of a facility that it would then rent from the airport). In all of these cases, private entities received what plaintiffs would, no doubt, consider extensive benefits, yet the appellate courts upheld the governmental actions on the grounds that the motivation was a public one.

As plaintiffs acknowledge (Pls.' Br. at 21), *Blinson* explained in no uncertain terms that the analysis of the public purpose question looks to the "motivation, aim, or intent" of the legislation at issue. *Blinson*, 651 S.E.2d at 278. "The task of the judiciary is to determine whether the aim of the legislation is primarily public and not to weigh the public benefit against the private benefit by making findings as to the projected monetary value of each." *Id.* at 277-78. Nevertheless, plaintiffs

continue to emphasize what they deem to be the benefits to Google. Their arguments assume that Google benefits up to \$90 million, in their estimate, to the full extent of any tax exemption and possible JDIG grant. (Pls.' Br. at 25) Plaintiffs brush off as "speculative at best" any benefit to the public in the form of stimulating the economy, increasing the tax base, and creating new jobs from the minimum two hundred fifty million dollars (\$250,000,000) investment required for the tax exemption to be available to Google or any other internet data facility. (Pls.' Br. at 29) Based on their own analyses, plaintiffs are asking this Court to "engage in economic projections as to the potential monetary benefits resulting from the legislation," despite the fact that those "analyses are for the General Assembly and the Executive Branch, which can also take into account non-monetary benefits." *Blinson*, 651 S.E.2d at 278. Plaintiffs are simply unwilling to accept the reality of modern public purpose analysis – that "an expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose." *Maready*, 342 N.C. at 724, 467 S.E.2d at 625. In sum, plaintiffs have put forth no viable argument that the tax exemption for internet data centers, or any JDIG agreement that might be executed with Google, violate the public purpose provisions of Article V, Section 2(1) or Article V, Section 2(7) of the Constitution of North Carolina. This Court should reject plaintiffs' claims that the internet data center tax exemption, as well as any JDIG agreement, are unconstitutional private benefits, and dismiss plaintiffs' public purpose claims for failure to state a claim upon which relief may be granted.

**II. NO INCENTIVES AVAILABLE TO GOOGLE ARE UNCONSTITUTIONAL EXCLUSIVE EMOLUMENTS IN VIOLATION OF ARTICLE I, SECTION 32 OF THE NORTH CAROLINA CONSTITUTION.**

Plaintiffs contend that the internet data center tax exemption and potential JDIG agreement constitute exclusive emoluments in violation of Article I, Section 32 of the Constitution of North Carolina. Plaintiffs are wrong, and this Court should dismiss plaintiffs' exclusive emoluments claims.

Plaintiffs face an uphill battle in pursuing their exclusive emoluments claims. As they acknowledge, an exemption does not constitute an exclusive emolument if “(1) the exemption is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest.” *Town of Emerald Isle v. State*, 320 N.C. 640, 654, 360 S.E.2d 756, 764 (1987). This test applies equally to affirmative benefits. *Blinson*, 651 S.E.2d at 278. Accordingly, for the same reasons that the internet data center tax exemption and any possible JDIG agreement do not violate the public purpose clauses of the Constitution, they are not exclusive emoluments. As *Blinson* explained, “when legislation is determined to ‘promote the public benefit’ under the Public Purpose Clauses, it necessarily is not an exclusive emolument.” *Id.* See also *Peacock*, 139 N.C. App. at 496, 533 S.E.2d at 848. Plaintiffs, in their Brief, attempt to portray the *Blinson* analysis as less than adamant on the principle that a statute which satisfies the public purpose test cannot be an exclusive emolument or even to suggest that the *Blinson* Court might have erred in its analysis and application of Supreme Court precedent. (Pls.’ Br. at 30-31) In fact, *Blinson* is unequivocal that a statute or benefit cannot be an exclusive emolument if it satisfies the public purpose test. Therefore, for the same reasons the internet data center tax exemption and the possible JDIG agreement do not violate the public purpose clause of Article V, Section 2(1) and Article V, Section 2(7), they do not violate the exclusive emoluments prohibition of Article I, Section 32.

