No. 328PA04-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

**********************************************

| | | |
|---|---|---|
| W. D. GOLDSTON, JR., JAMES E. HARRINGTON, and citizens, taxpayers and bondholders similarly situated,<br>Plaintiffs-Petitioners, | ) | From Wake County |
| v. | ) | |
| STATE OF NORTH CAROLINA and MICHAEL F. EASLEY, Governor, individually and in his official capacity,<br>Defendants-Respondents. | ) | |

*************************************************************

DEFENDANT-APPELLEES' NEW BRIEF

**************************************************************

**INDEX**

QUESTION PRESENTED . . . . . . . . . . 4

STATEMENT OF THE CASE . . . . . . . . . . 2

STATEMENT OF THE FACTS . . . . . . . . . . 5

Fiscal Year 2001-02 . . . . . . . . . . 5

Fiscal Year 2002-03 . . . . . . . . . . 7

The State Highway Bond Act of 1996 . . . . . . . . . . 8

ARGUMENT . . . . . . . . . . 8

I. THE COURT OF APPEALS CORRECTLY RULED THAT PLAINTIFFS LACKED STANDING TO PURSUE THIS ACTION CHALLENGING THE TRANSFER OF MONIES FROM THE HIGHWAY TRUST FUND TO THE GENERAL FUND WHEN PLAINTIFFS SUFFERED NO DIRECT PERSONAL HARM, THERE ARE NO ONGOING OR THREATENED FUTURE TRANSFERS, AND PLAINTIFFS ABANDONED THEIR CLAIM FOR *MANDAMUS*. . . . . . . . . . . 8

A. THE REQUIREMENT THAT PLAINTIFFS HAVE STANDING IS A JURISDICTIONAL PREREQUISITE TO ANY LITIGATION. . . . . . . . . . . 9

B. THE DIFFERENT TYPES OF TAXPAYER STANDING IN THIS CASE. . . . . . . . . . . 13

C. PLAINTIFFS HAVE MADE NO SHOWING OF WHAT THEY ARGUE CONSTITUTES CONSTITUTIONAL STANDING. . . . . . . . . . . 15

1. Constitutional Standing Authorizes The Challenge Of Prospective Expenditures And Actions, Not Of Completed Acts. . . . . . . . . . . 17

2. Plaintiffs Have Not Asserted Any Genuine Claim Of Continued Or Threatened Future Transfers Of Funds That Would Create Standing For Them To Pursue This Litigation . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 21

3. Plaintiffs' Expanded Theory Of Constitutional Standing Is Not Supported By The Cases They Cite. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 28

D. PLAINTIFFS HAVE MADE NO SHOWING OF DIRECT STANDING. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 35

E. PLAINTIFFS HAVE MADE NO SHOWING THAT THEY SATISFIED THE PREREQUISITES FOR ASSERTING DERIVATIVE STANDING. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 42

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 48

CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

### CASES

*Adams v. North Carolina Dep't of Natural and Econ. Res.*, 295 N.C. 683, 704, 249 S.E.2d 402, 414 (1978) . . . . . . . . . . . . . . . . . . . . 35

*Appeal of Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974) . . . . . . . . . . . . . . 11, 35, 38

*Augur v. Augur*, 356 N.C. 582, 573 S.E.2d 125 (2002) . . . . . . . . . . . . . . . . . . . . . . 12

*Branch v. Bd. of Educ.*, 233 N.C. 623, 65 S.E.2d 124 (1951) . . . . . . . . . . . . . . . 42, 44, 45, 46, 47, 48

*City of Greensboro v. Wall*, 247 N.C. 516, 101 S.E.2d 413 (1958) . . . . . . . . . . . 9, 12

*Consumers Power v. Duke Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 11

*Dennis v. City of Raleigh*, 253 N.C. 400, 116 S.E.2d 923 (1960) . . . . . . . . . . . . . 19

*Dixon v. Bd. of County Comm'rs of Pitt County*, 200 N.C. 215, 156 S.E. 852 (1931) . . . . . . . . . . . . . . . . . . . . . . . . . 33, 36, 37

*Dunn v. Pate*, 334 N.C. 115, 431 S.E.2d 178 (1993) . . . . . . . . . . . . . . . . . . . . . . . 12

*Flaherty v. Hunt*, 82 N.C. App. 112, 345 S.E.2d 426, *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986) . . . . . . . . . . . . . 43

*Freeman v. Bd. of Comm'rs of Madison County*, 217 N.C. 209, 7 S.E.2d 354 (1940) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 39

*Fuller v. Easley*, 145 N.C. App. 391, 553 S.E.2d 43 (2001) . . . . . . . . . . . . . . 13, 43

*Goldston v. State*, ____ N.C. App. ____, 618 S.E.2d 785 (2005) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . *passim*

*Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 358 S.E.2d 372 (1987) . . . . . 12

*Hammond v. McRae*, 182 N.C. 747, 110 S.E. 102 (1921) . . . . . 33

*Kitchin v. Wood*, 154 N.C. 565, 70 S.E. 995 (1911) . . . . . 30, 31

*Latta v. Jenkins*, 200 N.C. 255, 156 S.E. 857 (1931) . . . . . 32, 33

*Lewis v. White*, 287 N.C. 625, 216 S.E.2d 134 (1975) . . . . . 16, 17, 38

*Light Co. v. Iseley*, 203 N.C. 811, 167 S.E. 56 (1932) . . . . . 11

*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L. Ed. 2d 352 (1992) . . . . . 13

*Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979) . . . . . 45

*Malloy v. Cooper*, 356 N.C. 113, 565 S.E.2d 76 (2002) . . . . . 10

*Martin v. Piedmont Asphalt & Paving*, 337 N.C. 785, 448 S.E.2d 380 (1994) . . . . . 35

*Martin v. State*, 330 N.C. 412, 410 S.E.2d 474 (1991) . . . . . 25

*Matter of Appeal of University of North Carolina*, 300 N.C. 563, 268 S.E.2d 472 (1980) . . . . . 31, 37

*McCless v. Meekins*, 117 N.C. 34, 23 S.E. 99 (1895) . . . . . 29

*McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E.2d 888 (1961) . . . . . 19

*Mitchell v. North Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 159 S.E.2d 745 (1968) . . . . . 19

*Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 574 S.E.2d 48 (2002) . . . . . 13

*Nicholson v. Education Assistance Authority*,
275 N.C. 439, 168 S.E.2d 401 (1969) . . . . . . . . . . . . . . . . . . . . . . 14, 34, 37

*North Carolina ex rel. Horne v. Chafin*,
62 N.C. App. 95, 302 S.E.2d 281 (1983) . . . . . . . . . . . . . . . . . . . . . . . . . . 33

*North Carolina Sch. Bd.s Ass'n v. Moore*,
160 N.C. App. 253, 585 S.E.2d 418 (2003),
*aff'd in part and rev'd in part*, 359 N.C. 474, 614 S.E.2d 504 (2005) . . . . . 32

*Parker v. Comm'rs of Johnston County*, 178 N.C. 92, 100 S.E. 244 (1919) . . . . . 33

*Piedmont Memorial Hosp., Inc. v. Guilford County*,
218 N.C. 673, 12 S.E.2d 265 (1940) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 32

*Poore v. Poore*, 201 N.C. 791, 161 S.E. 532 (1931) . . . . . . . . . . . . . . . . . . . . . . 35

*Property Rights Advocacy Group v. Town of Long Beach*,
617 S.E.2d 715 (2005), *aff'd per curiam*, 628 S.E.2d 768 (2006) . . . . . 40, 41

*Raleigh Cemetery Ass'n v. City of Raleigh*,
235 N.C. 509, 70 S.E.2d 506 (1952) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 32

*Redevelopment Comm'n of High Point v. Guilford County*,
274 N.C. 585, 164 S.E.2d 476 (1968) . . . . . . . . . . . . . . . . . . . . . . 31, 32, 37

*Salisbury Hosp., Inc. v. Rowan County*, 205 N.C. 8, 169 S.E. 805 (1933) . . . . . . 32

*Sharpe v. Park Newspapers of Lumberton*,
317 N.C. 579, 347 S.E.2d 25 (1986) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 10

*Shaw v. Asheville*, 269 N.C. 90, 152 S.E.2d 139 (1967) . . . . . . . . . . . . . . . . . 16, 17

*Southern Ry. Co. v. Bd. of Comm'rs of Mecklenburg County*,
148 N.C. 220, 61 S.E. 690 (1908) . . . . . . . . . . . . . . . . . . . . . . . . . 29, 30, 37

*Southern Ry. Co. v. Cherokee County*, 177 N.C. 86, 97 S.E. 758 (1919) . . . . . . . 37

*Stanley v. Dep't of Conservation & Dev.*,
284 N.C. 15, 199 S.E.2d 641 (1973) . . . . . . . . . . . . . . . . . . . . . . . . 11, 14, 20

*State Educ. Assistance Auth. v. Bank of Statesville*,
276 N.C. 576, 174 S.E.2d 551 (1970) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 34

*State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 323 S.E.2d 294 (1984) . . . 9, 10, 11

*State ex rel. Martin v. Preston*,
325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) . . . . . . . . . . . . . . . . . . . . . . 25

*Texfi Industries v. City of Fayetteville*,
44 N.C. App. 268, 261 S.E.2d 21 (1979) . . . . . . . . . . . . . . . . . . . . . . . 35, 36

*Town of Andrews v. Clay County*, 200 N.C. 280, 156 S.E. 855 (1931) . . . . . . . . . 32

