

SUPREME COURT OF NORTH CAROLINA

W.D. GOLDSTON, JR, JAMES E.)
HARRINGTON, and citizens,)
taxpayers and bondholders similarly)
situated,)

Plaintiffs,)

v.)

From Wake County

STATE OF NORTH CAROLINA)
and MICHAEL F. EASLEY,)
Governor, individually and in his)
official capacity,)

Defendants.)

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BRIEF OF AMICUS CURIAE
NORTH CAROLINA INSTITUTE FOR
CONSTITUTIONAL LAW

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BRIEF OF AMICUS CURIAE
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The North Carolina Institute for Constitutional Law (“NCICL”),
through undersigned counsel, submits this brief as amicus curiae in support
of the position of the plaintiff-appellants.

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that the plaintiff-appellants had neither “direct standing” nor “constitutional standing” to challenge the constitutionality of the transfers of funds from the Highway Trust Fund at issue in this lawsuit.

SUMMARY OF ARGUMENT

In ruling that the plaintiff-appellants lacked standing to maintain this action, the Court of Appeals erroneously relied on many of its own opinions that distort and garble the requirements for standing under North Carolina law. In the end, it inappropriately attempted to adopt the federal test for standing as North Carolina’s own – despite important differences in the federal and state constitutions. The opinions of this Court, like the opinions of the highest courts of other states, have clarified that state standing requirements do not, need not, and, indeed, should not, mirror the federal rule. By confusing this issue, the Court of Appeals erred in its analysis of both the plaintiff-appellants’ direct standing as well as the plaintiff-appellants’ constitutional standing. In fact, the plaintiff-appellants have both direct standing and constitutional standing under the North Carolina formulation of those doctrines.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY APPLYING THE FEDERAL TEST FOR DIRECT STANDING RATHER THAN THE NORTH CAROLINA TEST.

ASSIGNMENTS OF ERROR NOS. 1 & 2

This Court, like its federal counterparts, recognizes a justiciability doctrine known as “standing.” “Standing” refers to “the determination of whether a specific person is the proper party to bring a matter to the court for adjudication.” Erwin Chemerinsky, *Federal Jurisdiction* § 2.3.1 (3d ed. 1999). Since the doctrine defines the scope of matters properly before a court, it necessarily reflects normative understandings about the judiciary’s appropriate role in a system of government. These understandings have both “prudential” and “constitutional” underpinnings. Among the jurisdictions within this country, however, systems of government are as diverse as the constitutions that define them. It should come as no surprise, therefore, that the tests developed to resolve questions of standing (and other questions of justiciability) differ widely from jurisdiction to jurisdiction.

North Carolina’s standing test is, for good reason, different than the federal standing test. Indeed, the role for North Carolina courts contemplated by the state constitution is very different than the role for the federal judiciary contemplated by the federal constitution. The Court of

Appeals, however, erred in this case by inappropriately applying the federal standing test and ruling that the plaintiff-appellants lacked standing. Had it applied the correct test, a different result would have followed, as plaintiff-appellants plainly have standing under this Court's test for direct standing.

A. This Court Has Developed the "Injuriously Affected" Test for North Carolina Courts to Use in Resolving Whether Direct Standing Exists.

This Court first succinctly articulated its test for direct standing in the North Carolina courts in Piedmont Canteen Service v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962). The Piedmont Canteen Court explained that the only persons who "may call into question the validity of a statute" are those "who have been injuriously affected thereby in their persons, property or constitutional rights." 256 N.C. at 166, 123 S.E.2d at 589 (emphasis added). The Court considered whether a vending machine operator had standing to challenge the constitutionality of a statute that required retailers to pay sales taxes to the state on all sales but prohibited them from collecting sales tax from their customers on items priced under ten cents. Id. at 159-60, 123 S.E.2d at 585. The plaintiff argued that the tax discriminated against vending machine retailers, especially those selling items priced under ten cents. Id. at 164-66, 123 S.E.2d at 588-89. The Court held that the tax had

not caused any financial loss to the plaintiff or violated his constitutional rights. Id. Accordingly, the plaintiff lacked standing. Id.

This Court expounded upon its “injuriously affected” test in Stanley v. Department of Conservation and Development, 284 N.C. 15, 199 S.E.2d 641 (1973). The Stanley Court held that three taxpayers had direct standing to challenge the constitutionality of certain bonds proposed by county authorities to finance industrial development and/or pollution abatement. 284 N.C. at 29, 199 S.E.2d at 650. The Stanley Court reasoned that the tax advantage given to the proposed bonds would necessarily “increase[] the burden imposed upon all other taxable property.” Id. at 29, 199 S.E.2d at 651. It then articulated this Court’s general rule: “A taxpayer injuriously affected by a statute may generally attack its validity. Thus, he may attack a statute which . . . exempts persons or property from taxation, or imposes on him in its enforcement an additional financial burden, however slight.” Id. (emphasis added). Accord Appeal of Barbour, 112 N.C. App. 368, 372-73, 436 S.E.2d 169, 173 (1993) (quoting Stanley for same proposition).

Stanley involved a challenge to the manner in which taxes are levied. However, it also signaled that taxpayers would have direct standing when injured by the manner in which tax revenues, once levied, are then expended. The Stanley Court cited with approval Price v. Philadelphia

Parking Authority, 422 Pa. 317, 221 A.2d 138 (1966), noting that Price “held that the exemption of property from taxation reduces the tax base and has the same effect upon a taxpayer as the unlawful expenditure of tax funds even though he is unable to establish any injury other than his interest as a taxpayer.” 284 N.C. at 29, 199 S.E.2d at 651. Indeed, this Court has recognized direct standing for taxpayers in such circumstances both before and after its decision in Stanley. For instance, in McIntyre v. Clarkson, the Court held that a taxpayer had standing to challenge the appointment and payment of justices of the peace from public funds. 254 N.C. 510, 119 S.E.2d 888 (1961). Likewise, in Maready v. City of Winston-Salem, the Court considered the merits of a taxpayer’s challenge to economic incentive grants from public funds without questioning his standing. 342 N.C. 708, 716, 467 S.E.2d 615, 620 (1996).¹ As this Court has noted, those related functions – levying taxes and expending the funds gathered thereby – are but two sides of the same coin. Mitchell v. N.C. Indus. Dev. Fin. Auth., 273 N.C. 137, 143, 159 S.E.2d 745, 749-50 (1968) (“The power to appropriate money from the public treasury is no greater than the power to levy the tax

¹ Since standing is a pre-requisite to the Court’s proper exercise of subject matter jurisdiction, litigants may not agree to waive it, and the Court may consider it sua sponte at any time in the proceedings. Aubin v. Susi, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002). For that reason, the fact that the Maready Court proceeded to consider the merits of that case necessarily demonstrates that it was satisfied of the taxpayers’ standing and, therefore, of its own subject matter jurisdiction.

which put the money in the treasury. Both powers are subject to . . . constitutional proscription . . .”). It stands to reason, therefore, that the sufficiency of an injury fairly attributable to one demonstrates the sufficiency of an injury attributable to the other.

