

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

WAKE COUNTY

07 CVS 011756

MICHAEL MUNGER, BARBARA HOWE, )  
And MARK WHITELEY CARES, )  
 )  
Plaintiffs, )

v. )

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

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**REPLY MEMORANDUM OF  
GOOGLE INC. AND MADRAS INTEGRATION, LLC  
IN SUPPORT OF THEIR MOTION TO DISMISS**

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## INTRODUCTION

Plaintiffs say they are not asking the Court to intervene in a political controversy, yet their brief seeks to debate “the proper role of government”; they suggest the General Assembly and Governor have instituted bad public policy by luring corporations to this State using direct incentives (“relocation,” they say, is “not a responsibility of the State”); and they indicate that if job creation is to be promoted at all by the political branches, it should be reminiscent of “some Depression era public works project.” (Plfs’. 24, 29, 33) Plaintiffs surely are raising a political controversy, one about the wisdom of the political branches using direct incentives to stimulate and diversify the economy, a dispute over whether those branches could more effectively accomplish their objections through other means. “Stimulation of the economy is an essential public and governmental purpose and the manner in which this purpose is to be accomplished is, within constitutional limits, *exclusively a legislative decision.*” Maready v. City of Winston-Salem, 342 N.C. 708, 723, 467 S.E.2d 615, 625 (1996) (emphasis added).

Missing from Plaintiffs’ brief is any plausible argument showing how the tax exemption they challenge can be distinguished, as a constitutional matter, from the legion of other tax incentives populating the tax code. It cannot. Indeed, Plaintiffs do not dispute that the subject exemption is just one of many in a laundry list; that the legislature has exempted other industries from the sales/use tax specifically with respect to business property and/or energy; and that the legislature has, with respect to sales/use taxes, acted to treat internet data centers and manufacturers alike. Upon reading Plaintiffs’ brief, one would think the subject tax exemption stands alone as an island. Not so. It mirrors those afforded to numerous other businesses and industries. If the Legislation is unconstitutional, so too are myriad other tax incentives enacted by the legislature, as well as other forms of economic development incentives.

In the end, this is an easy case because it is controlled by precedent, as demonstrated in Google’s opening brief. As shown below, Plaintiffs’ attempt to escape those precedents is unavailing. Indeed, the arguments they are making here, by and large, are the same failed arguments—in many respects *verbatim*—that were made by the plaintiffs in Blinson v. State, -- N.C.App. --, 651 S.E.2d 268 (2007), appeal dismissed and rev. denied, --- N.C. ---, --- S.E.2d --- (2008). (See Attachments E and F, which are the trial and appellate briefs filed by the plaintiffs in Blinson, and Attachment D, which is the notice of appeal and petition for discretionary review filed in the Supreme Court by the plaintiffs in Blinson.) Accordingly, the amended complaint should be dismissed with prejudice.

### **STANDARD OF JUDICIAL REVIEW**

Plaintiffs unremarkably reiterate that courts have the power to declare legislation unconstitutional. But they omit the governing standard for judicial review (see Google Opening Br. 13-14): The judiciary may not declare an act unconstitutional unless the challenger establishes “*beyond a reasonable doubt*” that the legislation is plainly and unmistakably prohibited by the Constitution. See, e.g., Rhyne v. K-Mart Corp., 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004); Brannon v. N.C. State Bd. of Elections, 331 N.C. 335, 339, 416 S.E.2d 390, 392 (1992); Town of Emerald Isle v. State, 320 N.C. 640, 647, 360 S.E.2d 756, 761 (1987); Rowlette v. State, -- N.C.App. --, 656 S.E.2d 619, 621 (2008).

### **ARGUMENT**

Like their complaint, Plaintiffs’ brief artfully characterizes the Legislation as “the Google Legislation,” a moniker which arises from their assumption that the challenged tax exemptions are “likely” limited to Google alone. (Plfs’ Br. 34 (asserting *ipse dixit* that “other companies may qualify in theory,” but that “Google alone is likely to qualify”).)

