

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 05-CVS-17197

CHARLES HEATHERLY; THOMAS SPAMPINATO;)
W. EDWARD GOODALL, JR., PAUL STAM;)
WAKE COUNTY TAXPAYERS ASSOCIATION;)
and THE NORTH CAROLINA FAMILY POLICY)
COUNCIL,)

Plaintiffs,)

WILLIS WILLIAMS; NORTH CAROLINA FAIR)
SHARE; and NORTH CAROLINA COMMON SENSE)
FOUNDATION,)

Proposed Plaintiff-Intervenors,)

v.)

STATE OF NORTH CAROLINA; CHARLES A.)
SANDERS, BRYAN E. BEATTY, LINDA)
CARLISLE, ROBERT A. FARRIS, JR., JOHN)
R. MCARTHUR, JIM WOODWARD, and ROBERT)
W. APPLETON, Members of the North)
Carolina Lottery Commission, in their)
Official capacity; NORTH CAROLINA)
LOTTERY COMMISSION; THOMAS N. SHAHEEN,)
Executive Director of the North)
Carolina Education Lottery, in his)
Official capacity; MICHAEL F. EASLEY,)
Governor of the State of North)
Carolina in his official capacity,)
RICHARD H. MOORE, Treasurer of the)
State of North Carolina, in his)
official capacity,)

Defendants.)

COPY

Transcript of proceedings taken in the
General Court of Justice, Superior Court Division,
Wake County, North Carolina, at the March 20, 2006
Civil Session before the Honorable H. Hight,
Judge Presiding.

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APPEARANCES:

ROBERT F. ORR, ESQUIRE
North Carolina Institute for Constitutional Law
Raleigh, NC
On behalf of the Plaintiffs

JACK HOLTZMAN, ESQUIRE
North Carolina Justice Center
Raleigh, NC
On behalf of the Plaintiff-Intervenors

NORMA S. HARRELL, ESQUIRE
SPECIAL DEPUTY ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
Raleigh, NC
On behalf of the Defendants

Reported by:
Gina M. Macchio, RPR, CSR
Official Court Reporter
Tenth Judicial District

1 (The proceedings were commenced in open court at 10:15
2 a.m.)

3 THE COURT: We'll take up the matter of Charles
4 Heatherly, Thomas Spampinato, W. Edward Goodall, Jr.; Paul Stam
5 and Wake County Taxpayers Association and North Carolina Family
6 Policy Counsel versus Willis Williams; North Carolina Fair Share
7 and North Carolina Common Sense Foundation versus State of North
8 Carolina, Charles Sanders, Bryan Beatty, Linda Carlisle, Robert
9 A. Farris, Jr., John R. McArthur, Jim Woodward, Robert B.
10 Appleton, North Carolina Lottery Commission, Thomas N. Shaheen,
11 Mike Beasley Easley, Richard Moore.

12 Counsel, you all did real well and gave me a lot of
13 reading material, which I read. So if you've got anything in
14 addition to that you want to present, more argument, I'd be glad
15 to hear it. I don't think I'll hear much else, I think I know
16 where you are.

17 Yes, sir.

18 MR. ORR: Your honor, there are a couple of minor
19 procedural matters.

20 THE COURT: Moving to amend.

21 MR. ORR: Yes, sir,

22 THE COURT: Not objected to.

23 MR. ORR: Correct.

24 THE COURT: Allowed.

25 MS. HARRELL: Thank you, sir.

1 THE COURT: Is that correct?

2 MS. HARRELL: Well, Your Honor, I told Plaintiffs'
3 counsel we would not object to the amended complaint. I'm a
4 little concerned now that the way it's done, they've got an
5 entirely new complaint, we don't have an answer.

6 THE COURT: You're fine.

7 MS. HARRELL: Okay. Would it be appropriate for me to
8 make a motion that in the event we need to follow this up with
9 something in writing, the Defendants would answer the amended
10 complaint in the same manner, except that they would admit that
11 Plaintiff Spampinato has --

12 THE COURT: Not paid tax.

13 MS. HARRELL: Right.

14 THE COURT: Okay.

15 MS. HARRELL: Yes, Your Honor.

16 THE COURT: Yes, sir.

17 MR. ORR: With the Court's permission, could we move
18 forward then with the brief arguments --

19 THE COURT: Yes, sir.

20 MR. ORR. --- on the merits?

21 THE COURT: Yes, sir.

22 MR. ORR: Thank you. I'll defer any statements on the
23 laches argument, since that I believe the State has the burden
24 of proof in that regard. And I'll certainly be mindful, Your
25 Honor, of the fact that you have been very patient in listening

1 to our earlier arguments and to the fact that we have submitted,
2 both sides, extensive briefing on the matter. I would like to
3 begin, though, where I began before and that is this suit's not
4 about the lottery. It's about very specific constitutional
5 issue involving two specific constitutional provisions, Article
6 2, Section 23 and Article 5, Section 7. There are no issues at
7 fact as Your Honor determined in the scheduling order, and that
8 we're here on the merits pursuant to your instructions.