Especially instructive is Stanley’s discussion of the rationale behind the Piedmont Canteen “injuriously affected” test. After reiterating the test, the Court explained that “only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue.” 284 N.C. at 29, 199 S.E.2d at 650. Indeed, “[t]he ‘gist of the question of standing’ is whether the party seeking relief has ‘alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.’” Id. (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968)). Cf. Appeal of Barbour, 112 N.C. App. at 373, 436 S.E.2d at 173. In other words, Stanley clarifies that the adversarial posture of the parties before the court is of paramount concern in North Carolina’s direct standing determination. Although the Court looks to confirm that the plaintiff was “injuriously affected” by the action complained of, it does so only because such injury demonstrates genuine

adversity – not because some particular level or quality of injury is a sine qua non for direct standing.

Since Stanley, this Court has recast the “injuriously affected” test in slightly different terms on at least two occasions, requiring claimants to allege a “direct injury in fact,” Greene v. Town of Valdese, 306 N.C. 79, 88, 291 S.E.2d 630, 636 (1982), or simply an “injury in fact.” Dunn v. Pate, 334 N.C. 115, 431 S.E.2d 178 (1993). Those variations, however, do not appear to impose any heightened substantive requirement beyond Piedmont Canteen’s “injuriously affected” test. Rather, they acknowledge that a plaintiff must allege an actual injury to have standing. See Dunn, 334 N.C. at 119, 431 S.E.2d at 180 (examining record for an allegation of injury in fact to justify standing); Greene, 306 N.C. at 88, 291 S.E.2d at 636 (looking to the record to note that the petitioners made no attempt to show that the action complained of injured them as a matter of fact). But cf. Coker v. DaimlerChrysler Corp., 627 S.E.2d. 461 (N.C. Apr. 7, 2006) (per curiam) (see discussion of Coker, infra p. 10, n.2).

Applying this Court’s direct standing test – the “injuriously affected” test – to the case sub judice leads inescapably to the conclusion that plaintiff-appellants do have direct standing to bring their claims. Plaintiff-appellants alleged and presented evidence of the Highway Trust Fund (hereinafter

“HTF”) taxes levied upon them. (R pp. 8-10, 14, 28.) They also complained of specific actions, evidenced in the record, that diverted those tax revenues from their proper purpose and explained their theories of unconstitutionality. (R pp. 11-12, 14-15 & 30-34.) Having adequately and thoroughly alleged that they were “injuriously affected” by the governmental actions about which they complain, plaintiff-appellants satisfy North Carolina’s direct standing test. The Court of Appeals erred in holding otherwise.

B. The Court of Appeals Invoked and Applied an Improper Federal Test for Determining Whether Direct Standing Existed Below.

Instead of applying this Court’s “injuriously affected” test, the Court of Appeals instead erroneously invoked a three-pronged federal standing test first set out as such by the United States Supreme Court in Lujan v.

Defenders of Wildlife, 504 U.S. 555 (1992):

Standing consists of three main elements: [1] 'injury in fact'--an invasion of a legally protected interest that is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical[;] ... [2] the injury [must be] fairly traceable to the challenged action of the defendant[;] and ... [3] it [must be] likely, as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Goldston v. State, 618 S.E.2d 785, 788 (N.C. Ct. App. 2005) (internal quotations and citations omitted) (quoting Neuse River Found., Inc. v.

Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002)

(quoting Lujan, 504 U.S. at 560-61), disc. review denied, 356 N.C. 675, 577

S.E.2d 628 (2003)). Loosely speaking, these federal elements of standing may be re-characterized as (1) injury in fact, (2) causation, and (3) redressability, respectively.

The federal test articulated in Lujan is far more restrictive than the test adopted by this Court for standing in the North Carolina courts. Although the federal “injury in fact” element is, in some ways, similar to this Court’s “injuriously affected” direct standing test, this Court has never explicitly required that an injury constitute “an invasion of a legally protected interest” or that the invasion be “concrete,” “particularized,” “actual,” or “imminent.”² Instead, by allowing taxpayers to challenge the constitutionality of expenditures of public funds, this Court has confirmed the opposite – that the alleged injury required to establish standing in North

² In a per curiam decision without any discussion or citation of authority, this Court recently affirmed the result in Coker v. DaimlerChrysler Corp., 617 S.E.2d 306 (N.C. Ct. App. 2005). Coker v. DaimlerChrysler Corp., 627 S.E.2d. 461 (N.C. Apr. 7, 2006) (per curiam). In Coker, the Court of Appeals dismissed an action for failure to allege an injury sufficient to state a claim for unfair trade practices and fraud. 617 S.E.2d at 612-14. It also cited several federal cases for a standing test that required an “injury in fact” that is “concrete and particularized” and “actual or imminent,” and found that the plaintiff’s alleged injury had not met that test. 617 S.E.2d at 310-11. Although per curiam opinions may be cited as precedent, Hyder v. Bd. of Road Trustees, 190 N.C. 663, 130 S.E. 497 (1925), this Court has declined at times to rely on per curiam opinions that contain no discussion to explain the basis of their holding. McGowan v. Davenport, 134 N.C. 526, 528, 47 S.E 27, 29 (1904); Stewart v. Southern Ry. Co., 128 N.C. 517, 519, 39 S.E. 51, 52 (1901). For the same reason, it is impossible to determine whether the Coker Court affirmed the outcome below based on the Court of Appeals’ finding that the injury alleged by the plaintiffs was insufficient to state a claim or its finding that the injury was insufficient to confer standing. In sum, in light of the long history of the “injuriously affected” standing test in this Court’s jurisprudence, Coker need not be read to establish a new test for standing modeled after the federal test.

Carolina courts need not implicate a concrete, particularized, actual, and imminent legally protected interest as required by the federal courts. See, e.g., Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033 (1968).³

This Court's direct standing test differs from the federal test not only in its less restrictive version of the "injury" prong, but also in that it lacks analogs to the federal elements of "causation" and "redressability." The closest that North Carolina's test has come to incorporating a "causation" element is the Piedmont Canteen test requiring the plaintiff to be injuriously affected by the statute or action complained of. Similarly, by requiring that plaintiffs allege a "direct injury in fact," the Greene test only arguably incorporates some notation of causation. Greene, 306 N.C. at 88, 291 S.E.2d at 636 (emphasis added). However, these standards are a far cry from the obscure, yet formulaic federal "causation" requirement that the injury be "fairly traceable to the challenged action," and the Court of Appeals erred in

³ Professor Jaffe makes an argument for conferring federal standing to so-called "non-Hohfeldian" or ideological plaintiffs who do not fit within the classical taxonomy of legal rights described by Wesley Hohfeld in Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913). 116 U. Pa. L. Rev. at 1033. Professor Jaffe classifies taxpayers challenging specific public expenditures as "non-Hohfeldian" since they seek no adjudication of their own tax bill. Id. at 1034. Professor Jaffe's work confirms that the courts of North Carolina and other states already grant standing to certain "non-Hohfeldian" plaintiffs, such as taxpayers making constitutional challenges without establishing an injury other than the injury to all taxpayers. See, e.g., Maready, 342 N.C. 708, 467 S.E.2d 615; Town of Emerald Isle v. State, 320 N.C. 640, 647, 360 S.E.2d 756, 760 (1987).

attempting to impose such a requirement in this case. Likewise, the court below effectively imposed a “redressability” requirement in its analysis of standing when it limited taxpayer standing to claims for prospective relief, even though this Court has never expressly adopted such a requirement.