As explained in Google’s opening brief, however, Plaintiffs’ “Google-only” interpretation of the Legislation is an unwarranted legal conclusion that is contrary to settled principles of statutory interpretation and administrative law; and it is the same argument rejected in Blinson, *supra*, where the plaintiffs likewise contended that tax-credit legislation for major computer manufacturers would benefit Dell alone. (Google Opening Br. 27-28); Blinson, 651 S.E.2d at 277 (“we do not read the legislation as narrowly as plaintiffs”). Here, the Legislation is not limited to Google; and it would defy the statute if State officials were to deny the tax exemption to any other eligible internet data center. (Google Opening Br. 27-28) Even if the State intended and expected Google to benefit from the Legislation, it does not follow that the Legislation is limited in its operation to Google alone—it does not follow that other internet data centers would be denied the exemption if they sought to locate new facilities here in the future. As for the allegation that some unidentified “representatives of the State of North Carolina after enactment of” the Legislation “acknowledged” that the Legislation was for the “sole benefit of Google” (Plfs’ Br. 8), the same allegation was made in Blinson, to no avail.<sup>1</sup> Whoever these “representative” are, and whatever they may have actually said, as a matter of law the views of individual representatives are irrelevant in interpreting legislation. State ex rel. N.C. Milk Comm’n v. Nat’l Food Stores, Inc., 270 N.C. 323, 332-33, 154 S.E.2d 548, 555-56 (1967) (“Testimony, even by members of the Legislature which adopted the statute, as to its purpose and the construction intended to be given by the Legislature to its terms, is not competent

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<sup>1</sup> *Compare* Cmplt. ¶36 (“While the legislation does not specifically reference Google, it was acknowledged by representatives of the State of North Carolina after enactment of S.L. 2006-66 that the subsidies were specifically intended for Google . . . . The Google legislation was in fact for the direct benefit of Google alone.”) *with* Attach. A ¶27 (“While the legislation does not specifically reference Dell, it was acknowledged by representatives of the State of North Carolina during the debate on the legislation that [it was] for the purpose of enticing Dell . . . . The legislation was in fact for the direct benefit of Dell alone.”).

evidence upon which the court can make its determination as to the meaning of the statutory provision.”); Electric Supply Co. of Durham, Inc. v. Swain Elec. Co., 328 N.C. 651, 657, 403 S.E.2d 291, 295 (1991) (“In determining legislative intent, this Court does not look to the record of the internal deliberations of committees of the legislature considering proposed legislation. Indeed, we have declared affidavits of members of the legislature who adopted statutes in question not to be competent evidence of the purpose and intended construction of the legislation.”); State v. Evans, 145 N.C.App. 324, 329-30, 550 S.E.2d 853, 857-58 (2001) (rejecting litigant’s reliance on Governor Hunt’s press release and on statements from the Governor’s Highway Safety Committee as evidence of legislative intent).<sup>2</sup>

Of course, for the reasons explained in Google’s opening brief, even if the legislature had targeted Google alone, that would not be unconstitutional—no more so than the targeted subsidies regularly dispensed under G.S. § 158-7.1 to encourage economic development. See Maready, supra (rejecting challenge to targeted subsidies dispensed under section 158-7.1 to Wachovia, etc.); Blinson, supra (rejecting challenge to agreement by county and city to provide millions of dollars of subsidies to Dell); Peacock v. Shinn, 139 N.C.App. 487, 533 S.E.2d 842 (rejecting challenge to city’s agreement to give millions of dollars to NBA franchise and related businesses), appeal dismissed and disc. review denied, 353 N.C. 267, 546 S.E.2d 110 (2000).

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<sup>2</sup> Further, the argument that only Google is “likely” to benefit from the Legislation reinforces the problem with the *facial* challenge Plaintiffs are mounting. This is not an as-applied challenge brought by an aggrieved internet data center alleging it was eligible for, but denied, the exemption. Plaintiffs do not and cannot bring that challenge. Instead they are advancing a facial challenge which simply assumes that the Legislation “likely” will be applied prospectively for Google’s benefit alone. (Plfs’ Br. 34) This turns the law upside down: in a facial challenge, the plaintiff “must establish that no set of circumstances exists under which the [a]ct would be valid,” not simply that it “might operate unconstitutionally under some conceivable set of circumstances.” State v. Bryant, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005). Yet that is what Plaintiffs are doing here: they assume the Legislation likely will be applied prospectively to benefit Google alone.

## I. PLAINTIFFS FAIL TO STATE A PUBLIC-PURPOSE CLAUSE CLAIM

As explained in Google’s opening brief, the public-purpose challenge is controlled by Maready, Blinson, and Peacock. After characterizing Blinson and Maready as “two carefully selected cases,” Plaintiffs contend these cases were much ado about nothing, and indeed that Maready “is not even useful to the Court’s decision here.” (Plfs’ Br. 15-22) Plaintiffs then proceed to outline what they deem to be the “relevant case law,” which turns out to be a body of pre-Maready cases dating back to before the Great Depression, including Mitchell v. N.C. Indus. Dev. Fin. Auth., 273 N.C. 137, 159 S.E.2d 745 (1968), and Stanley v. Dep’t of Conservation & Dev., 284 N.C. 15, 199 S.E.2d 641 (1973), two decisions whose holdings Maready deemed “overturned” and whose significance Maready deemed “diminish[ed].” 342 N.C. at 719-20, 467 S.E.2d at 622-23. In fact, Maready embraced the dissenting opinion of Chief Justice Parker in Mitchell. Id. at 727, 467 S.E.2d at 627. The cases cited by Plaintiffs are historical relics. The law has evolved since then, a point that Maready made crystal clear.

