

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 016422

CATHERINE M. EL-KHOURI, et al.,)
)
Plaintiffs,)
)
v.)
)
STATE OF NORTH CAROLINA, et al.,)
)
Defendants.)

MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS

NOW COME Plaintiffs, Catherine M. El-Khoury and W. Anthony Purcell¹ (hereinafter jointly referred to as "Plaintiffs"), by and through undersigned counsel, and urge the Court to deny Defendants' various Motions to Dismiss, for the reasons set out below.

NATURE OF THE CASE

Plaintiffs filed this action on 10 October 2007 to challenge the constitutionality of the fifty dollar surcharge assessed for the implementation of Article 22D of Chapter 163 of the North Carolina General Statutes, as codified at G.S. § 84-34, which surcharge funds, in part, the North Carolina Public Campaign Fund. Defendants filed a Motion to Dismiss on 13 November 2007 on the grounds that the action is barred by sovereign immunity and for failure to state a claim upon which relief may be granted.

STATEMENT OF FACTS

G.S. § 84-34 provides that every active member of the North Carolina State Bar ("State Bar") shall pay, in addition to the annual membership fee, a surcharge of fifty dollars (\$50.00) ("the judicial surcharge") for the implementation of Article 22D of Chapter 163 of the General Statutes. All licensed lawyers in North Carolina are members of the North Carolina State Bar.

¹ Plaintiff Laura Oberbauer filed a dismissal of her claims on 17 June 2008.

Only persons who are members of the State Bar, or foreign attorneys as authorized by statute or persons representing themselves, may practice law in North Carolina. G.S. §§ 84-4 and 84-16.

As alleged in the Complaint, Plaintiffs Catherine M. El-Khoury and W. Anthony Purcell are attorneys licensed to practice law in North Carolina in 1986 and 1992, respectively, and all plaintiffs are and at all times relevant to this action have been active members of the North Carolina State Bar.

The Defendants are the State of North Carolina, the State Bar, the State Bar treasurer, and all members of the State Bar Administrative Committee. The State Bar is an agency of the State and is charged with regulating the practice of law in North Carolina and with collecting the judicial surcharge. The Administrative Committee is authorized “to oversee the membership function of the State Bar, including the collection of dues, [and] the suspension of members for failure to pay dues and other fees,” 27 N.C. Admin. Code 1A § .0701(5).

**Collection of the Judicial Surcharge and
Distributions from the North Carolina Public Campaign Fund**

G.S. § 84-34, as amended by S.L. 2005-276, states: “Every active member of the North Carolina State Bar shall, prior to the first day of July of each year, pay to the secretary-treasurer an annual membership fee in an amount determined by the Council but not to exceed three hundred dollars (\$300.00), *plus a surcharge of fifty dollars (\$50.00) for the implementation of Article 22D of Chapter 163 of the General Statutes,*” (emphasis added).

Article 22D of Chapter 163 of the General Statutes, captioned “The North Carolina Public Campaign Fund,” established the North Carolina Public Campaign Fund (“Campaign Fund”) “as an alternative source of campaign financing for candidates who demonstrate public support and voluntarily accept strict fund-raising and spending limits.” G.S. § 163-278.61. Pursuant to G.S. § 163-278.61, *et seq.*, campaign financing from the North Carolina Public Campaign Fund is available to candidates for justice of the Supreme Court and judge of the

Court of Appeals in elections in 2004 and thereafter who meet the participation requirements of G.S. § 163-278.64.

The State Board of Elections is charged with certifying a participating candidate's eligibility. G.S. § 163-278.64(c). The State Board of Elections "shall distribute to a certified candidate revenue from the [Campaign] Fund" in an amount determined by G.S. § 163-278.65(b)(4), and that candidate is authorized to use such revenue for that candidate's election campaign. The Campaign Fund is funded, in part, by "[m]oney collected from the fifty-dollar (\$50.00) surcharge on attorney membership fees in G.S. 84-34." G.S. § 163-278.63(b)(7).

Attorneys, including Plaintiffs, paying the judicial surcharge may not prevent, limit, reduce, increase or authorize a distribution from the Campaign Fund to a candidate. Attorneys, including Plaintiffs, paying the judicial surcharge have no control over how their paid surcharge is used and have no control over how distributions from the Campaign Fund are used.

Actions by Defendants against Plaintiffs

As alleged in the Complaint, on or about May 1, 2006, the State Bar mailed to each Plaintiff a notice stating that each was required to pay the Judicial Surcharge by June 30, 2006. Each Plaintiff received that notice but declined to pay the judicial surcharge by the deadline. As a consequence, on August 22, 2006, the State Bar mailed to each Plaintiff a Notice to Show Cause why each should not be suspended from the practice of law for failure to pay the judicial surcharge. Plaintiffs, and other attorneys not a party to this action, asked to appear before the Administrative Committee in order to show cause.

On October 18, 2006, Plaintiffs and other attorneys not a party to this action appeared before the Administrative Committee to show cause. Plaintiffs argued, *inter alia*, that the judicial surcharge constituted unconstitutionally compelled speech, an impermissible tax, a violation of

other state law, and further argued that the State Bar is without authority to collect the judicial surcharge. The Administrative Committee deferred the matter until its January 2007 meeting. Thereafter, on January 17, 2007, the Administrative Committee reconvened and took up the show cause hearing on Plaintiffs' failure to pay the judicial surcharge.

On January 19, 2007, the State Bar issued Orders of Suspension for Non-payment of the Mandatory 2006 Surcharge, finding that each Plaintiff did not show sufficient cause for failure to pay the judicial surcharge and ordering each Plaintiff to pay the judicial surcharge within 30 days or face suspension of his license to practice law. The State Bar issued separate but substantially identical Orders for each Plaintiff. If Plaintiffs had not paid the judicial surcharge, they would have lost their ability to practice law in North Carolina, and, if they do not continue to pay the judicial surcharge, they will lose their ability to practice law in North Carolina in the future. Finally, having no other choice, each Plaintiff paid, under protest, the 2006 judicial surcharge, have paid to present, and for so long as required to do so will pay the judicial surcharge in subsequent years.