9 Now, the State concedes I think two important points
10 that go to the merits of the case. First of all, the State
11 acknowledges that the Lottery Act was not enacted in accordance
12 with the procedures set out in Article 2, Section 23. And
13 secondly, that literal compliance with the language in Article
14 2, Section 23 is a condition precedent and one which must be
15 performed in its entirety before a bill can ever become law. So
16 those two points simply are not at issue. We're here to
17 determine whether the Lottery Act falls within the provisions of
18 these constitutional provisions, and the primary argument, of
19 course, would be on Article 2, Section 23.

20 Now, the role that the issue that we have to address
21 is simply interpreting this constitutional provision. And as
22 Your Honor's well aware, which we have briefed extensively, the
23 principle's constitutional interpretation are accepted, but I
24 would like to at least read one small quote from probably the
25 most recent decision of our State Supreme Court which says the

1 constitution should be given not essentially a literal, narrow
2 or technical interpretation, but one based upon broad and
3 liberal principles designed to ascertain the purpose and scope
4 of its provisions. That was in the North Carolina School Board
5 case decided in 2005 in an opinion written by Justice Parker,
6 now Chief Justice.

7 And in looking at the intent of the framers, which is
8 the primary responsibility we have in discerning the meaning of
9 this constitutional provision, we have to take at least a very,
10 very brief examination of the historical context. And this
11 provision in the constitution, now Article 2, Section 23, was
12 first put in our State Constitution in 1868. And if you
13 consider the historical context, the State of North Carolina and
14 its people were economically devastated as a result of the Civil
15 War; you had enormous political and social changes in the
16 elected officials, in the governance of the state, and as a
17 result the framers of that constitution, in 1868, made a very
18 specific determination that on a special category or area of
19 legislation that a very specific process and procedure would
20 have to be used.

21 And we cited at length in our case and I want to go
22 back through those cases, the Bank versus Commissioners and the
23 Commissioners of Stanley County versus Snuggs, 1897 case, they
24 talk about the importance of these provisions in that context.
25 Now, what did they do? They carved out from all of the various

1 types of legislation that the General Assembly could enact, a
2 special determination for revenue bills. And within that
3 general framework there were three other -- there were three
4 categories within that. First of all, any revenue that was
5 generated by the imposition of any kind of tax. Secondly, was
6 where revenue was generated because of a pledge of the faith of
7 the State, either directly or indirectly, for any kind of debt.
8 And thirdly, for the credit of the State. And as a result, the
9 General Assembly was required in enacting this type of
10 legislation to go through a very specific process.

11 Now, historically since 1776 three readings were
12 required for any piece of legislation. And as Professor Orth
13 notes in his book, that was to make sure that there was no hasty
14 or ill-advised passage of legislation, but the constitutional
15 framers in 1868 went beyond that. And they required that there
16 be a reading on three separate or different days, and this
17 expanded the purpose to limit any kind of spur-of-the-moment
18 types of deliberation. And secondly, they required that on
19 second and third reading, that the ayes and the nays be
20 recorded.

21 Now, there has been very little attention given to
22 this aspect of the case by the State, but as conceded, on the
23 third and final reading, in both the House and the Senate, the
24 vote was not recorded. There was a very specific reason for
25 requiring that, or actually two reasons. One is accountability,

1 it allows the public and the press and everyone to know who
2 voted for a bill and who voted against a bill. And secondly,
3 it's the reliability of the vote. If you have the specific
4 votes recorded in the journal then you know that a bill passed.
5 And I would certainly submit in the context of the facts of this
6 case, where third reading was taken on a voice vote and what is
7 clearly an extraordinarily close and hotly contested piece of
8 legislation, in fact, in the Senate it was tied, if Your Honor
9 will recall. The importance of recording the ayes and the nays
10 is so that we all know for a fact certain that the legislation
11 was passed by a majority of the members of that particular
12 House. At this point all we really know is that there was a
13 ruling in the House by the presiding officer and a ruling in the
14 Senate by the presiding officer that the bill passed on third
15 reading by voice vote. Now, so that's the historical context
16 that we have to consider in interpreting the constitutional
17 revision.

18 Now, the sole question is whether the Lottery Act
19 comes within this specific constitutional provision. And the
20 first sort of over-arching reason is that it's a revenue bill.
21 Now, we know that the caption or heading on this constitutional
22 provision is revenue bills. And we know from the very language
23 of the Lottery Act that its expressed purpose was to generate
24 revenue for the funding of public education. And throughout in
25 various sections that we've set out in our brief, Your Honor, it

1 clears talk about raising revenue. And I would certainly contend
2 that in this broad application of the constitutional provision,
3 the Lottery Act fits within the type of legislation that the
4 framers of the constitution anticipated would have to follow
5 this particularly -- this particular process. Now --

6 THE COURT: The word revenue is not in Article 2,
7 Section 23.

8 MR. ORR: That is correct, Your Honor. It is only in
9 the caption of the bill and there is --

10 THE COURT: As passed by the General Assembly.

11 MR. ORR: I'm sorry, Your Honor,

12 THE COURT: The revenue is where?

13 MR. ORR: The revenue, the caption of the
14 constitutional provision says revenue bills. And then the body
15 of the constitutional provision does not, as Your Honor
16 indicated, use the word revenue. But in the process of
17 interpreting statutes or constitutional provisions, if there is
18 any -- any lack of clarity in the actual application of the
19 specific language of the constitutional provision, then it is
20 permissible under established case law to look at the caption or
21 title of the bill to get a sense of what the purpose is.