Plaintiffs offer several arguments in an attempt to distinguish what plainly is controlling precedent. These arguments are simply not plausible. They are addressed below.

To begin with, Plaintiffs contend that Maready and Blinson should be limited to the constitutionality of G.S. § 158-7.1. Plainly not. As for Maready: It was a broadly structured opinion that embraced an expansive sense of public purpose in evaluating direct aid to corporations for economic development. Given the breadth of § 158-7.1—the State gave its political subdivisions almost carte blanche to directly subsidize private industry for the purposes of stimulating the economy and increasing the tax base—the Supreme Court in Maready had to decide whether such an expansive grant of authority comported with the Public Purpose Clauses. That was answered in the affirmative, with a broad holding. Blinson, 651 S.E.2d at 271 (“the

Supreme Court *held* in Maready that economic incentives to recruit business to North Carolina involve a proper public purpose”) (emphasis added). As for Blinson: it did not deal only with § 158-7.1; it involved a challenge to tax-credit legislation. Relatedly, Plaintiffs’ contention that Maready and Blinson involved only “local” incentives as opposed to the “State level” is untrue. (Pfs’. Br. 18) The law upheld in Maready was a *State statute* (§ 158-7.1) in which the State delegated to its political subdivisions various powers to spur economic development in ways that would benefit the State at large; and Blinson involved *State incentives* in the form of tax-credit legislation. At any rate, there could not be any basis in law or logic to support a conclusion that the Public Purpose Clauses forbid the State from doing something that its political subdivisions may do through powers delegated by the State. Yet that is what Plaintiffs seem to be contending when they argue that incentives issued by the State’s political subdivisions may pass constitutional muster but that incentives authorized directly by the State may not.

Plaintiffs further argue that Blinson may be distinguished on the basis that, “[u]nlike the plaintiffs in *Blinson*,” the “Plaintiffs here have claimed that the Google incentives are provided ‘merely for [Google] operating its own business’ and are in fact ‘contrary’ to the achievement of a public purpose.” (Plfs’. Br. 18) (quoting complaint). But the Blinson complaint said the same thing, to no avail. See, e.g., Attach. A ¶107 (Blinson complaint alleging that the so-called “Dell legislation” gave Dell “a special tax benefit merely for operating its own business”). Nor could these contentions be entitled to any deference in this case, since the complaint itself confirms that the challenged tax exemptions are not provided “merely” for Google operating its business; they are provided for constructing a new facility in this State, for investing at least \$250,000,000 within the first five years of construction, and for locating the facility in a relatively distressed county. (Cmplt. Ex. A, at §§ 105-164.3(8e), 105-164.13(55)(c))

In a separate attempt to distinguish Maready, Plaintiffs unfurl yet another argument that was pushed in Blinson without success: that Maready involved only a *facial* challenge to § 158-7.1, and, accordingly, that Maready left it for trial courts to evaluate on an incentive-by-incentive basis (in “as-applied challenges,” Plaintiffs say) whether each particular incentive serves a public purpose. See Attach. E pp. 55-57 (making identical argument to Judge Hobgood in Blinson); Attach. F pp. 25-27 (making identical argument on appeal in Blinson). That argument is manifestly incorrect. In addition to a facial challenge, the plaintiff in Maready also advanced a challenge to two dozen particular applications of § 158-7.1. See Maready, 342 N.C. at 713, 467 S.E.2d at 618-19 (“This action challenges twenty-four economic development incentive projects entered into by the City or County pursuant to N.C.G.S. § 158-7.1.”). In fact, the plaintiff in Maready had sought an injunction to recover all funds expended for the 24 projects, and because the trial court did not grant the injunction, *the plaintiff cross-appealed* to the Supreme Court, assigning error to the trial court’s denial of that injunctive relief and to its “failure to make an alternative finding that the statute ... did not authorize the expenditures in question.”<sup>3</sup> That the plaintiff’s challenge to the two-dozen applications of § 158-7.1 was resolved by the Court was recognized by the Maready dissenters. Id. at 734, 467 S.E.2d at 631 (Orr, J., dissenting, joined by Lake, J.) (stating that the majority opinion sanctioned the 24 projects that were challenged by the plaintiff); see also id. at 742, 467 S.E.2d at 636 (dissenters concluding that § 158-7.1 was unconstitutional “as applied” by the city and county).