ARGUMENT

I. Standard for Consideration of a Motion to Dismiss

“When reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), a trial court may consider and weigh matters outside the pleadings.” *Department of Transp. v. Blue*, 147 N.C.App. 596, 603, 556 S.E.2d 609, 617 (2001), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

When considering a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the Court must accept all well-pleaded factual allegations of the Complaint as true, and the Complaint must be construed in the light most favorable to the

plaintiffs. *Ford v. Peaches Entertainment Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986), *cert. denied*, 318 N.C. 694, 351 S.E.2d 746 (1987). Dismissal of a complaint is proper only when it is clear that the plaintiff could prove no set of facts which would entitle him or her to relief. *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997).

II. Plaintiffs' Claims are not barred by the Doctrine of Sovereign Immunity.

Sovereign immunity will not shield Defendants from Plaintiffs' free speech claims. Free speech guarantees protect individuals from *government* restrictions on speech or compulsion of the same. Thus, free speech protections apply only to situations where the government is an actor. If sovereign immunity could be used to immunize the government from suits to enforce free speech guarantees, then the First Amendment is meaningless. The Supreme Court of North Carolina has held that sovereign immunity is not a bar to actions by citizens to enforce their constitutional rights:

[I]n determining the rights of citizens under the Declaration of Rights of our Constitution, it is the judiciary's responsibility to guard and protect those rights. The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights. It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity.

Corum v. University of North Carolina, 330 N.C. 761, 785-86, 413 S.E.2d 276, 291 (1992).

Our State Supreme Court has also refused to apply the doctrine of sovereign immunity to constitutional challenges to State tax measures For example, in *Charlotte-Mecklenburg Hosp. Auth. V. N.C. Indus. Comm'n*, 336 N.C. 200, 443 S.E.2d 716 (1994), taxpayers sued a state agency for misuse of tax proceeds. The defendants claimed sovereign immunity barred the

action, but the Supreme Court held “[t]he proceeds of State tax levies appropriated by the General Assembly for one purpose may not lawfully be disbursed by State officers for a different purpose and a citizen and taxpayer of the State may sue to restrain such illegal diversion of public funds.” *Id. at 644*. A taxpayer's right to seek equitable relief “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.” *Id.* (quoting *Merrimon v. S. Paving & Constr. Co.*, 142 N.C. 427, 431-32, 142 S.E. 366, 367-68 (1906)) (comparing the right of taxpayers to sue government officials for illegal disbursements with right of shareholders of a corporation to bring *ultra vires* shareholder suits).

Defendants’ attempt to cut short Plaintiffs’ claims by resort to the judicially created doctrine of sovereign immunity is contrary to strongly worded and directly controlling precedent. This Court should deny Defendants’ motion to dismiss based on sovereign immunity.

III. The Judicial Surcharge Violates Plaintiffs’ Freedom of Speech as Guaranteed by the United States and North Carolina Constitutions.

Plaintiffs, against their will, are forced to support candidates with whom they do or may ideologically disagree in that they are required to make a contribution to the Campaign Fund which distributes money to candidates without authorization from Plaintiffs. Financing from the Campaign Fund is available to candidates for appellate judgeships who meet the participation requirements of G.S. § 163-278.64. Members of the State Bar have no control over distributions from the Campaign Fund to qualifying and participating candidates but are nevertheless required to pay the judicial surcharge which funds, in part, the Campaign Fund.

Distributions have been made and will be made from the Campaign Fund to candidates Plaintiffs do not support. Consequently, the judicial surcharge of G.S. § 84-34 compels political speech and so violates guarantees of free speech embodied in both the United States and the North Carolina Constitutions.

The unconstitutionality of the judicial surcharge is obvious when one considers *Keller v. State Bar of California*, 496 U.S. 1 (1990), a case on all fours with this one. The plaintiffs in *Keller*, members of the State Bar of California, sued that body claiming the California Bar's use of their membership dues to finance certain ideological or political activities to which they were opposed violated their rights under the First Amendment. The Court held mandatory bar dues could not be used to finance political activities and also rejected the California Bar's argument that it was exempted from constraints on the use of its dues because it was a regulated state agency. *Id.* at 11.

Relying largely on *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977), the Supreme Court held that a state bar to which membership is mandatory cannot impose charges upon its members to "fund activities of an ideological nature." *Id.* at 14. The test for distinguishing activities which are ideological in nature and not constitutionally to be funded by mandatory assessment from regulatory activities which may be funded by mandatory dues was expressed thusly: "[T]he guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961)(plurality opinion). Improving the quality of legal service available is a goal which focuses on the quality of services provided by attorneys, not on judicial or other political campaigns. *See Lathrop*, 367 U.S. at 843 ("Both in purport and in practice the bulk of

State Bar activities serve the function, or at least so [the State] might reasonably believe, of elevating the *educational and ethical standards of the Bar* to the end of improving the quality of the legal service available to the people of the State, *without any reference to the political process.*” (emphasis added)).

Keller is but one case in a line of cases originating with *Abood* which limits the use of mandatory dues for political activities. In *Abood*, the Supreme Court considered whether, consistent with the First Amendment, mandatory agency dues paid by nonunion employees could be used to support political or ideological causes which were unrelated to the collective bargaining activities of the union. 431 U.S. at 235-36. The Court held that while the Constitution did not prohibit a union from funding political activities, the Constitution did require that such expenditures be financed from union dues voluntarily paid by employees. Just as prohibitions on making contributions for political purposes implicate free speech concerns, “compelled contributions for political purposes works no less an infringement of . . . constitutional rights.” *Id.* at 234.

Nothing about the judicial surcharge is related to regulating the legal profession or improving the quality of legal services. Compelling contributions from attorneys to fund political campaigns bears little or no relationship to the quality of services rendered by those attorneys or to the quality of legal services generally in the State. Nothing in the statutory scheme for collecting the judicial surcharge or distributing proceeds from it suggests otherwise.

