

NORTH CAROLINA SUPREME COURT

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

Plaintiffs,)

v.)

From Wake County

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

Defendants.)

SUPREME COURT OF
NORTH CAROLINA

APR 5 2010

FILED

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STATE DEFENDANTS'
RESPONSE TO PETITION FOR
DISCRETIONARY REVIEW

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the State of North Carolina, in his)
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Defendants.)

STATE DEFENDANTS'
RESPONSE TO PETITION FOR
DISCRETIONARY REVIEW

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COME the State of North Carolina, James T. Fain, III, Reginald Hinton, David McCoy, and Michael F. Easley (hereafter collectively referred to as the “State defendants”), by and through their undersigned counsel, and hereby file the STATE DEFENDANTS’ RESPONSE IN OPPOSITION TO PETITION FOR DISCRETIONARY REVIEW. The State defendants file this response in opposition to the plaintiff-petitioners’ (hereafter “plaintiffs”) PETITION FOR DISCRETIONARY REVIEW OF CONSTITUTIONAL ISSUES PURSUANT TO N.C. GEN. STAT. § 7A-31 AND APPELLATE RULE 15 (hereafter “the petition” or “plaintiffs’ petition”). The State defendants urge the Court to deny the petition on the grounds that the case does not meet any of the criteria for discretionary review under N.C.G.S. § 7A-31.

FACTS

PROCEDURAL FACTS:

Plaintiffs seek review of a unanimous decision of the Court of Appeals which affirmed the 14 November 2008 Order of the Wake County Superior Court, the Honorable Paul C. Ridgeway, Superior Court Judge presiding, dismissing plaintiffs’ action for lack of standing. (R pp. 1, 245-58)

Plaintiffs, who are three individual citizens, residents, and taxpayers of the State of North Carolina (Compl. ¶¶ 4-6, R pp. 35-36), initiated this action by filing

their original Complaint and Petition for Declaratory Judgment on 25 July 2007. (R pp. 5-32) An amended complaint (hereafter “complaint”) was filed as a matter of right on 15 August 2007. (R pp. 33-75) Plaintiffs’ goal in bringing the action was to have the courts invalidate economic incentive legislation enacted in 2006 relating to internet or web search facilities and services, as well as the initial approval of a job development incentive grant (hereafter “JDIG”) for defendant Google. Plaintiffs sought declaratory and injunctive relief invalidating the challenged tax benefits as well as any JDIG, prohibiting any payments or benefits under the challenged legislation or any JDIG grant, requiring the State defendants to recoup any money paid out or not collected as the result of any grants or tax exemptions, along with other remedies such as costs and attorney's fees. (Compl. R pp. 60-62) The defendants include the State of North Carolina, the Secretary of the North Carolina Department of Commerce, the Acting Secretary of the North Carolina Department of Revenue, the State Budget Officer, the Governor of North Carolina (hereafter the “State defendants”), plus Google, Inc. and Madras Integration, LLC (hereafter collectively “Google”). (Compl. ¶¶ 8-12, 14-16; R pp. 36-37)

The case was designated by the Chief Justice of North Carolina as an “exceptional” case pursuant to Rule 2.1 of the General Rules of Practice and assigned to the Honorable Paul C. Ridgeway, Superior Court Judge. (R p. 86) The matter was

heard in the trial court pursuant to motions to dismiss filed by all defendants. (R pp. 76-84) Each of plaintiffs' claims was dismissed based on N.C.G.S. § 1A-1, Rule 12(b)(1) of the Rules of Civil Procedure because plaintiffs lacked standing and/or based on N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief may be granted. (R pp. 253, 254, 257, 258) Each of the claims brought forward on appeal by plaintiffs was dismissed because of plaintiffs' lack of standing. (R pp. 255-57, 258)

On 12 December 2008 plaintiffs filed their Notice of Appeal. (R pp. 260-62) The settled record was filed in the Court of Appeals on 23 March 2009 and docketed on 31 March 2009. (R p. 1) The only claims brought forward by plaintiffs on appeal were their claims in Counts 7, 8, and 11 of the complaint that the internet data center tax exemption violates what they referred to as the "fair and equitable" clause of Article V, Section 2(1) (actually requiring that the taxing power "be exercised in a just and equitable manner"), the uniformity of taxation clause of Article V, Section 2(2), and the "law of the land" clause of Article I, Section 19 of the North Carolina Constitution, respectively. (R pp. 54-55, 56-58)

The case was heard in the Court of Appeals on 26 October 2009. In a unanimous opinion filed 16 February 2010, the Court of Appeals affirmed the decision of the trial court that plaintiffs lacked standing to pursue the claims brought

forward on appeal by the plaintiffs. *Munger v. State*, 689 S.E.2d 230, 2010 N.C. App. LEXIS 282 (N.C. Ct. App. Feb. 16, 2010) (hereafter cited as “*Munger*,” with all citations to the slip opinion as “slip op. at ___”). Plaintiffs timely filed their petition seeking this Court’s review on 23 March 2010.