Thus, Plaintiffs (who themselves are raising a facial challenge) are wrong to contend that only a facial challenge was at issue in Maready and that the Court left open whether § 158-7.1 might be unconstitutional as applied. Had the Supreme Court left open that possibility, it would

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<sup>3</sup> Record on Appeal, Maready v. City of Winston-Salem, No. 422PA95. The cross-appeal also raised an assignment of error regarding the Open Meetings Law, which the Court resolved.

have said so.<sup>4</sup> Indeed, had the Court left open that possibility, the Court would have remanded the matter to the trial court to examine the constitutionality of each of the 24 challenged incentives by the plaintiff. But the Court did not remand the case or hint that those incentives might be invalid. To the contrary, the Court’s stated concern was that this State will stand alone among other States, to its economic detriment, if such incentive programs are discontinued:

In the economic climate thus depicted, the pressure to induce responsible corporate citizens to relocate to or expand in North Carolina is not internal only, but results from the actions of other states as well. To date, courts in [all states to confront the public-purpose issue] have upheld the constitutionality of governmental expenditures and related assistance for economic development incentives. . . . Thus, by virtue of the trial court’s ruling [holding direct aid to corporations unconstitutional under the Public Purpose Clauses], North Carolina currently stands alone in so holding. Considered in this light, 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.

Id. at 726-27, 467 S.E.2d at 626-27. Given the Court’s concern about the consequences of invalidating economic incentives, it is especially implausible to read Maready as sanctioning challenges along the lines proposed by Plaintiffs—particularly since *every* subsidy to a corporation would fail their standard, including every subsidy dispensed under § 158-7.1.

To be sure, the Public Purpose Clauses are applied on a case-by-case basis, but Plaintiffs misunderstand what that means. It means a *purpose-by-purpose* basis, not an incentive-by-incentive basis, as Plaintiffs propose. Maready examined the *purposes* of stimulating the economy, promoting job creation, and increasing the tax base; the Court held that incentives dispensed directly to corporations for any of *those purposes* satisfy the Public Purpose Clauses as a matter of law, because “they are directly aimed at furthering the general economic welfare of the people.” Id. at 724-25, 467 S.E.2d at 625-26. Maready reached that holding after applying

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<sup>4</sup> Compare Wisconsin Right to Life, Inc. v. FEC, 546 U.S. 410, 412 (2006), cited by Plaintiffs, where the Court explicitly stated it did “not purport to resolve future as-applied challenges.”

the two-part test in Madison Cablevision v. City of Morganton, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989), the test Plaintiffs invoke here. Maready ruled, as a matter of law, that the two-part test is satisfied when the government's purpose is to stimulate or diversify the economy, promote job creation, or increase the tax base, even though private corporations necessarily benefit. In this case, the Legislation's evident purposes are economic stimulation and job creation: obviously a tax incentive aimed at the construction of a new technology-based facility in a relatively distressed county, coupled with private investment of at least \$250,000,000, is an incentive aimed at economic development; and the complaint itself says that the State's Economic Investment Committee determined that the Google project will create new jobs. (Cmplt. ¶¶20-27, 43) Thus, under Maready, Plaintiffs cannot show (much less beyond a reasonable doubt) that the Legislation fails the Madison Cablevision test.

Plaintiffs complain that the Legislation itself “does not state that it is for a public purpose or that the public will receive any benefit.” (Plfs’ Br. 18) But that is of no legal significance. Plaintiffs cite no authority for their premise that the constitutionality of legislation turns on whether the legislature includes magic words declaring that it is acting to benefit the public. The premise is contrary to the fundamental principle that legislation is *presumed* constitutional—i.e., it is presumed that the legislature acts rationally and for a public purpose with the intent to benefit the public when it passes a law. The presumption is particularly acute in this case, where the legislature *explicitly* made eligibility for the tax exemption contingent on the taxpayer constructing a new facility, investing at least \$250,000,000 within five years of construction, and locating in a county ranked among the more economically distressed in this State.

Relying on stale case law pre-dating Maready, Plaintiffs argue that the Madison Cablevision test cannot be satisfied because encouraging the location of new internet data centers

“is not part of the proper role of government” and because the incentives go “straight to Google’s corporate bottom line.” (Plfs’. Br. 24, 26) This argument defies Maready and Blinson. Maready held that the Madison Cablevision test was satisfied in the context of two-dozen incentives that included spousal relocation assistance, site improvements, and facility uplifting benefiting the “bottom lines” of corporations including Wachovia. Likewise, Blinson held the test satisfied despite the plaintiffs’ argument that the benefits went “straight to Dell’s corporate bottom line.” (Attach. E, p. 64) All incentives received by corporations can be said to benefit their “bottom lines”; under Maready, this benefit is deemed incidental as a matter of law for purposes of the Madison Cablevision test. Maready, 342 N.C. at 725, 467 S.E.2d at 625-26 (“While private actors will necessarily benefit from the expenditures authorized, such benefit is merely incidental,” resulting from “government’s efforts to better serve the interests of its people.”).

