

No.

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

\*\*\*\*\*

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

Plaintiffs, )

v. )

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

Defendants. )

From Wake County  
07 CVS 011756  
COA09-375

\*\*\*\*\*

**RESPONSE OF DEFENDANTS GOOGLE INC. AND MADRAS  
INTEGRATION, LLC IN OPPOSITION TO PLAINTIFFS'  
PETITION FOR DISCRETIONARY REVIEW**

\*\*\*\*\*

**INDEX**

INDEX .....ii

TABLE OF AUTHORITIES ..... iii

INTRODUCTION ..... 2

FACTS ..... 3

PROCEDURAL HISTORY ..... 5

REASONS WHY DISCRETIONARY REVIEW  
SHOULD NOT BE GRANTED ..... 5

THE COURT OF APPEALS CORRECTLY CONCLUDED  
THAT THE PLAINTIFFS’ LACKED STANDING TO PRESENT  
A DISCRIMINATION-BASED CHALLENGE TO A TAX STATUTE  
SUCH AS THE LEGISLATION CHALLENGED HERE ..... 6

CONCLUSION ..... 11

CERTIFICATE OF SERVICE ..... 12

**TABLE OF CASES AND AUTHORITIES**

<b>Cases</b>	<b>Page</b>
<i>Blinson v. State</i> 186 N.C. App. 328, 651 S.E.2d 268 (2007) <i>appeal dismissed and discretionary review denied,</i> 362 N.C. 355, 661 S.E.2d 240 (2008).....	6, 7, 9, 10
<i>Goldston v State</i> 361 N.C. 26, 637 S.E.2d 876 (2006).....	6, 7, 8, 9, 10, 11
<i>In re Appeal of Martin</i> 286 NC 66, 75, 209 S.E.2d 766, 773 (1974).....	9
<i>Nicholson v State Education Assistance Authority</i> 275 N.C. 439, 448, 168 S.E.2d 401, 407(1969).....	9
<i>Roberts v Durham County Hosp. Corp</i> 56 N.C. App. 533, 538-39, 289 S.E.2d 875, 878(1982) <i>aff'd per curium</i> 307 N.C. 465, 298 S.E.2d 384(1983).....	9
<b>Statutes</b>	
N.C.G.S. §7A-31(c) .....	2, 5
N.C.G.S. Ch. 105, art. 5 .....	3
N.C.G.S. §105-164.13 .....	3
N.C.G.S. §1A-1 .....	5
<b>Other Authorities</b>	
N.C. Const. art. V § 2(1) .....	5, 8
N.C. Const. art. V §2(2) .....	5, 8
N.C. Const. art. I §19.....	5, 8
<b>Rules</b>	
APPELLATE Rule 15 .....	2
Rule 12(b)(1).....	5
Rule 12(b)(6).....	5

No.

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

\*\*\*\*\*

MICHAEL MUNGER, BARBARA HOWE,  
And MARK WHITELEY CARES,

Plaintiffs,

v.

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

Defendants.

From Wake County  
07 CVS 011756  
COA09-375

\*\*\*\*\*

RESPONSE OF DEFENDANTS GOOGLE INC. AND MADRAS  
INTEGRATION, LLC IN OPPOSITION TO PLAINTIFFS'  
PETITION FOR DISCRETIONARY REVIEW

\*\*\*\*\*

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COME the Defendants Google Inc. and Madras Integration, LLC  
(collectively "Google"), by and through their undersigned counsel, and hereby file

their RESPONSE IN OPPOSITION TO THE PLAINTIFFS' PETITION FOR DISCRETIONARY REVIEW pursuant to N.C.G.S. §7A-31(c) and APPELLATE Rule 15. Google urges the Court to deny the Plaintiffs' Petition for Discretionary Review of the unanimous decision of the Court of Appeals on the ground that the case does not meet the criteria for discretionary review under N.C.G.S. §7A-31(c).

### INTRODUCTION

This case involves Plaintiffs' constitutional challenges to economic development incentives in the form of legislation granting exemptions from certain taxes to qualifying "Internet Data Centers." The Trial Court rejected all of the Plaintiffs' challenges. The Petitioners appealed only portions of the Trial Court's Order to the Court of Appeals, specifically the portions which concluded that the Plaintiffs lacked standing to pursue those three of the twelve claims originally asserted by Petitioners.

