

NO. 130PA10

TENTH JUDICIAL DISTRICT

NORTH CAROLINA SUPREME COURT

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

v.)

From Wake County
COA09-375

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,)
individually and in his official capacity,)
Defendants.)

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PLAINTIFFS-PETITIONERS' NEW BRIEF

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PLAINTIFFS-PETITIONERS' NEW BRIEF

ISSUES PRESENTED

- I. Whether the Court of Appeals erred in holding that taxpayers only have standing to challenge only expenditures in violation of the public purpose doctrine pursuant to *Goldston v. State*, 361 N.C. 26 (2006), and related cases?

- II. Whether a taxpayer has standing to challenge tax exemptions resulting in a diminution of funds available for lawful government purposes on the grounds that such exemptions violate fair taxation requirements of Article V, § 2(1), uniformity of taxation requirements at Article V, § 2(2), and equal protection and law of the land provisions of Article I, § 19?
- III. Whether Plaintiffs have standing to pursue their claims based on fair taxation requirements of Article V, § 2(1), uniformity of taxation requirements at Article V, § 2(2), and equal protection and law of the land provisions of Article I, § 19?

STATEMENT OF THE CASE

This case is an extraordinarily important one. At its core, this appeal is about whether ordinary taxpayers—or anyone else for that matter—may have their day in court to challenge the constitutionality of special tax breaks crafted for select corporate giants. The action arises out of legislation adopted by the General Assembly and signed into law on 10 July 2006, to provide special tax breaks for Google, Inc. (“Google”) if it built an internet data server farm in Caldwell County, North Carolina (“Google legislation”). (R p 33)

Plaintiffs Michael Munger, Barbara Howe, and Mark Whiteley Cares are tax-paying citizens of the State of North Carolina. (R pp 35-36) Plaintiffs-Petitioners (“Plaintiffs”) filed their Complaint and Petition for Declaratory Judgment on 25 July 2007. (R p 3) Plaintiffs filed an Amended Complaint and Petition for Declaratory Judgment (“Complaint”) on 16 August 2007. (R p 33)

The named Defendants are divided into two groups: 1) the State of North Carolina, the Secretary of the N.C. Department of Commerce, the Secretary of the

N.C. Department of Revenue, the State Budget Officer and the Governor (collectively “the State”); and 2) Google, Inc., and Madras Integration, LLC (collectively “Google”). (R pp 36-37)

Upon recommendation of the Senior Resident Superior Court Judge for Wake County, this matter was designated as an “exceptional” case pursuant to Rule 2.1 of the General Rules of Practice and assigned to the Honorable Paul C. Ridgeway. (R pp 85-86)

Each group of Defendants filed a separate Motion to Dismiss for failure to state a claim upon which relief may be granted and/or for lack of standing. (R pp 76-84) No Defendant filed an Answer.

Following a hearing conducted on 1 July 2008, the Superior Court dismissed Plaintiffs’ claims. Specifically, by order dated 14 November 2008, the trial court decreed: “Plaintiffs’ claims, namely the claims numbered 1 through 12 of the Complaint, are DISMISSED as to all Defendants pursuant to North Carolina Rule of Civil Procedure 12(b)(6) or, in the case of Claims for Relief 7, 8 and 11, Rule 12(b)(1).” (R p 258)

Plaintiffs appealed a portion of the trial court’s Order, and on 16 February 2010, the Court of Appeals affirmed the decision of the trial court as to the issues appealed. On 23 March 2010, Plaintiffs filed a Petition for Discretionary Review. Said Petition was allowed by Order of this Court on 8 October 2010.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Plaintiffs timely filed a Petition for Discretionary Review on 23 March 2010. The Petition was allowed on 8 October 2010. Review is authorized by N.C. GEN. STAT. § 7A-31.

STATEMENT OF THE FACTS

Parties

Plaintiffs Michael C. Munger, Barbara Howe, and Mark Whiteley Cares are three North Carolina citizens suing in their individual capacities as residents and taxpayers of the State of North Carolina. All Plaintiffs pay taxes, including state and local sales taxes on items purchased as well as state income taxes. No Plaintiff has received abatement or exemption from this legal obligation. (R pp 35-36)

Defendant State of North Carolina is a general-purpose state government which is capable of being sued, and which is being sued, for giving tax exemptions, authorized by the General Assembly, to Google. (R p 36)

