

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
05 CVS 017197

CHARLES HEATHERLY; THOMAS  
SPAMPINATO; W. EDWARD  
GOODALL, JR.; PAUL STAM; WAKE  
COUNTY TAXPAYERS ASSOCIATION;  
and THE NORTH CAROLINA FAMILY  
POLICY COUNCIL

Plaintiffs,

WILLIS WILLIAMS, NORTH  
CAROLINA FAIR SHARE, and  
NORTH CAROLINA COMMON SENSE  
FOUNDATION,

Plaintiff-Intervenors,

v.

THE STATE OF NORTH CAROLINA,  
CHARLES A. SANDERS, BRYAN E.  
BEATTY, LINDA CARLISLE, ROBERT  
A. FARRIS, JR., JOHN R. MCARTHUR,  
JIM WOODWARD, and ROBERT W.  
APPLETON, Members of the North  
Carolina Lottery Commission, in their  
official capacity; NORTH CAROLINA  
LOTTERY COMMISSION; THOMAS N.  
SHAHEEN, Executive Director of the  
North Carolina Education Lottery, in his  
official capacity; MICHAEL F. EASLEY,  
Governor of the State of North Carolina, in  
his official capacity; RICHARD H.  
MOORE, Treasurer of the State of North  
Carolina, in his official capacity;

Defendants.

FILED  
2006 FEB 15 AM 9:37  
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**INTERVENING  
COMPLAINT AND PETITION  
FOR DECLARATORY JUDGMENT  
(COMP)**

Plaintiff-Intervenors Willis Williams, the North Carolina Fair Share and the North  
Carolina Common Sense Foundation allege and state the following against the defendants:

**NATURE OF THIS ACTION**

1. This lawsuit was initially filed by the Plaintiffs on December 15, 2005, pursuant to the Uniform Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 to challenge the constitutionality of North Carolina's HB 1023, as amended by section 31.1 of SB 622, titled "AN ACT TO ESTABLISH A STATE LOTTERY TO GENERATE FUNDS TO FURTHER THE GOAL OF PROVIDING ENHANCED EDUCATIONAL OPPORTUNITIES SO THAT ALL STUDENTS IN THE PUBLIC SCHOOLS CAN ACHIEVE THEIR FULL POTENTIAL, TO SUPPORT SCHOOL CONSTRUCTION, TO FUND COLLEGE AND UNIVERSITY SCHOLARSHIPS, AND TO MAKE CONFORMING CHANGES TO THE GENERAL STATUTES" ("the Lottery Act") and to seek a judgment finding the Lottery Act null, void and unenforceable on the grounds that passage of the same did not satisfy requirements of the North Carolina Constitution. (A copy of HB 1023 as amended by section 31.1 of SB 622 is attached hereto as Exhibit A and fully incorporated herein.)

2. The action by the legislature and certain of the defendants in passing HB 1023, as amended by section 31.1 of SB 622, and the action by the other defendants in subsequently attempting to implement the Lottery Act violate Article II, Section 23 of the North Carolina Constitution. Article II, Section 23 requires that any law to raise money on the credit of the State or to pledge the faith of the State directly or indirectly for the payment of any debt, or to impose any tax upon the people of the State be read and passed three several readings each of which shall be on three separate days; and that the yeas and nays of each vote be entered on the journal of each house of the General Assembly.

3. The action by the legislature and certain of the defendants in passing HB 1023, as amended by section 31.1 of SB 622, and the action by other defendants in subsequently attempting to implement the Lottery Act also violate Article V, Section 7 of the North Carolina Constitution which prohibits the drawing of money from the State treasury except in consequence of appropriations made by law.

### **PARTIES**

#### **(Plaintiffs)**

Pursuant to the Uniform Declaratory Judgment Act, the following individuals are petitioning for a declaration as to the unconstitutionality of the legislation and resolutions at issue, as well as the past, present and future implementation of the Lottery Act, and for the purposes of this action are denominated as "Plaintiff-Intervenors":

4. Willis Williams is a citizen and resident of Martin County, North Carolina and at all times complained of, has been a taxpayer of this State and will likely continue to be a taxpayer of the State.

5. North Carolina Fair Share is a statewide membership organization dedicated to working with low wealth, unemployed and underemployed North Carolinians to bring about a fairer North Carolina. It is a nonprofit corporation organized under the laws of the State of North Carolina with its principal location in Wake County, North Carolina. At all times complained of, the membership of North Carolina Fair Share has consisted of citizens and residents of the State, including persons who have been taxpayers of this State and will likely continue to be taxpayers of the State.