Even cases which have not reached the same conclusion as *Keller* or *Abood* underscored the significance of the coercive effect of North Carolina’s judicial surcharge. For example, in *May v. McNally*, 55 P.3d 768 (Ariz. 2002), the Supreme Court distinguished the surcharge in that case from that which had been struck down in *Abood*. The court first noted that while

[t]he *Abood* line of cases instructs that government may not condition involuntarily associated individuals' opportunity to receive a benefit or ply their trade or profession upon their compelled support of speech with which they disagree, . . . no benefit is being conditioned upon the payment of the surcharge at issue here, nor is payment of the surcharge a precondition to employment.

May, 55 P.3d at 428. The same cannot be said the North Carolina's judicial surcharge. Every North Carolina lawyer must be a member of the State Bar to practice law in this State.

Membership in the State Bar is conditioned upon payment of the judicial surcharge. Indeed, Plaintiff's licenses and so their livelihoods were threatened by the State Bar when Plaintiffs refused to pay the surcharge.

The *May* court further distinguished the analysis offered in *Abood* by noting that "the 'germaneness test' derived from the *Abood* line of cases is predicated upon the existence of an association." *Id.* Exactly such a predication is present here. The State Bar is an association, and it collects the judicial surcharge from its mandatorily associated members.

The *May* court ultimately applied *Board of Regents v. Southworth*, 529 U.S. 217 (2000) to its fee analysis. But, *Southworth* determined that *Abood's* "germaneness test" was unworkable because the fee at issue there was imposed "for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students" in an academic setting at a university level, *id.* at 229, "where the State undertakes to stimulate the whole universe of speech and ideas." *Id.* at 232. In this case, however, the judicial surcharge is not imposed to facilitate or stimulate speech. Instead, it was designed to fund North Carolina's public funding scheme, which was adopted not to create a forum for speech, but rather to ensure that no candidate for appellate judgeship was at a financial advantage or disadvantage. In this context, the test established in *Abood* is workable, and indeed, determinative of Plaintiffs' claims. For these reasons, Plaintiffs have asserted a valid claim in Counts 1 and 2.

IV. The Judicial Surcharge is an Unconstitutional Tax.

The judicial surcharge constitutes a tax. *See Jackson, et al., v. Leake, et al.*, 476 F.Supp.2d 515, 523 (E.D.N.C. 2006) (holding G.S. § 84-34 creates a tax which, pursuant to the Tax Injunction Act (TIA), 28 U.S.C. § 1341, a federal court may not enjoin). Defendants assert in their motion that the holding in *Jackson* is not determinative of whether the judicial surcharge is a tax. That assertion and the arguments likely to accompany it are untenable and irreconcilable with any argument that the judicial surcharge is merely regulatory. Not only did the State defendants in *Jackson* urge the holding that the judicial surcharge is a tax, the State described the purpose of the judicial assessment as “not ‘regulatory or punitive’ but rather to raise revenues and benefit the entire population of North Carolina in order to implement the [Campaign] Fund and provide for publicly-financed campaigns and for the appellate judicial Voter’s Guide. (See Defendants’ Revised Memorandum in Support of Motion to Dismiss in *Jackson, et al., v. Leake, et al.*, 476 F.Supp.2d 515, 523 (E.D.N.C. 2006) (filed September 22, 2006).

While Defendants’ assert in their motion that the *Jackson* court’s determination that the judicial surcharge is a tax within the meaning of the TIA “does not mean that the judicial surcharge constitutes a tax within the meaning of North Carolina law,” that assertion relies on a misunderstanding of the applicability of the TIA. As noted by Judge Michael in *Lynn v. West*, 134 F.3d 582, 594 (4th Cir. 1998), the TIA applies if three prerequisites are met: “(1) the action is to enjoin, suspend or restrain the assessment, levy or collection of a state tax, (2) *the tax is a tax under State law*, and (3) the state provides a plain, speedy and efficient remedy in its own courts.” (emphasis added)(internal citations omitted). Thus, the fact that the federal court in *Jackson* concluded that the TIA barred its consideration of challenges to the judicial surcharge indicates not only that the federal court found the judicial surcharge to be a tax within the

meaning of the TIA, but also that it found the judicial surcharge to be a tax within the meaning of North Carolina law. Although not controlling, such precedent is certainly compelling.

Even without the State's argument in *Jackson*, a review of case law makes clear that the judicial surcharge is a tax. North Carolina courts have noted the defining characteristics of a "tax" in a variety of contexts.² In each case, the reviewing court has emphasized as deciding factors: 1) the purpose of the statute, i.e., raising revenue or some other purpose, such as regulation or establishment of a penalty, etc., and 2) the ultimate use of the funds, i.e., whether for a general government purpose or in some manner related to the item or service being charged or assessed.³

In *State Farm Mutual Auto Ins. Co. v. Long*, 129 N.C. App. 164 (1998), the North Carolina Court of Appeals adopted and applied Judge (now Justice) Breyer's analysis in *San Juan Cellular Telephone Co. v. Public Service Comm'n of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992),⁴ to determine whether a particular assessment or charge was a "fee" or a "tax" under North Carolina law. In holding that a challenged charge was not a tax, the *State Farm* court adopted a three-part test as initially laid out in *San Juan Cellular*, considering: "(1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether

² See e.g. *State of North Carolina ex rel v. Davis*, 292 N.C.147, 156-57, 232 S.E.2d 698 (1977) ("a tax...is a charge 'levied and collected as a contribution to the maintenance of the general government' " and "related to or limited by the necessities of government"); *State v. Danenberg*, 151 N.C. 718, 721-722, __ S.E.2d __ (1909) ("The authority to license and regulate particular privileges or occupations is usually regarded as a police power, but when license fees are imposed for the purpose of revenue they are taxes.").

³ The North Carolina General Assembly, in enacting N.C. Gen. Stat. § 105-1 (2005) ("Subchapter I. Levy of Taxes," "Title and purpose of Subchapter"), placed similar emphasis on these two defining characteristics of a tax. ("The purpose of this Subchapter shall be to raise and provide revenue for the necessary uses and purposes of the government and State of North Carolina...").