The Secretary of the North Carolina Department of Commerce, the Secretary of the North Carolina Department of Revenue, the State Budget Officer, and the Governor of North Carolina are each sued in their official capacities only for their respective roles in creating the complained of tax exemption and in administering the State budget and collecting tax revenues to fund State operations. (R pp 36-37)

Defendant Google is a for-profit, duly chartered corporation, incorporated in the State of Delaware; Google's principal office, as well as the North American headquarters of Google, is located in Mountain View, California. Google is licensed to do business in North Carolina. Defendant Madras Integration, LLC, is a limited liability company, incorporated in the State of Delaware; its principal office is located in Wilmington, Delaware. Madras Integration, LLC, is licensed to do business in North Carolina. Defendant Google is the ultimate parent company of Defendant Madras Integration, LLC. Defendant Google and/or Defendant Madras Integration, LLC (collectively, "Google") will have or have had an internet data center built for the operation of an internet server facility in Lenoir, Caldwell County, North Carolina. (R p 37)

The Google Legislation

Beginning on or about 8 December 2005, representatives and agents of Google secretly met in Raleigh and Charlotte, North Carolina, with State officials, including employees of the Departments of Commerce and Revenue, and representatives and agents of Burke, Caldwell, McDowell, Cleveland, and Rutherford Counties. As alleged in the Complaint, the purpose of the meetings was to discuss the establishment of a Google internet server facility in North Carolina by Google and to explore what incentives state and local governments would provide Google. Later, on or about 2 February 2006, State officials, including

employees of the Department of Commerce, again met with representatives and agents of Caldwell County. Again, as alleged in the Complaint, the purpose of this meeting was to tour a possible site for a Google internet server facility in Caldwell County, North Carolina. (R pp 38-39)

On or about 8 February 2006, the Caldwell County Commission and Lenoir City Council made an enhanced grant proposal to Google regarding the construction of an internet server facility in Caldwell County, North Carolina. Following that proposal, from February through April of 2006, representatives and agents of Google met privately with State officials, including the Commerce Secretary, employees of the Departments of Commerce and Revenue, representatives of Duke Power, and representatives of the City of Lenoir and Caldwell County. As alleged in the Complaint, the purpose of the meetings was to further discuss the site for the proposed internet server facility to be established in Caldwell County, North Carolina, by Google and the corresponding incentives. (R pp 39-40)

Shortly after and as a result of these discussions about the proposed data center and incentives, on or about 24 May 2006, a bill was introduced in the House chamber of the North Carolina General Assembly to exempt certain internet data centers from sales and use taxes applicable to citizens of North Carolina. (HB 2645). A substantially similar bill was introduced in the Senate on 25 May 2006.

(SB 1964). Both HB 2645 and SB 1964 proposed amendments to N.C. GEN. STAT. §§ 105-164.3 and 105-164.13. The substantive provisions of HB 2645/SB 1964 were added to the Current Operations and Capital Improvements Appropriations Act of 2006, SB 1741/S.L.2006-66, at section 24.17(a) (only this section of legislation is hereinafter referred to as the “Google Legislation”). The Current Operations and Capital Improvements Appropriations Act of 2006, SB 1741/S.L.2006-66 was ratified on 6 July 2006, and signed into law by Governor Easley on July 10, 2006. (R pp 40, 43)¹

The Google Legislation creates certain tax exemptions for an “eligible internet data center” and defines the same as a facility that is used primarily by a business engaged in the Internet service providers and web search portals industry, as defined by the North American Industry Classification System adopted by the United States Office of Management and Budget. Additionally, an eligible internet data center must locate in select areas of the state. North Carolina divides areas of the state into five enterprise tiers in order to prioritize so-called economic development activity, with tier one being the most distressed areas and tier five

¹ In addition, Google is slated to receive an award from the Job Development Investment Grant (“JDIG”) program. On or about 28 December 2006, the State’s Economic Investment Committee (“EIC”) voted unanimously to award a JDIG grant to Google in connection with Google’s construction and operation of an internet data center in Lenoir, North Carolina. Under the terms of the JDIG agreement, approved by the EIC, a 12-year grant will be established. Pursuant to the JDIG agreement, for each year that the company meets the required performance targets, the State will provide a grant equal to seventy-five percent (75%) of the State’s personal income withholding taxes derived from the creation of new jobs. (R p 44).

being the least distressed. Pursuant to the Google legislative, the eligible internet data center must also be in either an enterprise tier one, two, or three area pursuant to G.S. § 105-129.3, regardless of any subsequent change in county enterprise tier status. In addition, the facility must meet capital investment criteria. (R pp 40-41)