6. The North Carolina Common Sense Foundation is a progressive, nonpartisan, public policy research organization. It is a nonprofit corporation organized under the laws of the

State of North Carolina with its principal location in Wake County, North Carolina At all times complained of, the membership of North Carolina Common Sense Foundation has consisted of citizens and residents of the State, including persons who have been taxpayers of this State and will likely continue to be taxpayers of the State.

**(Defendants)**

Pursuant to N.C. Gen. Stat. § 1-260, the following are joined as parties who have an interest which would be affected by the declaration sought, and are for purposes of this action denominated as “Defendants”:

7. Defendant State of North Carolina is a general purpose state government which is capable of begin sued, and which is being sued, for enacting (through the General Assembly) legislation in violation of the North Carolina State Constitution, ie. the Lottery Act, as well as for the past, current and future unconstitutional implementation of the Lottery Act.

8. Defendants Charles A. Sanders, Bryan E. Beatty, Linda Carlisle, Robert A. Farris, Jr., John R. McArthur, Jim Woodward, and Robert W. Appleton are each citizens and residents of the State of North Carolina; each is a current member of the North Carolina State Lottery Commission and is sued in his or her official capacity as a member of the North Carolina State Lottery Commission, which is charged with establishing and administering the lottery laws of the State of North Carolina. The Defendants listed in this paragraph are hereinafter referred to as the “Lottery Commission Defendants.”

9. Defendant North Carolina Lottery Commission (“the Lottery Commission”) is a revenue-raising agency of the State of North Carolina, with its headquarters in Wake County and is charged with establishing and administering the lottery laws of the State of North Carolina.

10. Defendant Thomas N. Shaheen is a citizen and resident of the State of North Carolina and is sued in his official capacity as Executive Director of the North Carolina Education Lottery.

11. Defendant Michael F. Easley and Defendant Richard H. Moore are each sued in their official capacity as the Governor and the State Treasurer, respectively, of the State of North Carolina.

### **JURISDICTION AND VENUE**

12. This action is brought pursuant to N.C. Gen. Stat. § 1-253, the Uniform Declaratory Judgment Act, for the purpose of determining the constitutionality of certain actions of the State of North Carolina. This Court has jurisdiction over the subject matter of this action pursuant to N.C. Gen. Stat. § 1-253, the Uniform Declaratory Judgment Act and N.C. Gen. Stat. §§ 7A-245 (1), (3) and (4).

13. This Court has jurisdiction over the parties pursuant to N.C. Gen. Stat. § 1-75.4.

14. Venue is proper in this Court pursuant to N.C. Gen. Stat. § 1-82.

### **FACTUAL BACKGROUND**

#### **Legislative History**

15. Upon information and belief, HB 1023 was filed in the House of Representatives on March 30, 2005, was read for the first time and referred to the House Select Committee on the Lottery the following day. On April 6, 2005, HB 1023 (Committee Substitute) was placed on the calendar for that day for immediate consideration. (A copy of HB 1023 (Committee Substitute) is attached hereto as Exhibit B and is fully incorporated by reference).

16. Upon information and belief, HB 1023 (Committee Substitute) was called for a second reading and vote on April 6, 2005. The bill passed its second reading, by electronic vote, 62-58. The yeas and nays of the vote on the second reading were recorded in the House Journal. One representative (Representative Harrison) asked permission to change her vote from "aye" to "no." Permission was granted, and the final adjusted vote was 61-59.

17. Upon information and belief, on the same day, April 6, 2005, immediately after the vote on the second reading, HB 1023 (Committee Substitute) passed on a purported third reading by voice vote, as reflected in the House of Representatives Journal for that day. (A copy of the House Journal for April 6, 2005, is attached hereto as Exhibit C and fully incorporated by reference). The yeas and nays were not recorded in the House Journal.

18. Upon information and belief, on April 6, 2005, after purportedly passing HB 1023 (Committee Substitute) on a vote following a third reading, the House sent HB 1023 (Committee Substitute) to the Senate.

19. Purportedly having passed the House, HB 1023 (Committee Substitute) was received by the Senate on April 7, 2005, was read for the first time and was referred to the Committee on Rules and Operations of the Senate that same day.