The Plaintiffs contend that this case is of such significant public interest that this Court should in its discretion under N.C.G.S. §7A-31(c) review the unanimous decision of the Court of Appeals. They are wrong. The Court of Appeals' decision merely applies what are now well settled principles of state constitutional law that have been consistently and uniformly applied by this Court and the Court of Appeals. Plaintiffs argue that the constitutional issues they have raised are substantial because there has been extensive publicity about the legislation they

challenge, most of it initiated by the Plaintiffs in connection with this case. But the fact that Plaintiffs have initiated public discussion about this case at every opportunity is irrelevant to whether this case is of such legal significance that this Court need exercise its discretion to grant review of the unanimous decision of the Court of Appeals.

### FACTS

The Plaintiffs are North Carolina citizens suing in their individual capacities as residents who pay ad valorem taxes, state and local sales taxes, and state income taxes. Defendant Google is a corporation incorporated in the State of Delaware and headquartered in California. It is licensed to do business in North Carolina and is the ultimate parent company of defendant Madras Integration, LLC.

North Carolina has a Sales and Use Tax. N.C.G.S. Ch. 105, art. 5. Like other states North Carolina has historically maintained a lengthy list of dozens of exemptions from that tax. N.C.G.S. §105-164.13. This lawsuit arises from legislation (“Legislation”) adopted by the General Assembly on 6 July 2006 to add two more exemptions to the existing list. The added exemptions are for electricity and eligible business property sold to or used by eligible “internet data centers.” In adopting this Legislation, the General Assembly has treated internet data centers like manufacturers for purposes of the sales and use tax.

An eligible "internet data center," as defined by the Legislation is a newly constructed facility that is used primarily by a business that is engaged in "Internet Service Providers and Web Search portals industry 51811 by NAICS" and that satisfies several requirements to be eligible for the exemption. For example, an applicant must invest at least \$250 million in eligible property within the first five years after construction of the new facility. In addition, the facility must be located in a county that is not ranked among the least distressed in the State by the North Carolina Secretary of Commerce.

The exemption for eligible business property applies if the property is capitalized and used (i) for internet or web search portal services; (ii) for electricity generation, transformation, transmission, distribution, or management; or (iii) to provide computer engineering or computer science research. If the business property is not located and used at the eligible internet data center, then the exemption for that property is forfeited. Similarly, the exemption for electricity is forfeited if any portion of the electricity is not used at an eligible data center. A taxpayer that forfeits an exemption is liable for all past taxes avoided as a result of the forfeited exemption. The Legislation does not mention Google and under the terms of the Legislation any internet data center satisfying the statutory requirements is eligible for the tax exemption.

### **PROCEDURAL HISTORY**

The Plaintiffs initially presented twelve Claims for Relief in the Trial Court. The Defendants made motions to dismiss all of those claims pursuant to N.C.G.S. §1A-1, Rules 12(b)(1) and 12(b)(6) on grounds that the Plaintiffs had failed to state a claim upon which relief could be granted and/or lacked standing to bring the claims. On 14 November 2008, the Trial Court entered an Order dismissing all of the Plaintiffs claims pursuant to Rule 12(b)(1) or 12(b)(6). On appeal to the Court of Appeals the Plaintiffs abandoned all of their claims except Claims for Relief 7, 8 and 11, based upon (1) the “just and equitable” taxation provision of N.C. Const. art. V § 2(1); (2) the uniformity of taxation provision of N.C. Const. art. V §2(2); and (3) the “law of the land clause” of the N.C. Const. art. I §19. Each of these claims was dismissed pursuant to Rule 12(b)(1) for the Plaintiffs’ lack of standing to pursue the claims. The Plaintiff appealed and brought forward only the Trial Court’s rulings on those three claims. The Court of Appeals affirmed the Trial Court’s Order dismissing those claims for lack of standing.

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

This Court should deny the Petition for Discretionary Review because the Plaintiffs cannot show that certification is justified under any of the criteria set out in N.C.G.S. §7A-31(c). In its well reasoned decision below in this case, the Court of Appeals properly addressed all of the issues the Plaintiffs seek to present to this

Court and resolved them correctly based on established law. Consequently, at this time, none of the issues raised by Plaintiffs has significant public interest, and this case does not involve any unresolved legal principles of major significance to the jurisprudence of the State.