Plaintiffs doggedly continue to argue that this Court should consider whether the internet data center tax exemption and possible JDIG agreement were “in consideration of public services.” They urge this Court to follow language from such cases as *Madison Cablevision* in which the Court explained, “it is clear that article I, section 32 contemplates that exclusive emoluments or privileges may be granted if ‘in consideration of public services.’” *Madison Cablevision*, 325 N.C. at 654, 655, 386 S.E.2d at 212. Plaintiffs’ insistence that the Court should consider whether the internet data center tax exemption and the JDIG agreement were in consideration of public services misses the point. It is only if there is, in fact, an exclusive emolument or privilege that would otherwise violate Article I, Section 32 that it is necessary to consider whether that exclusive grant is in consideration of public services. *See* N.C. CONST. art. I, § 32 (“No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.”) Thus, the “public services” “issue only arises once a court has determined that an exemption or benefit constitutes an exclusive emolument.” *Blinson*, 651 S.E.2d at 279. Because the internet data center tax exemption and possible JDIG agreement are not exclusive emoluments, “it is immaterial whether they were provided ‘in consideration of public services.’” *Id.* Accordingly, plaintiffs’ exclusive emoluments claims under Article I, Section 32 of the Constitution of North Carolina must be dismissed for failure to state a claim upon which relief may be granted.

**III. NO INCENTIVES AVAILABLE TO GOOGLE VIOLATE CONSTITUTIONAL PROHIBITIONS ON UNFAIR AND INEQUITABLE TAXATION, AND PLAINTIFFS LACK STANDING TO CHALLENGE ANY ALLEGED UNFAIR OR INEQUITABLE TAXATION.**

In Counts 7, 8, and 11, plaintiffs present what they refer to as their “fair tax” claims based on what plaintiffs characterize as the “fair and equitable” taxation requirement of Article V, Section 2(1), the uniformity of taxation requirement of Article V, Section 2(2) of the Constitution, and the

law of the land provision of Article I, Section 19 of the Constitution. Despite plaintiffs' attempts to support these claims, all are subject to dismissal, both because plaintiffs lack standing to pursue these claims and because they fail to state claims upon which relief may be granted.

**A. PLAINTIFFS LACK STANDING TO BRING WHAT THEY CALL THEIR FAIR TAX CLAIMS.**

According to plaintiffs, they are entitled to bring all their claims based on their status as taxpayers without showing any injury specifically related to their "fair tax" claims. They disagree with defendants' characterization of their "fair tax" claims as discrimination-type claims and contend that defendants are insisting on a higher degree, or level, of injury for standing than, in plaintiffs' view, is required for them to pursue the claims for uniformity of taxation under Article V, Section 2(2) (Count 8), "fair and equitable" taxation under Article V, Section 2(1) (Count 7), and the law of the land clause of Article I, Section 19 (Count 11). Plaintiffs, however, are wrong; they have not alleged adequate bases for standing for the three claims they call "fair tax claims," and this Court should dismiss those claims pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1).

Plaintiffs argue they have "alleged an injury – Plaintiffs must pay taxes from which Google will be exempt." (Pls.' Br. at 37) To plaintiffs, it is sufficient that they have alleged what they consider to be an injury resulting from the tax exemption, and potential JDIG grants, regardless of whether that alleged injury is directly related to the nature of the claim they are pursuing. Apparently, in plaintiffs' view, standing for one issue is standing for all, regardless of the nature of the issue. They quote from a recent North Carolina Supreme Court opinion, "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 v. State*, 361 N.C. 26, 33, 637 S.E.2d 876, 881 (2006). They argue that *Goldston* makes no distinction between taxpayer standing for

claims questioning the underlying governmental authority to spend money for a particular purpose, such as plaintiffs' public purpose claims or the claims of misuse of Highway Trust Fund money at issue in *Goldston*, and other types of claims, such as their uniformity of taxation claims. (Pls.' Br. at 36) *Goldston*, of course, did not involve any claims of the discrimination or individual right nature, a point which explains why the Court would not analyze standing for claims of those types.