20. Upon information and belief, SB 622 (the "Budget Bill") was passed in the Senate on May 5, 2005. The Budget Bill contained provisions at section 31.1 which related to a State Lottery. The House passed the Budget Bill on June 16, 2005, without the Lottery provisions in the bill. However, after being sent to Conference Committee, SB 622 emerged with the Lottery provisions of section 31.1 included. These provisions were dependant for enactment upon the passage of HB 1023 (Committee Substitute) and would amend HB 1023 (Committee Substitute) if it (HB 1023 (Committee Substitute)) became law. SB 622 passed in the House on August 10, 2005, and in the Senate on August 11, 2005, and was signed into law by the Governor on August 13, 2005.(A copy of section 31.1 of SB 622 is attached hereto as Exhibit D and fully incorporated by reference.)

21. Upon information and belief, on August 24, 2005, after approximately 20 hours of debate, Marc Basnight as Senate President Pro Tempore announced that the Senate had

concluded its business for the session, would not be taking any additional votes, and would return the following week to take up a resolution for adjournment. Two days later on August 26, 2005, members of the Senate were supposedly notified that the Senate would be in session on August 30, 2005, to consider any eligible legislation.

22. Upon information and belief, on August 30, 2005, the Committee on Rules and Operations of the Senate reported HB 1023 (Committee Substitute) favorably to the Senate and it was placed on the calendar for that day.

23. Upon information and belief, HB 1023 (Committee Substitute) was passed by the North Carolina Senate on a purported second reading on August 30, 2005 by electronic vote. The yeas and nays of the vote on the second reading were recorded in the Senate Journal. The vote after the second reading in the Senate was tied at 24 yeas and 24 nays, and a tie breaking "yea" vote was cast by Lieutenant Governor Beverly Perdue, presiding in her official capacity. (A copy of the Senate Journal from August 30, 2005 is attached hereto as Exhibit E and fully incorporated by reference).

24. Upon information and belief, on August 30, 2005, the same day as the second reading and vote, HB 1023 (Committee Substitute) passed by voice vote after a purported third reading. The yeas and nays of the vote on third reading were not recorded in the Senate Journal.

25 HB 1023 (Committee Substitute), having purportedly passed the House and Senate and been signed by the presiding officers of each, and by the Governor, became law on August 31, 2005. (See Exhibit A), and HB 1023 (Committee Substitute) was thus amended by section 31.1 of SB 622 and the final manifestation of the Lottery Act (Exhibit A) was completed.

**Provisions of the Lottery Act**

26. Article 1 of HB 1023 as amended by section 31.1 of SB 622 states that the purpose of the bill is “to establish a State-operated lottery to generate funds for the public purposes” described in the bill, i.e., public education.

27. Article 2 of HB 1023 as amended by section 31.1 of SB 622 creates a Lottery Commission which “shall be an independent, self-supporting, revenue-raising agency of the State.”

28. Article 7 of HB 1023 as amended by section 31.1 of SB 622 created an enterprise fund within the State treasury, to be known as the North Carolina State Lottery Fund, the purpose of which is to generate revenue to be used for the educational welfare of all North Carolina citizens and residents.

29. The North Carolina State Lottery Fund will be the repository for all proceeds from the sale of lottery tickets, public funds for initial start-up costs provided by the State, all other funds credited or appropriated to the Lottery Commission, and interest earned by the North Carolina State Lottery Fund.

30. HB 1023 as amended by section 31.1 of SB 622 directs the Lottery Commission, to the extent practicable, to allocate revenues from the sale of lottery tickets in the following manner:

- a. At least fifty percent of the total annual revenues for prizes;
- b. At least thirty-five percent of the total annual revenues to be transferred to the Education Lottery Fund as directed by §18C-164 of HB 1023;
- c. No more than eight percent of the total annual revenues for payment of expenses of the lottery; and

- d. No more than seven percent of the total annual revenues for compensation paid to lottery game retailers.