⁴ Other state courts have also adopted the *San Juan Cellular* analysis in determining whether or not a particular charge or assessment was a "tax" under state law. See *May v. McNally*, 203 Ariz. 425, 431, 55 P.3d 768, 774 (2002); *District of Columbia v. Eastern Trans-Waste of Md., Inc.*, 758 A.2d 1, 11, 2000 D.C. App. LEXIS 192 (D.C. 2000); *Shea v. Boston Edison Co.*, 431 Mass. 251, 258, 727 N.E. 2d 41, 47 (2000); *Health Servs. Med. Corp. v. Chassin*, 175 Misc. 2d 621, 625, 668 N.Y.S.2d 1006, 1010 (N.Y. Sup. Ct. 1998).

the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed." *Id.* at 168. When application of the first two *State Farm* factors does not determine whether a charge imposed falls within the defining characteristics of a classic tax, a court should focus on "the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation." *State Farm*, 129 N.C. App. at 168 (citing *San Juan Cellular*, 967 F.2d at 685).

The *State Farm* court, in holding that the assessment in that case was not a "premium tax" under North Carolina's retaliatory tax statutes, relied to a substantial degree upon the fact that the proceeds of the fee in question were being charged to all insurers doing business in North Carolina and were used solely to cover the projected operating deficit of the North Carolina Department of Insurance, a cost related to regulating the industry, rather than for some general public purpose. *Id.* at 171.

Applying the *State Farm* test to the instant case, it is clear that the assessment or charge imposed by G.S. § 84-34 is a tax. Under the first *State Farm* factor, assessments or charges imposed by the legislature are closer to the classic definition of a "tax," as opposed to charges imposed by a regulatory agency. Here, the North Carolina legislature, rather than any administrative agency, is the entity that has imposed the judicial surcharge. Under the second factor, a charge imposed upon a broader range of a state's residents is closer to a "tax," while one imposed upon a narrow section of persons is closer to a "fee." In the instant situation, the charge imposed by G.S. § 84-34 is assessed against a broad section of state residents: all those who are licensed to practice law in North Carolina, making this factor closer to a classic "tax" than a classic "fee." Finally, in the instant case, assuming *arguendo* that the State's previously

articulated basis for enacting the judicial surcharge—to improve the integrity of the judiciary and public confidence in the judicial process—is accurate, then, to the extent that the beneficiaries are the public at large, the class of beneficiaries likely to benefit from the allocation the judicial surcharge is very broad. Thus, under the *State Farm/San Juan Cellular* test, the judicial surcharge is a tax.

In a case challenging a revenue producing scheme, West Virginia’s Limited Video Lottery Act was determined to be a “tax” under the *San Juan Cellular* test. See *Club Ass’n of W. Va., Inc. v. Wise*, 156 F. Supp. 2d 599 (S.D.W.Va. 2001), *aff’d* 293 F.3d 723 (4th Cir. 2002). The legislation under scrutiny in that case required operators, manufacturers and service technicians of video gambling machines to pay a periodic fixed amount as well as an additional amount equal to 30 to 50 percent of the gross profits from the operation of the machines. *Id.* 156 F.Supp. 2d at 612-13. That revenue is deposited in a fund used to finance education, state parks, and similar programs. Central to the court’s determination in *Club Ass’n* that the “license fees” in that case constituted a “tax” was that the charges created by the Limited Video Lottery Act were “imposed primarily for revenue generation purposes” and that revenue derived from the statute was earmarked for state programs that would benefit the state’s population as a whole. *Id.* 156 F. Supp.2d at 613-614. The *Club Ass’n* court also noted in making its determination that (as in the instant situation) the entity imposing the charge was the legislature. *Id.* The West Virginia scheme is similar to the judicial surcharge at issue here, in that the State, pursuant to § 84-34 has imposed an assessment as a condition of employment over and above the expenses of licensure and all regulation related costs, all so that the State may provide the general benefit of a voter guide and publicly financed judicial campaigns. The judicial surcharge is an assessment intended to generate revenue for a program to benefit the whole state in that the judicial surcharge has

been imposed for the purpose of financing campaigns, which will supposedly benefit the public as a whole by improving public confidence in appellate judicial campaigns.

a. The judicial surcharge violates the Equal Protection Clause of the United States Constitution and the Equal Protection and Law of the Land Clauses of Article I, § 19 of the North Carolina Constitution.

More than merely amounting to a tax, the judicial surcharge is in fact an arbitrary and irrational tax, and as such it is unconstitutional. Both the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Equal Protection and the Law of the Land Clauses of Article I, § 19 of the North Carolina Constitution prohibit any tax which is arbitrary and not rational.

Plaintiffs acknowledge that ensuring fair judicial campaigns in the State is a legitimate government interest. Thus, the issue is whether the imposition of the judicial surcharge is rationally related to achieving that goal. For the reasons discussed below, the judicial surcharge amounts to an irrational, arbitrary and discriminatory means of achieving the goal of fair judicial campaigns. There is no fundamental difference between Plaintiffs as attorneys working in the judicial system and any other member of the public whose life, profession, or family is impacted by the judiciary, and yet the judicial surcharge discriminates as between similarly situated North Carolinians. Additionally, the proceeds of the judicial assessment fund campaigns only for appellate judgeships. If the purpose of the judicial assessment is to prompt fair campaigns, that purpose is not and indeed cannot be fully realized by financing campaigns for only a couple dozen judgeships and ignoring campaigns for hundreds of district and superior court judgeships.