*Town of Emerald Isle v. State of North Carolina*,
320 N.C. 640, 647, 360 S.E.2d 756, 760 (1987) . . . . . . . . . . . . . . . 18, 20, 37

*Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 22 S.E.2d 450 (1942) . . . . . 9, 10

*Whitmire v. Cooper*, 153 N.C. App. 730, 570 S.E.2d 908 (2002)
*disc. review denied & appeal dismissed*,
356 N.C. 696, 579 S.E.2d 104 (2003) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 43

*Williams v. Blue Cross Blue Shield of North Carolina*,
357 N.C. 170, 581 S.E.2d 415 (2003) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 19

*Wise v. Harrington Grove Cmty. Ass'n*,
357 N.C. 396, 584 S.E.2d 731 (2003) . . . . . . . . . . . . . . . . . . . . . 9, 10, 28, 48

*Wishart v. Lumberton*, 254 N.C. 94, 118 S.E.2d 35 (1961) . . . . . . . . . . . . 15, 16, 17

*Wynn v. Trustees of Charlotte Cmty. Coll. Sys.*,
255 N.C. 594, 122 S.E.2d 404 (1961) . . . . . . . . . . . . . . . . . . . . . . . 14, 35, 36

## STATUTES AND RULES

N.C.G.S. § 1A-1, Rule 12(b) (1) (2006) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

N.C.G.S. § 1A-1, Rule 12(b) (2) (2006) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

N.C.G.S. § 1A-1, Rule 12(b) (6) (2006) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

N.C.G.S. § 105-187.9 (2006) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 5, 7, 23, 24

Session Laws 1989-692 § 4.3 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 5, 24

N.C. R. App. P. 28(b)(6) (2006) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 46

No. 328PA04-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

*************************************************

| | | |
|---|---|---|
| W. D. GOLDSTON, JR., JAMES E. HARRINGTON, and citizens, taxpayers and bondholders similarly situated,<br>Plaintiffs-Petitioners, | ) | From Wake County |
| v. | ) | |
| STATE OF NORTH CAROLINA and MICHAEL F. EASLEY, Governor, individually and in his official capacity,<br>Defendants-Respondents. | ) | |

******************************************************************

DEFENDANT-APPELLEES' NEW BRIEF

******************************************************************

## QUESTION PRESENTED

**I. DID THE COURT OF APPEALS CORRECTLY RULE THAT PLAINTIFFS LACKED STANDING TO PURSUE THIS ACTION CHALLENGING THE TRANSFER OF MONIES FROM THE HIGHWAY TRUST FUND TO THE GENERAL FUND WHEN PLAINTIFFS SUFFERED NO DIRECT PERSONAL HARM, THERE ARE NO ONGOING OR THREATENED FUTURE TRANSFERS, AND PLAINTIFFS ABANDONED THEIR CLAIM FOR *MANDAMUS*?**

## STATEMENT OF THE CASE

This matter is before the Court on discretionary review from the Court of Appeals' decision in *Goldston v. State*, ____ N.C. App. ____, 618 S.E.2d 785 (2005) (hereafter "*Goldston*") affirming on the grounds of plaintiffs' lack of standing the trial court's judgment in favor of defendants. The case was heard in the Court of Appeals on appeal from the Judgment/Order granting summary judgment to defendants and denying summary judgment to plaintiffs entered in the Superior Court of Wake County on 29 January 2004. The matter was heard on cross-motions for summary judgment on 25 November 2003 by the Honorable Joseph R. John, Emergency Superior Court Judge, who had been appointed by the Chief Justice of North Carolina, pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts of North Carolina, to hear and determine this case. (R p. 1, Amendment to Record on Appeal, R pp. 53-55)

The plaintiffs filed their Complaint on 14 November 2002, seeking declaratory and injunctive relief arising from the transfer of monies from the State of North Carolina's Highway Trust Fund (hereinafter the "HTF") to its General Fund. Plaintiffs brought this suit against the State of North Carolina and against Michael F. Easley, Governor, in both his individual and official capacities. (R pp. 8-16) Plaintiffs claimed they had standing as taxpayers under three theories: direct, derivative, and

"necessary." (R p. 9 ¶ 5) In their complaint plaintiffs purported to act on behalf of holders of State government bonds (R p. 9 ¶ 4), but they subsequently acknowledged that neither of the named plaintiffs actually owned any bonds. (Stipulation of Facts By All Parties (hereinafter "Stip.") ¶ 18, R p. 32)

On 13 January 2003, the defendants moved pursuant to N.C.G.S. § 1A-1, Rule 12(b) (1), (2), and (6), to dismiss the action on a number of grounds, including lack of standing and failure to state a claim for relief. (R pp. 25-26) On 5 February 2003, the trial court denied plaintiffs' motion for preliminary injunction, which had been filed on 3 January 2003. (That motion was heard by the Honorable Robert F. Farmer, originally designated by the Chief Justice of North Carolina, pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts of North Carolina, to hear the case. (R pp. 23, 24))

On 3 October 2003, all parties moved for summary judgment. (R pp. 36-40) Those motions were heard by the Honorable Joseph R. John, Sr., Emergency Superior Court Judge, designated pursuant to Rule 2.1 to hear the case following the withdrawal of Judge Farmer. (Amendment to Record on Appeal) On 29 January 2004, the trial court entered its order denying plaintiffs' motion for summary judgment and granting defendants'. In so doing, the trial court explained that it "merged its consideration of Defendants' Motion to Dismiss, and the stated grounds

therefore, within its ruling upon Defendants' Motion for Summary Judgment," as had "the parties in their arguments." (R p. 53) The court, in its order, also made clear that the plaintiffs had orally and in writing withdrawn their claim for *mandamus* or similar relief. (R p. 54)

On 4 February 2004, plaintiffs filed a timely notice of appeal to the Court of Appeals. (R p. 56) The record on appeal was filed in the Court of Appeals on 29 April 2004 and docketed on 7 May 2004. (R p. 1) On 9 August 2004, the Court of Appeals allowed plaintiff-appellants' Motion to Amend Record on Appeal to include in the record the 30 October 2003 Order entered by the Chief Justice of North Carolina designating the Honorable Joseph R. John, Sr., Emergency Superior Court Judge, to hear the case in lieu of Judge Farmer. The case was heard in the Court of Appeals on 13 June 2005 and decided on 20 September 2005. *Goldston*, 618 S.E.2d 785. On 25 October 2005 plaintiffs filed with this Court their Notice of Appeal based on an alleged constitutional question, Petition for Discretionary Review, and Alternative Petition for Discretionary Review on constitutional grounds. On 2 March 2006 the Supreme Court dismissed the Notice of Appeal, denied the Alternative Petition for Discretionary Review, and allowed the Petition for Discretionary Review.

## STATEMENT OF THE FACTS

The HTF was created by the General Assembly in Chapter 692 of the 1989 Session Laws as a special account within the State Treasury comprised of funds from specific fuel and highway use taxes and fees. (Stip. ¶ 6, R p. 29) The very legislation that created the HTF included a provision, ultimately codified as N.C.G.S. § 105-187.9, directing the State Treasurer to make annual transfers of $170 million from the taxes deposited in the HTF to the General Fund. (Stip. ¶ 9, R p. 30) The same legislation included another provision stating that, for fiscal year 1989-90, the amount transferred to the General Fund would be $279,400,000, and that, for fiscal year 1990-91, a total of $356,000,000 was to be transferred to the General Fund. Session Laws 1989-692 § 4.3. Other legislation enacted during that same session of the General Assembly provided that projects funded by the HTF were subject to the provisions of the Executive Budget Act, Article 1 of Chapter 143 of the General Statutes. (Stip. ¶ 8, R p. 30)

### Fiscal Year 2001-02

The General Assembly in 2001 amended N.C.G.S. § 105-187.9 to direct the transfer of $171.7 million of the taxes deposited in the HTF to the General Fund for fiscal year 2001-02 ($1.7 million in addition to the previously specified $170 million annually) and a total transfer of $172.4 million for fiscal year 2002-03. (Stip. ¶ 10,

R p. 30) On 5 February 2002, the Governor issued Executive Order No. 19, which noted that the budget enacted by the General Assembly for fiscal year 2001-02 could not be administered as enacted without the State incurring a deficit. (Stip. ¶ 26, R p. 34) Executive Order No. 19 further pointed out that General Fund revenue collections and projections for fiscal year 2001-02 would not meet budgeted and anticipated expenditures; the Executive Order authorized the Office of State Budget and Management to make transfers as necessary from the HTF to support General Fund appropriation expenditures. (Stip. ¶ 26, R p. 34) Pursuant to direction from the State Budget Officer, the State Controller transferred $80 million from the HTF to the General Fund on 8 February 2002. (Stip. ¶ 27, R p. 34) This $80 million transfer was the only time monies were transferred from the HTF to the General Fund under the authority of an Executive Order. (Stip. ¶ 29, R p. 34) Prior to the transfer, the State Budget Officer determined that the $80 million transfer would not impair the Department of Transportation in meeting current or future contractual obligations under the HTF program and that the transfer would not harm or delay construction projects to be funded by the HTF. (McCoy Aff. ¶ 8) As of the time the Chief Financial Officer for the Department of Transportation executed an affidavit for this case in the trial court proceedings, he had never been advised to make further executive branch transfers or that any such further transfers were contemplated at any

time. (Stallings Aff. ¶ 14) The HTF ended fiscal year 2001-02 with a balance of more than $548 million. (Stallings Aff. ¶ 11)

