

plaintiffs' factual allegations, it is [the court's] task to determine whether these allegations as a matter of law demonstrate the adequacy, or lack thereof, of legal administrative remedies.

Lloyd v. Babb, 296 N.C. 416, 427, 251 S.E.2d 843, 851 (1979).

The relevant facts underlying this action are not extensive and are not in dispute. In 2002, the North Carolina General Assembly created the North Carolina Public Campaign Financing Fund to provide the option of publically-financed campaigns for appellate judicial candidates and to provide for voter education about appellate judicial races. N.C. GEN. STAT., Chapter 163, Article 22D (N.C. GEN. STAT. § 163-278.61 *et seq.*)(“the Act). According to N.C. GEN. STAT. § 163-278.61,

[t]he purpose of [Article 22D] is to ensure the fairness of democratic elections in North Carolina and to protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, those effects being especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts. Accordingly, this Article establishes the North Carolina Public Campaign Financing Fund as an alternative source of campaign financing for candidates who demonstrate public support and voluntarily accept strict fund-raising and spending limits.

The Fund, which is administered by the State Board of Elections (“the State Board”) with the advice of an Advisory Council, provides a comprehensive scheme for allowing qualifying candidates who choose to participate to voluntarily forgo much private fund raising and to receive public financing for their campaigns. It also provides for the publication of a Judicial Voter Guide, which explains “the functions of the appellate courts” and includes specified information on all candidates for the North Carolina Supreme Court and the North Carolina Court of Appeals. N.C. GEN. STAT. § 163-278.69(a) and (b). This Judicial Voter Guide is distributed “to as many voting age individuals in the

State as practical.”¹ N.C. GEN. STAT. § 163-278.69(a).

Monies for the Fund come from a variety of sources, including State appropriations and individual and corporate donations. *See* N.C. GEN. STAT. § 163-278.63(b). In 2005, the General Assembly amended N.C. GEN. STAT. § 84-34 to require that, in addition to annual membership fees paid to the North Carolina State Bar, all licensed attorneys must pay to the Bar a surcharge of \$50 for the Fund; this surcharge was implemented beginning in 2006. *See* 2005 N.C. Sess. Laws 276, § 23A.1(a). As is the case with annual bar dues, failure to pay this surcharge can result in suspension of a member’s license to practice law in North Carolina or other discipline by the State Bar. N.C. GEN. STAT. § 84-16 and -34; 27 N.C.A.C. 1A.0701(a)(5). Each of the three plaintiffs initially failed to pay the surcharge and later paid the surcharge under protest.

ARGUMENT

Plaintiffs’ complaint alleges eight causes of action:

- By their first and second causes of action, plaintiffs claim that the judicial surcharge violates their free speech rights under the First Amendment to the United States Constitution and under Article I, § 14, of the North Carolina Constitution;
- By their third and fourth causes of action, plaintiffs claim that the judicial surcharge, which is charged only to members of the North Carolina State Bar, violates their equal protection rights under the Fourteenth Amendment to the United States Constitution and under Article I, § 19, of the North Carolina Constitution;
- By their fifth cause of action, plaintiffs claim that the provisions of N.C. GEN. STAT.

¹ The Judicial Voter Guides, which are attached to this Memorandum as Exhibits 1 and 2, recite that in 2004, four million copies were printed at a cost to the Fund of \$192,000 (Ex. 1, p. 15) and in 2006, four million copies were printed at a cost to the Fund of \$236,000 (Ex. 2, front cover).

§ 84-34 establishing the imposition and collection of the judicial surcharge constitute an improper delegation of the taxing authority to the executive branch in violation of Article V, §2(3), and violate the separation of powers requirement of Article I, § 6, of the North Carolina Constitution;

- By their sixth and seventh causes of action, plaintiffs claim that the judicial surcharge violates Article V, § 2, of the North Carolina Constitution because its is charged only to members of the North Carolina State Bar and is not, according to plaintiffs, charged in a just, fair and uniform manner; and
- By their eighth cause of action, plaintiffs incorporate all the causes of action and seek a declaratory judgment declaring that the judicial surcharge “is unauthorized, unlawful, unconstitutional and arbitrary.” (Compl. ¶ 66)

For the reasons that follow, each of plaintiffs’ eight causes of action should be dismissed.