Plaintiffs cite Piedmont Triad Airport Auth. v. Urbine, 354 N.C. 336, 554 S.E.2d 331 (2001). But that case did not even involve a public-purpose clause challenge. It was a condemnation action concerning eminent domain, i.e., a taking of real property. Eminent domain proceedings are regulated by statutory procedures not relevant here, procedures that entail a case-by-case showing of “public use” by the government and review by the courts. See N.C.G.S. § 40A-41 et seq. The citation to Piedmont Triad is also ironic: the Court *rejected* the challenge, holding that the taking of land was for a “public use,” even though the act directly benefited a large private corporation, Federal Express, by enabling it to expand its facility.

In the end, Plaintiffs are pursuing the discredited public-purpose theory unsuccessfully advanced in the Maready dissent. Just as the Maready dissenters contended that the majority’s analysis would render the Public Purpose Clauses meaningless in the context of economic

incentives, 342 N.C. at 734, 737-38, 467 S.E.2d at 631, 633-34 (Orr, J., dissenting), Plaintiffs advance the same grievance here. The public-purpose claims must be dismissed.

## II. PLAINTIFFS FAIL TO STATE AN EXCLUSIVE-EMOLUMENTS CLAIM

“Plaintiffs acknowledge that *Blinson* appears” to hold that if incentives are for a public purpose, they necessarily satisfy the Exclusive Emoluments Clause. (Plfs’ 30) Blinson does not “appear” to hold that. It *does* hold that. Blinson, 651 S.E.2d at 278 (“[W]hen legislation is determined to ‘promote the public benefit’ under the Public Purpose Clauses, it *necessarily is not* an exclusive emolument. As discussed above [in the analysis of the Public Purpose Clauses], the incentives and subsidies provided to Dell are intended to promote the general economic welfare of the communities involved, rather than to solely benefit Dell, *and, accordingly, do not amount to exclusive emoluments.*”) (emphasis added). Thus, the claim should be dismissed.

But even if the foregoing principle were ignored, Plaintiffs still fail to state a claim under the governing two-part test (the “public-interest test”). Under that test, to establish initially that a benefit even constitutes an exclusive emolument, Plaintiffs must prove (1) that the benefit was not intended to promote the general welfare, and (2) there was no reasonable basis for the State to conclude that granting the benefit will serve the public interest. Town of Emerald Isle v. State, 320 N.C. 640, 654, 360 S.E.2d 756, 764 (1987). Plaintiffs cannot meet that test. So they urge the Court to ignore that test, even though it has been applied in case after case.<sup>5</sup> In asking the Court to disregard the public-interest test, Plaintiffs make the same argument that was made

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<sup>5</sup> E.g., Blinson, 651 S.E.2d at 278; Town of Highlands v. Hendricks, 164 N.C.App. 474, 479-80, 596 S.E.2d 440, 445, rev. denied, 359 N.C. 75, 605 S.E.2d 149 (2004); Peacock, 139 N.C.App. at 496, 533 S.E.2d at 848 (2000); Crump v. Snead, 134 N.C.App. 353, 357, 517 S.E.2d 384, 387 (1999); Utilities Comm. v. Carolina Utility Cust. Assn., 336 N.C. 657, 677, 446 S.E.2d 332, 344 (1994); State ex rel. Martin v. Preston, 325 N.C. 438, 456, 385 S.E.2d 473, 482 (1989); Town of Emerald Isle, 320 N.C. at 654, 360 S.E.2d at 764 (1987); Lamb v. Wedgewood S. Corp., 308 N.C. 419, 438-39, 302 S.E.2d 868, 879 (1983).

in Blinson, to no avail. (Attach. F, pp. 27-30) They argue, against a wall of authority, see note 5, supra, that the Supreme Court has been “inconsistent” in applying the test, and that a benefit may satisfy that test yet nonetheless violate the Exclusive Emoluments Clause. But the two cases they cite for that proposition—Madison Cablevision and Leete v. County of Warren, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995)—are inapposite.

As for Madison Cablevision, the notion that it abandoned the public-interest test is untenable, since the Court recited that test in a case handed down just 29 days earlier, State ex rel. Martin v. Preston, 325 N.C. 438, 456, 385 S.E.2d 473, 482 (1989), and continued to apply it subsequently. See note 4, supra. Madison Cablevision did not even involve a benefit conferred on a private actor. Instead, it involved a city’s decision to operate a cable television system itself rather than give the plaintiff, a private actor, the benefit of doing so. The Court easily disposed of the plaintiff’s claim that the city unconstitutionally gave *itself* a benefit, on the basis that the Exclusive Emoluments Clause does not prohibit the city’s grant of a privilege to *itself*. 325 N.C. at 654-55, 386 S.E.2d at 212. Thus, there was no reason to recite the public-interest test. The “three criteria” that Madison Cablevision set forth (see Pifs.’ Br. 32-33) were simply the overlapping reasons the Court used to explain why a city does not violate the Exclusive Emoluments Clause when it opts to provide a service itself. They have no bearing here.