**Fiscal Year 2002-03**

Legislation enacted by the General Assembly in 2002 amended N.C.G.S.§ 105-187.9 to provide for the transfer of $252.4 million from the Highway Trust Fund to the General Fund for the 2002-03 fiscal year. (Stip. ¶¶ 10, 11 and 12, R pp. 30-31) Furthermore, the General Assembly, in Session Law 2002-126 § 2.2(g), directed the transfer of an additional $125 million from the HTF to the General Fund for the 2002-03 fiscal year, but provided that all funds transferred outside of the amount authorized by N.C.G.S. § 105-187.9 should be repaid to the HTF during fiscal years 2004-2005 through 2008-2009. (Stip. ¶¶ 13, 14, and 17, R pp. 31-32) The total of all legislatively directed transfers from the HTF to the General Fund for fiscal year 2002-03 was $377.4 million, which equated to quarterly transfers of $94.35 million. (McCoy Aff. ¶¶ 9-10) As of December 2002, when this case was being litigated in the trial court, tax revenues credited to the HTF since the beginning of that fiscal year were more than $413 million, and the balance in the HTF was more than $213 million. (Stallings Aff. ¶¶ 11, 17)

**The State Highway Bond Act of 1996**

In 1995 the General Assembly authorized a referendum for the approval of the issuance of $950 million in general obligation bonds to expedite construction of HTF projects. (Stip. ¶ 18, R p. 32) The State Treasurer issued and sold $250 million of the authorized bonds in November 1997, which are the only outstanding bonds for HTF projects. (Stip. ¶ 19, R p. 32) The debt service on the bonds is approximately $25 million annually and is paid from amounts deposited in the HTF. (Stip. ¶ 20, R pp. 32-33; Stallings Aff. ¶ 7) The named plaintiffs do not own any of the bonds issued pursuant to "The State Highway Bond Act of 1996." (Stip. ¶ 18, R p. 32)

**ARGUMENT**

**I. THE COURT OF APPEALS CORRECTLY RULED THAT PLAINTIFFS LACKED STANDING TO PURSUE THIS ACTION CHALLENGING THE TRANSFER OF MONIES FROM THE HIGHWAY TRUST FUND TO THE GENERAL FUND WHEN PLAINTIFFS SUFFERED NO DIRECT PERSONAL HARM, THERE ARE NO ONGOING OR THREATENED FUTURE TRANSFERS, AND PLAINTIFFS ABANDONED THEIR CLAIM FOR *MANDAMUS*.**

Plaintiffs contend that this Court should reverse the Court of Appeals' decision that they lack standing to bring this action. *See Goldston*, 618 S.E.2d 785. They argue to this Court that they have standing under three different theories – direct

standing, derivative standing, and "constitutional standing." (Pl.'s Br. at 16[1]) As both the Court of Appeals and the trial court determined, plaintiffs are wrong. They lack standing to bring this action under any theory, and this Court should affirm the decision of the Court of Appeals.

### A. THE REQUIREMENT THAT PLAINTIFFS HAVE STANDING IS A JURISDICTIONAL PREREQUISITE TO ANY LITIGATION.

Standing is a critical component of any plaintiff's case because it goes to the heart of our judicial system. Courts do not decide questions for plaintiffs who lack standing because, under such circumstances, the courts would essentially be issuing advisory opinions. This Court has made it clear that "[i]t is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter." *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942) (citation omitted). *Accord State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 360, 323 S.E.2d 294, 316 (1984); *City of Greensboro v. Wall*, 247 N.C. 516, 519, 101 S.E.2d 413, 416 (1958). *See also Wise v. Harrington Grove Cmty. Ass'n*, 357

---

[1] In their complaint, plaintiffs alleged that as taxpayers, they had direct standing, derivative standing, and necessary standing, which appears to be somewhat different from their current theory of "constitutional standing." (R p. 9 ¶ 5)

N.C. 396, 408, 584 S.E.2d 731, 740 (2003) (no decision rendered on provision "not an issue drawn into focus by these proceedings" because "to reach this question would be to render an unnecessary advisory opinion"). Even "'the apparent broad terms of the [Declaratory Judgment Act] do not confer upon the court unlimited jurisdiction of a merely advisory nature to construe and declare the law.'" *Malloy v. Cooper*, 356 N.C. 113, 116, 565 S.E.2d 76, 78 (2002) (quoting *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d 294, 303 (1984)).

Because our courts do not hand down advisory opinions, "an actual or real existing controversy between parties having adverse interests in the matter in dispute" is essential to a court's jurisdiction over any claim, including one brought for a declaratory judgment. *Tucker*, 312 N.C. at 338, 323 S.E.2d at 303. *See also Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 583, 347 S.E.2d 25, 29 (1986) (an actual controversy is a jurisdictional prerequisite for declaratory judgment action).[2] "An 'actual or real and existing controversy' means a controversy that arises out of the opposing contentions of the parties as to the validity or construction of a statute or ordinance, whereby the parties to the action have or may have *legal rights*, or are

---

[2] The fact that the Constitution of North Carolina contains no provision limiting litigation to actual controversies is irrelevant. "Indeed, it is uniformly held both in this country and in England that in the absence of any express provision making the existence of an actual controversy necessary to the jurisdiction, this limitation is nevertheless implied and will be observed by the courts." *Tryon*, 222 N.C. at 205, 22 S.E.2d at 453.

or may be *under legal liabilities* which are involved in the controversy." *Tucker*, 312 N.C. at 342, 323 S.E.2d 294 at 305 (citing *Consumers Power v. Duke Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974); *Light Co. v. Iseley*, 203 N.C. 811, 167 S.E. 56 (1932) (emphasis added).

As former Chief Justice Sharpe explained:

> Under our decisions "[o]nly those persons may call into question the validity of a statute who have been *injuriously affected thereby* in their persons, property or constitutional rights." *Canteen Service v. Johnson*, 256 N.C. 155, 166, 123 S.E. 2d 582, 589 (1962). *See also Nicholson v. Education Assistance Authority*, 275 N.C. 439, 168 S.E. 2d 401 (1969); *In Re Assessment of Sales Tax*, 259 N.C. 589, 131 S.E. 2d 441 (1963); *Carringer v. Alverson*, 254 N.C. 204, 118 S.E. 2d 408 (1961); *James v. Denny*, 214 N.C. 470, 199 S.E. 617 (1938). The rationale of this rule is that only one with a genuine grievance, *one personally injured by a statute,* can be trusted to battle the issue. "The '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 presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Flast v. Cohen*, 392 U.S. 83, 99, 20 L.Ed. 2d 947, 961, 88 S.Ct. 1942, 1952 (1968).

*Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (emphasis added). *Accord Appeal of Martin*, 286 N.C. 66, 72-73, 209 S.E.2d 766, 771 (1974).

Additionally, this Court has explained that, in order to have standing, plaintiffs "must allege [they have] sustained an '*injury in fact' as a direct result of*" the challenged state actions or failure to act. *Dunn v. Pate*, 334 N.C. 115, 119, 431 S.E.2d

178, 181 (1993) (emphasis added). *See also Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 444, 358 S.E.2d 372, 375 (1987) (plaintiffs in declaratory judgment action must show they have "sustained an injury or [are] in immediate danger of sustaining an injury *as a result of*" the challenged governmental action) (emphasis added). Similarly, "[t]he validity of a statute, when *directly and necessarily* involved, may be determined in a properly constituted action under G.S. 1-253 *et seq.*, but this may be done only when some specific provision(s) thereof is challenged by a person who is directly and adversely affected thereby." *City of Greensboro*, 247 N.C. at 519-20, 101 S.E.2d at 416 (emphasis in original; citations omitted). Accordingly, "declaratory judgments should not be made 'in the air' or in the abstract, *i.e.* without definite concrete application to a particular state of facts which the court can by the declaration control and relieve and thereby settle the controversy." *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002) (citation omitted).[3]

---

[3] The *amicus curiae* brief filed by the North Carolina Institute for Constitutional Law portrays the Court of Appeals opinion in *Goldston* as wrongly relying on a federal definition of standing. The Court of Appeals did cite language originating from a federal case, in explaining what constitutes standing. *See Goldston*, 618 S.E.2d at 788 (quoting *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002)(quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 352, 364 (1992))). However, contrary to the *amicus* argument, the *Lujan/Neuse River* definition is fully consistent with the requirements that this Court has established for the existence of standing, as evidenced by the cases cited *infra*. Moreover, regardless of the definitional fine points, the Court of Appeals in *Goldston* properly applied specific case law to the issues in this case to determine correctly that plaintiffs lacked standing.

In sum, there can be no doubt that plaintiffs are entitled to pursue this litigation only if they can show actual injury in fact, or the real threat of such an injury, as the result of the actions they challenge. As the Court of Appeals and the trial court properly determined, plaintiffs can make no such showing under any of the theories they pursue.