The federal courts’ use of its restrictive standing test is justified by several unique restraints on the federal judiciary that do not similarly restrain the North Carolina judiciary. The first such restraint is the “case and controversy” requirement of Article III of the United States Constitution. U.S. Const. art. III, § 2. See also Allen v. Wright, 468 U.S. 737, 750 (1984). The Lujan Court explained that justiciability doctrines such as standing promote the federal objective of separation of powers by fleshing out the “case and controversy” requirement. Lujan, 504 U.S. at 560. “[T]he ‘case or controversy’ requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are ‘founded in concern about the proper – and properly limited – role of the courts in a democratic society.’” Allen, 468 U.S. at 750 (internal citations omitted). While some aspects of the federal standing doctrine are merely “prudential considerations . . . of judicial self-government,” the Lujan test sets Article III’s “irreducible constitutional minimum of standing.” Lujan,

504 U.S. at 560-61. As discussed in more detail below, though, the North Carolina courts are not bound by a “case and controversy” clause.

Additional federal standing rules beyond the constitutional “case or controversy” requirement, have been promulgated to address the more “prudential” concern arising from the federal judiciary’s counter-majoritarian problem. By restricting the scope of matters before the federal judiciary (which, by virtue of its unelected and life-tenured status, is presumptively insulated from political pressure), federal judges use standing as a tool to mitigate their necessarily undemocratic role. As Judge Bork of the United States Court of Appeals for the D.C. Circuit explained,

[a]ll of the doctrines that cluster about Article III – not only standing but mootness, ripeness, political question, and the like – relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.

Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-1179 (D.C. Cir. 1983) (Bork, J., concurring) (emphasis added). Leaving a greater universe of “non-justiciable” matters to the politically accountable federal executive and legislative branches theoretically promotes majoritarian democracy. The North Carolina judiciary is, in contrast, elected by the people and need not accommodate this prudential concern.

Finally, since the federal system must balance power between the United States and each of its constituent States, federal justiciability doctrines like standing may be understood to also serve important federalism interests. The United States Supreme Court expressly recognized as much in City of Los Angeles v. Lyons, 461 U.S. 95 (1983). The Lyons Court denied standing to a plaintiff seeking an injunction against the future use of chokeholds by Los Angeles police officers. 461 U.S. at 97-98. Citing “principles of equity, comity and federalism that should inform the judgment of federal courts when asked to oversee state law enforcement authorities,” the Lyons Court explained that “federal courts must recognize [t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.” Id. at 112 (citation and internal quotations omitted). As one commentator explained, “the [United States Supreme] Court has devised an elaborate system of de facto immunities [to civil rights liability] through the combined effects of standing, mootness, deferential review, and equitable restraints on injunctive relief that together limit the reach of federal judicial power with respect to states and localities.” Helen Hershkoff, State Courts and the “Passive Virtues”: Rethinking the Judicial Function, 114 Harv. L. Rev. 1833, 1898-1899 (2001). Again, the North Carolina judiciary is not restrained by this concern as there are no

smaller governmental units – counties, for instance – with judicial power to preserve.

The Lujan test cited by the court below may provide an “irreducible constitutional minimum of standing,” but it is a federal constitutional minimum and does not, therefore, define the minimum for state courts. Of course, neither this Court nor any inferior court of this State is bound by Article III’s “case and controversy” requirement.⁴ Moreover, as explained in the next section, the prudential prerogatives that justify the federal judiciary’s onerous standing rules are as misfit for this Court as square pegs for a round hole. The Lujan test (like any other federal justiciability doctrine) is wholly inapplicable to this Court’s analysis, and the Court of Appeals erred in citing it as the test for standing in North Carolina’s courts.

C. The Role of the North Carolina Judiciary is Different Than the Role of the Federal Judiciary and Demands the Comparatively Broader Standing Doctrine That This Court Has Developed.

As the cases discussed in the previous section illustrate, the federal standing doctrine promotes important policy considerations that affect the role of that judiciary within the federal system. However, those policy considerations are largely absent in North Carolina’s system of government.

⁴ Neuse River, 155 N.C. App. at 114, 574 S.E.2d at 52 (“North Carolina courts are not constrained by the ‘case and controversy’ requirement of Article III of the United States Constitution.”) (cited by the Court of Appeals below, even as that Court was applying the federal standing test in the present case).

Additionally, fundamental differences in the North Carolina Constitution and the United States Constitution demand the broader standing rights that this Court has recognized to date.⁵

Whereas the United States Constitution defines and, thereby, limits “the judicial Power” to various listed cases and controversies, U.S. Const. art. III § 2; the North Carolina Constitution takes the opposite approach. It places no such definitional limit on “The judicial power of the State.” N.C. Const. art. IV, § 1. Whereas the United States Constitution presumes that judicial power is excluded unless specifically included, the North Carolina Constitution presumes that judicial power is included unless specifically

⁵ Federal and state courts alike have repeatedly recognized that states – not being bound by Article III’s “case and controversy” requirement – have developed justiciability doctrines very different from those developed by the federal courts. See, e.g., Doremus v. Bd. of Educ., 342 U.S. 429 (1952) (dismissing for lack of *federal* standing appeal from New Jersey Supreme Court decision that interpreted United States Constitution but acknowledging and not disturbing *state court’s* determination of justiciability); Risser v. Thompson, 930 F.2d 549 (7th Cir. 1991) (explaining that states need not allocate powers among the branches of state government in an imitation of the federal government); State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 86 Ohio St. 3d 451, 470, 715 N.E.2d 1062, 1081-82 (1999) (“State courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits.”); Van Slyke v. Bd. of Trustees, 613 So.2d 872, 875 (Miss. 1993) (explaining that, without the “case and controversy” requirement, Mississippi courts “have been more permissive in granting standing to parties who seek review of governmental actions”); Matter of Lawrance, 579 N.E.2d 32, 37 (Ind. 1991) (similar); Common Cause v. State, 455 A.2d 1, 8-9 (Maine 1983) (similar); McKee v. Likins, 261 N.W.2d 566, 569-71 (Minn. 1977) (similar). In fact, the provision of broad taxpayer standing rights (like those implicated in this case) by state courts provides one of the best and clearest examples of these differences. Acknowledging that state courts are not bound by federal justiciability constraints, academicians have heralded innovation in state court justiciability doctrine as a unique opportunity to further important state policies. See generally Hershkoff, supra.

excluded.⁶ Moreover, the North Carolina Constitution expressly forbids the General Assembly from depriving the judicial department of “any power or jurisdiction that rightfully pertains to it” or establishing new courts not constitutionally ordained. N.C. Const. art. IV, § 1. As this Court explained,

A court’s inherent power is that belonging to it by virtue of its being one of three separate, coordinate branches of the government. For over a century this Court has recognized such powers as being plenary within the judicial branch – neither limited by our constitution nor subject to abridgement by the legislature. In fact, the inherent power of the judicial department is expressly protected by the constitution: “The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government....” N.C. Const. art. IV, § 1.