As for Leete, it involved a county’s decision to give “severance pay” to a retiring county manager upon his retirement. It is settled that the Exclusive Emoluments Clause prohibits a municipality from making gifts or gratuities to a public official beyond what is owed for his employment services. Brown v. Bd. of Commrs. of Richmond County, 223 N.C. 744, 28 S.E.2d 104 (1943). The critical issue in Leete was whether the severance pay was a gift or gratuity over and above any salary due to the county manager for his work as an employee. A majority of the

Court concluded that the severance pay was a gratuitous gesture of appreciation since he had been paid in full for compensation due, and that therefore the case was controlled by Brown. Leete, 341 N.C. at 119-20, 462 S.E.2d at 478. The Court did not abandon the public-interest test or suggest that an emolument that satisfies that test may violate the Exclusive Emoluments Clause. In fact, the severance pay in Leete would fail the public-interest test, because it was a gratuitous gesture not intended to promote the general welfare—the payment was for a “private purpose.” Id. at 123, 462 S.E.2d at 480. Unlike Leete, this case does not involve a gift or gratuity. Google (and any other qualifying internet data center) must invest at least \$250,000,000 investment within first five years of construction to obtain a benefit.<sup>6</sup>

Plaintiffs focus on “public services.” But as explained in Google’s opening brief (at p. 25), the issue of “public services” cannot arise *unless* it is first determined that the benefit in question is an exclusive emolument under the public-interest test. Blinson, 651 S.E.2d at 278-79. Here Plaintiffs cannot make that showing. Thus the Court need not consider Plaintiffs’ “public services” argument, which itself is based on an unduly cramped notion of public services. Cf. Maready, 342 N.C. at 722, 467 S.E.2d at 624 (“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.”).

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<sup>6</sup> Plaintiffs also cite State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954), a criminal case involving illegal gambling. The case involved a State law that granted a special exemption from prosecution if gambling occurred at a single race track operated by a corporation under an exclusive, irrevocable franchise. Id. at 586-87, 80 S.E.2d at 634. The decision was based in part on the notion that criminal laws must have uniform application, but also on the belief that gambling was an “evil” and “injurious to the morals and welfare of the people.” Id. at 581, 583-84, 588, 80 S.E.2d at 630-32, 635. Under that view, the legislation could not have satisfied the public-interest test. Felton has nothing to do with this case.

Finally, Plaintiffs have no effective answer to the indisputable fact that Google is not the “exclusive” beneficiary of a tax exemption from sales/use taxes. (Google Opening Br. 3-7, 23-24) In light of the myriad exemptions available to numerous industries and businesses (including for energy and business property) it cannot plausibly be said that the privilege of claiming an exemption is *exclusive* to Google. Because Google is alleged to be eligible for something that has long been made available to numerous and diverse business organizations who pay taxes in this State, Plaintiffs cannot state a claim that Google is receiving an *exclusive* emolument.

Plaintiffs contend that the Exclusive Emoluments Clause prohibits privileges to “select groups as well as to individual recipients.” (Plfs’. Br. 34) Under their theory, these “groups” presumably would include *any* business (manufacturers, farmers, pharmaceutical companies, etc.) that receives tax incentives—in other words, *all* recipients of tax incentives are, under Plaintiffs’ logic, receiving unconstitutional exclusive emoluments. Again, Plaintiffs’ theory would render unconstitutional nearly all tax incentives (tax exemptions, credits, refunds, etc.), gutting huge swaths of the tax code. And since Plaintiffs are contending that even job-creation subsidies violate the Exclusive Emoluments Clause—they contend that the JDIG program is unconstitutional because it gives privileges to “small, select groups as well as to individual recipients” (Plfs’. Br 34-35)—their theory would invalidate or render constitutionally suspect an untold array of economic legislation, including job-training programs. The claims should be dismissed.