## B. THE DIFFERENT TYPES OF TAXPAYER STANDING IN THIS CASE.

The Court of Appeals considered the various arguments of the parties and made an effort to analyze the various potential bases for standing in taxpayer suits. It started from the basic principle that "[g]enerally, an individual taxpayer has no standing to bring a suit in the public interest." *Goldston*, 618 S.E.2d at 788 (quoting *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 36 (2001)). The Court of Appeals was not deviating from the principles established by this Court's cases, but following what this Court has made clear. "A taxpayer, as such, does not have standing to attack the constitutionality of any and all legislation." *Nicholson v. State Educ. Assistance Auth.*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969). Contrary to the apparent wishes of plaintiffs and *amicus* in this case, it is not sufficient simply to bring a taxpayer action in order to have the constitutionality of a statute or other governmental action reviewed. If that were so, this Court would not spend time analyzing the nature of a taxpayer's injury and determining which claims were permissible. *See, e.g.,*

*Wynn v. Trustees of Charlotte Cmty. Coll. Sys.,* 255 N.C. 594, 122 S.E.2d 404 (1961) (taxpayer may not challenge spending of tax funds for construction of college which they claim will be duplicative and discriminatory when they have not suffered any harm; challenge would have to come from someone who suffered harm); *Stanley*, 284 N.C. at 30, 199 S.E.2d at 650-51 (holding that taxpayer could challenge complete exemption from taxation of revenue bonds on the grounds that the exemption increased the burden imposed upon all other taxable property).

The Court of Appeals properly recognized circumstances in which taxpayer actions are permissible. Thus, it explained that a

> taxpayer may have standing if he can demonstrate that
>
> > [a] tax levied upon him is for an unconstitutional, illegal or unauthorized purpose[;] that the carrying out of a challenged provision "will cause him to sustain personally, a direct and irreparable injury[;]" or that he is a member of the class prejudiced by the operation of [a] statute.
>
> *Texfi Industries v. City of Fayetteville*, 44 N.C. App. 268, 270, 261 S.E.2d 21, 23 (1979) (citations omitted), *disc. review allowed in part and denied in part*, 299 N.C. 741, 267 S.E.2d 671, *aff'd,* 301 N. C. 1, 269 S. E. 2d 142 (1980).

*Goldston*, 618 S.E.2d at 788-89. Similarly, *Goldston* also recognized that taxpayers may contend they have derivative standing to assert claims on behalf of specific governmental entities. *Id.* at 789. Finally, the Court of Appeals discussed what the parties referred to as "constitutional standing." Under that concept of standing, "if the

governing authorities [are] preparing to put public property to an unauthorized use, citizens and taxpayers have the right to seek equitable relief." *Goldston*, 618 S.E.2d at 789 (quoting *Wishart v. Lumberton,* 254 N.C. 94, 96, 118 S.E.2d 35, 36 (1961)). It should be noted that plaintiffs have made no argument that they fall within a "class prejudiced by operation of a statute." *Id.* As to the other types of standing, the Court of Appeals addressed them and correctly concluded that plaintiffs could not meet the criteria to establish standing under any theory raised in this case. Nor do plaintiffs make any showing before this Court that they satisfy any of the theories of standing on which they rely.

### C. PLAINTIFFS HAVE MADE NO SHOWING OF WHAT THEY ARGUE CONSTITUTES CONSTITUTIONAL STANDING.

Plaintiffs contend that the Court of Appeals erred in concluding that they did not establish constitutional standing. To the contrary, the Court of Appeals ruling properly applied the holdings of this Court and correctly determined that the plaintiffs lack constitutional standing.

The Court of Appeals explained that the concept of constitutional standing, as raised by plaintiffs, referred to the right of citizens and taxpayers to obtain equitable relief when a governmental entity puts public property to an unauthorized use, citing *Wishart v. Lumberton,* 254 N.C. 94, 96, 118 S.E.2d 35, 36 (1961). *Goldston*, 618 S.E.2d at 789. "However, the cases that have applied this axiom have involved action

the government was preparing to take, which threatened the rights of the suing taxpayers, and which could still be restrained." *Id.* (citing *Lewis v. White*, 287 N.C. 625, 216 S.E.2d 134 (1975); *Shaw v. Asheville*, 269 N.C. 90, 96, 152 S.E.2d 139, 144 (1967); *Wishart*, 254 N.C. at 96, 118 S.E.2d at 36). The Court concluded that "these cases do not authorize citizens to sue for a court declaration that past government action, and unthreatened recurrences, are unlawful." *Goldston,* 618 S.E.2d at 789. Additionally, the Court of Appeals explained that plaintiffs had abandoned their claim for *mandamus* and sought only declaratory and injunctive relief, and further that "plaintiffs did not allege that a recurrence of the alleged misconduct was imminent." *Id.* at 790.

Both plaintiffs and the *amicus* argue that the Court of Appeals was wrong both in concluding that past actions could not be challenged on this theory and that plaintiffs had not asserted challenges for prospective actions that could be addressed in this litigation. In both respects, however, the Court of Appeals was correct.

### 1. Constitutional Standing Authorizes The Challenge Of Prospective Expenditures And Actions, Not Of Completed Acts.

First, constitutional standing applies to claims of prospective misuse of tax monies or governmental property, not to purely past use. Plaintiffs rely on such cases as *Lewis v. White*, 287 N.C. 625, 216 S.E.2d 134 (1975) (citizens may bring suit to

prevent commission from constructing an unauthorized cultural complex with tax funds appropriated by General Assembly solely for purpose of building art museum); *Wishart*, 254 N.C. 94, 118 S.E.2d 35 (action to restrain city from using as parking lot land that had allegedly been dedicated to use as a public park); and *Shaw v. Asheville*, 269 N.C. 90, 152 S.E.2d 139 (1967) (taxpayer may bring action to enjoin performance of void agreement between city and Cablevision, to prevent use of tax funds and tearing up of city streets, sidewalks, and other areas). As the Court of Appeals recognized, the cases relied on by plaintiffs for their purported constitutional standing at most permit citizens to seek equitable relief against the *threatened* use of public money or property for unauthorized purposes. *See Goldston*, 618 S.E.2d at 789 ("these cases do not authorize citizens to sue for a court declaration that past government action, and unthreatened recurrences, are unlawful").

Plaintiffs have also asserted that several other cases support their contention that "[a] taxpayer in this State 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." (Pl.'s Br. at 18 (quoting *Town of Emerald Isle v. State of North Carolina*, 320 N.C. 640, 647, 360 S.E.2d 756, 760 (1987))). *Town of Emerald Isle*, however, is at least in part a classic example of constitutional standing to challenge allegedly unlawful prospective expenditures. This Court observed that

"[t]he act, in directing the Town to maintain the facility, appears to require the expenditure of public funds." *Id.* Thus, although the challenged legislation may have been passed sometime previously, the basis for standing stemmed from the prospective expenditure of Town funds for maintenance of the facility, and taxpayers could maintain their action based on the future expenditures. (Significantly, the Town itself had a direct basis for challenge because of the requirement that it expend its funds for maintenance of the facility, and some of the individual plaintiffs also complained of direct harms such as losing their existing rights of vehicular access to the beach.)

Similarly, other cases cited by plaintiffs to support this proposition do not establish any right of taxpayers to challenge completed actions that do not involve alleged unlawful expenditures or use of government funds or property prospectively. *See* Pl.'s Brf. at 18. Thus, *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 581 S.E.2d 415 (2003) is not a taxpayer suit at all, but a discrimination suit. *Mitchell v. North Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 159 S.E.2d 745 (1968), involved prospective expenditures for purposes which this Court determined did not come within the category of "public purposes" as required under our Constitution, and standing was never even discussed. In *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E.2d 888 (1961), this Court determined that a county taxpayer could

challenge a statute providing for appointment of justices of the peace in his county "and for payment of their salaries from the general fund of the county," as "this Court has in numerous cases determined the constitutionality of statutes upon suit for injunctive relief by taxpayers where the expenditure of public funds is involved." *Id.* at 513, 119 S.E.2d at 890. In *Dennis v. City of Raleigh*, 253 N.C. 400, 116 S.E.2d 923 (1960), this Court considered a claim for injunctive relief challenging an appropriation by the City of Raleigh for advertising purposes. The Court concluded that the City should be enjoined from making such expenditures, but only to the extent that the funds to be used were derived from taxes rather than other sources. *Id.* at 405, 116 S.E.2d at 927. Thus, every case cited by plaintiffs (other than *Williams*) is exactly the type of case which the Court of Appeals recognized as sufficient for constitutional standing – cases in which the question was one of injunctive relief for prospective expenditures or uses of governmental funds or property in a manner that plaintiffs claimed was unlawful. Not a single case recognized this type of taxpayer standing based on completed actions in which the question was simply one of determining, essentially on an advisory basis, that the government had acted wrongly in the past.

Nor does the *amicus curiae* brief offer any insight into this issue. The *amicus* contends that, in *Stanley*, this Court permitted a challenge "of a statute that had created county financing authorities several years before the lawsuit was initiated."

(*Amicus* Br. at 37) The *amicus* brief misses the point. Regardless of when the legislation was enacted, the effects of the act would operate in the future. The complaint went to the tax-exempt nature of bonds authorized by the 1971 legislation, and no bonds had been issued at the time of the litigation. *Id.*, 284 N.C. at 28, 199 S.E.2d at 650. Thus, this Court concluded as to standing that "petitioners *will be injured* unless its invalidity is judicially declared for the exemption of any property from its fair share of the public burden, to that extent, increases the burden imposed upon all other taxable property." *Id.* at 30, 199 S.E.2d at 650-51 (emphasis added). Similarly, *Town of Emerald Isle* spoke to future effects of the challenged legislation in that the Town would be required to maintain the facilities in the future, and accordingly the alleged improper expenditure of tax monies would occur in the future.