The Google Legislation specifically exempted from the retail sales and use tax sales of electricity and eligible business property to be used and located at an eligible Internet data center and defined "eligible business property." (R p 41)

No debate on provisions related to any tax exemption for internet data center facilities occurred while the Appropriations Act/SB 1741 was under consideration on the floor of the Senate, and no fiscal note accompanying SB 1741 referenced any tax exemption for internet data center facilities. (R p 42)

The General Assembly's package for Google totals tens of millions of dollars. While the legislation does not specifically reference Google, as alleged in the Complaint, it was acknowledged by representatives of the State of North Carolina after enactment of S.L. 2006-66 that the subsidies at issue were specifically intended for Google. The Google legislation was, as conceded by those acknowledgments, for the direct and sole benefit of Google. (R pp 42-43)

Google Incentives Announcement and Its Aftermath

On 19 January 2007, the "State of North Carolina [,] Office of the Governor," issued a news release. That news release, among other things, reported

Google's plans to locate an internet server facility in North Carolina and further that, in connection with the Google project, the State awarded a JDIG worth as much as \$4.8 million. (R p 45)

On 7 March 2007, the North Carolina Senate Finance Committee ("Finance Committee") conducted a hearing regarding the Google project and the tax benefits for Google. At that hearing, the Finance Committee distributed a document with the heading "Elements of the State & Local Recruiting Package/Google Internet Data Center/Caldwell County – Tier 1." Among other things, that document described the aforementioned JDIG grant for Google and referred to what it called a "State Incentive Package," which included a "Sales Tax Exemption on Machinery & Equipment and Electricity" for Google, provided by the State. Pursuant to that exemption, the State exempts Google from having to pay certain retail sales and/or use taxes in connection with Google's purchase of certain machinery, equipment, and electricity. (R p 45)

The Google Legislation and the tax benefits for Google were put into place in connection with and for the Google project and only the Google project. Prior to negotiations with Google, the General Assembly had nothing similar to this legislation underway or contemplated. In fact, the only potential beneficiary of the Google Legislation was and remains Google. And while it had only Google in mind, the Google legislation contains no recitation that the Google project in

Caldwell County would not have gone forward were it not for the Google legislation. (R pp 46, 47)

As alleged in the Complaint, through the present time, Defendant State does not plan to provide any person or entity, other than Google, tax exemptions, grants, and subsidies pursuant to the Google legislation. Plaintiffs are not eligible for and have not received any tax forbearance or subsidies or grants similar to the tax benefits for Google. Plaintiffs get no tax breaks from any tax like Google's special tax breaks. Plaintiffs are, have been and will be directly injured by the tax benefits for Google in that those benefits unlawfully deplete the funds of the State to which the Plaintiffs contribute through their tax payments, thereby diminishing the funds available for lawful purposes and imposing disproportionate, additional, and increased financial burdens on the Plaintiff taxpayers. (R p 47)

ARGUMENT

I. A TAXPAYER HAS STANDING TO CHALLENGE SPECIAL TAX EXEMPTIONS AWARDED TO ANOTHER TAXPAYER ON THE GROUNDS THAT SUCH EXEMPTIONS VIOLATE FAIR TAX PROVISIONS, INCLUDING THE UNIFORMITY OF TAXATION CLAUSE, OF THE NORTH CAROLINA CONSTITUTION.

(Assignments of Error Nos. 1, 2, 3, 4, 5, and 6, below)

A. Standard of Review

In evaluating a dismissal pursuant to Rule 12(b)(1), this Court conducts a *de novo* review because the issue of whether a party has standing is a question of law.

Mangum v. Raleigh Bd. of Adjustment, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008); *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973). Invocation of standing does not require any special pleading. *Mangum*, 362 N.C. at 644, 669 S.E.2d at 283. As this Court so artfully explained:

... North Carolina is a notice pleading jurisdiction, and as a general rule, there is no particular formulation that must be included in a complaint or filing in order to invoke jurisdiction or provide notice of the subject of the suit to the opposing party. See *Mangum v. Surles*, 281 N.C. 91, 99, 187 S.E.2d 697, 702 (1972)("[I]t is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities." (citation omitted)). To deny a party his day in court because of his "imprecision with the pen" would "elevate form over substance" and run contrary to notions of fundamental fairness. See *Pyco Supply Co., Inc. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 443, 364 S.E.2d 380, 385 (1988).

Id.