The equal protection clauses of the United States Constitution and the North Carolina Constitution impose upon law-making bodies the requirement that any legislative classification “provide a reasonable means to a legitimate state objective.” *Powe v. Odell*, 312 N.C. 410, 412,

322 S.E.2d 762, 763 (1984). Further, legislation “may not discriminate arbitrarily either as between similarly situated persons, or groups of persons, or as between activities which are prohibited and those which are permitted.” *State v. Greenwood*, 280 N.C. 651, 657, 187 S.E.2d 8, 11-12 (quoting *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 666-667, 174 S.E.2d 542, 546 (1970)). The test under the equal protection clauses is whether the difference in treatment made by the law has a reasonable basis in relation to “the purpose and subject matter of the legislation.” *Guthrie v. Taylor*, 279 N.C. 703, 714, 185 S.E.2d 193, 201 (1971) (*cert. denied*, 406 U.S. 920, 92 S.Ct. 1774, 32 L.Ed.2d 119 (1972) (citing *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E.2d 18 (1968))).

Acknowledging that our courts have traditionally deferred to legislative judgment in reviewing equal protection challenges of an economic nature, (see, e.g., *Powe v. Odell*, 312 N.C. at 412, 322 S.E.2d at 763), and that all doubts are resolved in support of the act, our appellate courts have recognized that courts have not only the power but also the *duty* to declare a legislative act unconstitutional when such is plainly and clearly the case. *City of New Bern v. New Bern – Craven County Bd. Of Educ.*, 338 N.C. 430, 435, 450 S.E.2d 735, 738 (1994) (emphasis added). When appropriate, our Supreme Court has “not hesitated to strike down business regulation on grounds of arbitrariness when no distinguishing feature of the business rationally related to the regulation could be discerned.” *Poor Richard’s, Inc. v. Stone*, 322 N.C. 61, 65, 366 S.E.2d 697, 699 (1988) (citing *Roller v. Allen*, 245 N.C. 516, 96 S.E.2d 851 (1957); *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949); and *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940)) (parentheticals omitted).

In *State v. Greenwood*, 280 N.C. 651, 187 S.E.2d 8 (1972), the court invalidated an ordinance that banned operation of billiard halls on Sundays, but allowed the operation of all

other facilities for recreation, amusement, and sports on Sundays. The court concluded that there was no rational basis for singling out billiard halls in light of the apparent purpose of promoting Sunday as a day of rest and tranquility. 280 N.C. at 657-658, 187 S.E.2d at 12-13. In *State v. Smith*, 265 N.C. 173, 143 S.E.2d 293 (1965), an enactment closing clubs located within 300 yards of churches or schools between 2:00 a.m. and midnight on Sunday, was held to deny equal protection of the laws, the court noting that schools were not in session and churches were not meeting during the hours the clubs operated, and the court found no reasonable basis for the 300 yard distance requirement. In *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E.2d 18 (1968), the court struck down an ordinance creating detailed regulations for the operation of massage parlors, health salons and physical culture studios, but excepted barber shops, beauty parlors, and YMCA and YWCA health clubs. 273 N.C. 293, 160 S.E.2d at 18.

Taxing classifications "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation" if they are to survive equal protection scrutiny. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527, (1959) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 562 (1920)). Although states are ordinarily accorded a wide latitude under the Equal Protection Clause in determining what and how to tax (see *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159 (1930)), less deference will be accorded when a discriminatory taxing scheme implicates other constitutional rights. "Classic examples are the taxes that discriminated against ... interstate commerce (see *Michigan-Wisconsin Pipe Line v. Calvert*, 347 U.S. 157 (1954) or required licenses to engage in interstate commerce." *Lehnhausen v. Lake Shore Auto Parts, Co.*, 410 U.S. 356, 359 n. 3 (1973). As argued above, the judicial surcharge not only implicates the constitutional right of free speech, it violates fundamental guarantees of free speech by compelling political speech.

Undersigned counsel's research reveals no other assessment or surcharge imposed on a single profession for the benefit of the public as a whole in North Carolina. This marks the first time in North Carolina's history that a single profession must bear the financial burden of a program purportedly intended to benefit the entire state. This action discriminates against Plaintiffs and attorneys throughout the state who must pay for a general public benefit or face losing their livelihoods.

Although one might argue that Plaintiffs as attorneys have a greater interest in preserving the integrity of judicial campaigns and so a tax on attorneys is rationally related to achieving that goal, such an argument is specious. Attorneys appear in court to be sure, but the function of an attorney is to serve his or her client. The court system adjudicates the claims of parties, not those of their counsel. Thus, the interest of an attorney, as a servant of the client, is no greater than that of the client in seeing a fair judiciary. And, attorneys' interests, like the interests of the public at large, in fair campaigns for appellate judgeships are no less than their interests in seeing fair trial level judgeships which are wholly ignored by the judicial assessment and the Campaign Fund.

By its design and effect, the judicial surcharge is arbitrary and irrational and deprives Plaintiffs, as members of the sole class of taxpayers assessed the surcharge, of their right to equal protection of the law and due process as guaranteed by the Equal Protection Clause and the Law of the Land Clause of Article I, § 19 of the North Carolina Constitution.

b. Collection and Enforcement of the Judicial Surcharge Permits Unlawful Delegation of Authority and Violates Separation of Powers Clause

Article I, section 6 of the North Carolina State Constitution provides that “[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.” This clause is violated when “one branch of state government exercises powers that are reserved for another branch of state government.” *Ivarsson*

v. Office of Indigent Def. Servs., 156 N.C. App. 628, 631, 577 S.E.2d 650, 652 (2003).

“Legislative power is vested in the General Assembly by Article II, section 1 of the Constitution.” *Adams v. N.C. Dep’t of Natural and Econ. Res.*, 295 N.C. 683, 696, 249 S.E.2d 402, 410 (1978). Reading Article I, section 6 together with Article II, section 1, makes clear “the bedrock principle ‘that the legislature may not abdicate its power to make laws [n]or delegate its *supreme* legislative power to any coordinate branch or to any agency which it may create.’” *Id.*, 249 S.E.2d at 410 (quoting *N.C. Tpk. Auth. v. Pine Island, Inc.*, 265 N.C. 109, 114, 143 S.E. 2d 319, 323 (1965)). A literal interpretation of the Constitution would, therefore, preclude the delegation of any legislative power. Plaintiffs, however, do not and need not urge such a strict reading of the Constitution.