Neither plaintiffs nor the *amicus curiae* has brought forward any authority in this State for the courts to permit challenges of past governmental actions under the theory of constitutional standing. Each of the cases cited by them in fact addresses real, not speculative, future or ongoing governmental spending or use of governmental property that may be addressed by injunctive relief. No such real future or ongoing spending is at issue here, as the trial court and the Court of Appeals both recognized.

**2. Plaintiffs Have Not Asserted Any Genuine Claim Of Continued Or Threatened Future Transfers Of Funds That Would Create**

**Standing For Them To Pursue This Litigation.**

Plaintiffs contend that they alleged that future threatened recurrences of the transfers of funds from the HTF to the General Fund were unlawful. (Pl.'s Br. at 17) *See also Amicus* Br. at 41 ("the Governor and the legislature repeatedly effected transfers of millions of dollars from the HTF in non-emergency situations"). In fact, plaintiffs alleged only two imminent transfers which they in fact challenged in this litigation, and both were concluded prior to the summary judgment proceedings in the Superior Court. Consequently, the Court of Appeals properly concluded that plaintiffs could not pursue this action under the theory of constitutional standing. *Goldston*, 618 S.E.2d at 790.

Specifically, plaintiffs alleged that on 5 February 2002 the Governor had transferred $80,000,000.00 from the HTF to the General Fund (R p. 11 ¶ 13) pursuant to an executive order at a time that the Governor determined was one of fiscal emergency, causing him to invoke his authority under Article III, Section 5(3) of the Constitution of North Carolina to ensure that expenditures did not exceed revenues. *See* Stip. ¶¶ 26-28, R p. 34. The parties stipulated that this one transfer "is the only time monies were transferred from the Highway Trust fund to the General Fund by a Governor pursuant to an Executive Order." (Stip. ¶ 29, R p. 34) As of the time the Chief Financial Officer for the Department of Transportation executed an affidavit for

this case in the trial court proceedings, he had never been advised to make further executive branch transfers or that any such further transfers were contemplated at any time. (Stallings Aff. ¶ 14) Plaintiffs have never brought forward any evidence or anything other than sheer speculation that at some time in the future such an occurrence might happen again.

Plaintiffs further alleged that “the Defendant State of North Carolina, acting through its General Assembly at its 2002 Session, threatens to withdraw by appropriation $80,000,000 annually from the Highway Trust Fund in the form of a purported ‘recurring inflationary adjustment,’ contrary to the original legislative intent and letter of the Highway Trust Fund Law.” (R p. 12 ¶ 18) Yet, plaintiffs also alleged that they “do not challenge the right of the Legislature to enact new legislation relating to collection [sic] taxes prospectively and appropriate prospectively expenditures relating to intrastate highways, urban loops, city streets, secondary roads and bond debt services.” (R pp. 12-13 ¶ 20) Indeed, plaintiffs proceeded to be even more specific by alleging further that “[p]laintiffs’ claims for relief relate to unlawful and unconstitutional spending of Highway Trust Funds for purposes not specified by tax laws at the time of collection as required by the Constitution and the threat of future misappropriation.” (R pp. 12-13 ¶ 20)

Legislation enacted by the General Assembly in 2002 in fact amended N.C.G.S. § 105-187.9 to provide for the transfer of $252.4 million from the Highway Trust Fund to the General Fund for the 2002-03 fiscal year. (Stip. ¶¶ 10, 11 and 12, R pp. 30-31) Notably, the very legislation that created the HTF included a provision, ultimately codified as N.C.G.S. § 105-187.9, directing the State Treasurer to make annual transfers of $170 million from the taxes deposited in the HTF to the General Fund. (Stip. ¶ 9, R p. 30) Consequently, the 2002 legislation merely increased the amount flowing from the HTF to the General Fund. Moreover, the collections coming in by virtue of taxes to be paid for the 2002-03 fiscal year were more than sufficient to cover all legislatively authorized transfers for that fiscal year. (McCoy Aff. ¶¶ 9-10; Stallings Aff. ¶¶ 11, 17) In other words, plaintiffs' agreement that the General Assembly could prospectively alter the amount transferred from the HTF to the General Fund (R p. 13 ¶ 20) meant that the amount transferred by the 2002 legislation for the 2002-03 fiscal year fell within the category of transfers to which plaintiffs did not object.

Plaintiffs, however, also alleged that "the Defendant State of North Carolina, acting through its General Assembly at its 2002 Special Session, threatens to withdraw $125,000,000 from the Highway Trust Fund in the form of a purported 'loan' stating an 'intent' to return the trust funds during fiscal years 2004-2005

through 2008-2009." (R p. 12 ¶ 19) The parties stipulated that the General Assembly, in Session Law 2002-126 § 2.2(g), directed the transfer of an additional $125 million from the HTF to the General Fund for the 2002-03 fiscal year, but provided that all funds transferred outside of the amount authorized by N.C.G.S. § 105-187.9 should be repaid to the HTF during fiscal years 2004-2005 through 2008-2009. (Stip. ¶¶ 13, 14, and 17, R pp. 31-32) Except for the stated intention to repay the transfer, this action was essentially identical to one taken by the legislature that created the HTF, which specified in the enacting legislation that the amount transferred to the General Fund would be $279,400,000; and that, for fiscal year 1990-91, a total of $356,000,000 was to be transferred to the General Fund. Session Laws 1989-692 § 4.3.

Significantly, then, from the beginning of the HTF's existence, the General Assembly has provided by statute that certain sums of money shall be transferred to the General Fund from the HTF. Moreover, the General Assembly also provided, from the very beginning, for an additional transfer from the HTF to the General Fund in a provision enacted in a non-codified session law. Thus, although plaintiffs present this case as one challenging the use of funds for purposes other than those for which the taxes were levied, in contravention of Article V, § 5 of the Constitution of North Carolina, they are really complaining about the amounts of money going to the

General Fund. For some reason, plaintiffs seem to think that Article V, Section 5 restricts the State to collect and distribute tax proceeds only in the precise manner and amounts which the original taxing statute contemplated. In fact, the plain language or everyday meaning of Article V, § 5 is that tax statutes must state the *objects* or *purposes* for which the taxes are levied, and those taxes can only be used for those same *objects* or *purposes*. *See Martin v. State,* 330 N.C. 412, 416, 410 S.E.2d 474, 476 (1991) ("In interpreting our Constitution -- as in interpreting a statute -- where the meaning is clear from the words used we will not search for a meaning elsewhere.") (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989)). Nowhere does Article V, Section 5 state that tax acts must specify fixed or unalterable percentages of moneys going to the purposes for which those taxes are imposed. From the very beginning, the legislation establishing the HTF provided that the money collected from various sources and paid into the HTF was to be used for specified road-related purposes, for expenses of administering the HTF, and – via transfer of funds from the HTF to the General Fund – for General Fund purposes. The transfers of which plaintiffs have complained in this litigation neither used, nor authorized the use of, HTF money for any purpose other than those same purposes for which the taxes were originally levied.

Most damaging for plaintiffs is the fact that they did not challenge any transfer or expenditure other than those completely executed by the time this matter came before the trial court. The case was heard in the Superior Court of Wake County on 25 November 2003. (R pp. 1, 53) By that time, the 2002-03 fiscal year had passed. Plaintiffs had abandoned their claim for *mandamus*. (R p. 54; *Goldston*, 618 S.E.2d at 790) In addition, they no longer, if they ever had, challenged the prospective transfer of funds pursuant to codified legislation, a fact they made very explicit in their brief in the Court of Appeals. The only transfers they challenged were the $80 million transfer by executive order in 2002 and the $125 million transfer pursuant to legislative action in 2002. *See* Appellants' Brief in the Court of Appeals at 2 ("Plaintiffs request judgment declaring the two transfers ($80 million by the executive branch and $125 million by the legislative branch) were unconstitutional. Plaintiffs seek no money damages.") Instead of challenging any specific imminent or threatened future transfers, plaintiffs declared that "[t]he legislative and executive branches need guidance regarding appropriate constitutional methods for handling future budgetary shortfalls." (Appellants' Brief in the Court of Appeals at 2) In their Statement of Facts in the Court of Appeals, they listed the executive branch actions and General Assembly actions at issue and addressed only the $80 million transfer by executive order and the $125 million transfer by virtue of the 2002 legislation.

(Appellants' Brief in the Court of Appeals at 9-10) Again, plaintiffs summarized their argument before the Court of Appeals by stating that "[t]his case involves two unlawful transfers totaling $205 million in Trust Fund taxes" and then specifying the $80 million executive transfer in February of 2002 and the transfer of $125 million by virtue of the 2002 legislation. (Appellants' Brief in the Court of Appeals at 10)

After expressly litigating this case as involving two transfers that were completed prior to the time the trial court heard this matter (R pp. 1, 53), and even prior to the time plaintiffs filed their summary judgment motion (R pp. 36-37), plaintiffs cannot now claim before this Court that the case is about some other transfers, transfers that they speculate might occur at some time in the future, whether five, ten, or one hundred years from now. Nor can plaintiffs rely on their complaint as suggesting that they challenged prospective transfers. As is evidenced from the recitation above of the relevant pleadings, the executive and legislative proceedings, and the parties' stipulations, the only specifically threatened transfers they alleged in the complaint were the ones that were completed prior to the summary judgment proceedings. The only purpose a declaratory judgment would serve in this case would be to declare past actions of the General Assembly and the Governor to be proper or improper and would truly constitute the type of advisory opinion which "it is no part

of the function of the courts to issue." *Goldston*, 618 S.E.2d at 789 (quoting *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 408, 584 S.E.2d 731, 740 (2003)).