B. Argument

Refined to its simplest terms and most essential character, this lawsuit questions the constitutionality of a sweetheart deal crafted and executed for the sole benefit of a single taxpayer by dramatically reducing the tax liability for this one taxpayer. The issue now on appeal is whether Plaintiffs have standing to file this lawsuit. This issue asks whether ordinary, everyday taxpayers can ask for judicial resolutions to substantial constitutional questions relating to governmental actions that reduce tax revenue for the State and benefit a single taxpayer. It asks whether common citizens can challenge the constitutionality of special deals for corporate giants. It asks whether individual taxpayers can demand that each

taxpayer, even corporate entities, in North Carolina pay its fair share of taxes. And, the answer to those questions must be a resounding “Yes.”

At Counts 7, 8, and 11, Plaintiffs have alleged violations of the constitutional requirement that taxation be “fair and equitable,” Article V, § 2(1), and that taxation be uniform, Article V, § 2(2). Plaintiffs further alleged a violation of the law of the lands provision of Article I, § 19. Defendants have described these claims collectively as “discrimination-based claims.” Characterizing them in such manner, Defendants argued below, and the trial court ultimately concluded that Plaintiffs lack standing as to these counts because they are not in the class of taxpayers discriminated against by the tax exemptions crafted for Google’s benefit. As explained below, these counts should be described as “fair tax claims,” not “discrimination claims,” and Plaintiffs do have standing to pursue those claims.

Essential to understanding the basis of Plaintiffs’ standing is an understanding of the central constitutional provision at issue: the Uniformity Clause at Article V, § 2(2). While this provision explicitly requires uniform treatment among classifications for property tax purposes, based on principles of justice, the courts have extended this uniformity requirement to sales and use taxes, license taxes, franchise taxes, taxes on trades and professions and other forms of taxation. *Hajoca Corp. v. I. L. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971). As Justice Higgins explained for the majority, “[a]lthough it is not expressly provided

that the tax on trades, etc., shall be uniform, yet a tax not uniform, as properly understood, would be so inconsistent with natural justice, and with the intent which is apparent in the section of the Constitution ... that it may be admitted that the collection of such a tax would be restricted as unconstitutional.” *Hajoca Corp.*, 277 N.C. at 568, 178 S.E.2d at 486.

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

Great Atlantic & Pacific Tea Co. v. Maxwell, 199 N.C. 433, 438-39, 154 S.E. 838, 841 (1930). See also *Smith v State*, 349 N.C. 332, 341, 507 S.E.2d 28, 33 (1998) (finding “the Constitution requires that laws shall be passed taxing real and personal property ... by uniform rule”) (quoting *Hajoca Corp.*, 277 N.C. at 568, 178 S.E.2d at 486 (citations omitted)).

1. *Plaintiffs have standing on the grounds that they have been injured and so have a right to seek redress in court.*

Plaintiffs raised constitutional challenges to the Google legislation based on the uniformity clause and related provisions in the law of the land clause, Article I, § 19, and the just and equitable clause, Article V, § 2(1), in Counts 7, 8, and 11. Defendants below have characterized these claims as “discrimination-based” in an apparent attempt to elevate the standing requirements necessary for Plaintiffs to proceed. Defendants argued below, and the Court of Appeals concluded that a plaintiff seeking to prosecute his so-called discrimination claim must jump a higher standing hurdle by demonstrating that he is in a class discriminated against by the allegedly discriminatory action. However, Plaintiffs submit that where a taxpayer is challenging a tax exemption, rather than a tax levy, he need not be among the class eligible for the specific tax exemption in question in order to challenge the constitutionality of the exemption. This proposition must be accepted because such a taxpayer is injured by the diminution in tax collections stemming from the allegedly unconstitutional tax exemption, in this case the exemptions crafted especially for Google. Further, if a plaintiff must be discriminated against in order to have standing as contended by Defendants, that discrimination is against all those subject to the tax that the special interest, like Google, gets to avoid. To conclude otherwise would result in no one being able to challenge the kind of tax favoritism at issue here in violation of the constitutional provisions at issue here.

The Court of Appeals concluded that Plaintiffs' standing was foreclosed by established North Carolina law which "requires that a person seeking to challenge 'the validity of a discriminatory statute . . . belong[] to the class which is prejudiced by the statute.'" *Munger v. State*, 689 S.E.2d 230, 239 (2010) (quoting *In Re Appeal of Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974)). However, this analysis overlooks two critical points: first, Plaintiffs have consistently asserted that they are prejudiced by the statute in that they suffer from a diminution in funds available for lawful purposes, as were the *Goldston* plaintiffs; and second, Plaintiffs are prejudiced in that they must pay sales and use taxes from which Google is exempt pursuant to the challenged statute. Each of these points is addressed in turn below.

a. *Goldston* establishes Plaintiffs' standing.