Plaintiffs also attempt to characterize the Court of Appeals' opinion as being in conflict with decisions of this Court. As demonstrated below, however, the decision of the Court of Appeals in this case does not conflict with the decisions of this Court. Instead, precedent established by this Court, properly applied by the Court of Appeals in *Blinson v. State* 186 N.C. App. 328, 651 S.E.2d 268 (2007), *appeal dismissed and discretionary review denied*, 362 N.C. 355, 661 S.E.2d 240 (2008), and in its decision below in this case, governs the issues raised by the Plaintiffs in their petition for discretionary review. Therefore, those issues do not present any unresolved legal principles of major significance.

**THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE PLAINTIFFS LACKED STANDING TO PRESENT A DISCRIMINATION-BASED CHALLENGE TO A TAX STATUTE SUCH AS THE LEGISLATION CHALLENGED HERE**

The Plaintiffs petition for discretionary review is based entirely on their misreading of this Court's Opinion in *Goldston v State*, 361 N.C. 26, 637 S.E.2d876 (2006). The Plaintiffs seem to contend that *Goldston* stands for the proposition that any taxpayer of the State has standing to challenge any tax statute and also any tax exemption adopted by the Legislature. The Court of Appeals

correctly rejected this interpretation of *Goldston* in its *Blinson* decision and again in its decision below in this case.

*Goldston* dealt with a situation in which the Plaintiffs alleged that tax monies already collected and held by the State were being misappropriated and misused by government officials. It did not involve the constitutionality of a tax statute or an exemption from a tax statute. *Goldston* involved alleged misappropriations of funds already in the public fisc after having been collected from all of the taxpayers of the State. In its analysis of the standing of taxpayers to challenge such misappropriation of public funds by public officials, this Court reviewed its prior cases going back to the nineteenth century. All of the numerous cases this Court reviewed in *Goldston* involved situations in which it was alleged that public officials had engaged in “illegal or unconstitutional disbursement” of public funds, “illegal disposition of the monies of the County,” “illegal disbursements of public funds by payment of salaries to unauthorized persons,” and “diversion of public funds away from highway construction.” *Goldston*, 361 N.C. at 30-33, 637 S.E.2d at 879-81. Neither *Goldston* nor any of the cases it relied upon to find taxpayer standing involved a challenge to the constitutionality of a tax statute, an exemption from a tax statute or a discrimination-based challenge to a tax statute. Such issues are not even remotely related to the issues before this Court in *Goldston*.

Here the Plaintiffs, solely in their capacity as individuals who paid North Carolina income and sales and use taxes, attempt to challenge the sales and use tax exemptions for eligible internet data centers contained in the Legislation in controversy on the grounds that they (1) violate N.C. Const. art. V, §2(1) which states that the power to tax shall “be exercised in a just and equitable manner”; (2) violate N.C. Const. art. V, §2(2) the uniformity of taxation clause which says that no class of property may be taxed “except by uniform rule”; (3) violate of the “law of the land” clause of N.C. Const. art. I, §19 which provides that no person will be “deprived of his life, liberty or property, but by the law of the land” or “denied the equal protection of the laws... .”

As the Court of Appeals correctly observed, the only way *Goldston* can be read as having authorized Plaintiffs to bring discrimination-based constitutional challenges to tax statutes where, as here, they are not members of the class who have been discriminated against is to read *Goldston* as having fundamentally changed or overruled established North Carolina law. However, this Court’s analysis in *Goldston* makes it clear that the Court neither intended to nor felt it was creating any new law or altering long established law. By reviewing a lengthy list of cases that began in the nineteenth century and that established that there was “no serious question” under North Carolina law that a tax-payer had a right to sue to prevent illegal disbursement of money that was already held in the public fisc, this

Court clearly indicated that it intended merely to restate clearly established principles of law.

This case does not involve allegations of misappropriation or unlawful disbursements of public funds from the public fisc such as were alleged in *Goldston*. Therefore, the established law relied upon by this Court in *Goldston* simply does not apply.