**3. Plaintiffs' Expanded Theory Of Constitutional Standing Is Not Supported By The Cases They Cite.**

In addition to the cases discussed above, plaintiffs cite additional cases which they contend support their assertion that they have constitutional standing. These cases, and the bases on which plaintiffs rely on them, are varied. However, none of these cases support plaintiffs' position that they have constitutional standing or standing of any kind.

Two cases cited by plaintiffs involve what was then Article V, Section 7 of the Constitution (now Article V, Section 5) and are hailed by plaintiffs as "recogniz[ing] citizens' right to sue to enjoin a constitutional violation." (Pl.'s Br. at 15) Contrary to plaintiffs' argument, neither of these cases establishes or even suggests that an unaffected citizen may sue at will simply to challenge constitutional violations that have no direct impact on him. For example, in *McCless v. Meekins*, 117 N.C. 34, 23 S.E. 99 (1895), this Court explained that the primary "object of this action is to restrain the defendant, Meekins, from paying into the general county treasury a special tax fund which the plaintiff alleges was collected for the benefit of himself." *Id.* at 36, 23 S.E. at 100. The plaintiff not only challenged prospective payments, but he

claimed a direct interest in the funds to be paid. No one could question the plaintiff's standing under such circumstances, but the case is irrelevant to plaintiffs here who have no such direct claim to specific funds.

The second such case proffered by plaintiffs as somehow supporting their argument for standing was *Southern Ry. Co. v. Bd. of Comm'rs of Mecklenburg County*, 148 N.C. 220, 61 S.E. 690 (1908). *Southern Ry. Co.* involved a challenge by the plaintiff, which had withheld part of its tax payments, resulting in a lien against its property, while complaining that the assessments for roads, convicts, and bonds were unconstitutional, and further than the county commissioners should have collected an additional poll tax. Clearly, by challenging as improper a specific portion of the taxes he paid, the taxpayer had standing in a way that plaintiffs here do not have. Interesting, even in that case, the Court limited the plaintiff's challenge, rejecting his right to raise an issue as to whether repeal of the poll tax in question impaired the obligation of contract of certain bondholders, on the grounds the "[t]he plaintiff has no such relation to the bonds, so far as this record discloses, as entitles it to raise the question." *Id.* at 245, 61 S.E. at 699. Not only does the case provide absolutely no support for plaintiffs' contention that they have standing, constitutional or otherwise, but it demonstrates that this Court was distinguishing carefully between

the claims which the plaintiff had a basis to raise and those to which he had no direct relationship and was not allowed to raise, for lack of standing.

Plaintiffs attempt to manufacture a new theory of constitutional standing by proclaiming that taxpayers can challenge alleged violations of constitutional provisions whenever they are "self-executing." In support of this novel concept, they cite *Kitchin v. Wood*, 154 N.C. 565, 70 S.E. 995 (1911). *Kitchin* does indeed discuss self-executing constitutional provisions, describing such a provision as one which "needs no legislation to give it effect and no special means for its enforcement." *Id.* at 568, 70 S.E. at 996. Yet, the point of whether a constitutional provision is self-executing has nothing to do with standing. *Kitchin* was a *mandamus* action by the Governor to compel the State Auditor to transmit tax assessment forms to the counties. The Court had no problem with the idea that the Governor could seek a *mandamus* to compel the Auditor to perform a ministerial duty. *Id.* at 996, 70 S.E. at 566. The issue as to whether a constitutional provision was self-executing concerned whether the legislative act in question was null and void and therefore no tax could be collected or whether the constitutional mandate for collection of a specific "capitation tax" was self-executing. It is difficult to see how this case is at all relevant to plaintiffs or how they can garner from it the novel idea that plaintiffs have some

automatic right to challenge alleged violations of self-executing constitutional provisions.

Finally, plaintiffs list in their briefs what they describe as "[a] panoply of case precedents from this Court . . . brought by plaintiff taxpayers . . . whom this Court held had 'standing' to pursue various 'self-executing' clauses of the Constitution." (Pl.'s Br. at 19) The long list of cases which follows does not support plaintiffs' description of the cases and certainly does not support their claim to standing in this case. First, a substantial number of the cases involve challenges to taxes by taxpayers who claim the specific taxes assessed against them are unconstitutionally assessed because the taxpayers contend they are exempt from taxation. These cases include: *Matter of Appeal of University of North Carolina*, 300 N.C. 563, 268 S.E.2d 472 (1980) (University claiming its property is exempt from local property taxes by virtue of Article V, Section 2(3) of the Constitution); *Redevelopment Comm'n of High Point v. Guilford County*, 274 N.C. 585, 164 S.E.2d 476 (1968) (redevelopment commission asserting that it is constitutionally exempt from local property taxes assessed against it); *Raleigh Cemetery Ass'n v. City of Raleigh*, 235 N.C. 509, 70 S.E.2d 506 (1952) (challenge by nonprofit cemetery association to street assessments under theory that assessments are taxes, from which it is exempt); *Piedmont Memorial Hosp., Inc. v. Guilford County*, 218 N.C. 673, 12 S.E.2d 265 (1940) (hospital challenged county's

assessment of property taxes against property owned by hospital); *Salisbury Hosp., Inc. v. Rowan County*, 205 N.C. 8, 169 S.E. 805 (1933) (challenge by hospital to county property taxes assessed against it, claiming exemption from taxation); *Town of Andrews v. Clay County*, 200 N.C. 280, 156 S.E. 855 (1931) (town challenged county's assessment of taxes against certain property owned by town).

In other cases, plaintiffs brought claims in which they alleged a direct interest of a kind very different from anything remotely at issue in this case. *North Carolina Sch. Bd.s Ass'n v. Moore*, 160 N.C. App. 253, 585 S.E. 2d 418 (2003) (plaintiffs, which included local school boards as well as the School Boards Association, brought an action for determination that certain funds being collected by the State were properly fines and forfeitures that should go to the school boards under Article IX, Section 7 of the Constitution of North Carolina), *aff'd in part and rev'd in part*, 359 N.C. 474, 614 S.E.2d 504 (2005); *Latta v. Jenkins*, 200 N.C. 255, 156 S.E. 857 (1931) (trustee under will paid under protest, and sought to recover, property taxes on portion of business property held for sale, with the proceeds scheduled to go to exempt charitable organizations pursuant to the will); *Dixon v. Bd. of County Comm'rs of Pitt County*, 200 N.C. 215, 156 S.E. 852 (1931) (county taxpayers challenged "capitation tax" that exceeded constitutionally permissible limit); *Parker v. Comm'rs of Johnston County*, 178 N.C. 92, 100 S.E. 244 (1919) (taxpayers claimed stock law fence

assessment should be refunded to them after legislative enactment making the assessment unnecessary, and further claimed legislative provisions for use of surplus funds was unconstitutional).

In two other cases cited by plaintiffs, the courts never discussed standing, yet those cases in no way support plaintiffs' contention that they have standing in this case. *North Carolina ex rel. Horne v. Chafin*, 62 N.C. App. 95, 302 S.E.2d 281 (1983) (taxpayer challenged past expenditures of public funds as illegal, apparently seeking to force repayment from defendants, in a case in which standing was not discussed; however, case is captioned as if taxpayer asserted some authority beyond his individual status to bring the litigation, perhaps the kind of derivative standing discussed in Argument I.C. *infra*); *Hammond v. McRae*, 182 N.C. 747, 110 S.E. 102 (1921) (challenge by taxpayers to restrain issuance and sale of bonds in a case that appears to involve a traditional form of constitutional standing).

In sum, plaintiffs have trotted out a long litany of cases for their contention that they have constitutional standing and that self-executing constitutional provisions somehow justify litigation without traditional standing. Not a single case supports this position. Virtually all of them exemplify traditional standing concepts. Plaintiffs cannot simply list case after case as if the sheer volume of taxpayer lawsuits, most by

persons questioning the necessity of their paying specific taxes, could somehow bolster plaintiffs' own standing claims.

Plaintiffs have no constitutional standing to pursue this litigation as they challenged only two provisions that were fully executed prior to the proceedings below. Plaintiffs should not be allowed to have this Court examine the actions of the Governor and the General Assembly purely for what plaintiffs assume would be the satisfaction of having the Court say the Governor or the General Assembly acted improperly. This Court does not address constitutional questions except when necessary to resolve real controversies. *See State Educ. Assistance Auth. v. Bank of Statesville*, 276 N.C. 576, 581, 174 S.E.2d 551, 556 (1970) (even agreement of the parties "does not require, or authorize, the Court to pass upon the constitutional questions not necessary to the determination of the right of the party who denies the validity of the legislation") (quoting *Nicholson*, 275 N.C. at 448, 168 S.E.2d at 407). Here, there is no real controversy, but merely plaintiffs' desire for what is in reality an advisory opinion on an abstract or hypothetical question, and this Court does not issue such advisory opinions. *See Martin v. Piedmont Asphalt & Paving*, 337 N.C. 785, 788, 448 S.E.2d 380, 382 (1994) ("it is not a proper function of courts 'to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic

matter'") (quoting *Adams v. North Carolina Dep't of Natural and Econ. Res.*, 295 N.C. 683, 704, 249 S.E.2d 402, 414 (1978) (quoting *Poore v. Poore*, 201 N.C. 791, 161 S.E. 532 (1931))). The Court of Appeals, like the trial court, properly concluded that plaintiffs lacked constitutional standing, and this Court should affirm.