22 Now -- and there's a good bit of case law that -- that
23 equates this constitutional provision with revenue bills. And,
24 of course, revenue appears extensively in the Lottery Act. So,
25 again, from a general standpoint, it's our position that the

1 Lottery Act falls within the general intent and purpose of this
2 constitutional provision. But specifically, as Your Honor
3 knows, the Lottery Act and -- as we contend, imposes a tax. And
4 the language in the constitutional provision, Article 2, Section
5 23, talks about the imposition of any tax.

6 Now, exactly how does this lottery revenue generating
7 machine work? And for simplicity sake, I'll say it's a dollar
8 ticket. And a dollar is paid into the treasury for buying a
9 lottery ticket. Fifty percent or fifty cents of that dollar
10 goes into a pool which is used to generate winnings for the
11 however many people are successful in their scratch-off game or
12 other type of lottery game. Eight percent or eight cents of
13 that dollar goes for the expenses of operating the lottery. And
14 seven percent or seven cents go to lottery retailers who are
15 actually out there selling these tickets. Well, 35 percent or
16 35 cents out of every dollar goes for the various educational
17 purposes that the legislative act sets out.

18 Now, we have heard a great deal, Your Honor, that this
19 is an education lottery. And if this is an education lottery, I
20 would submit to you, this 35 percent is the education tax. We
21 fund public education in North Carolina through tax revenue. At
22 the state level a variety of types of taxes generate revenue
23 that go to fund our public schools. At the local level ad
24 valorem taxes go to fund a portion of our public school
25 requirements. The very purpose of this act, the very purpose of

1 that 35 percent figure is to fund public education. State
2 concedes this. So it is clearly a tax, an education tax,
3 because there's nothing involved with the lottery other than
4 this 35 percent that has anything to do with education.
5 Everything is key to that 35 percent. That's the very purpose
6 of the legislation. That's the very purpose of the entire
7 lottery process, and we would submit that it constitutes a tax.
8 It has no purpose in the operation or functioning of the lottery
9 other than that. And the State concedes, as I indicated, that
10 the purpose is to fund the general governmental responsibilities
11 that are constitutionally mandated and that is the various
12 aspects of our public schools.

13 Now, North Carolina case law supports extensively a
14 conclusion and a determination that that 35 percent is, in fact,
15 a tax. The State Farm versus Long case, which adopted the San
16 Juan test, focuses -- there are three prongs of that, but it
17 focuses primarily on the purpose of the statute and the ultimate
18 use of the revenue. Now, that -- that concept of determining is
19 this a tax, set out in State Farm, is found in a number of other
20 North Carolina cases. In Hart, in Turnpike Authority, in
21 references in the cases to two U.S. Supreme Court Cases,
22 Nebecker and Millard, all of which focus on in determining is
23 this a tax, on the purpose of the statute and the use of the
24 revenue. And here there is no question that the purpose of the
25 statute is to raise money for public education. That's in the

1 legislation. It's in all of the public and political
2 pronouncements about the legislation. That is the purpose, the
3 general governmental purpose, and that's -- clearly meets the
4 test as set out in this long line of cases that we have briefed
5 extensively for Your Honor.

6 Now, the State, as best I could tell, relies on some
7 utility cases and user fee cases. And we would submit, Your
8 Honor, that they're simply not applicable and I think in most
9 of them they come under different constitutional provisions. I
10 don't recall that there was one dealing with the Article 2,
11 Section 23 process that we have. The operation of a utility by
12 municipality or some governmental entity is obviously
13 considerably different than what we have here in the operation
14 of a lottery.

15 The State also places great reliance on the benefit
16 that the purchaser of the lottery ticket gets, and the
17 voluntariness of that purchase. And we think that neither of
18 these items dictate an answer in favor of the State's position,
19 in part, to deal with benefits. Any purchase that a citizen of
20 North Carolina makes, whether it's a car, a shirt, whatever, you
21 receive a benefit but you pay a tax on that. And the simple
22 fact that you receive a benefit does not mean that somehow the
23 tax that you pay is not a tax.

24 Now, while we would submit that there certainly in
25 regard to the 35 percent, there is no specific benefit generated

1 to the purchaser of a lottery ticket, whatever benefit might be
2 comes in the general governmental framework of the education
3 spending. And whatever other minimal benefit that the purchaser
4 of a ticket might get, and certainly based upon the odds of
5 winning in a lottery, that benefit's pretty slim, the concept of
6 that there's some, you know, some benefit and therefore this
7 isn't a tax, simply is without any merit.