The seminal case for taxpayers establishing standing in North Carolina, *Goldston v. State*, 361 N.C. 26, 637 S.E.2d 876 (2006), clearly sets forth the longstanding principle that, in North Carolina, a taxpayer has standing to challenge unconstitutional government expenditures. "If the governing authorities are preparing to put public property to an unauthorized use, citizens . . . have the right to seek equitable relief." *Wishart v. Lumberton*, 254 N.C. 94, 96, 118 S.E.2d 35, 36 (1961). Standing to challenge the unconstitutional misuse or misappropriation of public funds was acknowledged and reaffirmed by this Court in *Goldston*.

There, this Court began its decision simply: “Our cases demonstrate that a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds.” *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881.

The Court of Appeals elected to characterize Plaintiffs’ treatment of *Goldston* as “having worked a fundamental change in North Carolina standing jurisprudence.” *Munger*, 689 S.E.2d at 239. Nothing could be further from the truth. Plaintiffs recognize that *Goldston* affirmed long-standing principles of standing and recapped North Carolina’s well established jurisprudence allowing taxpayers to challenge the unlawful or unconstitutional expenditures of public funds. Plaintiffs argued below as they argue here: *Goldston* recognizes diminution in public funds available for lawful government purposes constitutes an injury which taxpayers have a right to challenge. Plaintiffs here *must* pay taxes, like sales taxes on electricity, which Google gets to avoid. (Comp. ¶¶ 31, 57) The disparity in their treatment is both prejudicial and injurious.

Since the facts in *Goldston* dealt with the alleged unconstitutional expenditure of public money, the Court had no occasion to specifically articulate that taxpayer standing applies equally to the unconstitutional failure to collect revenue. Regardless, the rationale of *Goldston* is just as compelling to the latter situation. The justification of *Goldston* was simply that the misuse or

misappropriation of public money results in a loss of funds available for legitimate public purposes. The same result follows the government's failure to levy and collect taxes. *Goldston* addressed standing in the context of unconstitutional expenditures while this case presents the question of standing in the context of unconstitutional suppression of funds. Both situations result in less money in the public coffers, and both situations warrant standing for those taxpayers seeking redress of their injury.

North Carolina appellate jurisprudence has evolved over the last forty years to view taxpayers, generally, as having an interest in avoiding unfair tax burdens. This Court has permitted taxpayers to mount such suits provided litigants demonstrate a connection between the challenged statute and an injury to "persons, property or constitutional rights." However, that injury may amount to nothing more than a *de minimis* increase in the plaintiff's tax burden. *Piedmont Canteen Service, Inc. v. Johnson*, 256 NC 155, 166, 123 S.E.2d 582, 589 (1962); *accord. Stanley v. Dept. of Conservation & Dev.*, 284 N.C. 15, 199 S.E.2d 641 (1973).

Tax exemptions given to Google result in the diminution of available funds from which the State can pay for government services. That is, because Google is exempt from paying certain taxes, the State will have less money than it would have but for Google's special exemptions. The State will accordingly have less money available to spend on government services. As a result, Plaintiffs will either

have to shoulder a larger portion of the expense of government or do without the full measure of government services. In either event, as alleged, Plaintiffs are being deprived of the benefit of Google's tax liability because of the unconstitutional tax exemptions awarded to Google. (R. p. 47) That loss is a real and remediable injury. It is, in fact, precisely the kind of injury which the *Goldston* court deemed sufficient to establish standing.

Other states have recognized the right of taxpayers to bring challenges to tax exemptions awarded to other taxpayers. See, e.g., *Beattie v. East China Charter Township*, 157 Mich. App. 27, 403 N.W.2d 490 (1987) (residents had standing to challenge tax exemptions awarded to power company as part of employment development act); *Anchorage Baptist Temple v. Coonrod*, 166 P.3d 29 (2007) (standing unquestioned in lawsuit filed by taxpayers groups challenging tax exemptions for educators' residences owned by private religious or parochial schools).