### D. PLAINTIFFS HAVE MADE NO SHOWING OF DIRECT STANDING.

Plaintiffs contend they have direct standing to bring this action. They lump together under this heading three categories of direct claims: those brought by taxpayers who contend a tax levied upon them is for an unconstitutional or illegal purpose, citing *Wynn*, 255 N.C. 594, 122 S.E.2d 404; those brought by taxpayers who contend a specific challenged act or action will cause them to sustain a direct and irreparable injury, citing *Nicholson,* 275 N.C. at 448, 168 S.E.2d at 406; and those brought by persons who are members of a class prejudiced by the operation of a statute, citing *Appeal of Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974). *See also Texfi Industries 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). *Accord Goldston*, 618 S.E.2d at 788-89. Contrary to plaintiffs' argument before this Court, they meet none of these categories.

First, regardless of how plaintiffs characterize their claims, they are not in fact contending that they are subjected to unconstitutional or illegal taxes or ones which are being used for unconstitutional or illegal purposes. Nowhere do plaintiffs assert

that the taxes going into the HTF are illegal; instead, plaintiffs merely dispute specific instances of the relative distribution of legitimate taxes to legitimate governmental purposes – *i.e.*, the HTF and the General Fund. Indeed, *Wynn* illustrates that it is not sufficient to claim some constitutional defect resulting from the expenditure of tax money to come within this category of cases as *Wynn* held that the plaintiffs in that case lacked standing to challenge the particulars or methods of use of bond proceeds for construction of colleges, even on grounds that the planned use would result in unconstitutionally separate or discriminatory colleges. Rather, the taxes themselves were not for unconstitutional or unlawful purposes, the bonds were not unconstitutional, and the taxpayer was not affected directly by the colleges, so he lacked the necessary standing. *Wynn*, 255 N.C. at 599-601, 122 S.E.2d at 408-09. This type of standing is best illustrated by cases cited by plaintiffs in which the claims challenged specific types of taxes as unconstitutional. *See Dixon*, 200 N.C. 215, 256 S.E. 852 (county taxpayers challenged "capitation tax" that exceeded constitutionally permissible limit); *Southern Ry. Co.*, 148 N.C. 220, 61 S.E. 690 (plaintiff challenged part of his property tax assessments, for roads, convicts, and bonds, as unconstitutional). *See also Southern Ry. Co. v. Cherokee County,* 177 N.C. 86, 97 S.E. 758 (1919) (action by plaintiff to recover tax paid under protest where tax authorized by statute exceed amount permitted by Constitution).

Second, whatever plaintiffs argue, they have not presented a claim that they will suffer a direct and irreparable injury. *See Nicholson,* 275 N.C. at 448, 168 S.E.2d at 406. Plaintiffs who suffer a direct and irreparable injury may be those such as two of the individual taxpayers in *Town of Emerald Isle*, who stood to lose their vehicular access rights to the beach property. *Town of Emerald Isle*, 320 N.C. at 644, 360 S.E.2d at 759. They may also be those such as the governmental entities challenging taxes improperly collected from them when their property was exempt. *E.g., Matter of Appeal of University of North Carolina,* 300 N.C. 563, 268 S.E.2d 472 (1980) (University claiming its property is exempt from local property taxes by virtue of Article V, Section 2(3) of the Constitution); *Redevelopment Comm'n* , 274 N.C. 585, 164 S.E.2d 476 (redevelopment commission asserting that it is constitutionally exempt from local property taxes assessed against it). In this type of case, if there were plaintiffs claiming that they were directly harmed by the failure to build specific roads that would have been built except for the increase in the payment of funds from the HTF to the General Fund, such persons might under some circumstances present a claim for a direct injury. If there were plaintiffs who were bondholders who had a viable claim that their bonds were impaired, such persons might present a claim for a direct injury. There are no such plaintiffs in this case. Defendants submit there can be no such plaintiffs because no such harms have occurred, and the lack of any harm

illustrates why this case should not proceed. Nevertheless, if there were any persons harmed, plaintiffs are not those persons and cannot claim to have standing based on direct harm.

Nor can plaintiffs argue that they are members of a class prejudiced by operation of a statute. *See Appeal of Martin*, 286 N.C. at 75, 209 S.E.2d at 772. Here, there is no person or group prejudiced by operation of the statute in a discriminatory sense, and plaintiffs are unable to assert this type of standing.

Plaintiffs' efforts to create some form of direct standing will not pass scrutiny. They rely in this argument on a number of cases which are more properly considered within the scope of the constitutional standing discussed in Argument I.C *supra*. *See, e.g., Lewis,* 287 N.C. 625, 216 S.E.2d 134 (citizens may bring suit to prevent commission from constructing an unauthorized cultural complex with tax funds appropriated by General Assembly solely for purpose of building art museum); *Freeman v. Bd. of Comm'rs of Madison County*, 217 N.C. 209, 7 S.E.2d 354 (1940) (local taxpayers may obtain injunctive relief to restrain defendant county commissioners from making unlawful appropriations of county funds).

Plaintiffs also quibble with the Court of Appeals' opinion, noting that the court stated that "generally a taxpayer has no standing to bring a suit in the public interest." *See* Pl.'s Br. at 24 (quoting *Goldston*, 618 S.E.2d at 788). According to plaintiffs, the

Court of Appeals "neglects to mention that this general rule" "does not apply where a taxpayer shows that the tax levied upon him is for an unconstitutional, illegal or unauthorized purpose." (Pl.'s Br. at 24 (citations omitted)) Yet, the Court of Appeals did, almost immediately after the statement plaintiffs quote, note that taxpayers may have standing if they can show any of the three sets of circumstances plaintiffs address in this argument as direct standing, including whether a tax was imposed for an unconstitutional or illegal purpose. *Goldston*, 618 S.E.2d at 788-89. The Court of Appeals simply did not agree with plaintiffs that they had any claim of direct standing. It concluded, to the contrary, that

> their complaint did not claim that they suffered injury from the collection of the taxes which benefit the HTF. Rather, 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.[4] In so doing, the Court of Appeals correctly assessed the nature of plaintiffs' claims. Plaintiffs did not object to the collection of the taxes or the nature of the taxes. They did not assert any injury different from other taxpayers. Consequently, they do not meet the standards for direct standing, however defined, and plaintiffs' objections to the ruling below are without merit.

Interestingly, plaintiffs cite this Court to a dissenting opinion in *Property Rights Advocacy Group v. Town of Long Beach*, for the proposition that this court must determine the rights and liabilities or duties of the parties when conflict exists between the Constitution and a statute "because the Constitution is the superior rule of law in

---

[4] The *amicus curiae* brief argues that the Court of Appeals opinion would require a distinguishable injury even for persons subjected to unconstitutional taxes. *See Amicus* Br. at 42-44. According to them, the opinion of the Court of Appeals would mean that no one would have standing to challenge an unconstitutional tax because all taxpayers would suffer equally from it. The *amicus* misreads the Court of Appeals opinion which notes both that plaintiffs "did not claim that they suffered injury from the collection of the taxes which benefit the HTF" and that they challenged withdrawals from the HTF that affected them in the same manner as all taxpayers. *Goldston*, 618 S.E.2d at 789. The more logical reading of the Court of Appeals opinion is that the court would recognize either the assertion of an actual injury from collection of the taxes or a harm different from other taxpayers, but that plaintiffs presented neither. This Court should not succumb to the *amicus* brief's effort to conjure up a straw man in the form of a radical change in the law to be gleaned by implication from the Court of Appeals opinion. The Court of Appeals plainly did not intend to suggest that a person clearly harmed by the collection of an unconstitutional tax could not challenge that tax unless he suffered differently from taxpayers generally subject to it. The question did not arise as plaintiffs did not challenge the imposition of the tax, did not make any claims that related to an unconstitutional tax, and the challenge they did make was to the distribution of the tax funds as to a matter in which they suffered no direct harm.

that situation." 617 S.E.2d 715, 720 (2005) (Hunter, J., dissenting) (citations omitted), *aff'd per curiam*, 628 S.E.2d 768 (2006). Yet, this Court affirmed the majority opinion in that case in which the Court of Appeals determined that it no longer had jurisdiction to review plaintiffs' challenge to a statute authorizing the town to provide through ordinances for the development of parks on municipal streets and an ordinance adopted thereto that closed as "parks" certain streets dead-ending into waterways. Once the town repealed the ordinance and adopted another ordinance that did not create public parks or close streets, the majority of the Court of Appeals concluded that it could not assume jurisdiction based on the "hypothetical circumstances" asserted by plaintiffs and thus "there is no longer a justiciable controversy between the parties." *Id.* at 718. Plaintiffs, too, are asking for review based on past events and "hypothetical circumstances," and there is not currently "a justiciable controversy between the parties" in this case. *Id.* This Court should reject plaintiffs' claims to direct standing and affirm the Court of Appeals decision.

## E. PLAINTIFFS HAVE MADE NO SHOWING THAT THEY SATISFIED THE PREREQUISITES FOR ASSERTING DERIVATIVE STANDING.

Plaintiffs argue that they are entitled to pursue this case on the basis of derivative standing. Plaintiffs are wrong; they have not made any showing sufficient to establish derivative standing, as the Court of Appeals correctly determined. *Goldston*, 618 S.E.2d at 790.

This Court has set out at length the standard for plaintiffs to establish derivative standing:

> [A] taxpayer cannot bring an action on behalf of a public agency or political subdivision where the proper authorities have not wrongfully neglected or refused to act, after a proper demand to do so, unless the circumstances are such as to indicate affirmatively that such a demand would be unavailing.