8 Now, voluntariness; the State says, oh, well, this is
9 all voluntary. You don't have to buy a lottery ticket. Well,
10 that's correct, you don't have a buy a lottery ticket. You
11 don't have a buy a car. You don't have to buy a shirt at Belk.
12 You don't have to make any other purchase. But if you chose to,
13 you pay a tax. And we would submit to Your Honor that when a
14 citizen of North Carolina or somebody from out of state buys a
15 lottery ticket in North Carolina, they are going to be required
16 to pay that 35 percent tax. You do not and cannot buy a
17 sixty-five cent lottery ticket. You can't say I'm only going to
18 pay the money into the pool for the winnings and covering the
19 expenses you have to pay that 35 percent. There is nothing
20 voluntary about that. And we would submit therefore, Your
21 Honor, that any utilization of this concept of voluntariness as
22 to making that 35 percent something other than it is, simply
23 does not hold any credence.

24 Now, in conclusion Your Honor, it would be our
25 position that on the broad general intent of this constitutional

1 provision dealing with revenue bills, the act at question, which
2 is a revenue raising bill, sole purpose, falls within that
3 purview. We would say specifically, as I have argued, that the
4 case law, the facts of the operation of the lottery, mandate
5 that the 35 percent is a tax. They may not call it a tax in the
6 legislation, it is without any question, it has all the
7 characteristics of a tax. And that is the very purpose of the
8 tax, to support public education. So on that grounds, we would
9 contend to Your Honor that the Lottery Act is unconstitutional
10 in that it failed to follow the very express process required
11 under Article 2, Section 23.

12 Now, we did raise two other issues that I want to talk
13 about very briefly, Your Honor. I appreciate your patience.
14 And one is in Article 2, Section 23, one of the categories is
15 that money is raised, revenue is raised, and the faith of the
16 State is pledged directly or indirectly for a debt. Now, I
17 would submit to Your Honor the whole process here of raising
18 this money through the lottery is that the State sells tickets,
19 little tickets with pictures of lighthouses and cardinals on it.
20 And they get money back for it. And that money comes into the
21 state treasury and the State directly or indirectly pledges that
22 the winnings, whether it's a five dollar scratch-off winner or a
23 thousand dollar jackpot or a multi-million dollar pay out, that
24 the State is going to make sure that those winners are paid. It
25 is this device, this means of raising revenue that again falls

1 within the very specific provisions of the constitutional
2 provision at issue here. And we would submit, in addition to
3 the argument about 35 percent being a tax, that this is further
4 evidence that the Lottery Act violates Article 2, Section 23.

5 And finally, Article Five, Section Seven says you
6 don't take money out of the state treasury except by
7 appropriation, except by lawful appropriation. The \$10 million
8 loan authorized in the act is what's funding the lottery at this
9 point. Salaries are being paid from it. Leases are being paid
10 from it, whatever else they're paying from it, it's all by
11 virtue of a loan and not by a lawful appropriation. The General
12 Assembly could have very easily said we appropriate \$10 million
13 for the start-up of the lottery. They didn't do it, and the
14 constitution requires them to do it.

15 In conclusion, Your Honor, all of this could have been
16 solved and resolved had the General Assembly and the House and
17 the Senate taken one extra day, passed the bill in the House, or
18 to pass it in the Senate. It could have been resolved by making
19 the \$10 million start-up money an appropriation instead of a
20 loan. They failed to do that. A ruling that the Lottery Act is
21 unconstitutional does not mean that North Carolina will never
22 have a lottery. It doesn't necessarily mean that on March 30th
23 they can't sell scratch-off tickets. The solution or a
24 resolution, arguably, is for a special session of the General
25 Assembly to come back, have a bill introduced, have it follow

1 the proper constitutional process, and then if it's the will of
2 the elected officials of this state to enact a new Lottery Act,
3 then so be it. But we simply cannot let an important process
4 mandated in our state constitution go by the board simply
5 because of the circumstances surrounding the votes on that day.

6 Members of the General Assembly take an oath and that
7 oath says nothing about convenience or expediency or having to
8 succumb to political pressure. The oath before they take their
9 positions as a member of the General Assembly requires them to
10 support, maintain and defend the constitution of our state. And
11 that is the position of the Plaintiffs in this case, that the
12 constitution was violated when this Lottery Act was enacted.
13 And we would respectfully request the Court, pursuant to the
14 uniform declaratory judgment act, to declare the Lottery Act
15 unconstitutional.

16 Thank you, Your Honor. If you have any questions,
17 obviously be happy to answer them.

18 THE COURT: Yes, sir. Care to be heard?

19 MR. HOLTZMAN: Other than, Your Honor, able argument
20 of Plaintiff's counsel speaks to what we would be arguing, in
21 fact, have argued in our joint brief. Just wanted to bring to
22 the Court's attention that it's our understanding that the State
23 is not contesting one of the facts that are alleged in the brief
24 as to the taxpayer status of Mr. Williams. That was put in
25 their brief, and I just wanted to highlight that to the Court,

1 that in fact, Mr. Williams filled a tax joint return with his
2 wife. It's my understanding that the State is not contesting
3 that. I just wanted to bring that fact out to the Court's
4 attention.'