I. STATUTES ADOPTED BY THE GENERAL ASSEMBLY ARE PRESUMED CONSTITUTIONAL.

The North Carolina Supreme Court has often said that “[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined *beyond reasonable doubt*.” *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (quoting *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967)) (emphasis added).

This is so because the acts of the legislature are effectively the acts of the people.

All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution.

State ex rel. Martin v. Preston, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989). *See also Pope*

v. *Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (The legislative power rests “with the people and is exercised through the General Assembly, which functions as the arm of the electorate An act of the people’s elected representatives is thus an act of the people and is presumed valid unless it conflicts with the Constitution” (emphasis in original) (citations omitted)). Moreover, “[i]f there is any doubt as to the Legislature’s power to act in any given case, the doubt should be resolved in favor of the Legislature’s action.” *Baker v. Martin*, 330 NC at 338, 410 S.E.2d at 891 (quoting *County of Fresno v. State of California*, 268 Cal. Rptr. 266, 270 (Cal. App. 5th Dist. 1990)(citations omitted), *judgment aff’d*, 53 Cal. 3d 482, 808 P.2d 235, 280 Cal. Rptr. 92 (1991)).

This is the standard against which plaintiffs’ complaint must be measured. Plaintiffs have not overcome this presumption and have failed to state claims upon which relief can be granted.

II. THE JUDICIAL FUND FEE STATUTES DO NOT VIOLATE PLAINTIFFS’ RIGHTS TO FREEDOM OF EXPRESSION AND ASSOCIATION.

By their first two causes of action, plaintiffs contend that the \$50 judicial surcharge imposed on them as licensed attorneys violates their Free Speech rights under both the United States and North Carolina Constitutions because it compels them to support candidates with whom they disagree or may even oppose. Of course, “[t]he fallacy of [plaintiffs’] argument is . . . apparent: every appropriation . . . uses public money in a manner to which some taxpayers object.”² *Buckley v. Valeo*, 424 U.S. 1, 91-92, 96 S. Ct. 612, 669, 46 L. Ed. 2d 659, 729 (1976). Indeed, “*Buckley* thus affirms the proposition that the public financing of political candidates, in and of itself, does not

² Plaintiffs have alleged that the judicial surcharge is a tax. (Compl. ¶¶ 54 and 58) In so alleging, they rely on *Jackson v. Leake*, 476 F. Supp.2d 515, 522 (E.D.N.C. 2006). In *Jackson*, the United States District Court for the Eastern District of North Carolina determined that the judicial surcharge was a tax within the meaning of the federal Tax Injunction Act, 28 U.S.C. § 1341; the court did not consider whether the judicial surcharge is a tax within the meaning of North Carolina state law.

violate the First Amendment, even though the funding may be used to further speech to which the contributor objects.” *May v. McNally*, 55 P.3d 768, 771 (Ariz. 2002), *cert. denied*, 538 U.S. 923, 123 S. Ct. 1583, 155 L. Ed. 2d 314 (2003). This is so because as long as “viewpoint neutrality” is observed in the dissemination of funds, the rights of those who object to paying the assessments are protected. *Board of Regents v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000).

Without question, the Fund operates with viewpoint neutrality, and plaintiffs have not alleged otherwise. The situation in this case differs markedly from that considered by the United States Supreme Court in *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), a case upon which plaintiffs rely in their complaint. The North Carolina State Bar, which collects the assessment, does not spend the monies collected, nor does it decide how those monies are to be spent. Rather, those monies are forwarded to the Fund, which the State Board of Elections distributes in accordance with established, viewpoint neutral statutory guidelines.³ The judicial surcharge does not violate Constitutional guarantees of freedom of expression and freedom of association. Plaintiffs’ Counts 1 and 2, then, fail to state claims for relief and must therefore be dismissed as a matter of law.