Plaintiffs' argument ignores the fundamental nature of standing and the reason it is required for a plaintiff to pursue a claim. The "gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Goldston*, 361 N.C. at 30, 637 S.E.2d at 879 (quoting *Stanley*, 284 N.C. at 28, 199 S.E.2d at 650) (quoting *Flast v. Cohen*, 392 U.S. 83, 99, 20 L. Ed. 2d 947, 961 (1968) (citation omitted)) (internal quotation marks omitted). *Accord Blinson*, 651 S.E.2d at 274. As the Court of Appeals explained in *Blinson* with regard to those plaintiffs' uniformity of taxation and federal Commerce Clause claims, "[p]laintiffs' claims that the Computer Legislation violates the Uniformity of Taxation Clauses and the Federal Dormant Commerce Clause do not relate to any injury plaintiffs themselves have sustained." *Id.* Similarly, plaintiffs' "fair tax" claims in this case do not relate to any injury these plaintiffs have sustained. For example, whether the internet data center tax exemption is "uniformly applicable to all businesses in every county, city and town and other unit of government" or whether it "treat[s] Google in a massively preferential way relative to other similarly situated taxpayers" (Compl. ¶ 78) does not relate to any injury that might have been suffered by plaintiffs, as individual citizens and taxpayers who are in no way similarly situated to internet data centers or Google or any other business. Nor do any of plaintiffs'

allegations concerning what they call the “fair and equitable” clause of Article V, Section 2(1) or the law of the land clause of Article I, Section 19 relate specifically to any injury plaintiffs might have incurred except dislike of the internet data center tax exemption and the potential JDIG agreement.<sup>4</sup> (Compl. ¶¶ 75-76, 83-91) In other words, plaintiffs lack any “personal stake in the outcome of the controversy with respect to their challenges under these provisions.” *Id.* (quoting *Stanley*, 284 N.C. at 28, 199 S.E.2d at 650) (internal quotation marks omitted).

Astoundingly, plaintiffs argue to this Court that *Goldston* controls the standing issue and never even acknowledge the decision in *Blinson* that rejected a similar argument. *Blinson* was decided after *Goldston* and recognized its significance, readily determining that *Goldston* resolved all questions of plaintiffs’ standing as to public purpose and exclusive emoluments claims. *Blinson*, 651 S.E.2d at 273-74. Nevertheless, *Blinson* held that plaintiffs were required, for their discrimination-type claims, including uniformity of taxation, to show standing directly related to those claims. Thus, for uniformity of taxation, the Court of Appeals followed the longstanding rule that “plaintiffs must demonstrate that they belong[] to the class which is prejudiced by the statute.” *Blinson*, 651 S.E.2d at 274 (quoting *In re Appeal of Barbour*, 112 N.C. App. 368, 373, 436 S.E.2d 169, 173 (1993) (quoting *In re Appeal of Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974)) (internal quotation marks omitted). It reached a similar conclusion for the federal Commerce Clause claim before it. *Blinson*, 651 S.E.2d at 274. This Court should recognize the similarity between those discrimination-type claims and the “fair and equitable” taxation claims of Article V, Section

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<sup>4</sup> To the extent plaintiffs’ Counts 7 and 8 are intended to address the possible JDIG agreement as well as the internet data center tax exemption, those Counts must be dismissed for the additional reason that Article V, Sections 2(1) and 2(2) address taxation and do not extend to any possible JDIG agreement.

2(1), and dismiss it on the grounds that plaintiffs have not demonstrated an injury directly related to that claim or that they are in the class “prejudiced by the statute.” *Id.* Similarly, plaintiffs’ “law of the land” claims are analyzed substantively under the same standard as equal protection claims, *see Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181, 594 S.E.2d 1, 15 (2004), and they should be equally subject to dismissal on grounds of lack of standing where plaintiffs cannot show they are prejudiced by the harm to which they object. *See State v. Trantham*, 230 N.C. 641, 644, 55 S.E.2d 198, 200-01 (1949); *In re Appeal of Barbour*, 112 N.C. App. 368, 373, 436 S.E.2d 169, 173 (1993). Even if one does not consider the law of the land claim as a discrimination-type claim, it is certainly one based on an individual right contained within the Declaration of Rights of our Constitution, and plaintiffs should not be able to pursue such a claim except on the basis of an alleged violation of their own personal rights to due process or the law of the land. Like the plaintiffs in *Blinson*, “[p]laintiffs have not demonstrated that they belong to a class that is prejudiced by the operation of the” statute (and potential JDIG agreement) that they challenge, and therefore they lack standing to pursue their claims under Counts 7, 8, and 11 of their complaint. *Blinson*, 651 S.E.2d at 274.