Matter of Alamance County Court Facilities, 329 N.C. 84, 93, 405 S.E.2d 125, 129 (1991) (citations omitted).

As this Court has noted, its jurisdiction is not entirely without limits. The Court has heeded its own caution to review the constitutionality of legislative acts only when “determin[ing] the respective rights and liabilities or duties of litigants in a controversy brought before it by the proper procedure,” Nicholson v. State Educ. Assistance Auth., 275 N.C. 439, 447,

⁶ To the extent that the North Carolina Constitution does list specific matters incident to the judicial power, it does so only to carve out specifically those delegated to administrative agencies under Article IV, section 3. N.C. Const. art. IV, § 1. The expansive universe of judicial power not so delegated is vested in the Court for the Trial of Impeachments or the General Court of Justice. N.C. Const. art. IV, § 1.

168 S.E.2d 401, 406 (1969), and it has imposed deferential standards of review in doing so. See, e.g., Town of Emerald Isle v. State, 320 N.C. 640, 647, 360 S.E.2d 756, 761 (1987) (setting forth standard for constitutional review).

Counterbalancing those precedents, however, this Court has emphasized its role as a forum for constitutional challenges as a matter of “duty,” “obligation,” and “responsibility.” See, e.g., id. (“[C]ourts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional”) (emphasis added); Maready, 342 N.C. at 716, 467 S.E.2d at 620 (“It is the duty of this Court to ascertain and declare the intent of the framers of the Constitution and to reject any act in conflict therewith.”) (emphasis added); Corum v. Univ. of N.C., 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) (“It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State.”) (emphases added).

Moreover, this Court and the courts below it have proceeded to exercise that duty faithfully – even in the face of flawed justiciability arguments like those on which the Court of Appeals’ decision below turned. For instance, in Leandro v. State, this Court rejected the argument that the

issues presented were “nonjusticiable political questions” and held instead that it “has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution. When a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits.” 346 N.C. 336, 345, 488 S.E.2d 249, 253-54 (1997) (citations omitted, emphases added). See also McIntyre, 254 N.C. at 513-14, 119 S.E.2d at 890-91 (rejecting argument that taxpayer lacked standing because it was “essential to the effective and orderly government . . . that an immediate determination of the case be had on the merits”); Stanley, 284 N.C. at 30, 199 S.E.2d at 651 (recognizing a potential ripeness problem but stating that “the public interest requires that we now decide whether the Act is constitutional in whole or in part”); Neuse River, 155 N.C. App. at 118, 574 S.E.2d at 54 (noting that “it would [have been] incumbent on us to fully examine the issue as part of our independent governmental function” if plaintiffs had made a constitutional challenge).

In exercising this duty to interpret the North Carolina Constitution, this Court has not – and need not – become unnecessarily constrained by an elaborate web of justiciability doctrines like that spun by the federal courts. The exercise of this duty provides a key “check and balance” on the State legislative and executive branches and, therefore, is an important ingredient

in the separation of powers mix called for by the North Carolina Constitution. As critics of federal justiciability theory point out, overly rigorous justiciability doctrines actually undermine the separation of powers interests they are designed to protect by frustrating a court's ability to perform this vital role. See generally Robert J. Pushaw, Jr., Justiciability and Separation of Powers: A Neo-Federalist Approach, 81 Cornell L. Rev. 393 (1996). This Court has, in its precedents, struck a healthy balance between the competing separation of powers interests, and it need not depart from that course now.

Similarly inapplicable in the context of North Carolina's state justiciability doctrine, are the federal court's concerns with the so-called counter-majoritarian problem and with federalism considerations. Unlike federal judges, judges in this State are elected by the people and, therefore, are not so far removed from the democratic process. Accordingly, they need not share the federal judiciary's concern that the people are powerless to challenge their decisions. If the people of this State disagree with a judicial decision rendered by a North Carolina court, they have democratic recourse at the ballot box. In addition, since North Carolina courts need not defer to any more local system of government, the federalism concerns that support federal standing doctrine are, of course, wholly absent in the State context.

In addition to the fact that North Carolina courts are not bound by the same prudential restraints as the federal judiciary, substantive features of the North Carolina Constitution not found in its federal counterpart necessitate the broader standing rights that this Court has recognized to date – particularly broader taxpayer standing rights. Unlike the United States Constitution, the North Carolina Constitution provides detailed and specific mandates for substantive areas of government including finance and taxation (Article I, § 8 and Article V), suffrage (Article I, §§ 9-10 and Article VI), local government (Article VII), corporations (Article VIII), education (Article I, § 15 and Article IX), homesteads and exemptions (Article X), and punishments, corrections, and charities (Article I, §§ 27-28 and Article XI). Cf. Corum, 330 N.C. at 783, 413 S.E.2d at 290 (“Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens.”). Among these are the specific mandates on which plaintiff-appellants base their challenges; the complaint invokes Article I, § 19 (“Law of the land” and “equal protection of the laws” clauses), Article III, § 5(3) (“Duties of Governor regarding the Budget” clause), and Article V, § 5, (“Acts levying taxes to state objects” clause). (R p. 14.)

If these constitutional mandates are to be given any practical effect, however, the courts must allow their beneficiaries to enforce and protect

them through judicial review. “Because state constitutions include many substantive social and economic provisions, taxpayer standing provides an important mechanism for regulatory enforcement and policy elaboration, sometimes placing interbranch disputes before the court.” Hershkoff, supra at 1855. If the very citizens burdened by an unconstitutional abuse of the legislature’s taxing power or the executive’s administration thereof cannot enforce their constitutional rights, no one can. Indeed, it is hard to imagine anyone more “injuriously affected.” This Court’s landmark substantive constitutional decisions reflect that understanding. See, e.g., Leandro, 346 N.C. at 345, 488 S.E.2d at 253-54 (conferring standing to plaintiffs seeking to enforce their constitutionally guaranteed opportunity to receive a sound basic education); Corum, 330 N.C. at 782, 413 S.E.2d at 289 (holding that even absent an adequate state remedy “the common law, which provides a remedy for every wrong,” will provide adequate redress for infringement of Article I rights).