Plaintiffs also contend that the judicial surcharge will not survive a free speech challenge because the surcharge is not sufficiently related to or needed for achieving an impartial judiciary and does not serve North Carolina’s interests in regulating the legal profession or improving the quality

³ Plaintiffs’ causes of action seem to be predicated upon the misunderstanding that all monies of the Fund are used to support specific candidates. As noted at n.1, *supra*, \$428,000 has been expended by the Fund to print the 2004 and 2006 Judicial Voters Guides, which served to educate voters about the functions of the appellate judiciary and about all the candidates for seats on the appellate judiciary. The 2008 Judicial Voter Guide is in the process of being published.

of North Carolina's legal services. This argument presupposes that the judicial surcharge on its face infringes upon the free speech protections of the United States and North Carolina Constitutions, and that the State must show a compelling interest to justify that infringement. As already shown, the United States Supreme Court has rejected the idea that any free speech objection can be raised to the manner in which public funds are used.⁴ No compelling interest, therefore, need be shown. Nevertheless, as shown in the next argument, North Carolina does indeed have good reason to assess the judicial surcharge on members of the North Carolina State Bar.

III. THE JUDICIAL FUND FEE STATUTE DOES NOT VIOLATE PLAINTIFFS' RIGHT TO EQUAL PROTECTION.

In their third and fourth causes of action, plaintiffs contend that the judicial surcharge is levied only upon active members of the State Bar and that imposition of a tax exclusively upon the legal profession for the funding of "political, judicial campaigns"⁵ is arbitrary and not rationally related to the purposes of the Fund or to other legitimate governmental purposes. Thus they contend that the judicial surcharge deprives them of their right to equal protection of the law under both the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and its

⁴ It should be noted that North Carolina's Freedom of Speech Clause is only 35 years old, having been adopted as part of North Carolina's third Constitution – the 1971 Constitution. "It is curious, but true, that North Carolina's first two constitutions contained no specific provision protecting freedom of speech; the present safeguard was inserted only in 1971." JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION: WITH HISTORY AND COMMENTARY* 51 (1993). Thus, it is clear that North Carolina's Freedom of Speech Clause is modeled after the First Amendment to the United States Constitution.

⁵ Defendants note that judicial campaigns in North Carolina are non partisan pursuant to N.C. GEN. STAT. § 163-322.

cognate provision in Article 1, § 19, of the North Carolina Constitution.⁶

This contention lacks any legal basis. As plaintiffs' third and fourth causes of action effectively concede (by relying on a lesser standard of review in alleging their equal protection claims (Compl. ¶¶ 55, 59)), lawyers are not a suspect class and payment of the judicial surcharge does not interfere with the exercise of a fundamental right. Thus the appropriate standard of review to determine if the judicial surcharge is constitutional is to inquire whether payment of the judicial surcharge is rationally related to "a conceivable legitimate interest" of the State in passing the statute.

In re: Consolidated Appeals of Certain Timber Cos. etc., 98 N.C. App. 412, 420, 391 S.E.2d 503, 507 (1990).

The Equal Protection Clause is not violated merely because a statute classifies persons differently, so long as there is a reasonable basis for the distinction. *Lamb v. Wedgewood*, 308 N.C. 419, 435, 302 S.E. 2d 868, 877 (1983). "A court may not substitute its judgment of what is reasonable for that of the legislative body, particularly where the reasonableness of a particular classification is fairly debatable." *Id.*, citing *ASP Associates v. The City of Raleigh*, 298 N.C. 207, 226, 258 S.E.2d 444, 456 (1979).

In re Assessment of Additional North Carolina & Orange County Use Taxes etc., 312 N.C. 211, 222, 322 S.E.2d 155, 162-63 (1984).

The judicial surcharge is deposited into the Fund. The stated purpose of the Act is to protect North Carolina's citizens from "the detrimental effects of increasingly large amounts of money being

⁶ Again, it is worth noting that the Equal Protection Clause of the North Carolina Constitution, like the Freedom of Speech Clause, is only 35 years old. While our Supreme Court has stated that the concept of equal protection, "made explicit in the Fourteenth Amendment to the Constitution of the United States," was inherent in our Constitution prior to being expressly added, *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971), the Equal Protection Clause of Article I, § 19, was not expressly incorporated into the Constitution until the revision of 1971. Like the Free Speech provision of Article I, § 14, North Carolina's Equal Protection Clause is clearly modeled after its federal cognate.