However, equally well established and long-standing law of North Carolina requires that a person seeking to bring a discrimination-based challenge to the constitutionality of a statute must be a member of the class adversely affected by the statute. *E.g.*, *In re Appeal of Martin*, 286 NC 66, 75, 209 S.E.2d 766, 773 (1974); *Nicholson v State Education Assistance Authority*, 275 N.C. 439, 448, 168 S.E.2d 401, 407(1969); *Roberts v Durham County Hosp. Corp.*, 56 N.C. App. 533, 538-39, 289 S.E.2d 875, 878(1982), *aff'd per curium* 307 N.C. 465, 298 S.E.2d 384(1983). Further, since its decision in *Goldston*, this Court has given no indication that it intended in *Goldston* to modify its previous long-standing decisions requiring membership in the class adversely affected by an allegedly discriminatory tax statute as a precondition for challenging its constitutionality.

Clearly, the Court of Appeals in an earlier but post-*Goldston* decision concluded that this Court had not intended in *Goldston* to work any change in existing law. *Blinson v. State* 186 N.C. App. 328, 651 S.E.2d 268 (2007), *appeal*

*dismissed and discretionary review denied*, 362 N.C. 355, 661 S.E.2d 240 (2008). As a result the Court of Appeals rejected the discrimination-based claim the Plaintiffs brought to an exemption from a tax statute because the Plaintiffs had not demonstrated that they belonged to the class which was allegedly prejudiced by the statute. *Id. at 274*, 651 S.E.2d 334-35. The Court of Appeals based its holding in this regard in the *Blinson* case on the well established line of earlier cases from this Court previously referenced above. Although the Defendants recognize that it is not controlling authority binding on this Court, it is worth noting that this Court dismissed the *Blinson* Plaintiffs' appeal from the decision of the Court of Appeals and denied their Petition for Discretionary Review of that opinion. *Blinson v State*, 186 N.C. App. 328, 651 S.E.2d 268, *appeal dismissed and discretionary review denied*, 362 N.C. 355, 661 S.E.2d 240. Interestingly, the Plaintiffs have entirely omitted any acknowledgment of the existence of the *Blinson* case from their Brief to the Court of Appeals in this case and from their Petition to this Court.

The Plaintiffs make "sky is falling" type contentions in their Petition to the effect that the Court of Appeals in this case has limited *Goldston's* applicability only to public purpose doctrine constitutional challenges to tax statutes. That is not the case. In its decision below and in the *Blinson* decision the Court of Appeals did not consider any limitation on standing other than to hold that in order to bring a discrimination-based constitutional challenge to a statute a Plaintiff must

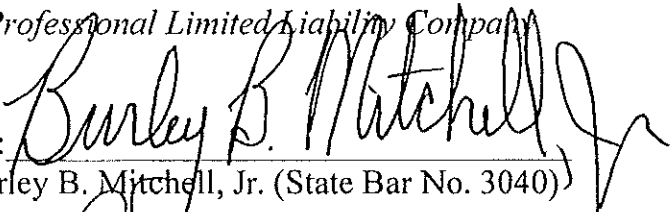
be a member of the class discriminated against by the statute and not merely a taxpayer who disagrees with the legislative enactment. In this regard, the Court of Appeals has consistently followed well established principles of law laid down by this Court and which this Court did not undertake to overrule or modify in its decision in *Goldston*. The Court of Appeals correctly concluded that the Plaintiffs had no standing to bring the discrimination-based constitutional claims and properly affirmed the ruling of the Trial Court.

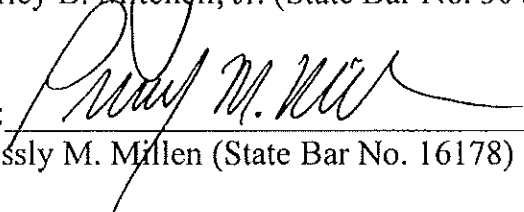
**CONCLUSION**

For the foregoing reasons, the Defendants respectfully suggest that this Court deny the Plaintiffs' Petition for Discretionary Review.

This the 5<sup>th</sup> of April, 2010.