5 THE COURT: Thank you, sir.

6 Yes, ma'am.

7 MS. HARRELL: Your Honor, to clarify as to Plaintiff
8 Intervenor's complaint, the question -- the problem I don't
9 think was that Mr. Williams filed a joint tax return. The
10 problem is that there was more than one Willis Williams, and he
11 was not sufficiently identified in the complaint for us to know
12 which one was the Plaintiff-Intervenor. So we would stipulate
13 that we no longer contest the status of Mr. Williams,
14 Plaintiff-Intervenor, as the taxpayer.

15 In recognition of the Court's comments concerning
16 having read the briefs and being fully aware what our argument
17 is, in view of the Plaintiff's argument, Defendants would simply
18 say that we believe we have shown that the Plaintiff's action
19 should be barred by laches. That they were aware of the Lottery
20 Act and their contention that it violated Article 2, Section 23,
21 not only by the time it was enacted, but Plaintiff Stam's
22 affidavit that was previously submitted indicated that that was
23 a concern back in April before it was enacted, finally enacted
24 on August 30th, that they were fully aware of the issue, they
25 failed to take any action, they didn't file a complaint for

1 three and a half months and didn't seek any kind of injunctive
2 relief for a couple weeks after that. Meanwhile, the State
3 acted in ways that would prejudice it. The Plaintiffs were
4 successful at this point. People were hired; people such as the
5 director, Mr. Shaheen, moved from other states to accept
6 employment. Leases and contracts were entered into. Primary
7 vendor was selected and the contract entered into, a contract
8 was entered into with A. L. E. to provide various background
9 check services and other services. In other words, many, many
10 things were done. Money was expended, contracts and leases and
11 other commitments were made, and Plaintiffs could have avoided
12 that by filing suit earlier. They knew or should have known the
13 questions that they thought were at issue. Certainly by the
14 time the legislation was enacted they knew or should have known
15 that that was an issue they were concerned about months before.
16 And that by falling to act sooner, their actions should be
17 barred by laches.

18 With regard to the claims on the merits Your Honor,
19 Plaintiffs have argued in their briefs and to the Court here
20 today that there are principles in constitutional construction
21 or interpretation that the Court should consider. This --
22 Defendant's view would be that their choice of principle is
23 selected. There is a very basic principle in constitutional
24 construction or interpretation or constitutional decision-making
25 that the Plaintiffs have not mentioned. That is, statutes are

1 presumed constitutional. Why? Because our constitution leaves
2 the power that is not otherwise prohibited to the people to act
3 through their representatives. Their representatives have acted
4 here. And when the people have acted through their
5 representatives, anyone who challenges those actions has a heavy
6 burden of proving the unconstitutionality of the legislation
7 that they challenge. Otherwise the legislation must be upheld,
8 because it is the people's legislation. And those who disagree
9 for policy or political reasons or other reasons, those who
10 disagree legally have the burden of showing that the people did
11 not act constitutionally through their representatives. We
12 submit that the Plaintiffs have not done that here. They cannot
13 do that, and that the legislation was enacted in a
14 constitutional manner and should be held by this Court to be
15 constitutional in all respects.

16 Now, three of Plaintiffs' complaints that are
17 presently before the Court of course dealt with Article 2,
18 Section 23. Plaintiff spent a lot of time talking about the
19 article -- the section captioned revenue bills. Of course, the
20 relevant language is that no law shall be enacted to raise money
21 on the credit of the State, or to pledge faith of the State
22 directly or indirectly for the payment of any debt or to impose
23 any tax upon the people of the state or to allow cities or
24 counties to do so, unless the conditions under the provision
25 have be met.

1 As Plaintiffs say, the State does not contend that the
2 Lottery Act itself, as opposed to the budget act as amended as
3 an added provision, but defendant's do not contend that the
4 Lottery Act itself was enacted in compliance with the
5 requirements of Article 2, Section 23. Plaintiff say that the
6 Defendants haven't paid much attention to the second -- to the
7 part of the requirements that says that the ayes and nays in the
8 second and third reading still have been entered under the
9 journal. That's because you get first to the part that says it
10 has to be read three separate times in three separate days, and
11 we all know that it wasn't. So we don't get there.

12 But more importantly, Your Honor, we don't get to any
13 of those criteria. And that would be the Defendant's position,
14 because the Lottery Act is simply not a bill and/or legislation
15 covered by Article 2, Section 23. I would submit that from our
16 standpoint, Defendant's believe that Plaintiffs have advocated
17 most strongly for their view that the Lottery Act violates
18 Article 2, Section 23, provision that no law shall impose tax
19 upon the people of the State unless it is enacted in compliance
20 with that provision.

21 Your Honor, there simply is no tax involved here.
22 Regardless of whether money collected for the lottery from
23 lottery tickets is used for education purposes or anything else,
24 the State has not imposed a tax on anyone. That is the language
25 of the constitutional provision, that no law should be enacted

1 to impose any tax upon the people of the State unless it's
2 enacted according to provision. There is no tax imposed. You
3 can buy a lottery ticket if you want to. You can buy it if you
4 don't. You don't have to buy it. If you buy it, you get a
5 chance to win money. And the State, in effect, keeps some of
6 that money for what is in effect profit that can be used for the
7 purpose the State chooses in this case for the purposes of
8 education. As Professor Orth notes in his book that the parties
9 have cited several times to Your Honor, a tax is a forced
10 contribution to government. No one is forced to contribute to
11 government here; you don't have to buy a lottery ticket. You
12 don't have to buy a lottery ticket or contribute to the cost of
13 the lottery ticket in order to be a citizen in good standing in
14 this state. You don't have to buy a lottery ticket.