**B. PLAINTIFFS HAVE MADE NO ARGUMENT THAT SUPPORTS THEIR CLAIM THAT THE INTERNET DATA CENTER TAX EXEMPTION VIOLATES THE UNIFORMITY OF TAXATION PRINCIPLE.**

Plaintiffs argue that the internet data center tax exemption violates the uniformity of taxation clause of Article V, Section 2(2) of the Constitution. They speculate that the criteria for the tax exemption are so specific that no entity other than Google could qualify; consequently, according to plaintiffs, the criteria are unconstitutionally arbitrary. Plaintiffs are wrong. The General Assembly was entitled to make distinctions in tax treatment, as it did, so long as those distinctions do not draw arbitrarily unconstitutional lines. Plaintiffs are not entitled to pursue this litigation on their unsupported assumption that the lines drawn by the legislature are unconstitutionally arbitrary.

“A tax is uniform when it imposes an equal tax burden upon all members of a particular class. As long as a classification is not arbitrary or capricious, but rather founded upon a rational basis, the distinction will be upheld by the Court.” *Broadwell Realty Corp. v. Coble*, 291 N.C. 608, 617, 231 S.E.2d 656, 662 (1977) (citations omitted). Indeed, “[t]he requirements of ‘uniformity,’ ‘equal protection,’ and ‘due process,’ are, for all practical purposes, the same under both the State and Federal Constitutions.” *Id.* (citations omitted). Plaintiffs have provided absolutely no basis, as a matter of law, even to suggest the possibility that the internet data center tax exemption results in anything other than “an equal tax burden upon all members of” the class of taxpayers upon which it operates. Plaintiffs’ mere suggestion that some other entity might make investments that would stimulate the economy and create jobs (Pls.’ Br. at 46) does not support their contention that the internet data center tax exemption violates the uniformity clause. It is up to the General Assembly to draw lines in making tax classifications, and “narrow distinctions are sometimes invoked.” *Deadwood, Inc. v. North Carolina Dep’t of Revenue*, 356 N.C. 407, 410, 572 S.E.2d 103, 105 (2002)

(upholding the taxation of live entertainment differently from “moving picture shows”) (quoting *Leonard v. Maxwell*, 216 N.C. 89, 96, 3 S.E.2d 316, 322 (1939)). Indeed, the Supreme Court “has sustained numerous tax classifications which rested on subtle distinctions.” *Deadwood*, 356 N.C. at 414, 572 S.E.2d at 107 (listing various examples).

Plaintiffs cite various cases to illustrate arbitrary and unreasonable, or irrational, classifications under Article V, Section 2 or its predecessor. They also declare that cases cited by defendants upholding legislation against uniformity challenges are distinguishable. In reality, there are no North Carolina cases similar to this one. None of the cases plaintiffs cite present legislation remotely comparable to the internet data center tax exemption because no prior case has interpreted legislation at all like this for uniformity of taxation purposes.<sup>5</sup>

What the Court must consider in assessing plaintiffs’ uniformity challenge are the principles our appellate courts have established for such an analysis. It is for the General Assembly to determine the classifications, and the General Assembly may make fine distinctions and tax different industries under different standards. “The Legislature is sole judge of what subjects it shall select for taxation . . . , and the exercise of its discretion is not subject to the approval of the judicial department of the State.” *Deadwood*, 356 N.C. at 410, 572 S.E.2d at 105. Plaintiffs’ mere speculation that the line is arbitrary and unfair to others cannot form the basis of a viable claim against the defendants. Rather, the General Assembly can exercise “reasonable flexibility and variety appropriate to reasonable schemes of State taxation” even though its classifications may be founded on restrictive distinctions aimed at promoting the legislative goals. *In re Consolidated*

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<sup>5</sup> The plaintiffs in *Blinson*, of course, raised the uniformity issue. However, since the Court of Appeals concluded they lacked standing to pursue their uniformity claim, the merits of the uniformity question were not addressed. *See Blinson*, 651 S.E.2d at 274.