“What is, and what is not, legislative power, within the principle of constitutional law . . . is not always easy to determine.” *Durham Provision Co. v. Daves*, 190 N.C. 7, 11, 128 S.E. 593, 595 (1925). North Carolina’s Supreme Court has recognized, however, that “the problems which a modern legislature must confront are of such complexity that strict adherence to ideal notions of the non-delegation doctrine would unduly hamper the General Assembly in the exercise of its constitutionally vested powers.” *Adams*, 295 N.C. at 696-97, 249 S.E.2d at 410. Thus, the Court has “repeatedly held that the constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers.” *Id.*, at 697, 249 S.E.2d at 410 (citations omitted); *see also Tripp v. Flaherty*, 27 N.C.App. 180, 184, 218 S.E.2d 709, 711-12 (1975) (citations omitted) (stating that the legislature may delegate to an administrative agency “the authority to make determinations of fact upon which the application of a statute to particular situations will

depend, provided the General Assembly has itself declared the policy to be effectuated, has established the broad framework of law within which that policy is to be accomplished, and has fixed adequate standards for guidance of the administrative agency.”); *N. C. Tpk. Auth.*, 265 N.C. at 114, 143 S.E.2d at 323 (citations omitted) (“[A]s to some *specific* subject matter, [the legislature] may delegate a *limited* portion of its legislative power to an administrative agency *if* it prescribes the standards under which the agency is to exercise the delegated powers.”); *Efird v. Bd. of Comm’rs for Forsyth Cty.*, 219 N.C. 96, 103, 12 S.E.2d 889, 893 (1941) (citation omitted) (“While the Legislature may not ordinarily delegate its power to make laws, it may nevertheless make laws and delegate the power to subordinate divisions of the Government to determine facts or state of things upon which the law shall become effective.”).

While it is not uncommon for the legislature to delegate power to administrative agencies, *see, e.g., Tpk. Auth.*, 265 N.C. at 114, 143 S.E. 2d at 323, or to “subordinate divisions of government,” *see, e.g., Efird*, 219 N.C. at 103, 12 S.E.2d at 893, it sometimes delegates power to a coordinate branch of government. For example, in *Phillip Morris USA, Inc. v. Tolson*, 176 N.C. App. 509, 626 S.E.2d 853 (2006), Phillip Morris appealed from a denial of its request of a tax refund based on its claim of entitlement to the benefits of both a “special tax allocation formula” under two Tax Review Board orders and a subsequently enacted statutory corporate tax incentive formula. *Id.* at 510, 626 S.E.2d at 855. Phillip Morris argued that the trial court’s interpretation of the two orders issued by the augmented Tax Review Board “create[d] a fundamental violation of separation of powers because it permit[ted] the augmented Tax Review Board, which is part of the executive branch of government, to ‘encroach’ upon the General Assembly, the legislative branch of government.” *Id.* at 518, 626 S.E.2d at 860. The Court found

this argument without merit because the augmented Tax Review Board exercised the powers statutorily reserved for it by the General Assembly. *Id.*

Whether the legislature delegates power to an administrative agency or to a coordinate branch, adequate guiding standards must accompany the delegation. The Court has recognized, however, that “[t]he task of determining whether a particular delegation is accompanied by *adequate guiding standards* is not a simple one.” *Adams*, 295 N.C. at 697, 249 S.E.2d at 410. In *Jernigan v. State*, 279 N.C. 556, 565, 184 S.E.2d 259, 266 (1971), the Court stated: “The inherent conflict between the need to place discretion in capable persons and the requirement that discretion be in some manner directed cannot be satisfactorily resolved.” Significantly, “the purpose of the adequate guiding standards test is to reconcile the legislative need to delegate authority with the constitutional mandate that the legislature retain in its own hands the supreme legislative power.” *Adams*, 295 N.C. at 697, 249 S.E.2d at 411.

In applying the test, the Court balances between the need for the legislature to have the capacity, in proper instances, to delegate to administrative bodies, while ensuring that “all such delegations are indeed necessary and do not constitute a total abdication by the General Assembly.” *Id.* The *Adams* court concurred that “[t]he key to an intelligent application of this [test] is an understanding that, while delegations of power to administrative agencies are necessary, such transfers of power should be closely monitored to insure that the decision-making by the agency is not arbitrary and unreasoned and that the agency is not asked to make important policy choices which might just as easily be made by the elected representatives in the legislature.’ ” *Id.* at 697-98, 249 S.E.2d at 411 (quoting Glenn, *The Coastal Management Act in the Courts: A Preliminary Analysis*, 53 N.C.L. Rev. 303, 315 (1974)).

To determine whether “adequate guiding standards” support a particular delegation of authority, “it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards.” *Adams*, 295 N.C. at 697, 249 S.E.2d at 411. The Court has identified that a “key purpose” of the “adequate guiding standards test,” is to “insure that the decision-making by the agency is not arbitrary and unreasoned.” *Id.* (quoting *Glenn, supra*). The Court adheres, therefore, to a “growing trend of authority which recognizes that the presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards.” *Id.* (citing K. Davis, 1 Administrative Law Treaties, § 3.15 at p. 210 (ed. 1978)).

Legislative guidance is found primarily in “declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers.” *Id.* As to the legislature’s declarations, “[i]t is one thing to provide that a thing may be done if it is made to appear that under the law a certain condition exists; it is another thing to provide that a thing may be done if in the opinion of a named party a certain situation exists.” *Pue v. Hood*, 222 N.C. 310, 314, 22 S.E.2d 896, 899 (1942) (citing *Se. Greyhound Lines v. Ga. Public Serv. Comm’n*, 181 Ga. 75, 181 S.E. 834, 838, 102 A.L.R. 517). Accordingly, an Act must be “complete in every respect when it left the hands of the legislature.” *See Id.* at 314, 22 S.E.2d at 900.