15 Now, Plaintiffs counsel says, well, but there is a tax
16 imposed if you engage in voluntary acts of purchases such as
17 when you purchase a car, for example, and therefore, the fact
18 that it's a voluntary purchase doesn't make it, this, any
19 different. There is a difference there. If I buy a car from a
20 car dealer, I've engaged in a voluntary transaction with a car
21 dealer. The tax is imposed on me, and the car dealer, by the
22 government, is not part of the basic voluntary transaction.
23 It's a external imposition by the government forcing the
24 purchaser to contribute to the government.

25 Here we have a voluntary transaction between the

1 purchaser of a lottery ticket and the North Carolina lottery.
2 And nothing is imposed. It's simply part of the sale price,
3 includes money which would be used like the profit of a car
4 dealer for its purposes. We use -- looks like profit, but in
5 this case, for the support of the government, in particular for
6 the support of education throughout the state. Plaintiffs have
7 implied in their briefs and to the Court that certain cases they
8 have cited, San Juan Telephone Company case, the North Carolina
9 Court of Appeals case, State Farm Mutual Automobile Insurance
10 Company V. Long, they say that there are certain tests for
11 determining whether charging a tax or a fee. And part of it is
12 whether the revenue goes to the general government or for a
13 limited purpose. Those lines -- that line of cases, Your Honor,
14 does not address the issue before this Court. That line of
15 cases only deals with trying to decide whether a regulatory
16 charge is a regulatory fee or a tax. As the Court of Appeals
17 noted in the State Farm case, the key issue here is whether the
18 regulatory charge is a tax.

19 We don't have a regulatory charge here. This is not a
20 regulatory case. This is not a regulation. This is the
21 creation of a lottery dealing with voluntary transactions
22 between purchasers of lottery tickets and the lottery, and
23 vendors within their contract. So the State Farm case, the
24 other cases Plaintiffs have talked about along those lines are
25 simply irrelevant to this case.

1 Now, the courts of our state have defined revenue
2 bills as things that levy tax in the strict sense of the word.
3 This case, and the Lottery Act, does not levy a tax in the
4 strict sense of the word. In the Turnpike Authority case, the
5 court said taxes are -- Plaintiffs argue that the Turnpike
6 Authority case, which says tax levied for the support of the
7 government, also says tolls are compensation for the use of
8 another's property or improvements. We would point out to the
9 Court an important part of that is that taxes are levied. There
10 is no levy here. Also, where in the Turnpike Authority case, of
11 course, we pointed out the court said that the purchase of toll
12 is a voluntary act, or using a toll road is a voluntary act,
13 just as we would say that purchasing a lottery ticket is a
14 voluntary act here. The court has, our Supreme Court has also
15 said this court has defined a tax as a charge levied and
16 collected as a contribution to the maintenance of the general
17 government. It is imposed upon the citizens in common at
18 regularly recurring periods for the purpose of providing a
19 continuous revenue. Again, we would say these case all show
20 that a tax, when it's levied, is imposed. That's not what we
21 have here.

22 The significant thing here is we have a transaction
23 where the purchaser of a lottery ticket receives a benefit
24 different from that generally enjoyed by citizens. We've cited
25 to the Court several cases to that effect. One of the cases is

1 the Indiana Supreme Court Case Ennis V. State Highway
2 Commission. By the way, this is the case that our supreme court
3 was citing quoting from that Turnpike Authority case. The
4 Indiana Supreme Court says the payment of a tax is compulsory
5 and not optional, and entitles the taxpayer to receive nothing
6 in return, other than the rights of government which are enjoyed
7 by all citizens alike. But where there is something that is
8 obtained that is different from a benefit different from what
9 citizens generally enjoy, then we do not have a tax.

10 In the Town of Tarboro V. Forbes, which goes back to
11 1923, our Supreme Court was addressing a different
12 constitutional provision, but a constitutional provision dealing
13 with tax. And the court was addressing whether an assessment,
14 property assessments are tax. The Court said that it is true
15 that local assessments may be a species of tax, and that the
16 authority to levy them is generally referred to the taxing
17 power, but they are not taxes within the meaning of that term as
18 generally understood in constitutional restrictions and
19 exemptions. They are not levied and collected as a
20 contribution to the maintenance of the general government, but
21 are made a charge upon property on which are conferred benefits
22 entirely different from those received by the general public.
23 There not imposed upon the citizens in common at regularly
24 recurring periods for the purpose of providing a continuous
25 revenue, but upon a limited class in return for a special

1 benefit.