raised and spent to influence the outcome of [judicial] elections” N.C. Gen. Stat. § 163-278.61. The Act’s public funding system is necessary because the “effects [of money have been] especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts.” *Id.*

It is simply undeniable that attorneys have a particular interest in avoiding the appearance of impropriety in the election of judges. Attorneys, along with judges, are officers of the court who bear an obligation to avoid corruption or the appearance of corruption in the functioning of the judicial branch, including the election of judges to serve in that branch. Few things can give rise to the appearance of corruption as much as the specter of judges running for office who are, or who appear to be, dependant upon the lawyers who appear in front of them in order to mount effective campaigns. The public may rightly wonder whether some lawyers receive special consideration before some judges because of campaign contributions they have received.

The Constitution itself contains an even more compelling reason why the General Assembly’s decision to impose the judicial surcharge only upon members of the North Carolina State Bar is a reasonable legislative classification. Under Article IV, § 22, of the North Carolina Constitution, “[o]nly persons duly authorized to practice in the courts of [North Carolina] shall be eligible for election or appointment as a Justice of the Supreme Court, Judge of the Court of Appeals, Judge of the Superior Court, or Judge of District Court.” Because lawyers licensed by the State Bar are the only persons qualified to be judges in North Carolina, they have an immediate and unique obligation to help ensure the appearance of an impartial judiciary, which is after all, composed solely of lawyers. The Constitution bestows a privilege upon members of the legal profession that is not bestowed on any other citizens. There is thus a rational and reasonable

relationship between ensuring an impartial judiciary or the appearance of an impartial judiciary and the legal profession as a whole. As members of the legal profession are the only citizens eligible for election as judges, members of that profession bear a particular responsibility with regard to those elections. Plaintiffs' third and fourth claims for relief fail to state a claim upon which relief may be granted and must, therefore, be dismissed.

IV. THE JUDICIAL FUND FEE STATUTE DOES NOT UNLAWFULLY DELEGATE AUTHORITY TO THE STATE BAR IN VIOLATION OF THE CONSTITUTIONAL REQUIREMENT OF SEPARATION OF POWERS.

Plaintiffs contend in their fifth cause of action that by allowing the State Bar, through its Administrative Committee, to determine whether an attorney will be suspended for nonpayment of the judicial surcharge, the General Assembly has delegated its taxing authority to the executive branch in violation of Article V, § 2(3), and violated the separation of powers clause of Article I, § 6, of the North Carolina Constitution. Again, this cause of action fails to state a claim upon which relief can be granted and should therefore be dismissed.

The General Assembly has not delegated taxing authority to the State Bar in violation of legislative taxing authority or separation of powers. N.C. GEN. STAT. § 84-34 provides in pertinent part:

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. . . . The fifty-dollar (\$50.00) surcharge shall be sent on a monthly schedule to the State Board of Elections. . . .

N.C. GEN. STAT. § 84-16 provides in pertinent part:

The active members [of the N.C. State Bar] shall be all persons who have

obtained a license or certificate, entitling them to practice law in the State of North Carolina, *who have paid the membership dues specified, and who have satisfied all other obligations of membership.* No person other than a member of the North Carolina State Bar shall practice in any court of the State except foreign attorneys as provided by statute and natural persons representing themselves.

(Emphasis added.) Nowhere in these statutes is there room for the State Bar to exercise discretion in collecting and remitting the judicial surcharge to the State Board for the Fund. The State Bar's function in collecting and remitting the judicial surcharge is merely a ministerial act. A ministerial act is

“one which a person performs in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done.” Black's Law Dictionary, 3rd Ed. Indeed “a ministerial duty . . . is one in respect to which nothing is left to discretion; it is a simple, definite duty arising under circumstances admitted or proved to exist and imposed by law.” Black's Law Dictionary.

Langley v. Taylor, 245 N.C. 59, 62, 95 S.E.2d 115, 117 (1956).