31. HB 1023 as amended by section 31.1 of SB 622 directs the Lottery Commission to distribute the net revenue of the North Carolina State Lottery Fund annually as follows:

- a. Five percent shall be transferred to the Education Lottery Reserve Fund to be used for purposes of conforming the General Assembly's appropriation of net revenue (which is based on estimates) to the actual net revenues for any given year.
- b. Fifty percent of the remaining net revenues shall be transferred to the Education Lottery Fund to support reduction of class size in early grades of public schools;
- c. Forty percent of the remaining net revenues shall be transferred to the Public School Building Capital Fund created in Article 38A of Chapter 115C of the General Statutes and appropriated for expenditure in accordance with that Article;
- d. Ten percent of the remaining net revenues shall be transferred to the State Educational Assistance Authority and appropriated to fund scholarships pursuant to Article 35A of Chapter 115C of the General Statutes

32. Pursuant to §18C-164(d) of HB 1023 as amended by section 31.1 of SB 622, the Education Lottery Fund, the Public School Building Capital Fund, the State Educational Assistance Authority shall be subject to appropriation by the General Assembly and shall be used to further the goal of providing enhanced educational opportunities so that all students in the public schools can achieve their full potential.

33. Section 10.2(a) of HB 1023 as amended by section 31.1 of SB 622 directs the Lottery Commission to deduct and withhold state income taxes from the payment of winnings that are reportable to the Internal Revenue Service. The amount of taxes to be withheld is seven percent of the winnings.

34. Section 10.3 of HB 1023 as amended by section 31.1 of SB 622 rewrites in part N.C.G.S. § 105-134 to impose a tax on every nonresident of North Carolina who derives income from gambling activities in the State, including the lottery.

35. Section 15 of HB 1023 as amended by section 31.1 of SB 622 directs the State Treasurer to lend to the North Carolina State Lottery Commission, at a rate of interest comparable to short-term rates in the private capital market and with repayment terms satisfactory to both parties, sufficient State funds to cover initial operating expenses of the Lottery Commission, except that the total amount of borrowed funds shall not exceed \$10 million. The borrowed funds are to be deposited in the North Carolina State Lottery Fund and are to be available for expenditure as set forth in HB 1023 without further action by the General Assembly.

36. Article 2 of HB 1023 as amended by section 31.1 of SB 622 provides for the establishment of a Lottery Commission to establish and oversee the operation of a State lottery and specifies that the Lottery Commission shall consist of “nine members, five of whom shall be appointed by the Governor, two of whom shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, and two of whom shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.”

**Relevant Constitutional Provisions**

37. Article II, Section 23, of the North Carolina State Constitution states:

Revenue bills. No law shall be enacted to raise money on the credit of the State, or to pledge the faith of the State directly or indirectly for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and shall have been agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal.

38. Article V, Section 7, of the North Carolina State Constitution states in pertinent part:

Drawing Public money.

(1) *State treasury*. No money shall be drawn from the State treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be published annually.

39. Upon information and belief, on or about December 5, 2005, Defendant Shaheen began work as Executive Director of the North Carolina Education Lottery.

40. Plaintiff Williams intends to purchase a North Carolina lottery ticket once such tickets are made available for purchase by the Defendants. It is also likely that some members of the North Carolina Common Sense Foundation will similarly purchase a North Carolina lottery ticket once such tickets are made available by the Defendants.

41. A demand by the Plaintiff-Intervenors upon the Defendants and/or Attorney General Roy Cooper to institute proceedings to recover moneys unconstitutionally expended by the North Carolina Lottery Commission would be useless and futile, in that, upon information

and belief, the Plaintiffs in this lawsuit made a substantially similar demand upon Defendants Sanders, and Moore, as well as Attorney General Roy Cooper, on or about November 17, 2005. Upon information and belief, Defendants Sanders and Moore, and Attorney General Roy Cooper have each refused to respond to Plaintiffs' demand letters or otherwise institute proceedings to recover moneys unconstitutionally expended by the North Carolina Lottery Commission.

**COUNT ONE**

**(The Lottery Act Unconstitutionally Raises Money on the Credit of the State for the Payment of Lottery Winnings)**

42. Plaintiff-Intervenors incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 41.

43. By means of creating a lottery which, upon information and belief, will sell lottery tickets, the winnings for which will be paid by the State, the State intends to raise money on the credit of the State.

44. Plaintiff-Intervenors allege that the process by which Defendants enacted a state lottery in North Carolina violates Article II, Section 23 of North Carolina Constitution for the following reasons:

45. HB (Committee Substitute) improperly passed the Senate in that:

(a) HB 1023 (Committee Substitute) passed the Senate on a second and a third reading each having been conducted on the same day, August 30, 2005, in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that no law to raise money on the credit of the State be enacted unless the bill for the purpose shall have been read three several times in each house of the General

Assembly and passed three several readings, which readings must be on three different days; and

(b) HB 1023 (Committee Substitute) passed the Senate on the second reading by electronic vote and third reading by voice vote in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that the yeas and nays on the second and third readings of a bill to raise money on the credit of the State be recorded in the journal of the House and of the Senate.