### **III. THE DISCRIMINATION-BASED CLAIMS SHOULD BE DISMISSED**

#### **A. Plaintiffs Lack Standing To Bring These Claims**

Plaintiffs take issue with the characterization of their claims as discrimination-based. But that is exactly what they are. They are complaining that the Legislation is not uniform or fair or

consistent with the law of the land because “the classifications required to qualify for the tax breaks” discriminate in an allegedly irrational way—specifically, by not including similarly-situated (but unidentified) entities that are not internet data centers, or by not including internet data centers that invest less than \$250,000,000. (Plfs’. Br. 41, 45-47; Cmplt. ¶78 (uniformity claim is based on assertion that the exemptions are not extended “to other similarly situated taxpayers”; id. ¶¶84-85 (law-of-the-land claim rests on alleged “governmental favoritism for Google, relative to other persons and entities” who are not “eligible”)) These claims of unequal treatment allege that the legislature is discriminating in favor of some vis-à-vis others similarly situated. Therefore, Plaintiffs are required to show that they are similarly situated in order to have standing. This is not a “higher standing hurdle,” as Plaintiffs contend. (Plfs’. Br. 36) It is part and parcel of the requirement that, to have standing, one must allege “a personal stake in the outcome of the controversy” by establishing that he has been “injuriously affected” by the law. Goldston v. State, 361 N.C. 26, 30, 35, 637 S.E.2d 876, 879, 882 (2006).

Simply put, to have standing, a plaintiff challenging a tax classification must be within the class of those similarly situated to the beneficiaries of the exemption. Generic taxpayer status does not create standing for such a claim, because if a preferential tax exemption is truly unconstitutional, the unequal treatment may be remedied by the legislature *extending* the exemption to others similarly situated, see Smith v. State, 349 N.C. 332, 335, 507 S.E.2d 28, 29-30 (1998), a remedy which would not boost the public treasury. For example, in this case, even if the Legislation’s \$250,000,000 investment requirement somehow were unlawfully arbitrary, as Plaintiffs contend, eliminating that requirement—i.e., extending the tax exemption to *any* new data center, regardless of the size of investment—would not remediate any alleged taxpayer injury; it would expand the class of those eligible for a tax exemption.

Plaintiffs rely on Goldston's *silence* on this issue. But Goldston involved no claim of unequal treatment (or any individual right). Rather, the case involved a claim that the Governor and the State exceeded their powers by diverting taxpayer funds. Thus, the Court had no reason to address the standing issue presented here, and it did not purport to overrule settled law holding that "a person who is seeking to raise the question as to the validity of a discriminatory [tax] statute has *no* standing for that purpose *unless* he belongs to the class which is prejudiced by the statute." In re Martin, 286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974) (emphasis added).

The Court of Appeals agrees. Blinson, 651 S.E.2d at 273-74. In Blinson, after discussing Goldston, the Court of Appeals correctly held that the plaintiffs lacked standing to bring discrimination-based claims (including a Uniformity of Taxation Clause claim) because they were not similarly situated to Dell. Id. at 274. The plaintiffs could not demonstrate *they* were prejudiced by the allegedly discriminatory-aspects of the Dell incentives; *they* were not victims of legally cognizable discrimination or unequal treatment by not receiving the tax credits that Dell received. Id. Therefore they had no standing, even though they alleged the tax credits would diminish treasury revenues. Id. The plaintiffs appealed that ruling to the Supreme Court, contending the Court of Appeals had defied Goldston, but the Supreme Court dismissed the appeal. (Attach. D)

Plaintiffs also rely on Stanley, supra. Stanley was decided in 1973, so it predated decisions such as Martin, supra, holding that a taxpayer must belong to the prejudiced class to have standing. Moreover, Stanley did not hold that the plaintiffs had standing to raise a claim of unequal taxation. Rather, Stanley held that the plaintiffs had standing to advance a public-purpose claim, based on a clause that directly limits the power of government to tax and spend. Here, Defendants do not argue that Plaintiffs lack standing to bring a public-purpose claim.

Plaintiffs also cite a pair of 1979 Court of Appeals decisions: Kloster v. Council of Governments, 36 N.C.App. 421, 245 S.E.2d 180 (1979); and Texfli Indus. v. City of Fayetteville, 44 N.C.App. 268, 261 S.E.2d 21 (1979). But Kloster did not involve a claim of unequal taxation. And Texfli did not even involve taxpayer standing: it involved a challenge to municipal annexation by a corporation claiming that *its* individual rights were violated; the plaintiff alleged that it was directly injured by alleged discriminatory treatment because it fell within the class of those who were denied the right to vote in the annexation referendum. Meanwhile, Plaintiffs' citation of Court of Appeals cases omits In re Barbour, 112 N.C.App. 368, 373, 436 S.E.2d 169, 173 (1993), a uniformity challenge where the Court denied standing after reaffirming that a taxpayer "has no standing ... unless he belongs to the class which is prejudiced by the statute." And Plaintiffs ignore Blinson, which addressed this issue head-on and held that taxpayers lacked standing to raise such claims. 651 S.E.2d at 273-74.

In sum, Plaintiffs are not similarly situated to Google or any other data centers that are or are not eligible to receive exemptions for property/electricity purchased or used for business purposes. Plaintiffs—each of whom is an individual taxpayer, none of whom is a corporation operating any kind of business—could not benefit from an expansion of the tax exemptions to allegedly similarly situated entities. Thus, they have no standing to advance these claims.