*Branch v. Bd. of Educ.*, 233 N.C. 623, 625-26, 65 S.E.2d 124, 126 (1951) (citations omitted). Specifically, this Court said that in order to sue on behalf of a *local* governmental unit, a taxpayer

> must allege facts sufficient to establish the existence of one or the other of these alternative requirements: (a) That there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the public agency or political subdivision; or (b) that such a demand on such authorities would be useless.

*Branch*, 233 N.C. at 626, 65 S.E.2d at 126-27 (citations omitted). *Accord Goldston*, 618 S.E.2d at 789.

The same principles inevitably govern a taxpayer's attempt to sue on behalf of a state government. Indeed, the Court of Appeals has addressed similar issues on several occasions with regard to state government. *E.g., Fuller v. Easley,* 145 N.C. App. 391, 395-96, 553 S.E.2d 43, 47-47 (2001); *Flaherty v. Hunt*, 82 N.C. App. 112, 345 S.E.2d 426 (holding that plaintiffs could not bring action to recover funds for State for former Governor's alleged misuse of State property), *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986). In *Flaherty*, the Court of Appeals held that, under N.C.G.S. § 143-32 the Attorney General has been accorded the exclusive authority to pursue such matters. The Court of Appeals expanded on that rule in *Whitmire v. Cooper*, 153 N.C. App. 730, 735-36, 570 S.E.2d 908, 912 (2002), *disc. review denied & appeal dismissed*, 356 N.C. 696, 579 S.E.2d 104 (2003). In that case, the court rejected the plaintiff's claim for derivative standing despite his allegation that he had sought action from the Attorney General, noting that there was "no allegation in the complaint that the Attorney General's refusal to act was wrongful." *Id.* at 735, 570 S.E.2d at 912. In fact, the Court of Appeals concluded in *Whitmire* that only if "the Attorney General was derelict in his duties" could a plaintiff have standing to sue on a derivative basis to recover funds for the State. *Id.*

Plaintiffs have utterly failed to establish derivative standing. First, the nature of derivative standing is that "it permits a taxpayer to bring a taxpayer's action on

behalf of a public agency or political subdivision *for the protection or recovery of the money* or property of the agency or subdivision in instances where the proper authorities neglect or refuse to act." *Branch*, 233 N.C. at 625, 65 S.E.2d at 126 (emphasis added). Plaintiffs, however, are not seeking to protect or recover the money or property of the State or the HTF. They have abandoned their claim for *mandamus* and have pointed to no imminent or realistic threat of any transfers from the HTF to the General Fund other then the prospective legislative transfers which have not only been part of the HTF legislation from the beginning, but which plaintiffs conceded they do not challenge. (R p. 13 ¶ 20) Plaintiffs therefore do not present a claim which fits within the derivative standing mold.

Additionally, there is no authority whatsoever for the application of derivative standing where, as here, the dispute involves the transfer of money in the State Treasury from one fund to another rather than the payment of money to a separate entity or failure to recover money from a separate entity. Surely, derivative standing should not be expanded to encompass whether money properly belongs in one state account rather than another or to one state agency rather than another. Derivative standing, as to the State, surely must apply when the State's money is paid out to non-State entities or when the State fails to recover from non-State entities, and no such situation exists here.

Nor can plaintiffs show that they have met the criteria for pursuing litigation as taxpayers on behalf of the government. This Court said in *Branch* that, in order to pursue a derivative standing suit, plaintiffs "must allege *facts sufficient to establish the existence* of" "a demand on and refusal by the proper authorities to institute proceedings" or that such a demand would be futile. *Branch*, 233 N.C. at 626, 65 S.E.2d at 126-27. Plaintiffs argue that they alleged such facts. In fact, plaintiffs made only vague allegations which do not identify any specific authority to whom objections were made, how the objections were made, what, if any, specific requests for action were made, and exactly what the response was. *See* R p. 10 ¶ 8, R p. 9 ¶ 5b, R p. 10 ¶ 8.

Plaintiffs argue that the allegations of the verified complaint must be taken as true and that their allegations are unrebutted. The problem for plaintiffs is that the standard requires that specific facts be alleged to show the existence of the foundational requirements for a plaintiff to sue on a derivative standing basis. In part, their allegations fail because they are conclusions or factual deductions that need not be accepted as true. *Cf. Lloyd v. Babb*, 296 N.C. 416, 427, 251 S.E.2d 843, 851 (1979). In part, their allegations fail because they do not provide any specificity at all to "establish the existence of one or the other of" the alternative methods of demonstrating the necessary base for a derivative standing lawsuit. *Branch*, 233 N.C.

at 626, 65 S.E.2d at 126-27. Without plaintiffs' specifying from what authorities they allegedly requested corrective action, what the specific objections or requests were and how they were made, what the specific response was or the circumstances of any failure to respond, it is impossible for this or any other court to determine whether the proper demands were made to the proper authorities and whether there was a sufficient refusal and failure to respond for plaintiffs to go forward. Even taking their factual allegations as true, without the conclusions made therefrom, plaintiffs have not shown the existence of either means of pursuing derivative standing.

Plaintiffs argue to this Court that "the State presented no evidence contradicting the Plaintiffs' allegation regarding a demand on the Attorney General to take action and/or the utter futility of such a demand." (Pl.'s Br. at 27) There is no evidence before this Court of any appropriate demand on the Attorney General. Plaintiffs attempted to offer an affidavit by plaintiff Goldston, at and after the summary judgment hearing; however, the evidence was ruled inadmissible because it was untimely. (R pp. 53-55; *see also* R pp. 42-46, 47-49) Although plaintiffs assigned error to the exclusion of the additional evidence (R p. 3), they did not argue in their brief before the Court of Appeals that the exclusion was erroneous. As a result, that assignment of error was abandoned. N.C. R. App. P. 28(b)(6) (2006). Consequently, the Court of Appeals properly determined that the affidavit could not be considered.

*Goldston*, 618 S.E.2d at 789-90. Plaintiffs' suggestion that defendants failed to rebut such evidence absolutely ignores the fact that the affidavit was untimely and never entered into evidence. Thus, there was no opportunity for the defendants to respond. Moreover, the affidavit is insufficient to support derivative standing in that it apparently references a conversation in which plaintiff *Goldston* says he "asked [the Attorney General] to please check into the legality of taking money from the Highway Trust Fund." (R p. 44 ¶ 4) Even this evidence does not indicate that plaintiffs asked the Attorney General "to institute proceedings," which is essential to a demand intended to establish a foundation for derivative standing. *Branch*, 233 N.C. at 626, 65 S.E.2d at 126.

As this Court has observed, "[t]he law takes cognizance . . . of the disruptive tendency of officious intermeddling by taxpayers in matters committed to the decision of public officers." *Branch*, 233 N.C. at 625, 65 S.E.2d at 126. Plaintiffs seek to do just that – interfere with the decision-making entrusted by our Constitution to the Governor and the General Assembly. This Court should not accept plaintiffs' invitation to expand the concept of standing so that taxpayers could sue to challenge virtually any decision or action by the legislative and executive branches, regardless of whether those decisions are fully executed, without any direct or specific harm to the plaintiffs. In plaintiffs' view, any governmental action may be challenged, so long

as money is involved, as it almost always is in governmental actions. Plaintiffs', and *amicus curiae's*, notions of standing presented in this case would permit any taxpayer to roam through the actions of the government and challenge any of them that involve, or at some point did involve, the taxing of citizens or the spending of money in any way. Truly, the courts would be issuing those advisory opinions which "it is no part of the function of the courts to issue," *Goldston*, 618 S.E.2d at 789 (quoting *Wise*, 357 N.C. at 408, 584 S.E.2d at 740), while simultaneously facilitating "the disruptive tendency of officious intermeddling by taxpayers in matters committed to the decision of public officers." *Branch*, 233 N.C. at 625, 65 S.E.2d at 126. This Court should reject plaintiffs' and *amicus curiae's* expanded theories of standing and affirm the decision of the Court of Appeals affirming the granting of summary judgment to defendants.

## CONCLUSION

For all the reasons discussed above, this Court should affirm the Court of Appeals' judgment affirming the superior court's grant of summary judgment to defendants based on plaintiffs' lack of standing to pursue this action.

Respectfully submitted this the 13th day of June, 2006.

ROY COOPER
Attorney General

Electronically Submitted,
Grayson G. Kelley
Chief Deputy Attorney General
State Bar No. 8349
gkelley@ncdoj.gov

Electronically Submitted,
John F. Maddrey
Assistant Solicitor General
State Bar No. 8890
jmaddrey@ncdoj.gov

Electronically Submitted,
Norma S. Harrell
Special Deputy Attorney General
State Bar No. 6654
nharrell@ncdoj.gov

N.C. App. R. 33(b) Certification: I certify that all of the attorneys listed above have authorized me to list their names on this document as if they had personally signed.

N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6900
Fax: (919) 716-6763

## CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing DEFENDANT-APPELLEES' NEW BRIEF 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

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

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

Julia F. Youngman
Thomas H. Segars
ELLIS & WINTERS, LLP
Post Office Box 33550
Raleigh, NC 27636

Robert F. Orr
NORTH CAROLINA INSTITUTE
FOR CONSTITUTIONAL LAW
225 Hillsborough Street
Suite 280
Raleigh, NC 27619

This the 13th day of June, 2006.

Electronically Submitted
Norma S. Harrell
Special Deputy Attorney General