HISTORICAL FACTS:

Plaintiffs brought this action to challenge economic incentive legislation enacted in 2006, as well as the initial approval of a job development incentive grant, relating to internet or web search facilities and services, which plaintiffs construed as being solely for the benefit of Google. Plaintiffs’ challenge, which was originally based on a number of provisions of the Constitution of North Carolina, in effect disputes the policy judgments made by the General Assembly. Moreover, plaintiffs doggedly ignore the benefits flowing to the State of North Carolina and its citizens from the economic development and job opportunities resulting from the underlying legislative policies as well as from Google’s location of a new facility in this State.

Specifically, in the 2006 Current Operations Appropriations Act, the General Assembly approved the exemption from retail sales and use taxes of sales of electricity to be used at eligible internet data centers and of certain property used at an eligible internet data center. *See* N.C. SESS. LAWS 2006-66 § 24.17 (Compl. Exhibit A (R pp. 64-67)); N.C.G.S. §§ 105-164.3(8e), 105-164.13(55) (2009). The

internet data center exemption is limited to facilities which are “used primarily by a business engaged in ‘Internet service providers and Web search portals’ industry.” N.C.G.S. §§ 105-164.3(8e). To qualify for the exemption, internet data center facilities must be accompanied by investments of at least two hundred fifty million dollars (\$250,000,000) within five years after the construction of the facility begins, as certified by the Secretary of Commerce. N.C.G.S. § 105-164.3(8e)d. The exemption is also limited to facilities located in counties that fall within one of the less distressed tiers for economic development, or the least distressed tier, according to rankings under former and current statutory schemes. N.C.G.S. § 105-164.3(8e)c (referencing former N.C.G.S. § 105-129.3 or current N.C.G.S. § 143B-437.08). Internet data centers are merely one in a long list of a wide variety of items exempted from these taxes, N.C.G.S. § 105-164.13, including broad exemptions of the sale of electricity to farmers and manufacturers beginning in 2010. N.C.G.S. §§ 105-164.13(1b), -164.13(57) (2009). Finally, the internet data center exemption is forfeited if the level of investment is not met or the property or electricity is not located or used at the eligible internet or web search facility. N.C.G.S. § 105-164.13(55).

Throughout their complaint, plaintiffs describe the 2006 legislation as the “Google legislation” and depict it as serving no purpose except to attract, and benefit,

a Google internet data center in Lenoir, Caldwell County, North Carolina. *See* Compl. ¶¶ 20-38; R pp. 38-43. Plaintiffs acknowledge that the legislation is not by its terms limited to Google. (Compl ¶ 36; R pp. 42-43) Nevertheless, they portray the legislation as being enacted expressly and solely for the benefit of Google and its shareholders and the facility itself as providing benefits only to Google and its shareholders. (Compl. ¶¶ 36, 50, 55, 62, 66, 69, 73, 78, 80; R pp. 42, 46-53, 55-56)

In their complaint and in the trial court, plaintiffs also challenged on constitutional grounds a JDIG which was approved for Google, but never finalized. However, plaintiffs did not pursue on appeal any arguments concerning the JDIG.

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

This Court should deny the petition for discretionary review because plaintiffs cannot show that certification is justified under any of the criteria set out in N.C.G.S. § 7A-31(c). In particular, given the well-reasoned decision of the Court of Appeals, all significant legal issues have been properly addressed and the correct result reached. Consequently, at this time, none of the issues raised by plaintiffs has significant public interest, and the cause does not involve legal principles of major significance to the jurisprudence of the State. Further, the Court of Appeals' decision

is in no way in conflict with any decision of this Court. *See* N.C.G.S. § 7A-31(c) (2009).

Regardless of plaintiffs' contention that the case involves a matter of significant public interest, certification of a matter on the grounds of significant public interest is appropriate only when there are unresolved legal issues worthy of this Court's attention. While the legislation that prompted plaintiffs' suit may have sparked public attention, there remains no legal matter of substance here. Similarly, while plaintiffs and others may object politically or philosophically to the practice of governmental entities offering incentives to encourage economic development, those objections do not elevate the legal questions raised by this case to the jurisprudential level warranting this Court's review. Precedents from this Court, properly applied by the Court of Appeals in *Munger* as well as in the case of *Blinson v. State*, 186 N.C. App. 328, 333, 651 S.E.2d 268, 273 (2007), *appeal dismissed and disc. review denied*, 362 N.C. 355, 661 S.E.2d 240, 241 (2008), sufficiently govern the issues raised by plaintiffs so that those issues, in reality, do not involve legal principles of major significance to the jurisprudence of this State. Plaintiffs' desire to re-litigate established issues does not convert this case to one meriting discretionary review.