The State Bar has no discretion in collecting and remitting the judicial surcharge; it merely performs the ministerial act of collecting and remitting the fee much as a retailer collects and remits sales taxes to the North Carolina Department of Revenue. A member of the State Bar must pay the judicial surcharge to remain an active member of the Bar pursuant to N.C. GEN. STAT. § 84-16, and the State Bar is compelled to suspend membership if the fee is not paid. As a matter of law there is no unconstitutional delegation of taxing authority from the General Assembly in requiring the State Bar to collect the judicial surcharge; there is merely a requirement that the State Bar collect and remit the surcharge as a ministerial act just as the Department of Revenue collects and remits income taxes to the State's General Fund. Plaintiffs' fifth cause of action fails to state a claim upon which relief should be granted and must be dismissed.

V. THE STATE HAS NOT WAIVED ITS SOVEREIGN IMMUNITY, THUS PLAINTIFFS ARE PRECLUDED FROM SUING THE STATE OR ITS OFFICIALS FOR ALLEGED VIOLATIONS OF CONSTITUTIONAL TAXING PROVISIONS.

Plaintiffs' sixth and seventh causes of action are barred by sovereign immunity. In any action against officials of the State, it is the plaintiff's burden to show a waiver of sovereign immunity. "The State of North Carolina is immune from suit unless and until it expressly consents to be sued. Absent consent or waiver, this immunity is absolute and unqualified." *State v. Taylor*, 322 N.C. 433, 435, 368 S.E.2d 601, 602 (1988). It is also well established that a "[w]aiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. North Carolina State Ports Authority*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983).

To state a claim against the State, a complaint must specifically allege a waiver of sovereign immunity. Absent such an allegation, a complaint fails to state a cause of action. *Fabrikant v. Currituck County*, 174 N.C. App. 30, 621 S.E.2d 19 (2005) (holding some causes of action were barred because plaintiffs failed to properly allege a waiver of sovereign immunity in their complaint); *Paquette v. County of Durham*, 155 N.C. App. 415, 573 S.E.2d 715 (2002), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003) (holding trial court did not err in dismissing complaint where complaint failed to specifically allege county had waived its sovereign immunity); *Vest v. Easley*, 145 N.C. App. 70, 549 S.E.2d 568 (2001) (holding that without alleging waiver of sovereign immunity in the complaint, plaintiff was barred from suing State and its officials in their official capacities). At a minimum, to avoid dismissal because of sovereign immunity, a complaint must allege facts that are sufficient to establish a waiver by the State of its sovereign immunity. *Fabrikant*, 174 N.C. App. at 38, 621 S.E.2d at 25.

In plaintiff's complaint there is no mention of sovereign immunity at all. There is no averment that sovereign immunity has been waived or is inapplicable. Defendants concede that sufficient facts are alleged to establish a waiver of sovereign immunity for Counts 1 through 5, pursuant to *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992) (State has no sovereign immunity defense for claims based on allegations of violations of Article I of the North Carolina Constitution, the Declaration of Rights). For the counts raised under Article V of the North Carolina Constitution regarding tax matters, however, there is no allegation of a waiver of sovereign immunity, and no facts that would support waiver. Pursuant to the Court's ruling in *Fabrikant*, plaintiffs' sixth and seventh causes of action must be dismissed.

Plaintiffs purport in their sixth and seventh causes of action pursuant to the Declaratory Judgment Act to challenge the constitutionality of a tax that violates Article V, § 2(2), of the North Carolina Constitution (requirement that taxes be uniform) (Compl., ¶ 64) and Article V, § 2(1) (requirement that taxes be justly and equitably administered) (Compl., ¶ 66). However, the Declaratory Judgment Act does not provide the requisite waiver of sovereign immunity for these causes of action.

The North Carolina Supreme Court has long held that the Declaratory Judgment Act does not constitute a waiver of sovereign immunity. See *Buchan v. Shaw*, 238 N.C. 522, 523, 78 S.E.2d 317, 317 (1953) ("the State has not waived its immunity against suit by one of its citizens under the Declaratory Judgment Act"); *Great American Ins. Co. v. Gold*, 254 N.C. 168, 173-74, 118 S.E.2d 792, 796 (1961) ("Our Court has not permitted the Declaratory Judgment Act to supplant or substitute for the specific statutory proceeding for testing a tax statute."); *Bragg Development Co. v. Braxton*, 239 N.C. 427, 429, 79 S.E.2d 918, 920 (1954) ("As broad and comprehensive as it is, even the Declaratory Judgment Act does not supersede the rule or provide an additional or

concurrent remedy” to express statutory waivers of sovereign immunity for tax collection). And, because the Declaratory Judgment Act does not waive the State’s sovereign immunity, the ancillary relief provision of the Declaratory Judgment Act, N.C. GEN. STAT. § 1-259, does not give this Court subject matter jurisdiction to order a refund of the judicial surcharge as plaintiffs request.