WOMBLE CARLYLE SANDRIDGE & RICE,  
*a Professional Limited Liability Company*

By:   
Burley B. Mitchell, Jr. (State Bar No. 3040)

By:   
Pressly M. Millen (State Bar No. 16178)

P.O. Box 831  
Raleigh, North Carolina 27602  
(919) 755-2100

*Counsel for Defendants Google Inc. and  
Madras Integration, LLC*

**CERTIFICATE OF SERVICE**

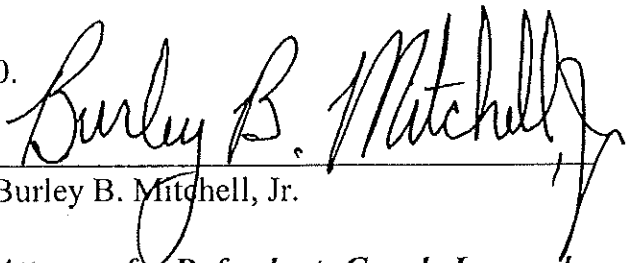
I hereby certify that I have this day served a copy of the foregoing **RESPONSE OF DEFENDANTS GOOGLE INC. AND MADRAS INTEGRATION, LLC IN OPPOSITION TO PLAINTIFFS' PETITION FOR DISCRETIONARY REVIEW** in the above-captioned action upon all parties by depositing a copy of same in the United States Mail,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

Jeanette K. Doran  
North Carolina Institute for  
Constitutional Law  
225 Hillsborough St., Suite 245  
Raleigh, NC 27619  
E-Mail: [brooks@ncicl.org](mailto:brooks@ncicl.org)

Norma S. Harrell  
Special Deputy Attorney General  
N.C. Department of Justice  
P. O. Box 629  
Raleigh, NC 27602  
E-Mail: [nharrell@ncdoj.gov](mailto:nharrell@ncdoj.gov)

I. Faison Hicks  
Assistant Attorney General  
N.C. Department of Justice  
P. O. Box 629  
Raleigh, NC 27602  
E-Mail: [fhicks@ncdoj.gov](mailto:fhicks@ncdoj.gov)

This the 5<sup>th</sup> day of April, 2010.

  
\_\_\_\_\_  
Burley B. Mitchell, Jr.

*Attorney for Defendants Google Inc. and  
Madras Integration, LLC*

## PHOTOGRAPHY SERVICE AGREEMENT

This Photography Service Agreement (the "Agreement") is entered into this 24th day of March, 2010 by and between Open Aperture Photography, LLC ("Contractor") and Cynthia Crowds ("Client") (collectively the "Parties").

The Parties agree as follows:

1. **Services:** Contractor will perform the photographic services described below (the "Services"): 4 hours wedding day coverage, \$100 merchandise credit, engagement shoot.
2. **Time of Completion:** The date, time (beginning and ending) and location during which the Services will be rendered by Contractor are as follows: 5/15/10 wedding date  
Time: \_\_\_\_\_  
After the event, Contractor will provide a compact disc with all finished images within six (6) weeks of the event. Client receives rights to these images as outlines in paragraph 8 of this Agreement. Client should, as soon as possible, provide Contractor with a list of the desired images to be printed or enlarged. Costs for printing or enlarging selected photographs are set out on the attached fee schedule. In the event Client desires Contractor to perform services outside of the timeframe set forth in this paragraph, said services will be charged at a rate of \$300 per hour.
3. **Equipment:** (mark the applicable provision)  
 Client shall provide the following equipment for Contractor's use when performing the Services: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Contractor shall provide all other equipment necessary to perform the Services.  
 When performing the Services, Contractor will utilize his own equipment.
4. **Payment:** In consideration for the Services provided by Contractor, Client agrees to pay Contractor the sum of \$1250. A reservation deposit in the amount of 25% of the total fee is due upon the execution of this Agreement, and the balance is due thirty (30) days before the event. If, for any reason, the event is canceled, the deposit will not be refunded. However, if the event is postponed or otherwise rescheduled, the deposit may be transferred provided the Contractor remains available for the alternate date and time. Client shall forfeit all deposit fees paid if the Contractor is unavailable for the rescheduled event. Any merchandise credit will be honored for a period not exceeding six (6) months from the event date.
5. **Communication/Notice:** Client is responsible for immediately notifying Contractor of any changes in the information provided in paragraph 2, and Contractor agrees to notify Client upon learning of any event that would prevent Contractor from performing under