The effect *Goldston* and its predecessors deemed sufficiently injurious to warrant standing, i.e. diminution in the public fisc, is exactly the same injury which results from the failure of government to levy and collect taxes duly imposed on the citizens. See also *Merrimon v. Souther Paving & Constr. Co.*, 142 N.C. 539, 545, 55 S.E. 366, 369 (1906) ("That a citizen, in his own behalf and that of all other tax-payers, may maintain a suit in the nature of a bill in equity to enjoin the

governing body of a municipal corporation from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayers—such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, etc.—is well settled.”). Thus, the rationale, if not the precise wording, of *Goldston* applies to a situation where a taxpayer seeks to challenge the unconstitutional failure of the government to collect tax money or to challenge unconstitutional tax rebates. The long-standing tradition in North Carolina now entrenched in our jurisprudence is that a taxpayer has standing to challenge an unconstitutional expenditure. The same case law which establishes without equivocation taxpayer standing allows for a taxpayer to challenge government conduct which results in a diminution of the public fisc without regard to whether that diminution flows from an expenditure of public money or an intentional failure to collect public money.

- b. *Stanley* allows a taxpayer to challenge tax exemptions for which he is ineligible.

In *Stanley*, Justice Sharp, writing for the North Carolina Supreme Court, enunciated a conception of standing in line with the United States Supreme Court’s holding in *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952 (1968) (question of standing is whether the party seeking relief has alleged such a personal stake in the outcome to assure the concrete adverseness which sharpens presentation of issues). *Stanley*, 284 N.C. at 28, 199 S.E.2d at 650. The *Stanley* plaintiffs mounted

challenges to a tax-exempt State bond issue which was to finance construction of pollution-abatement facilities for the use of private paper mills. The *Stanley* plaintiffs argued that the bond issue amounted to a state subsidy for private enterprise in contravention of the North Carolina Constitution, and that exempting the bonds from tax yielded an unfair tax burden for all other North Carolina taxpayers. En route to agreeing with the plaintiffs on the merits, the Court held that the plaintiffs' allegation of unfair tax burden based upon the exemption was sufficient for standing:

. . . Plaintiffs will be injured unless [the statute's] invalidity is judicially declared[,] for the *exemption of any property from its fair share of the public burden, to that extent, increases the burden imposed upon all other taxable property.* 'A taxpayer injuriously affected by a statute may generally attack its validity. Thus, he may attack a statute which . . . exempts person or property from taxation, *or* imposes on him in its enforcement an additional financial burden, *however slight.*'

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

Like the instant case, *Stanley* was a case in which taxpayers complained not of a direct disbursement of public funds but rather a tax exemption which would result in reduced tax collections and thereby reduced public funds available for lawful government purposes. Plaintiffs here complain of the same harm. That is, Google's special tax exemptions will result in reduced tax collections and thereby reduced public funds available for lawful government purposes. It is noteworthy,

the Court could have limited standing in *Stanley* to bondholders who must pay the tax from which the challenged bonds were exempt. The Court of Appeals analysis would jive with such a standing paradigm; however, that is not the holding of *Stanley*. This Court held the plaintiffs in *Stanley* had standing because of the possibility of an increased tax burden and so too should it hold Plaintiffs have standing.

Plaintiffs, together with their fellow taxpayers, face a reduction in the public funds available for lawful government use. This necessarily means that Plaintiffs will either face a greater tax burden or have to make do with reduced government resources. This is the heart of *Stanley's* core holding: a taxpayer “may attack a statute which . . . exempts persons or property from taxation, or imposes on him in its enforcement an additional financial burden, *however slight*.” *Stanley*, 284 at 29, 199 S.E.2d at 651 (citation omitted)(emphases added). Neither lower courts nor Defendants below have ever pointed to any language from *Stanley* which limits standing to those discriminated against. No such limitation can be found in or gleaned from *Stanley*.

2. *To the extent that standing requires membership in a prejudiced class, Plaintiffs by virtue of their status as taxpayers have been prejudiced.*

Notwithstanding *Goldston* and *Stanley*, as well as Plaintiffs' allegations of injury, the lower courts concluded that Plaintiffs lack standing to pursue their fair

tax claims because they were not in the class of taxpayers discriminated against by the Google legislation. Not only is this analytical framework wrong as argued above, but also, the facts of this case were incorrectly applied to it. Plaintiffs alleged they are discriminated against by the Google legislation because they must pay a tax from which Google is specially exempt, i.e. sales and use tax.

Even assuming solely for the sake of argument that Plaintiffs must be discriminated against by the challenged government action, the Court of Appeals and the trial court mischaracterized the class discriminated against by the Google legislation and so failed to recognize that Plaintiffs are, in fact, among that class.