The case for protecting substantive state constitutional mandates with broad standing rights is furthered by the United States Supreme Court’s reasoning in the lone context in which it has recognized federal taxpayer standing. In Flast v. Cohen, the United States Supreme Court articulated its only exception to the rule that federal taxpayers do not, by virtue of that

status, have standing to challenge the constitutionality of federal statutes. 392 U.S. 83 (1968). The Flast Court held that federal taxpayers, by virtue of that status, do have standing to challenge Congress's expenditure of tax revenues as violating the Establishment Clause. Id.; cf. U.S. Const. amend. 1 ("Congress shall make no law respecting an establishment of religion . . ."). The Court established a two-part "nexus" test, explaining that would-be taxpayer plaintiffs need to show both (1) a "logical link" between their taxpaying status and the action complained of (which is satisfied if the action is simply an exercise of the congressional taxing and spending power); and (2) that the action complained of "exceed[ed] specific constitutional limitations imposed" on the taxing and spending power. Id. at 102-03. The Court distinguished Establishment Clause challenges from other constitutional challenges (which federal taxpayers would not necessarily have standing to bring) by looking to the specificity with which the Establishment Clause was written. Id. at 104. The Flast Court explained that "[t]he Establishment Clause was designed as a specific bulwark against . . . potential abuses of governmental power, and . . . operates as a specific constitutional limitation upon" Congress's exercise of the taxing and spending power." Id. (emphases added). Thus, the Flast plaintiffs had satisfied both prongs of the "nexus" test. Although the Flast Court did not

identify any other constitutional challenge that would similarly pass muster under the “nexus” test, it explained that “[t]he taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power.” Id. at 106 (emphasis added).

The state constitutional protections invoked by plaintiff-appellants are precisely the sort of “specific bulwarks” against abuses of the taxing and spending powers that Flast reasoned were properly guarded through taxpayer challenge – even under the more restrictive federal standing test. Article V, section 5, for example, requires that “[e]very act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose.” N.C. Const. art. V, § 5 (emphases added). Article III, section 5(3) on the Governor’s spending power similarly provides specific limitations. N.C. Const. art. III, § 5(3) (“The budget as enacted by the General Assembly shall be administered by the Governor. The total expenditures of the State for the fiscal period covered by the budget shall not exceed the total of receipts during that fiscal period”) (emphases added). Those proscriptions are, in fact, far more specific than the federal Establishment Clause that Flast considered.

Thus, for many of the same reasons the Flast Court allowed federal taxpayers to challenge expenditures on Establishment Clause grounds, the plaintiff-appellants and other North Carolina taxpayers who seek to protect the highly specific mandates that our constitution provides would have standing even if the federal standing test governed this case. For the many reasons explained above, though, the federal test does not apply in this case, and the plaintiff-appellants' direct standing is even more clear under the broader "injuriously affected" test adopted by this Court.

D. Summary.

This Court's "injuriously affected" direct standing test has served this jurisdiction well. It promotes a degree of genuine adversity among litigants that insures that disputes will be effectively presented for resolution. It is also, however, flexible enough to confer the broad standing rights needed to bring critical state constitutional issues before the courts in the first place. As such, it is an essential tool for this Court's exercise of its vital duty, obligation, and responsibility to interpret the North Carolina Constitution.

The Court of Appeals' invocation and application of federal standing law below was a radical departure from this Court's precedents. The federal doctrine – designed by and for a different judiciary – neither reflects the role of this judiciary within North Carolina's system of government nor

adequately protects the specific substantive mandates that set North Carolina's constitution apart from others. The lower court in this case erred in substituting federal law for North Carolina's "injuriously affected" test that has stood for more than forty years. Under that test, the plaintiff-appellants do, in fact, have direct standing to challenge the constitutionality of the legislative and executive acts about which they complain.

II. THE COURT OF APPEALS ERRED BY FAILING TO FIND THAT THE PLAINTIFF-APPELLANTS HAVE CONSTITUTIONAL STANDING TO MAINTAIN THEIR CLAIMS.

In addition to considering whether the plaintiff-appellants in this case had "direct standing" to maintain their claims, the Court of Appeals below assessed whether they also had standing as taxpayers making a constitutional challenge under a doctrine called "constitutional standing" or "taxpayer standing." This doctrine acknowledges the standing of taxpaying citizens to challenge the constitutionality of an executive or legislative act such as a tax, tax exemption, or expenditure that affects public funds.

The Court of Appeals concluded that the plaintiff-appellants did not have constitutional standing, but its discussion and application of that doctrine was flawed in two ways: First, the Court of Appeals erred by ignoring Town of Emerald Isle v. State, 320 N.C. 640, 360 S.E.2d 756 (1987), and other precedents of this Court that explicitly hold that a taxpayer

has standing to challenge the constitutionality of an act involving public funds, without regard to whether that taxpayer has suffered any injury other than the injury to the public treasury suffered by all taxpayers. Instead, in its discussion of constitutional standing, just as in its discussion of direct standing, it attempted to inappropriately engraft federal requirements, such as having an “imminent injury” that is “redressable,” when this Court has never required a showing of such elements. Goldston, 618 S.E.2d at 790. Second, the Court of Appeals erred in holding that the doctrine only allows taxpayers to make prospective challenges to government actions but does “not allow citizens to sue for a court declaration that past government action, and unthreatened recurrences, are unlawful.” Id., 618 S.E.2d at 789.

These errors led the Court of Appeals to conclude, mistakenly, that plaintiff-appellants lacked constitutional standing to maintain their claims. A correct application of the doctrine clarifies that the plaintiff-appellants do, in fact, have constitutional standing to bring this lawsuit.

A. The Court Of Appeals Erred In Attempting to Engraft Federal Standing Requirements on this Court’s Test for Constitutional Standing.

The doctrine labeled “constitutional standing” by the Court of Appeals and by the parties to this action is actually simply a new name for a well-established doctrine. In North Carolina, taxpayers have standing to

question the constitutionality of government actions that affect public funds, such as taxes and expenditures, without establishing that they have suffered any injury other than the injury common to all taxpayers. In contrast, federal courts prohibit “generalized grievances.” In other words, while citizens may initiate lawsuits in federal courts to protect their own constitutional rights, they generally may not do so to ensure that the government complies with the federal Constitution. Warth v. Seldin, 422 U.S. 490 (1975).⁷ As the United States Supreme Court has explained, “when the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of [federal] jurisdiction.” Id. Further, the “core component of [federal] standing,” including the prohibition on generalized grievances, “is an essential and unchanging part of the case-or-controversy requirement of Article III” of the federal Constitution. Lujan, 504 U.S. at 560, 575.

The courts of many states, however, allow such taxpayer lawsuits, acknowledging that they are not bound by federal courts’ interpretation of standing under the federal Constitution, but are bound instead to apply standing doctrines that are crafted to satisfy their own unique state constitutions. See supra, footnote 5. When, “[u]nlike the Federal

⁷ The exception for Establishment Clause violations set out in Flast v. Cohen, 392 U.S. 83, 99 (1968) and discussed supra pp. 23-25 is the sole exception.

Constitution, there is no express language in [a state's] Constitution which confines the exercise of [its] judicial power to actual cases and controversies," the state need not apply federal standing principals. Home Builders League of S. Jersey, Inc. v. Township of Berlin, 81 N.J. 127, 132, 405 A.2d 381, 384 (1979). "State courts need not become enmeshed in the Federal [standing] complexities and technicalities and are free to reject procedural frustrations in favor of just and expeditious determinations." Carpenter v. Suffolk Franklin Sav. Bank, 370 Mass. 314, 318, 346 N.E.2d 892 (1976).