46. HB 1023 (Committee Substitute) improperly passed the House in that:

(a) HB 1023 (Committee Substitute) passed the House on a second and a third reading each having been conducted on the same day, April 6, 2005, in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that no law to raise money on the credit of the State be enacted unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings must be on three different days; and

(b) HB 1023 (Committee Substitute) passed the House on the second reading by electronic vote and on the third reading by voice vote in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that the yeas and nays on the second and third readings of a bill to raise money on the credit of the State be recorded in the journal of the House and of the Senate.

47. The rights of Plaintiff-Intervenors under Art. II, Section 23 of the North Carolina Constitution, have been, are and will continue to be violated by Defendants' implementation of the unconstitutional Lottery Act.

48. To the extent that Mr. Williams' and/or members of the N.C. Common Sense Foundation participate in the lottery program by purchasing tickets, their rights under Art. II, Section 23 of the North Carolina Constitution will be violated, in that a tax will be imposed on them that not been properly authorized in accordance with the North Carolina Constitution.

**COUNT TWO**

**(The Lottery Act Unconstitutionally Pledges the Faith of the State for the Payment of A Debt)**

49. Plaintiff-Intervenors incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 48.

50. By means of creating a lottery which, upon information and belief, will sell lottery tickets, the winnings for which will be paid by the State, the State intends to pledge the faith of the State directly or indirectly for the payment of the debt to be owed to the holder of a winning lottery ticket.

51. Plaintiff-Intervenors allege that the process by which Defendants enacted a state lottery in North Carolina violates Article II, Section 23 of North Carolina Constitution for the following reasons:

52. HB 1023 (Committee Substitute) improperly passed the Senate in that:

(a) HB 1023 (Committee Substitute) passed the Senate on a second and a third reading each having been conducted on the same day, August 30, 2005, in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that no law to pledge the faith of the state directly or indirectly for the payment of any debt be enacted unless the bill for the purpose shall have been read three

several times in each house of the General Assembly and passed three several readings, which readings must be on three different days; and

(b) HB 1023 (Committee Substitute) passed the Senate on the second reading by electronic vote and on the third reading by voice vote in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that the yeas and nays on the second and third readings of a bill to pledge the faith of the State directly or indirectly for the payment of any debt be recorded in the journal of the House and of the Senate.

53. HB 1023 (Committee Substitute) improperly passed the House in that:

(a) HB 1023 (Committee Substitute) passed the House on a second and a third reading each having been conducted on the same day, April 6, 2005, in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that no law to pledge the faith of the State directly or indirectly for the payment of any debt be enacted unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings must be on three different days; and

(b) HB 1023 (Committee Substitute) passed the House on the second reading by electronic vote and third reading by voice vote in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that the yeas and nays on the second and third readings of a bill to pledge the faith of the State directly or indirectly for the payment of any debt be recorded in the journal of the House and of the Senate.

54. The rights of Plaintiff-Intervenors under Art. II, Section 23 of the North Carolina Constitution, have been, are and will continue to be violated by Defendants' implementation of the unconstitutional Lottery Act.

55. To the extent that Mr. Williams' and/or members of the N.C. Common Sense Foundation participate in the lottery program by purchasing tickets, their rights under Art. II, Section 23 of the North Carolina Constitution will be violated, in that a tax will be imposed on them that not been properly authorized in accordance with the North Carolina Constitution.

### COUNT THREE

#### **(The Lottery Act Unconstitutionally Creates an Implicit Tax)**

56. Plaintiff-Intervenors incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 55.

56. By means of creating a lottery for the express purpose of raising revenue, in that approximately 35% of the gross revenues from the sale of lottery tickets would be paid to the State as "net revenues" for purposes of funding education, and 15% of the gross revenues from the sale of the lottery tickets would be paid for the operation by the State of the lottery, the State has created an implicit tax upon the people of the State.