Relying on *In re Appeal of Barbour*, 112 N.C. App. 368, 436 S.E.2d 169 (1993), lower courts have held that, for so-called discrimination claims, a plaintiff be among the class prejudiced or discriminated against by the challenged legislation in order to have standing. The Court of Appeals then relied on *Blinson v. State*, 186 N.C. App. 328, 651 S.E.2d 268 (2007), to hold that Plaintiffs were not among the class of taxpayers discriminated against and contrasted the facts of this case and *Blinson* with the facts of *Barbour* in which the plaintiff had standing to pursue his claims.

The *Blinson* opinion does not discuss the facts of *Barbour* in any detail. However, the facts at issue in the two cases are clearly different. In *Barbour*, a residential property owner was allowed to challenge a tax exemption granted to the owner of another tract of property used for residential purposes. In *Blinson*, however, a group of individuals who paid property, income, and sales and use taxes were not allowed to challenge tax

exemptions provided to large computer manufacturers. As a result, the taxpayer who brought suit in *Barbour* was attempting to challenge a tax exemption associated with the type of property that he did, in fact, own, while the same could not be said of the taxpayers who brought suit in *Blinson*.

Munger, ___ N.C. at ____, 689 S.E.2d at 242, fn.7.

Curiously, the Court of Appeals overlooked the type of tax exemptions at issue in *Blinson*. There, the plaintiffs sought to challenge exemptions from the corporate income and corporate franchise tax, but as individuals, plaintiffs were not subject to those taxes. *Blinson*, 186 N.C. App. at 333, 651 S.E.2d at 273. While the *Blinson* plaintiffs also raised challenges to other tax exemptions, the thrust of their arguments was a challenge to tax exemptions for which other corporations could not qualify. *Id.* at 333-34, 651 S.E.2d at 273-74 (“[P]laintiffs’ claims under these provisions pertain only to a theoretical injury that might be suffered by other businesses that may attempt to compete with Dell.”) It is also noteworthy that *Blinson* has not been reviewed by this Court. *Blinson v. State*, 362 N.C. 355, 661 S.E.2d 240 (2008)(dismissing appeal based on substantial constitutional question and denying discretionary review of Court of Appeals decision). Thus, *Blinson* offers little illumination and, in any event, is subservient to this Court’s holding in *Stanley* that a taxpayer “may attack a statute which . . . exempts persons or property from taxation, or imposes on him in its enforcement

an additional financial burden, *however slight.*" *Stanley*, 284 at 29, 199 S.E.2d at 650-51 (citation omitted)(emphasis added).

In *Barbour*, an individual property owner sought to challenge a tax exemption created for religiously affiliated or Masonic retirement homes. The plaintiff there based his standing argument on two theories. First, he maintained that he had standing as an individual homeowner who paid property taxes from which such retirement homes were exempt; additionally, he argued he had standing because the exemption provision discriminated against retirement homes which were not religiously affiliated or Masonic. The Court held that he had standing on the ground that he as a homeowner did not have the opportunity to qualify for the exemption, though the Court went on to hold that he could not pursue claims that the exemption discriminated against retirement homes which were not religious or Masonic because he was not in the class (i.e. retirement home not religiously affiliated or Masonic) which was prejudiced by the exemption.

Sadly overlooked by the lower courts was the fact the plaintiff in *Barbour* was permitted to proceed as a member of the class of taxpayers not exempt from taxation under the challenged statute.

In the present case, Barbour first alleges that N.C.G.S. § 105-275(32) discriminates against the class of individual residential property owners who own their property for private personal residences and are not exempt under the statute from taxation. Barbour is a member of this class, and the exemption of property under this statute affects him as a residential property owner subject to taxation. Thus, based on the previously cited law, Barbour

has standing to challenge the statute on this basis.

Barbour, 112 N.C. App. at 373, 436 S.E.2d at 173.

The holding of *Barbour* can be graphically set out and applied to the instant case as follows:

Plaintiff	Class Discriminated Against by Challenged Statute			Class Benefitted	Standing
	Taxpayer type	Property use	Eligibility?		
Barbour	Individual property owner	Owning property for personal use	Not exempt from taxation under statute	Corporation qualifying for special tax exemption	YES. <i>Barbour</i> , 112 N.C. App. at 373.
Munger	Individual property owner	Owning property for personal use	Not exempt from taxation under statute	Corporation qualifying for special tax exemption	This Court should hold YES.