Like the other states, the North Carolina judiciary is free to apply its own standing requirements to fulfill the goals and meet the needs of the North Carolina Constitution. As discussed above, supra pp. 15-25, North Carolina courts are not constitutionally bound to adopt the restrictive federal standing requirements that arise from unique aspects of the federal judicial system, and the Court of Appeals erred in so doing.

That freedom applies equally in the context of "direct standing" as well as "constitutional standing." Moreover, this Court has not heretofore expressly adopted the federal standing doctrine as its own. To the contrary, however, it has expressly adopted a rule allowing taxpayers to raise constitutional challenges that would not be allowed in federal court.

Accordingly, just as in its discussion of direct standing, the Court of Appeals erred in applying federal standing requirements in its analysis of the plaintiff-appellants' constitutional standing.

The doctrine of "constitutional standing" or "taxpayer standing" under North Carolina law is actually a much simpler rule than the complex federal standing doctrine. As this Court has confirmed on numerous occasions, a North Carolina taxpayer simply and unequivocally "has standing to challenge the validity of an act which requires the expenditure of public funds on grounds that the act violates the North Carolina Constitution." *Emerald Isle*, 320 N.C. at 647, 360 S.E.2d at 760. A taxpayer need not allege causation, redressability, or even any injury beyond the financial injury common to all taxpayers. *Id.*

In *McIntyre v. Clarkson*, for example, this Court expressly ruled that a taxpayer could challenge the constitutionality of the payment of the salaries of justices of the peace from the general funds of a county without alleging any particular injury to himself; it was sufficient that he was harmed, as were all taxpayers, by the allegedly improper expenditure of public funds. 254 N.C. 510, 119 S.E.2d 888. The Court held that the taxpayer had standing, explaining:

[J]ustices of the peace have many official duties and powers . . .
. Their activities vitally affect the business and social life of the

State. It would be stretching a procedural rule to the breaking point to hold that a citizen and taxpayer must violate a criminal law, breach a contract, commit a tort, contract a questionable marriage or make a doubtful acknowledgment of a deed [to be injured by the allegedly improper exercise of jurisdiction by a justice of the peace], before he may, on his own part and on behalf of other citizens and taxpayers of his county, invoke the equitable jurisdiction of the courts to have determined the validity of a statute which so vitally affects the public welfare and public funds.

Id., at 514, 119 S.E.2d at 891. Likewise, in Stanley, this Court held that taxpayers had standing to challenge the constitutionality of a statute that created county authorities that could then issue allegedly unconstitutional tax-exempt bonds. 284 N.C. at 29, 199 S.E.2d at 650-51. The Court explained that a “taxpayer injuriously affected by a statute may generally attack its validity” without alleging any specific or unique injury to himself. Id. See also Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970) (allowing, without commentary, taxpayers to challenge constitutionality of acts that exempted certain bonds from taxation without alleging specific injury); Mitchell, 273 N.C. 137, 159 S.E.2d 745 (allowing taxpayer to challenge constitutionality of certain expenditures of public funds without alleging specific injury); Dennis v. City of Raleigh, 253 N.C. 400, 116 S.E.2d 923 (1960) (same).

None of these cases enforces any of the federal requirements that the Court of Appeals attempted to impose below, such as “imminence” of the

injury or “redressability,” in the context of constitutional or taxpayer standing. Each case instead notes that, in order to establish standing to make a constitutional challenge, the taxpayer plaintiff need only suffer the same injury, however slight, that all taxpayers suffer when public funds are wrongfully expended or the tax base is wrongfully diminished.

Ignoring these precedents, the Court of Appeals below attempted to create from whole cloth a rule that taxpayers must allege some unique injury (in other words, one not sustained by their fellow taxpayers) in order to enjoy standing. It reasoned that “the complaint challenged only certain withdrawals of taxpayer money from the HTF, which affected the present plaintiffs in the same way that it affected all citizens and taxpayers of this state. Thus, plaintiffs lacked standing to bring their action directly as injured taxpayers.” Goldston, 618 S.E.2d at 789. Ironically, the Court of Appeals was imposing an injury standard even higher than the test for simple direct standing, while at the same time stating, but overlooking, that the plaintiff-appellants met that test because they were, in fact, injuriously affected. Id.

Based on the Court of Appeals’ citation in support of this proposition to Texfi Indus., Inc. v. City of Fayetteville, 44 N.C. App. 268, 270, 261 S.E.2d 21, 23 (1979), aff’d, 301 N.C. 1, 269 S.E.2d 142 (1980)), its erroneous reasoning appears to have its genesis in the case cited by Texfi,

Green v. Eure, 27 N.C. App. 605, 220 S.E.2d 102 (1975). Yet Green did not involve a challenge to a tax, exemption, or expenditure of funds. The Green Court denied “taxpayer standing” to a plaintiff who sought declaratory and injunctive relief to stop the Secretary of State from enrolling certain constitutional amendments allegedly made in violation of the North Carolina Constitution. 27 N.C. App. at 606, 220 S.E.2d at 103. The Green Court correctly cited Piedmont Canteen and Stanley for this Court’s test for direct standing but then went further, stating:

[P]laintiff has alleged he is a citizen and taxpayer of the State. As such, he has no more than a “general interest common to all members of the public” in the questions he seeks to have determined in this litigation. He has neither alleged nor offered proof that he occupies with respect to those questions any status legally different from that of all other citizens and taxpayers of the State.

Id. at 608-609, 220 S.E.2d at 105 (quoting Charles Stores Co. v. Tucker, 263 N.C. 710, 717, 140 S.E.2d 370, 375 (1965)).

Of course, Green presents an entirely different factual situation than both Stanley and the case sub judice. Since the taxpayer in Green alleged no improper tax, exemption, or expenditure of public funds, he did not allege the type of injury required for direct taxpayer standing purposes by the Stanley Court. Rather, he complained of a government action entirely unrelated to its taxing or spending power. As such, the Green plaintiff’s

status as “taxpayer” bears no greater nexus to his claimed injury than would his status as “concerned citizen,” “resident,” or “voter.” Likewise, the cases cited by Green for the relevant proposition are similarly distinguishable in that the plaintiffs in those cases also failed to allege even the common injury of all taxpayers whose tax burden has been increased or otherwise affected, however slightly.⁸

Later Court of Appeals decisions have misidentified the Green holding as a “general rule” that taxpayers generally do not have standing to “challenge questions of public interest that affect[] all taxpayers equally.” Texfi Indus., 44 N.C. App. at 270, 261 S.E.2d at 23. See also Fuller v. Easley, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001). These decisions then characterize this Court’s precedents conferring taxpayer standing, or constitutional standing, as exceptions to the “general rule,” arguably putting the cart before the horse.

Whether Green is more appropriately characterized as a “general rule” subject to this Court’s “exceptions” or a case factually distinguishable from this Court’s taxpayer standing precedents is of no moment. Ultimately, these are but two ways of saying, in essence, the same thing. In no event, however, can Green or its progeny be construed as imposing a new limit on

⁸ See Nicholson v. State Educ. Assistance Auth., 275 N.C. 439, 168 S.E.2d 401 (1969); Charles Stores v. Tucker, 263 N.C. 710, 140 S.E.2d 370 (1965).

this Court's taxpayer or constitutional standing test. To the extent that the Court of Appeals has construed Green or its progeny as such, it contradicts this Court's numerous opinions which impose no such limit.