57. Plaintiff-Intervenors allege that the process by which Defendants enacted a state lottery in North Carolina violates Article II, Section 23 of North Carolina Constitution for the following reasons:

58. HB 1023 (Committee Substitute) improperly passed the Senate in that:

(a) HB 1023 (Committee Substitute) passed the Senate on a second and a third reading each having been conducted on the same day, August 30, 2005, in violation of the requirement, codified at Article II, Section 23 of the North Carolina

Constitution, that no law to impose a tax upon the people be enacted unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings must be on three different days; and

(b) HB 1023 (Committee Substitute) passed the Senate on the second reading by electronic vote and on the third reading by voice vote in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that the yeas and nays on the second and third readings of a bill to impose a tax upon the people be recorded in the journal of the House and of the Senate.

59. HB 1023 (Committee Substitute) improperly passed the House in that:

(a) HB 1023 (Committee Substitute) passed the House on a second and a third reading each having been conducted on the same day, April 6, 2005, in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that no law to impose a tax upon the people be enacted unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings must be on three different days; and

(b) HB 1023 (Committee Substitute) passed the House on the second reading by electronic vote and on the third reading by voice vote in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that the yeas and nays on the second and third readings of a bill to impose a tax upon the people be recorded in the journal of the House and of the Senate.

60. The rights of Plaintiff-Intervenors under Art. II, Section 23 of the North Carolina Constitution, have been, are and will continue to be violated by Defendants' implementation of the unconstitutional Lottery Act.

61. To the extent that Mr. Williams' and/or members of the N.C. Common Sense Foundation participate in the lottery program by purchasing tickets, their rights under Art. II, Section 23 of the North Carolina Constitution will be violated, in that a tax will be imposed on them that not been properly authorized in accordance with the North Carolina Constitution.

#### COUNT FOUR

##### **(The Lottery Act Unconstitutionally Creates an Express Tax on Residents)**

62. Plaintiff-Intervenors incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 61.

63. By means of directing the Lottery Commission to deduct and withhold state income taxes, in the amount of seven percent (7%) of the winnings, from the payment of winnings that are reportable to the Internal Revenue Service, the State has created an express tax upon the people of the State.

64. Plaintiff-Intervenors allege that the process by which Defendants enacted a state lottery in North Carolina violates Article II, Section 23 of North Carolina Constitution for the following reasons:

65. HB 1023 (Committee Substitute) improperly pass the Senate in that:

(a) HB 1023 (Committee Substitute) passed the Senate on a second and a third reading each having been conducted on the same day, August 30, 2005, in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that no law to impose a tax upon the people be enacted unless the bill for

the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings must be on three different days; and

(b) HB 1023 (Committee Substitute) passed the Senate on the second reading by electronic vote and on the third reading by voice vote in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that the yeas and nays on the second and third readings of a bill to impose a tax upon the people be recorded in the journal of the House and of the Senate.

66. 42. HB 1023 (Committee Substitute) improperly passed the House in that:

(a) HB 1023 (Committee Substitute) passed the House on a second and a third reading each having been conducted on the same day, April 6, 2005, in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that no law to impose a tax upon the people be enacted unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings must be on three different days; and

(b) HB 1023 (Committee Substitute) passed the House on the second reading by electronic vote and on the third reading by voice vote in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that the yeas and nays on the second and third readings of a bill to impose a tax upon the people be recorded in the journal of the House and of the Senate.

67. The rights of Plaintiff-Intervenors under Art. II, Section 23 of the North Carolina Constitution, have been, are and will continue to be violated by Defendants' implementation of the unconstitutional Lottery Act.

68. To the extent that Mr. Williams' and/or members of the N.C. Common Sense Foundation participate in the lottery program by purchasing tickets, their rights under Art. II, Section 23 of the North Carolina Constitution will be violated, in that a tax will be imposed on them that not been properly authorized in accordance with the North Carolina Constitution.

### COUNT FIVE

#### **(The Lottery Act Unconstitutionally Creates an Express Tax on Nonresidents Who Receive Income in North Carolina by Winning a Lottery Prize)**

69. Plaintiff-Intervenors incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 68.

70. By means of creating a tax on lottery winnings to be paid to nonresidents by amending N.C.G.S. § 105-134, the State has created an express tax upon nonresidents who receive income in North Carolina by winning a lottery prize.

71. Plaintiff-Intervenors allege that the process by which Defendants enacted a state lottery in North Carolina violates Article II, Section 23 of North Carolina Constitution for the following reasons:

72. HB 1023 (Committee Substitute) improperly passed the Senate in that:

(a) HB 1023 (Committee Substitute) passed the Senate on a second and a third reading each having been conducted on the same day, August 30, 2005, in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that no law to impose a tax upon the people be enacted unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings must be on three different days; and

(b) HB 1023 (Committee Substitute) passed the Senate on the second reading by electronic vote and on the third reading by voice vote in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that the yeas and nays on the second and third readings of a bill to impose a tax upon the people be recorded in the journal of the House and of the Senate.