The standing principle recognized in *Barbour* is simply that a taxpayer has standing to challenge the existence of an exemption, but only one who is discriminated against by operation of the qualifying criteria may challenge eligibility criteria, like requirements of Masonic or religious affiliation. The claims here fall into the former category. The Google legislation exempts a qualifying “Internet data center” from paying retail sales and use taxes. Retail sales and use taxes are imposed at Article 5 of Chapter 105 of the General Statutes. Plaintiffs alleged that they pay sales taxes. But, pursuant to the Google legislation, Google

does not. Plaintiffs specifically alleged that they are not eligible for the tax benefits Google has received and will receive pursuant to the Google Legislation. (R p 47) Thus, Plaintiffs claims are like those Barbour could pursue. Although Plaintiffs do not concede the correctness of either *Blinson* or *Barbour* to the extent the plaintiff was denied standing on some claims, even if those cases were correctly decided, neither applies here. Had Plaintiffs attempted to challenge eligibility criteria which discriminate among corporations their claims would have been analogous to those foreclosed in *Barbour* and *Blinson* by the Court of Appeals. But, that simply is not the case here. Plaintiffs' complaint is not that businesses other than Google cannot meet the qualifying criteria to be an "eligible Internet data center." Their argument is that no such exemption should exist in the first place.

A careful review of the Complaint shows that Plaintiffs' objection is that Google is getting preferential treatment in violation of the State Constitution, which Plaintiffs and any other taxpayers, individual or corporate, cannot get. For example, at Paragraph 57, Plaintiffs specifically alleged: "Plaintiffs are not eligible for and have not received any tax forbearance or subsidies or grants similar to the tax benefits for Google." (R p 47) Further, at Count 11, Paragraph 84, Plaintiffs alleged, "Providing Google with the tax benefits for Google is state governmental favoritism for Google, relative to *other persons and entities (including plaintiffs)*." (R p 57) (emphasis added). That same language, "*other persons and entities*

(including plaintiffs),” appears again at the subsequent paragraph. Contrary to assertions by Defendants below, Plaintiffs do not seek to vindicate the rights of other companies which cannot qualify for the tax exemptions. *Compare Blinson*, 186 N.C. App. at 333-34 (“[P]laintiffs’ claims under these provisions pertain only to a theoretical injury that might be suffered by other businesses that may attempt to compete with Dell.”) Rather, they seek to vindicate their own personal rights—the right to have taxes levied in a constitutionally uniform manner and to have those taxes revenues available to fund lawful government purposes. It is against this backdrop that the Court should view their injury, and it is against this backdrop that their standing as individual taxpayers, like that of the homeowner in *Barbour*, is clear.

The Court of Appeals decision is deafeningly silent on a question of profound juridical importance: If a taxpayer subject to a particular tax cannot challenge an exemption from that tax created for another taxpayer, who can? The practical effect of the Court of Appeals decision here is not simply to nail shut the courthouse doors but to solder shut the doors’ hinges. Government would have carte blanche to hand out special tax breaks to special interests in a random and discriminatory fashion. Constitutional mandates of uniformity of taxation and equal protection would be rendered wholly unenforceable, a mere precatory list of our Founding Fathers’ ideals.

Plaintiffs raised a claim that the Google legislation is unconstitutional because it established a tax exemption that allows Google to avoid taxes which Plaintiffs and every taxpayer BUT Google must pay. Thus, the classification in question is the class subject to retail sales and use taxes. But for the allegedly unconstitutional exemption created by the Google legislation, Google would—like Plaintiffs—be subject to the retail sales and use taxes of Chapter 105, Article 5. Plaintiffs have standing to challenge the existence of an exemption from a tax they must pay. Their standing is predicated not upon the discriminatory features of qualifying criteria, but rather on the existence of the exemption in the first place. Plaintiffs should be allowed to move forward with proving their case upon the filing of an Answer by Defendants.

CONCLUSION

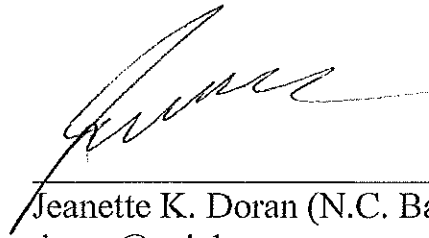
For the foregoing reasons, Plaintiffs respectfully request the decision of the Court of Appeals be reversed and the matter remanded for trial.

This the 6th day of November, 2010.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a copy of the foregoing PLAINTIFFS-APPELLEES' NEW BRIEF by depositing a copy contained in a first-class postage paid envelope into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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