Plaintiffs may contend that under the North Carolina Supreme Court’s holding in *Corum*, State officials may be sued for a violation of any Constitutional right. This precise contention was rejected in *Petroleum Traders Corp. v. State*, ____ N.C. App. ____, 660 S.E.2d 662, 2008 N.C. App. LEXIS 1003 (2008). In *Petroleum Traders*, plaintiffs argued that a fee that the State charged for procurement over the Internet was a tax passed in violation of Article V of the North Carolina Constitution, much as plaintiffs aver here. The plaintiffs in *Petroleum Traders* argued that under *Corum* and its progeny, State officials had no valid defense of sovereign immunity. The *Petroleum Traders* Court disagreed, holding:

Corum contains no suggestion of an intention to eliminate sovereign immunity for any and all alleged violations of the N.C. Constitution. Its holding is closely tethered to its stated policy rationale, that the personal rights guaranteed by the N.C. Constitution Declaration of Rights [Article I] are of such fundamental importance that their protection should not be barred by the doctrine of sovereign immunity. . . . We conclude that *Corum* is properly limited to claims asserting violation of the plaintiff’s personal rights as set out in the N.C. Constitutional Declaration of Rights.

____ N.C. App at ____, 660 S.E.2d at 667.

Thus, plaintiffs’ sixth and seventh causes of action are barred by the doctrine of sovereign immunity and must be dismissed.

VI. EVEN IF THIS COURT WERE TO DECIDE THAT IT HAD JURISDICTION TO CONSIDER THE TAX ISSUES, THE JUDICIAL FUND FEE IS RATIONALLY RELATED TO THE GOALS OF THE STATE IN PROTECTING JUDICIAL RACES FROM IMPROPRIETY OR THE APPEARANCE OF IMPROPRIETY.

Plaintiffs contend in their sixth cause of action that the judicial surcharge violates the State Constitutional requirement that taxes be uniform (N.C. Constitution, Art. V, § 2(2)) and contend in their seventh cause of action that the judicial surcharge violates the State Constitutional requirement that taxation must be fair and uniform (N.C. Constitution, Article V, § 2(1)). Even assuming for the sake of argument that the judicial surcharge is a tax,⁷ plaintiffs cannot prevail on this cause of action.

Art. V, § 2 of the North Carolina Constitution states in pertinent part:

- (1) *Power of taxation.* The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.
- (2) *Classification.* Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated. No class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.

While the grant of authority in Article V, § 2(2), establishes the general rule that taxes must be applied uniformly, it “does not prohibit reasonable flexibility and variety appropriate to reasonable schemes of State taxation.” *In re: Consolidated Appeals of Certain Timber Companies*, 98 N.C. App. 412, 416, 391 S.E.2d 503, 505 (1990) (quoting *In re Appeal of Martin*, 286 N.C. 66, 75-76, 209 S.E.2d 766, 773 (1974)). “[A] classification does not violate this provision if it is founded upon a reasonable distinction and bears a substantial relation to the object of the legislation.

⁷ As noted in footnote 2 above, there has been no determination that the judicial surcharge is a tax within the meaning of North Carolina law. If this Court accepts defendants’ logic set forth in the argument under Section V of this brief above, the Court need not reach the question whether the judicial surcharge is a tax.

... It is only those classifications which are arbitrary or capricious which violate Article V, Section 2.” *Id.* (quoting *In re Assessment of Taxes Against Village Publishing Corp*, 312 N.C. 211, 223-24, 322 S.E.2d 155, 163 (1984), *appeal dismissed*, 472 U.S. 1001, 86 L. Ed. 2d 710 (1985)).