In passing the judicial surcharge, the legislature delegated its taxing authority, *see* N.C. Const. art. V, § 2(1), without providing sufficient standards for enforcement. *See generally State Ed. Assistance Auth. v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970). The General Assembly left enforcement to the State Bar without providing guidelines for discipline to be imposed upon attorneys who fail to pay the judicial surcharge tax. Instead, the manner of

enforcement depends on the whim of the State Bar. That is to say, should an attorney fail to pay the judicial assessment, the State Bar apparently has the discretion to suspend the license of such an attorney but is not required to do so. That discretion is the functional equivalent of the taxing authority because the authority to tax is predicated upon the authority to compel the payment of the tax imposed.

Consequently, such broad delegation leaves to the State Bar's discretion important policy choices—effectively allowing the State Bar to determine how or even whether the judicial surcharge tax is to be enforced and thereby “to make policy rather than follow the policy set by the legislature.” *See Bring v. N.C. State Bar*, 348 N.C. 655, 661, 501 S.E.2d 907, 911 (1998) (Orr, J. dissenting). Certainly, then, there is a risk that the State Bar's decisions could be arbitrary and unreasoned; moreover, the absence of procedural safeguards as to the State Bar's determinations means that the legislation lacks adequate guiding standards and invites arbitrary enforcement. *See Adams*, 295 N.C. at 698, 249 S.E.2d at 411. Accordingly, the legislation violates the separation of powers doctrine, and as such, is unconstitutional.

c. Judicial Surcharge is based on an Arbitrary and Capricious Classification and as a result the Surcharge Violates the Uniformity of Taxation Clause.

The North Carolina Constitution has had a provision requiring the Legislature to tax in a uniform manner since 1868. Prior to the adoption of the current Constitution, Article V, § 3 provided: “Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise . . .” 1868 N.C. Constitution, art. V, § 3. That provision has been retained in substance in the current Constitution under Article V, Section 2(2). Courts have interpreted this provision to mean that a classification made for purposes of taxation “must not be arbitrary, unreasonable or unjust.” *Great Atl. & Pac. Tea Co. v. Maxwell*, 199 N.C. 433, 440, 154 S.E. 838, 842 (1930). *See Smith v. State of North Carolina*,

349 N.C. 332, 341 507 S.E.2d 28, 33 (1998) (explaining that the uniformity rule from the 1868 Constitution was retained and that prior case law still applies to the interpretation of the corresponding provision in the current Constitution.)

As explained in *Snyder v. Maxwell*, 217 N.C. 617, 9 S.E.2d 19 (1940), the uniformity requirement has two levels of analysis. “First, the classification itself must be based upon a reasonable distinction. Second, the tax must apply equally to all those within the class defined.” *Id.* at 620, 9 S.E.2d at 21 (citations omitted). Plaintiffs have alleged that the judicial surcharge fails the first part of the test.

While Article V, Section 2(2) 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). “Although 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.

Tea Co. v. Maxwell, 199 N.C. at 438-39, 154 S.E. at 841. See also *Smith*, 349 N.C. at 341, 507 S.E.2d at 33 (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)).

The North Carolina Supreme Court has indicated that a classification of taxpayers, if arbitrary, violates the rule of uniformity. *Hajoca Corp.* 277 N.C. at 568, 178 S.E.2d at 486.⁵ The Court must consider “whether a distinction ... may justify a further classification for the purpose of taxation, and whether such further classification is within the intent of the statute and has been therein effectively expressed.” *Snyder v. Maxwell*, 217 N.C. 621, 9 S.E.2d 21. “Classification, to be valid, must rest on genuine distinction.” *Lenoir Finance Co. v. Currie*, 254 N.C. 129, 134, 118 S.E.2d 543, 547 (1961).

If a classification is arbitrary, unreasonable or unjust, then a taxing scheme cannot treat the classes of taxpayers differently, and if it does, it violates the uniformity requirement by not levying the tax uniformly. *Great Atl. and Pac. Tea Co. v. Doughton*, 196 N.C. 145, 144 S.E. 701 (1928). The tax statute at issue in *Tea Co. v. Doughton* required a person operating six or more stores in North Carolina to pay a tax of \$50 for each store in the State. *Id.* at 148, 144 S.E. at 702. Consequently, merchants operating fewer than six stores were exempt. *Id.* The Court determined that the decision to tax merchants with six stores and to exempt merchants with five stores was an arbitrary classification. *Id.* at 150, 144 S.E. at 705.

The classification made in the statute ... cannot be held as founded upon a real and substantial difference between the two classes. The classification

⁵ In practicality, the requirements for uniformity are the same ostensibly as the requirements for equal protection and due process. *Hajoca Corp.*, 277 N.C. at 568, 178 S.E.2d at 486.

attempted for the purpose of imposing a license tax ... is, we think, under the authorities, clearly arbitrary, and if enforced would result in depriving merchants within the ... [taxed] class, of equal protection of the laws of this state. ... Their business differs from the business of other merchants, not taxed by the statute, *only in matters of detail* and methods of buying and selling merchandise.

Id. (emphasis added).

In addition, the Court has determined a tax to be discriminatory, and thereby lacking uniformity, if there is a tax for using the services of one company but no tax for using the services of a competing company. *American Equitable Assurance Company of New York v. Gold*, 249 N.C. 461, 106 S.E.2d 875 (1959). In *American Equitable Assurance*, the Court held an act unconstitutional that imposed a tax on purchasers of fire and lightning insurance from any insurance company except for insurance companies that were members of the Farmers Mutual Fire Insurance Association. *American Equitable Assurance*, 249 N.C. at 466, 106 S.E.2d at 878. “A tax for the privilege of selecting between two competing insurance companies is contrary to fundamental justice and in violation of the specific requirement of [the uniformity clause]. *Id.* at 466, 106 S.E.2d at 879.

Continuing this rejection of arbitrary classifications that are discriminatory, the Court found that relieving taxpayers who filed notice challenging a tax later held unconstitutional but not relieving taxpayers who paid but did not file notice violated the uniformity requirement. *Smith v. State of North Carolina*, 349 N.C. 332, 507 S.E.2d 28 (1998). In *Smith*, the legislation at issue addressed the tax consequences for three groups of taxpayers: (1) it forgave intangibles tax on corporate stock for the group of taxpayers who had benefited from the taxable percentage deduction found unconstitutional by the U.S. Supreme Court; (2) it allowed refunds for those who paid the tax under protest; and (3) it did not refund those who paid the tax without protest.