*Appeals of Certain Timber Cos.*, 98 N.C. App. 412, 416, 391 S.E.2d 503, 505 (1990). Here, the General Assembly's goal of promoting investment that stimulates the economy and creates jobs, through tax incentives provided to a new type of internet-age business, is reasonably related to and promoted by the internet data center tax exemption. As a result, plaintiffs' Count 8, based on the uniformity of taxation clause of Article V, Section 2(2) of the Constitution, must be dismissed for failure to state a claim upon which relief may be granted.

**C. PLAINTIFFS HAVE MADE NO ARGUMENT THAT SUPPORTS THEIR CLAIM THAT THE INTERNET DATA CENTER TAX EXEMPTION VIOLATES THE FAIR AND EQUITABLE TAXATION PRINCIPLE OR THE LAW OF THE LAND CLAUSE.**

Plaintiffs contend that the internet data center tax exemption violates what they term the "fair and equitable" taxation requirement of Article V, Section 2(1), and that both the exemption and the possible JDIG agreement violate the law of the land clause of Article I, Section 19 of the Constitution of North Carolina. Plaintiffs have made no argument that does much more than suggest that they disagree with the classification by the General Assembly. They acknowledge that job creation may be a legitimate objective of the General Assembly. (Pls.' Br. at 49) They leap to the conclusion that the classification chosen in this case is not a reasonable means of achieving that objective (and the additional one of stimulating the economy in other ways as a result of the investment required by the internet data center tax exemption and the JDIG agreement). (Pls.' Br. at 49-50) Yet, plaintiffs have utterly failed to present any reason why the internet data center tax exemption (and the potential JDIG agreement) are not valid means of stimulating the economy and creating jobs. Providing tax exemptions and investment grants based on large levels of investment in new facilities logically bears a close relationship to the encouragement of such investments with their resulting stimulation of the economy and creation of new jobs. Surely, these measures "bear[]

a substantial relation to the object of the legislation.” *In re Assessment of Additional North Carolina & Orange County Use Taxes*, 312 N.C. 211, 223, 322 S.E.2d 155, 163 (1984) (addressing what is actually the requirement in Article V, Section 2(1) of the Constitution that “[t]he power of taxation shall be exercised in a just and equitable manner.”) Moreover, these measures equally “have a rational relation to a valid state objective” and, therefore, pass constitutional muster under the law of the land clause. *Swanson v. State*, 330 N.C. 390, 395, 410 S.E.2d 490, 494 (1991), *vacated on other grounds*, 509 U.S. 916, 125 L. Ed. 2d 713 (1993), *on remand*, 335 N.C. 674, 441 S.E.2d 537, *cert. denied*, 513 U.S. 1056, 130 L. Ed. 2d 598 (1994). Plaintiffs have offered this Court no substantive support, either in legal argument or factual allegations, for their claims under Article V, Section 2(1) and Article I, Section 19 of the Constitution of North Carolina. This Court should, therefore, dismiss Counts 7 and 11 of the complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief may be granted.

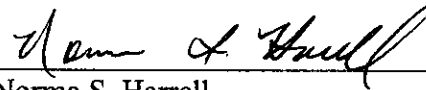
### **CONCLUSION**

For all the reasons discussed above and in their previous memorandum of law, the State defendants submit that all of plaintiffs’ claims should be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Further, Counts 7, 8, and 11 of the complaint should be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) for lack of jurisdiction based on plaintiffs’ lack of standing to bring these claims. The State defendants urge the Court to grant their motion to dismiss, enter judgment for defendants, and tax costs to plaintiffs.

Respectfully submitted, this the 20<sup>th</sup> day of June, 2008.

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## CERTIFICATE OF SERVICE

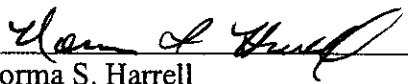
This is to certify that the undersigned has this day served the foregoing STATE DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS in the above titled action upon all other parties to this cause by:

- Hand delivering a copy hereof to each said party or to the attorney thereof;
- Transmitting a copy hereof to each said party via facsimile transmittal or e-mail; and
- Depositing a copy hereof, first-class postage pre-paid in the United States mail, properly addressed to:

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This the 20<sup>th</sup> day of June, 2008.

  
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