The judicial fund surcharge is not arbitrary or capricious and the requirement that lawyers must pay it is a classification founded upon a reasonable distinction bearing a substantial relation to the object of the legislation. The goal of the Act, as set out above,

is to ensure the fairness of democratic elections in North Carolina and to protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, those effects being especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts.

N.C. GEN. STAT. § 163-278.61. The Act accomplishes this by providing public funding to judicial candidates that is disseminated in a viewpoint-neutral fashion and by means of voter education. Because members of the legal profession are the only persons qualified to become judges under Article IV, § 22, of the North Carolina Constitution, the requirement that lawyers pay a surcharge to fund appellate judicial races and educational guides about judicial races (Ex. 1 and 2) bears a substantial relation to the intent of the legislation. Because lawyers have what is in essence a constitutional monopoly on judicial election or appointment, it is rational for the State to require them to pay a surcharge that funds public financing of judicial races and public education concerning the appellate judiciary and candidates for election to it.

The requirement that lawyers pay the judicial surcharge is rationally related to the goal of providing public funding for judicial races to avoid the appearance of impropriety. Again, plaintiffs have failed, as a matter of law, to state a claim upon which relief may be granted and their sixth and

seventh causes of action must be dismissed.

VII. PLAINTIFFS' EIGHTH CAUSE OF ACTION, WHICH INCORPORATES ALL PRIOR CAUSES AND REQUESTS A DECLARATORY JUDGMENT THAT THE JUDICIAL SURCHARGE IS UNCONSTITUTIONAL, FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Plaintiffs' eighth cause of action incorporates by reference and realleges all prior causes of action in their complaint and requests a declaratory judgement that the judicial surcharge and any efforts by the State to collect the surcharge are unconstitutional and unlawful. This eighth cause of action also fails to state a claim upon which relief can be granted.

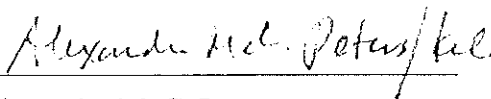
As discussed in this memorandum, plaintiffs cannot meet the burden of showing that the judicial surcharge violates their right to freedom of speech, violates their right to equal protection or is an unlawful delegation of legislative authority to the State Bar. Applying the appropriate standards of review, the judicial surcharge is constitutional as a matter of law. Additionally, plaintiffs have not shown that the State has waived sovereign immunity as to the constitutional taxation claims, and these causes of action must be also be dismissed. The plaintiffs have failed to state a claims upon which relief may be granted as a matter of law and they have failed to argue successfully that the State has waived its sovereign immunity as to taxation issues. There is nothing in this eighth cause of action which adds anything new to the complaint and it must be dismissed.

CONCLUSION

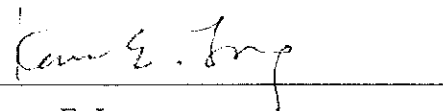
For the foregoing reasons, this action should be dismissed.

Respectfully submitted, this the 20st day of August 2008.

ROY COOPER
ATTORNEY GENERAL



Alexander McC. Peters
Special Deputy Attorney General
State Bar No. 13654
E-mail: apeters@ncdoj.gov



Karen E. Long
Special Deputy Attorney General
N.C. State Bar No. 8874
E-mail: klong@ncdoj.gov

North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602-0629
Tel: (919) 716-6900
Fax: (919) 716-6763
Counsel for Defendants

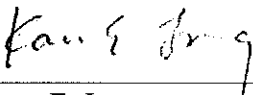
CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **MEMORANDUM IN SUPPORT OF THE DEFENDANTS' MOTION TO DISMISS** in the above titled action upon all other parties to this cause by:

- Hand delivering a copy hereof to each said party or to the attorney thereof;
- Transmitting a copy hereof to each said party via facsimile transmittal and/or electronic transmittal; or
- Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

Ms. Jeanette Doran Brooks
North Carolina Institute for Constitutional Law
Suite 180, Six Forks Place
333 East Six Forks Road
Raleigh, North Carolina 27609
Counsel for Plaintiffs

This the 20st day of August 2008.



Karen E. Long
Special Deputy Attorney General