The court found the legislation drew a classification that “violate[d] the uniformity provision of the North Carolina Constitution.” *Smith*, 349 N.C. at 341, 507 S.E.2d at 33.

Admittedly, not all tax classifications violate the uniformity requirement. But, cases upholding taxing schemes which rely on classifications are distinguishable from the classification at issue here because those permissible distinctions were genuine and so they were rationally related to the attempt to define a class. The classification here is easily identifiable: all members of the North Carolina State Bar. Distinguishing attorneys from other members of the public and assessing a tax based on that professional distinction bares virtually no relationship to the putative purposes of the statute—ensuring public confidence in the judiciary and in judicial campaigns.

In *Tea Co. v. Maxwell*, *supra*, the act taxed *chain* store operators and therefore the distinction between a merchant with one store and a merchant with more than one was permissible because the later defines a *chain* store operator. In *Deadwood, Inc. v. N.C. Dep’t of Revenue*, 356 N.C. 407, 572 S.E.2d 103 (2002), a privilege tax was assessed against businesses operating facilities with “live entertainment” that was not applicable to facilities showing “moving picture shows.” In upholding the distinction, the Court found live performances to have many distinguishing features, including increased volume, higher concentration of attendees and the sale of alcohol, that created a greater burden on the local community and thereby justifying different classifications. *Id.* at 412, 572 S.E.2d at 107.

In *Snyder v. Maxwell*, 217 N.C. 617, 9 S.E.2d 19, the Court upheld a tax on the privilege of operating machines vending soft drinks that was distinct from the privilege taxing the operation of machines vending other items. The Court found distinguishing the contents of a vending machine to be a rational classification because value of a privilege is rationally related

to its expected profit. *Id.* at 621, 150 S.E.2d at 22. “These distinctions imply a difference in the commodities which may reasonably affect the value of the privilege because of the expectancy of its more profitable exercise.” *Id.*

In *Lenoir Fin. Co. v. Currie*, 254 N.C. 135, 118 S.E.2d 547, a license tax on installment paper dealers that exempted banks was upheld because of the vast laws treating banks uniquely, the least of which are the extensive legal necessities required for creation. In *Clark v. Maxwell*, 197 N.C. 604, 606, 150 S.E. 190, 192 (1929), a higher licensing tax for the privilege of operating motor-propelled vehicles over fifty miles was upheld because the privilege was more valuable because the service furnished by the state was more expensive. In *Rosenbaum v. City of New Bern*, 118 N.C. 83, 95, 24 S.E. 1 (1896), there were two taxing regimes at issue that applied to merchants selling secondhand clothing. Both were upheld because “it was competent to classify dealers in secondhand clothing separately from vendors of other articles of general merchandise.” *Id.* at 95, 24 S.E. 4.⁶

Contrasting the permissible tax classification upheld in *Tea Co.*, *Deadwood*, *Snyder*, and *Lenoir* with the classification used to impose the judicial surcharge sets in bass relief the constitutional infirmity of the taxing scheme here in question. Specifically, permissible classifications bear a true connection with the basis for the assessment. The judicial surcharge does not. At first glance, a casual observer might conclude that attorneys have a greater interest in the judiciary than nonlawyers and that interest somehow warrants that attorneys bear a greater burden in achieving an ideal judiciary. Upon closer consideration, such a conclusion proves specious. Many attorneys do not appear before the courts, for example those practicing real

⁶ *Leonard v. Maxwell*, 216 N.C. 89, S.E.2d 316, (1939) is not directly comparable, because the issue there was whether it was rational for certain classifications of retail merchants to receive different tax exemptions, not whether the definition of the class was arbitrary, which is what Plaintiffs are arguing.

estate transactions who have no occasion to appear in court. Likewise, many attorneys with boutique or limited practices, such as patent attorneys and federal prosecutors, do not appear in state courts. Conversely, many professionals other than attorneys work within or on the periphery of the judicial system, including court reporters, law enforcement officers, even journalists. Even among litigators, many attorneys do not practice at the appellate level and so have no occasion to appear before the Court of Appeals or Supreme Court, yet such attorneys are forced to finance the campaigns of appellate judges. Moreover, those with the greatest stake in a fair judiciary are *parties* to litigation, not attorneys.

The purpose of the judicial surcharge is to finance judicial campaigns. The rationale for publically financed judicial campaigns rests on a desire to promote a fair and impartial judiciary as well as to avoid the appearance of attorneys unduly influencing the judiciary by making campaign contributions. The overarching goal of the campaign fund, and accordingly the judicial surcharge which funds it, is to promote both justice and the appearance of justice. However, singling out attorneys to finance such lofty aspirations because many members of the legal profession appear before the courts has no real and substantial connection to the objective of the tax.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court DENY all Defendants' Motions to Dismiss.

Respectfully submitted

This the _____ day of August, 2008.

North Carolina Institute for Constitutional Law

Jeanette K. Doran (State Bar No.29127)

333 E. Six Forks Rd., ste 180
Raleigh, North Carolina 27609
Phone: (919) 838-5313
Facsimile: (919) 838-5316

Attorney for the Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS was served on all parties by depositing true copies thereof with the United States Postal Service, first class postage prepaid, addressed to the following:

Alexander McC. Peters
Special Deputy Attorney General
Karen E. Long
Special Deputy Attorney General
N.C. Dept. of Justice
P.O. Box 629
Raleigh, NC 27602-0629

This the _____ day of August, 2008.

North Carolina Institute for Constitutional Law

Jeanette K. Doran (State Bar No.29127)

333 E. Six Forks Rd., ste 180
Raleigh, North Carolina 27609
Phone: (919) 838-5313
Facsimile: (919) 838-5316

Attorney for the Plaintiffs