The Court of Appeals also erred in citing its own opinion in Neuse River as support for its misguided effort to impose federal standing requirements as elements of constitutional or taxpayer standing under North Carolina law. Goldston, 618 S.E.2d at 789-90. Yet the Neuse River case is even less applicable than Green; it did not even involve a taxpayer challenge to the constitutionality of any government action, but instead involved a claim in nuisance brought by various parties against private hog farming companies. Thus, the Neuse River Court did not even address constitutional or taxpayer standing. More importantly, the Neuse River Court itself expressly acknowledged that North Carolina courts need not apply federal standing requirements. Neuse River, 155 N.C. App. at 114, 574 S.E.2d at 52. Neither that case nor any opinion of this Court has ever purported to hold that "imminent injury" or "redressability" are requirements for taxpayer standing to make a constitutional challenge under North Carolina law.⁹ Thus, the portion of the Court of Appeals discussing constitutional standing

⁹ But see footnote 2, supra, for a discussion of Coker v. DaimlerChrysler Corp., 627 S.E.2d. 461 (N.C. Apr. 7, 2006) (per curiam).

and its purported application of Neuse River to that doctrine is simply misguided and erroneous.

In sum, the Court of Appeals' opinion limiting taxpayer or constitutional standing to those who have suffered unique injuries is not only unsupported by precedent, but also contrary to the precedents of this Court and the policies that underlie them. It represents a misguided attempt to impose federal standards that have no support in the North Carolina Constitution. Accordingly, the Court of Appeals should be reversed.

B. The Court of Appeals Erred in Attempting to Limit the Doctrine of Constitutional Standing to Apply Only to Claims Involving Prospective Relief.

The Court of Appeals also erred in its discussion of constitutional or taxpayer standing when it attempted to limit that doctrine to only those cases in which a taxpayer seeks prospective equitable relief as by a prayer for mandamus or a request for an injunction. The Court of Appeals ruled that the plaintiff-appellants had no constitutional standing because they sought only a declaration of the unconstitutionality of certain governmental acts, and "abnegated their prayer for mandamus." Goldston, 618 S.E.2d at 789. Yet this Court has never expressly limited the doctrine of taxpayer or constitutional standing to allow taxpayers to assert only claims for mandamus or for prospective relief. In fact, many of the cases in which this

Court has found the plaintiff to have such standing have involved requests for declaratory relief of the type sought in the present case.

For instance, in Stanley, this Court held that taxpayers had standing to challenge the constitutionality of a statute that had created county financing authorities several years before the lawsuit was initiated. 284 N.C. 15, 199 S.E.2d 641. The Court acknowledged its duty to interpret the constitution, and explained that “the public interest requires that we now decide whether the Act is constitutional in whole or in part.” Id., 284 N.C. at 30, 199 S.E.2d at 651 (emphasis added). Likewise, in Emerald Isle, the Court held that taxpayers had standing to seek a declaration that a statute passed several years prior to the lawsuit, which required expenditure of public funds, was unconstitutional. 320 N.C. 640, 360 S.E.2d 756. Both Stanley and Emerald Isle implicitly recognized that North Carolina courts do not abandon their responsibility to address an unconstitutional act merely because the allegedly wrongful act does not continue at the time the court rules.

Similarly, the courts of other states have also repeatedly held that plaintiffs can exercise taxpayer or constitutional standing to seek declarations that past acts of the government were unconstitutional. For instance, in Sloan v. Department of Transportation, the Supreme Court of South Carolina held that a taxpayer had standing to seek a declaration that

certain government contracts had violated bidding requirements even though the contracts had long since been entered, performed, and paid. 365 S.C. 299, 618 S.E.2d 876 (2005). The court explained, “[A]n appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review.’ Additionally, ‘if a decision by the trial court may affect future events, ... an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.’” Id. at 303, 618 S.E.2d at 878 (citations omitted). The court went on to hold that the plaintiff had standing to challenge the contracts despite any potential mootness to his case. It noted that, in a strikingly similar case, the same plaintiff had been found to have standing because the issues involved were “of such wide concern” that the “declaratory judgment action should be decided for future guidance in the expenditure of public funds.” Id. at 304, 618 S.E.2d at 879.

Similarly, in Home Builders League of South Jersey, Inc. v. Township of Berlin, the Supreme Court of New Jersey held that a variety of taxpayer groups had standing to challenge the constitutionality of a statute setting minimum floor area requirements for new residential construction even though none of the plaintiffs had specifically alleged that they had proposed to build or occupy a particular house but were prevented from doing so by

the statute. 81 N.J. 127, 134, 405 A.2d 381, 385 (1979). As part of its discussion of standing, the court reasoned that “the strong public interest involved justif[ied] a balancing or weighing in favor of having the matter litigated.” Id.

In another case, McPherson v. Foster, the Louisiana Court of Appeals held that a taxpayer had standing to seek a declaration that the terms of a transfer of real property that had been donated to the state prior to the lawsuit violated the state constitution. 889 So.2d 282, 292-93 (La. Ct. App. 2004). The McPherson court explained that, under Louisiana law, although a taxpayer might need to show a unique interest in litigation to seek mandamus to compel the performance of a public duty or at least a slight increase on his tax burden to seek an injunction, he would only need to show “an effect upon the public fisc by the government action in question” to have standing to seek a declaration of unconstitutionality. Id. at 292. See also Henson v. HealthSouth Med. Ctr., Inc., 891 So.2d 863 (Ala. 2004) (holding that taxpayer had standing to seek declaratory judgment that tax abatement was improper, even though he had only the same injury as every other taxpayer – the decrease in the state treasury thereby increasing his own tax burden – and even though he was seeking only the declaration and not the actual collection of the taxes); Schulz v. Silver, 212 A.D.2d 293, 629

N.Y.S.2d 316, (N.Y. App. Div. 1995) (taxpayer had standing to challenge constitutionality of all expenditures made by government after the deadline for passage of budget, even though expenditures had been made and presumably could not be recovered); Butte-Silver Bow Local Gov't v. State, 235 Mont. 398, 768 P.2d. 327 (1988) (taxpayers had standing to seek declaration that statute authorizing expenditure was unconstitutional even though certain of the funds had already been expended and could not be recovered); Paul v. Blake, 376 So.2d 256, (Fl. Dist. Ct. App. 1979) (taxpayer had standing to seek a declaration that previously granted tax exemptions were unconstitutional); Hertel v. Racing Comm'r, 68 Mich. App. 191, 197, 242 N.W.2d 526, 528-29 (1976) (taxpayer had standing to challenge constitutionality of statute allowing appropriations and expenditures of public money even though the money had already been spent and could no longer be recovered).