Plaintiffs also attempt to characterize the Court of Appeals' opinion as being in conflict with decisions of this Court, or more specifically with one decision of this

Court – *Goldston v. State*, 361 N.C. 26, 30, 637 S.E.2d 876, 879 (2006). As demonstrated below, rather than conflicting with *Goldston* or any other decision of this Court, the Court of Appeals opinion properly applied the decisions of this Court to the questions before it.

On appeal, plaintiffs brought forward their claims in Counts 7, 8, and 11 of the complaint that the internet data center tax exemption violates what they referred to as the “fair and equitable” clause of Article V, Section 2(1) (actually requiring that the taxing power “be exercised in a just and equitable manner”), the uniformity of taxation clause of Article V, Section 2(2), and the “law of the land” clause of Article I, Section 19 of the Constitution, respectively. (R pp. 54-55, 56-58) Each of these claims is a discrimination-type claim. *See Munger*, slip op. at 23-24. For example, this Court has said with regard to the uniformity of taxation principle that it “relates to equality in the burden on the State’s taxpayers.” *Appeal of Martin*, 286 N.C. 66, 76, 209 S.E.2d 766, 773 (1974) (citing *Hajoca Corp. v. Clayton, Comm’r of Revenue*, 277 N.C. 560, 178 S.E.2d 481 (1971)). Under the rule of uniformity, a classification need only be “founded upon a reasonable distinction or difference and bear[] a substantial relation to the object of the legislation.” 286 N.C. at 76, 209 S.E.2d at 773. The same is true for plaintiffs’ “fair and equitable taxation” claim under Article V, Section 2(1) of the North Carolina Constitution. Although there is very little

litigation concerning “fair and equitable” (or “just and equitable”) taxation under Article V, Section 2(1), this Court has concluded that “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.” *In re Assessment of Additional North Carolina & Orange County Use Taxes*, 312 N.C. 211, 223, 322 S.E.2d 155, 163 (1984). Similarly, with regard to the “law of the land” clause of Article I, Section 19 of the Constitution, “as long as there could be some rational basis for enacting [the statute at issue], this Court may not invoke [principles of due process] to disturb the statute.” *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181, 594 S.E.2d 1, 15 (2004) (quoting *Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985)).

In addressing standing questions relating to discrimination types of claims, the rule is clear that one must be a member of the class against which a statute discriminates in order to have standing to bring a discrimination-based claim. In *Appeal of Martin*, this Court addressed a county’s attempt to challenge as unconstitutional under the Uniformity Clause the classification of certain property as nontaxable. The Court ruled that the county lacked standing to do so:

Finally, the County is precluded from challenging the constitutionality of *G.S. 105-281* (1969 Cum. Supp.) on yet another ground: It is not a member of the class subject to the alleged discrimination. *State v. Trantham*, 230 N.C. 641, 55 S.E. 2d 198 (1949); *State v. Sims*, 213 N.C. 590, 197 S.E. 176 (1938).

See also Stone v. City of Wichita, 145 Kan. 377, 65 P. 2d 595 (1937). The general rule is that “a person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute.” 16 Am. Jur. 2d, Constitutional Law, § 123 (1964).

Appeal of Martin, 286 N.C. at 75, 209 S.E.2d at 772-73. *See also Munger*, slip op. at 11, 20, 23. This was true despite the fact that the county’s tax revenues were diminished by the exemption from taxes of the property at issue. 286 N.C. at 73, 209 S.E.2d at 771. As explained even earlier by the Court:

When the class which includes the party complaining is in no manner prejudiced, it is immaterial whether a law discriminates against other classes or denies to other persons equal protection of the law. 11 A.J. 757. He who seeks to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is discriminated against.

State v. Trantham, 230 N.C. 641, 644, 55 S.E.2d 198, 200-01 (1949) (denying defendant’s standing to raise due process and equal protection claims with regard to Sunday closing laws since he sold no items that were exempt from the Sunday closing prohibitions when sold by other types of businesses).

As the Court of Appeals recognized, the fact that plaintiff was not a member of the class supposedly harmed by the exemptions for internet data centers was fatal to their ability to bring their discrimination-type claims challenging the exemptions.

In reaching its decision the Court of Appeals in part followed its own decision in a similar case, *Blinson*, 186 N.C. App. at 333, 651 S.E.2d at 273. In *Blinson*, the Court of Appeals had concluded that plaintiffs in that case could not rely on their status as taxpayers who paid income taxes to permit them to bring discrimination-type claims, including a uniformity of taxation challenge, to economic incentives for computer manufacturing companies. See 186 N.C. App. at 334-35, 651 S.E.2d at 273-74; see also *Munger*, slip op. at 26-28.