73. 42. HB 1023 (Committee Substitute) improperly passed the House in that:

(a) HB 1023 (Committee Substitute) passed the House on a second and a third reading each having been conducted on the same day, April 6, 2005, in violation of the requirement, codified at Article II, Section 23 of the North Carolina constitution, that no law to impose a tax upon the people be enacted unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings must be on three different days; and

(b) HB 1023 (Committee Substitute) passed the House on the second reading by electronic vote and on the third reading by voice vote in violation of the requirement, codified at Article II, Section 23 of the North Carolina Constitution, that the yeas and nays on the second and third readings of a bill to impose a tax upon the people be recorded in the journal of the House and of the Senate.

74. The rights of Plaintiff-Intervenors under Art. II, Section 23 of the North Carolina Constitution, have been, are and will continue to be violated by Defendants' implementation of the unconstitutional Lottery Act.

75. To the extent that Mr. Williams' and/or members of the N.C. Common Sense Foundation participate in the lottery program by purchasing tickets, their rights under Art. II,

Section 23 of the North Carolina Constitution will be violated, in that a tax will be imposed on them that not been properly authorized in accordance with the North Carolina Constitution.

**COUNT SIX**

**(The Lottery Act Unconstitutionally Draws Money from the State Treasury without an Appropriation Made by Law)**

76. Plaintiff-Intervenors incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 75.

77. By means of lending money from the State Treasury to the North Carolina Lottery Commission and requiring repayment of the same, the State intends to draw money from the State treasury.

78. Plaintiff-Intervenors allege that the process by which Defendants enacted a state lottery in North Carolina violates Article V, Section 7 of North Carolina Constitution for the following reasons:

79. HB 1023 as amended by section 31.1 of SB 622 purported to authorize the drawing of money from the State treasury without an appropriation by law, in violation of the prohibition, codified at Article V, Section 7 of the North Carolina Constitution, against drawing money from the State treasury but in consequence of appropriation made by law.

80. The rights of Plaintiff-Intervenors under Art. V, Section 7 of the North Carolina Constitution, have been, are and will continue to be violated by Defendants' implementation of the unconstitutional Lottery Act.

81. To the extent that Mr. Williams' and/or members of the N.C. Common Sense Foundation participate in the lottery program by purchasing tickets, their rights under Art. V,

Section 7 of the North Carolina Constitution will be violated, in that a tax will be imposed on them that not been properly authorized in accordance with the North Carolina Constitution.

### PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Intervenors respectfully pray:

- A. That the Court issue an order declaring that HB 1023 as amended by section 31.1 of SB 622, enacted by the N.C. General Assembly, and any resulting contractual agreements are unauthorized, unlawful, arbitrary and in violation of the North Carolina Constitution as alleged in this complaint;
- B. That the Court issue an order declaring any and all contractual agreements entered into by the State, the Lottery Commission or any other State agency or employee in furtherance of a state lottery are unauthorized, unlawful, arbitrary and in violation of the State Constitution as alleged in this complaint;
- C. That to the extent any public money or benefits have already been paid or transferred to the Lottery Commission from the State treasury, pursuant to the legislation, then the Lottery Commission or the receiving entity be ordered to refund, return, or reimburse to the public treasury of the State such money paid and/or the value of any benefits received;
- D. That the Court order such other relief including relief by way of injunction as the Court deems proper;
- E. That the Court award the plaintiff-intervenors their reasonable attorney's fees as allowed by law;
- F. That the Court tax the costs of this action against the defendants; and

G. That the Court award such further and additional relief as the Court may deem necessary and proper.

Respectfully submitted this 15<sup>th</sup> day of February, 2006.

Counsel for Plaintiff-Intervenors Willis Williams,  
North Carolina Fair Share and the North Carolina  
Common Sense Foundation

NORTH CAROLINA JUSTICE CENTER  
P.O. Box 28068  
Raleigh, NC 27611  
Telephone: (919) 856-2165  
Facsimile: (919) 856-2175

BY: 

Jack Holtzman  
Attorney at Law  
NC Bar # 13548