In fact, the judiciary's willingness to fulfill its duty and examine the constitutionality of an act may be most crucial in certain cases that do not involve prospective relief. In situations such as the present case, where an isolated but unconstitutional expenditure is both initiated and accomplished by the executive or legislative branch in a very short time period, taxpayers will likely be unable to learn of the act, initiate a lawsuit, and prosecute it to

its completion before the act is finished. Under the Court of Appeals' analysis, the claim would no longer properly be before the court because the injury would no longer be prospective and imminent. Yet, where an unconstitutional act is likely to be repeated but will evade review because of the finality of each instance of the unconstitutional act, unless the court fails to exercise jurisdiction, the court may have its greatest duty to exercise jurisdiction. Just as this Court held in McIntyre v. Clarkson, in such a case a court should exercise jurisdiction because it is "essential to the effective and orderly government . . . that an immediate determination of the case be had on the merits." 254 N.C. 510, 513-14, 119 S.E.2d 888, 890-91 (1961).

Just as in the many cases discussed above and in numerous others, the plaintiff-appellants are challenging the constitutionality of a government act that had a significant impact on the state treasury. Although the public funds at issue have now been transferred and spent and presumably would be difficult if not impossible to recoup, that fact should not negate the plaintiff-appellants' standing. Because, as evidenced by the fact that the Governor and the legislature repeatedly effected transfers of millions of dollars from the HTF in non-emergency situations, the allegedly unconstitutional act in this case is one that is capable of repetition yet evading review. Because of the enormity of the amount of funds at stake, the great public significance of

the issue, and, if the plaintiff-appellants are correct in their analysis of the merits, the great public harm being done, the courts below should have exercised jurisdiction over the plaintiff-appellants' claims in this case. Certainly, the doctrine of constitutional standing, as established by this Court mandates that the plaintiff-appellants be allowed to maintain their challenge to the transfers at issue. The Court of Appeals erred in holding to the contrary in reliance on an invented rule requiring a request for prospective relief.

III. THE HOLDING OF THE COURT OF APPEALS WILL HAVE DISASTROUS EFFECTS IF ALLOWED TO STAND.

As explained above, the Court of Appeals below erred in requiring that the plaintiff-appellants not only be injured, but be injured in some greater measure or in some different way than all other taxpayers in order to have either direct standing or constitutional standing. Goldston, 618 S.E.2d at 789. In so holding, the Court of Appeals confused, conflated, and misstated the requirements for direct standing and for constitutional standing. Such a rule, if allowed to stand, would have the disastrous effect of eviscerating the doctrine of standing as it has stood in North Carolina for many decades.

A rule requiring taxpayers to allege some distinguishable injury would be antithetical to the doctrine of direct standing under Stanley and its progeny. That line of cases recognizes that improper taxes, exemptions, and expenditures of tax revenues have ramifications on the entire remainder of the tax base and injure each taxpayer by, for instance, increasing his or her share of the tax burden. Indeed, their recognition that those ramifications are real injuries in fact, “however slight,” strongly supports the idea that the measure of injury is irrelevant to direct standing analysis.

Moreover, such a rule would fatally undermine North Carolina’s current standing doctrines. All similarly-situated taxpayers necessarily share in common the burdens associated with paying taxes. The very act of paying taxes is the source of both the relevant status and relevant injury, as well as the logical nexus between the two. To disqualify the scores of taxpayer litigants who have enjoyed standing in North Carolina’s courts to date would hinder this Court’s ability to perform its crucial duty of interpreting and applying the North Carolina Constitution.

The practical consequences of such a rule would be disastrous. If the holding of the Court of Appeals is allowed to stand, the General Assembly could levy plainly unconstitutional taxes or apply public funds to plainly unconstitutional purposes with the people utterly powerless to stop it. The

hypothetical example of a simple poll tax levied by the General Assembly on every citizen of North Carolina in plain violation of Article V, section 1 illustrates this point well. See N.C. Const. art. V, § 1 (“No poll or capitation tax shall be levied by the General Assembly or by any county, city or town, or other taxing unit.”). By definition, such a tax would affect all taxpayers (and, in fact, all citizens) of the State equally. Cf. Black’s Law Dictionary at 1159 (6th ed. 1995) (defining “poll tax” as “a tax of a specific sum levied upon each person within the jurisdiction of the taxing power . . .”). Since this Court could not review the tax “upon its own initiative,” however, it would be (as it always is and always has been) incumbent upon individual litigants to challenge the tax. Nicholson, 275 N.C. at 447, 168 S.E.2d at 406. Since all citizens would be taxed exactly equally, however, no one individual subject to the hypothetical poll tax would ever have standing under such a rule. No check or balance would exist on the legislature’s taxing power.

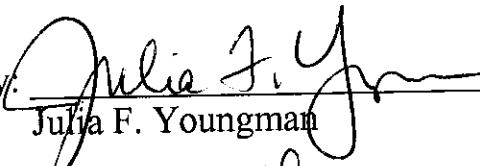
In sum, the Court of Appeals’ effort to limit a taxpayer’s standing to instances in which the taxpayer suffers a unique injury that is different from and greater than the injury of other taxpayers contradicts both the direct standing and constitutional standing tests of this Court.

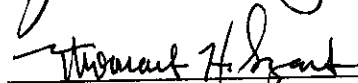
CONCLUSION

For the reasons stated above, this Court should reverse the decision of the Court of Appeals and hold that the plaintiff-appellants had both direct standing and constitutional standing to bring their claims in this action.

Respectfully submitted this 3rd day of May, 2006.

ELLIS & WINTERS LLP

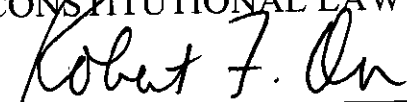
By: 
Julia F. Youngman

By: 
Thomas H. Segars

Post Office Box 33550
Raleigh, NC 27636
(919) 865-7000
E-mail: julie.youngman@elliswinters.com

Attorneys for amicus curiae North Carolina
Institute for Constitutional Law

NORTH CAROLINA INSTITUTE FOR
CONSTITUTIONAL LAW

By: 
Robert F. Orr

225 Hillsborough Street, Suite 280
Raleigh, NC 27619
(919) 838-5313
E-mail: orr@ncicl.org

CERTIFICATE OF SERVICE

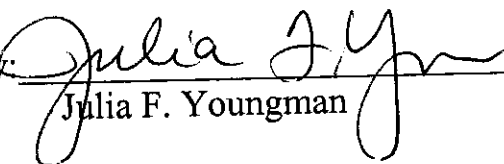
A copy of the forgoing brief of amicus curiae the North Carolina
Institute for Constitutional Law has this day been placed in the United States
Mail, postage prepaid, and properly addressed to:

Eugene Boyce
R. Daniel Boyce
Philip R. Isley
BOYCE & ISLEY, PLLC
P.O. Box 1990
Raleigh, NC 27602-1990

Anthony M. Brannon
BRANNON LAW FIRM, PLLC
107 Fayetteville Street Mall
Suite 201
Raleigh, NC 27601

Roy Cooper
Grayson G. Kelley
John Maddrey
Norma Harrell
N.C. DEPT. OF JUSTICE
SPECIAL LITIGATION SECTION
P.O. Box 629
Raleigh, NC 27602-0629

This the 3rd of May 2006.

By: 
Julia F. Youngman