2 What is this telling? This tells us our courts, going
3 way back, have recognized, one, when we talk about particular
4 provisions in the constitution that deal with taxes we are
5 talking about a tax in the strict sense, just as the court said
6 in the Hart V. Commissioners case. Two, that a tax is not
7 something where there is an exchange between the citizen and the
8 government for benefit different from what citizens generally
9 receive. That's why the street assessments are not tax. Why
10 our Court of Appeals recognized that, for example, landfill fees
11 charged by a local government are not taxes for the same reason,
12 because a tax is levied and collected as contribution in
13 maintenance of the general government imposed upon the citizens.
14 Since the purpose is providing continuous revenue, the landfill
15 fees in that case, sewer charges, that kind of charges are tolls
16 or rent for benefits received by use of the landfill.

17 So we would say, Your Honor, as we've alleged in our
18 brief, that there's a distinction between taxes and charges for a
19 particular benefit. And that's what the lottery does; it
20 charges a fee for the benefit you chose voluntarily to seek,
21 which is the possibility of winning money from the lottery. And
22 the charge is not a tax. Plaintiffs would say, well, the part
23 that goes for the education is. Appears that really what
24 Plaintiff objects to is some of the money goes to education.
25 They wouldn't object if all the money went to the expenses of

1 the lottery. At least from the argument that the Lottery Act
2 imposes a tax, which we've cited to you several cases, Your
3 Honor, cited them in our brief where courts have looked at
4 things like utility fees and things of that sort, trying to
5 decide whether a particular charge is a tax. One of them was
6 from the Eastern District of North Carolina Federal Court,
7 dealing with the City of Rocky Mount and dealing with whether
8 utility charges were taxes. So that the Plaintiffs could
9 complain about unequal taxation under Article 5, Section 2(1) of
10 the North Carolina Constitution, the Federal Court said no,
11 there is no tax here. It doesn't matter that the City of Rocky
12 Mount had explicitly, expressly set the utility rate high enough
13 to produce additional revenue so they can transfer to their
14 general fund for general governmental purposes, they
15 deliberately set the utility rates that would give them a
16 profit, closed quote, that they can then use for their general
17 government purpose, not to the money for utilities. It still
18 doesn't make the charge itself or any part of the charge, even
19 the profit component, to become a tax.

20 In the New Mexico court, Apodaca V. Wilson case we
21 cite in our brief, a tax is a tribute levied for the support of
22 government. A rate charged for a public utility service or
23 product is not a tax, but a price at which and for which the
24 public utility service or product is sold. Since the rate
25 charged is not a tax in its inception, ultimate use of surplus

1 funds derived therefrom for the support of municipal government
2 will not convert it into taxes or cause it to assume the nature
3 of taxes.

4 Plaintiff says, oh, utilities aren't relevant to this
5 case. Well, Your Honor, we think they are. They show the
6 analysis of a transaction between the government and an
7 individual where the individual is voluntarily purchasing
8 something from the government and getting a benefit different
9 from citizens in general. That is a much better analogy than
10 the regulatory case which plaintiff instead would argue to you.
11 And we think these cases show, Your Honor, that when an
12 individual makes a purchase from the government, whether it's
13 the lottery fund, the lottery commission, lottery itself, or
14 whether it's local government for utilities or other
15 possibilities, that when they make a purchase and when they pay
16 a charge for a benefit different from others, then that is not a
17 tax. And even a profit component, so-to-speak, is not, does not
18 convert the charges itself or any part of it into a tax. We
19 think there is case law that amply supports that.

20 We would urge Your Honor to find what we submit is
21 simple common sense; the lottery at does not impose a tax.
22 There's no tax there, just a charge for purchasing the ticket.
23 And when one gets free of all the arguments that both counsels
24 have made, we think that common sense tells you that we believe
25 that the law supports which is not paying a tax, you're buying a

1 lottery ticket. So we would ask the Court to rule that the
2 Lottery Act is not a tax and for that reason, is not required to
3 comply with Article 2, Section 23.

4 In addition, of course, the Plaintiffs have argued the
5 Lottery Act raises money on the credit of the State. And
6 pledges the faith of the State for payment of a debt. Again, to
7 amplify this, Your Honor, as Professor Orth noted, both those
8 phrases implicate borrowing; that is, securing money in the
9 present by promising future repayment, usually with interest.
10 We don't have that here, Your Honor. Plaintiff said at one
11 point most of the cases, just about all of the cases dealing
12 with this aspect of Article 2, Section 23 involve bonds. Why?
13 That's because bonds are involved when the government borrows
14 money and this section dealing with borrowing money. There's no
15 borrowing of money here. Instead the General Assembly said that
16 the commission shall be an independent self-supporting and
17 revenue raising agency of the state. It's independent and it's
18 self supporting. It has to support itself and its expense out
19 of its own revenue, except for that one loan, Your Honor, which
20 the General Assembly specified was for start-up expenses,
21 therefore it could not be used for other purposes.