In reaching its decision in *Munger* (as in *Blinson*), the Court of Appeals was well aware of this Court's decision in *Goldston*. Indeed, in its decision below, the Court of Appeals quoted *Goldston* for the proposition that "the right of a citizen and taxpayer to maintain an action in the courts to restrain the unlawful use of public funds to his injury cannot be denied." *Munger*, slip op. at 10 (quoting *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881). *Munger* expressly recognized that this Court had held in *Goldston* that "a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds." *Munger*, slip op. at 11 (quoting *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881). However, *Munger* also correctly decided that *Goldston* did not provide any basis to grant standing to plaintiffs for their discrimination-based claims.

According to plaintiffs, “*Goldston* addressed standing in the context of unconstitutional expenditures while this case presents the question of standing in the context of the unconstitutional stifling of funds. Both situations result in less money in the public coffers, and both situations warrant taxpayer standing.” (Petition, p. 6) But what plaintiffs ignore is that both those characterizations of the challenges in *Goldston* and in this case address the inherent invalidity of the spending or exemption at issue, not the discrimination types of claims that plaintiffs bring forward here. Plaintiffs are, in effect, attempting to use their discrimination-type claims as a vehicle to assert claims more like the public purpose and exclusive emoluments claims which they alleged in their complaint (R pp. 48-54), but which they did not bring forward on appeal.¹ It is in this context that the Court of Appeals stated in *Munger*, after reviewing *Goldston* and other cases, that

the decisions of the Supreme Court and of this Court with respect to “taxpayer standing” differentiate between (1) actions challenging the constitutional validity of a statute on the grounds that it allows public funds to be dispersed for reasons other than a “public purpose,” in which a taxpayer generally has standing, and (2) actions challenging the constitutional validity of a statute on the grounds that the statute discriminates among classes of

¹ As the Court of Appeals noted, plaintiffs characterized this case as “eerily similar” to *Stanley v. Dep’t of Conservation & Dev.*, 284 N.C. 15, 199 S.E.2d 641 (1973). *Munger*, slip op. at 19 n.4. *Stanley*, of course, was a public purpose case, thus illustrating yet again that plaintiffs seek to pursue their public purpose claims under the guise of their discrimination-based claims.

persons, in which a taxpayer must show that he belongs to a class that receives prejudicial treatment.

Munger, slip op. at 12. Plaintiffs' contention that the Court of Appeals attempted to convert *Goldston* into a public purpose ruling (Petition, p. 7) simply does not comport with that court's review of relevant decisions including *Goldston* and the fact the claims plaintiffs seek to assert under the guise of such provisions as uniformity of taxation are in reality more in the nature of the public purpose claims they chose not to pursue on appeal. Nor does it reflect the fact that the Court of Appeals accurately quoted the holding in *Goldston* (*Munger*, slip op. at 10-11) and made no effort to assert that *Goldston* was limited to public purpose claims.

What the Court of Appeals did was recognize that *Goldston* did not "work[] a fundamental change in North Carolina standing jurisprudence." *Munger*, slip op. at 19. Rather, this Court explicitly said, "our cases demonstrate that a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds." *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881 (quoted in *Munger*, slip op. at 19-20). Thus, the court in *Munger* read *Goldston* as saying that it was applying established law to reach the result in that case. Since established law of both this Court and the Court of Appeals requires that a plaintiff be a member of the class prejudiced by a statute in order to bring a

discrimination-type claim against it, the Court of Appeals properly determined that plaintiffs could not bring their discrimination-type claims without being a member of the class prejudiced by the statute. *Goldston* did not change that requirement. *Munger*, slip op. at 20.

Plaintiffs' attempt to misrepresent the Court of Appeals' decision as a revision of *Goldston* is simply not supported by the *Munger* opinion. Nor does it change the fact that plaintiffs have failed to show that they have standing to bring their discrimination-type claims against defendants in this case or that the Court of Appeals erred in any way in affirming the trial court's dismissal of the discrimination-type claims for lack of standing. Consequently, plaintiffs have failed to show that the decision of the Court of Appeals conflicts with any decision of this Court or is otherwise in error or that there exists any justification for this Court to grant discretionary review.

CONCLUSION

For the reasons discussed above, plaintiffs have failed to show any justification or basis for this Court to grant their petition for discretionary review. Therefore, the petition should be denied.

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Respectfully submitted, this the 5th day of April, 2010.

Electronically submitted

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing STATE DEFENDANTS' **RESPONSE TO PETITION FOR DISCRETIONARY REVIEW** 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 or e-mail; and/or

X Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

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This the 5th day of April, 2010.

Electronically Submitted
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Special Deputy Attorney General