**B. Plaintiffs Fail To State A Claim Under The Uniformity Of Taxation Clause, The "Fair And Equitable" Tax Clause, And The Law Of The Land Clause**

Plaintiffs contend that the Legislation is arbitrary because it singles out internet data centers, as opposed to other unidentified industries. Again, this argument ignores reality. Within the sales/use tax code, the General Assembly has exempted or provided full refunds to dozens of industries, not just internet data centers. G.S. §§ 105-164.13, 105-164.14, 105-187.51, 105-187.51A; Google Opening Br. 3-7. But even if one ignores the laundry list of exemptions and

refunds for other industries and views the Legislation in a vacuum, it was hardly arbitrary for the legislature to create an incentive to lure new internet data centers, for the reasons explained in the Opening Brief. (Id. at 35-52) “The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain precise, scientific uniformity with reference to composition, use or value.” Martin, 286 N.C. at 75-76, 209 S.E.2d at 773. Here the General Assembly may have rationally concluded that a new internet data center facility, investing \$250,000,000 in private funds within five years after construction begins, would provide a substantial economic return to the State vis-à-vis other potential candidates, by stimulating and diversifying the economy, creating jobs, increasing the tax base, establishing a marketable workforce with transferable skills, and enhancing the State’s image as a technology-oriented destination for business and skilled workers looking to relocate.

Nor is the Legislation’s investment requirement arbitrary. (Plfs’. Br. 45-46) The requirement (at least \$250,000,000 in private funds) is rationally related to the goals of stimulating and diversifying the economy and promoting long-term job creation. Putting aside the permissible inference that a larger capital investment means a larger facility, the General Assembly rationally could have concluded that the investment requirement promotes retention, on the belief that a company making such a substantial investment in this State poses a lesser risk of picking up and leaving. In short, the General Assembly could rationally conclude that a company making such a substantial capital investment in North Carolina is more valuable to the State. Cf. Clark v. Maxwell, 197 N.C. 604, 150 S.E. 190 (1929) (upholding tax classification based on whether delivery truck traveled more than 50 miles, because legislature could conclude

that trucks delivering at that distance imposes “a greater cost to the State”), aff’d per curiam, 282 U.S. 811 (1931).

The tax code is filled with similar examples of line-drawing. For example, in the sales/use tax code, a full refund is available to numerous industrial facilities, and eligibility is based on a required investment of private funds:

If the facility is located in a development tier one area . . . the required amount is fifty million dollars (\$50,000,000). For all other facilities, the required amount is one hundred million dollars (\$100,000,000).

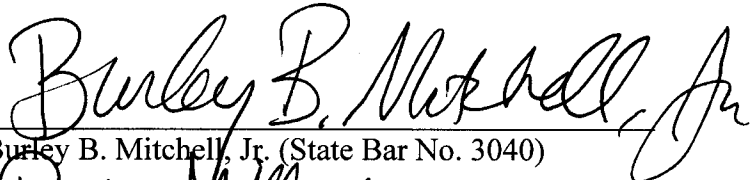
G.S. § 105-164.14(j) (2). In fact, the tax-credit legislation upheld in Blinson (the so-called “Dell Legislation”) has a \$100,000,000 investment requirement. Id. § 105-129.62. With respect to the Legislation challenged here, where the investment line should be drawn (at \$250,000,000 or some other number) is a matter committed to legislative judgment. See Clark, 150 S.E. at 192 (quoting Justice Holmes’s famous statement that, “when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the Legislature must be accepted, unless we can say that it is very wide of any reasonable mark”).

**CONCLUSION**

For the above reasons and for the reasons stated in Google’s opening brief, Google respectfully requests that the Court dismiss Plaintiff’s amended complaint with prejudice.

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

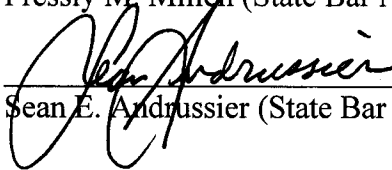
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WCSR 3917849v3

**CERTIFICATE OF SERVICE**

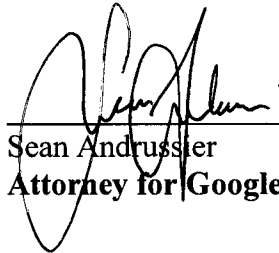
I hereby certify that I have this day served a copy of the foregoing **MEMORANDUM OF GOOGLE INC. AND MADRAS INTEGRATION, LLC IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT AND PETITION FOR DECLARATORY JUDGMENT** in the above-captioned action upon all parties by depositing a copy of same in the United States Mail, first-class postage prepaid as addressed below and via e-mail as follows:

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

  
\_\_\_\_\_  
Sean Andrusser  
Attorney for Google, Inc.