22 So we would submit, Your Honor, and we've argued in
23 our brief that the Lottery Act in no way violates the provision
24 regarding the raising of money on the credit of the State,
25 pledging its faith for the payment of debts. And that we would

1 urge the Court to conclude that the Lottery Act does not fall
2 within the scope of Article 2, Section 23, therefore did not
3 have to be enacted according to their -- what we agree are
4 mandatory directives of that section for legislation to which
5 complies, but despite the absolutely mandatory nature of those
6 directives, they are irrelevant to legislation such as this,
7 which does not fall within the scope anymore than many, many
8 other pieces of legislation over the years that have simply said
9 that the State would pay money for something or other.
10 Therefore, we would urge the Court to -- offer Article 2,
11 Section 23 does not apply.

12 Finally, Your Honor, the Plaintiffs argue that the
13 Lottery Act authorizes the payment of money from the treasury
14 without the appropriation required by law in violation of
15 Article 5, Section 7. Your Honor, the Plaintiff's appearing to
16 say that the loan from the State to the lottery fund is a
17 violation of this provision. We would say first, Your Honor,
18 when you move money within the treasury, you are not drawing
19 money from the treasury. So simply a loan from the general fund
20 or some other fund within the treasury to the lottery fund could
21 not possibly violate that section.

22 Now, if you get to the point that you're arguing,
23 well, when they pay money out, based on that loan, then it
24 violates Article 5, Section 7, we say there is a procedure for
25 the payments, Your Honor. The General Assembly specified the

1 lottery fund is appropriated by the commission and may be
2 expended without further action of the General Assembly for the
3 purposes of operating the Commission and the lottery games.
4 Once the loan has transferred, it's part of the lottery fund and
5 the lottery fund is appropriate. We have cited several cases to
6 Your Honor from other states with almost identical
7 constitutional provisions in which we have included that the
8 kind of procedure that exists here is more than adequate to
9 satisfy such constitutional provision. So we would submit, Your
10 Honor, that the Lottery Act in no way violates or authorizes
11 violation of Article 5, Section 7. And yet again to quote
12 Professor Orth, the power with regards to Article 5, Section 7
13 he said the power of the purse is the exclusive prerogative of
14 the General Assembly. So the point of Article 5, Section 7, is
15 to make sure nobody's making payments that are not as authorized
16 by the General Assembly, because the General Assembly's entitled
17 to specify how state money shall be used. Where the General
18 Assembly does specify, Plaintiff's action would appear to be an
19 action that thwarts the decision of the General Assembly and
20 frustrates the purpose of Article 5, Section 7, rather than
21 enforce it.

22 So in conclusion, Your Honor, we would say that the
23 Lottery Act was enacted by the General Assembly, the people's
24 representatives, is presumed constitutional, and the Plaintiffs
25 have failed to overcome their burden of showing the act was

1 unconstitutional. Rather, the act does not impose a tax on the
2 people. The act does not involve the pledging of faith or
3 credit of the State for debt or any other purpose. Therefore,
4 it was not required to be enacted pursuant to Article 2, Section
5 23, nor does it violate Article 5, Section 7, because it does
6 not authorize the drawing of money from the treasury other than
7 by apportion made by law. Difficult to see how the General
8 Assembly can authorize payment, payment other than its directed.
9 Generally, we are taking about such cases -- about in such cases
10 about payments other than how the General Assembly directed. In
11 conclusion, Your Honor, we would say that the lottery act does
12 not violate any provision of the constitution plaintiffs' have
13 argued, or any other provision, and we would urge the Court to
14 rule that the Lottery Act is and was constitutionally enacted
15 and respectfully enter judgment for the Defendants in all claims
16 in this case. Thank you.

17 MR. ORR: If I could have five minutes.

18 THE COURT: Sure.

19 MR. ORR: Let me respond to the laches argument.

20 Obviously, no one knew for a fact certain what would transpire
21 in regard to the lottery provision until the last day that the
22 Senate acted on it, which was August 30th of 2005. Now, within
23 three and a half months we were able to bring everything
24 together to file this lawsuit in superior court. But prior to
25 that time, Your Honor, I would note that on November 17th of

1 2005, our organization, on behalf of prospective Plaintiffs,
2 served letters upon the chairman of the Lottery Commission, on
3 the representatives of the Attorney General's office, the State
4 Treasurer, raising the constitutional questions that are part of
5 this lawsuit, and requesting that they not proceed in expending
6 funds and entering into any kind of binding obligations until
7 this issue could be resolved. That was obviously ignored. I
8 would note that virtually every cent that the State has spent in
9 getting the lottery up to speed has come since that letter
10 was -- those letters were delivered, and the lawsuit filed. In
11 fact, Mr. Shaheen was not even hired as director until the
12 afternoon of November 17th, which was the day that we served
13 those letters. So obviously, from a time standpoint, the State
14 does not come in with clean hands and say, oh, we've spent all
15 this money, and look, you've brought this lawsuit now.

16 And obviously, Your Honor, in a case involving
17 substantial constitutional questions, it was necessary for a lot
18 of research to be done to make sure that our theories were
19 sound. And in anticipation of all of the defenses that the
20 State threw up, standing sovereign immunity, research had to be
21 done in that regard. And certainly, Your Honor, we think that
22 based upon all the case law as to what constitute laches and an
23 untimely and unreasonable time frame, we certainly moved as
24 expeditiously as any responsible legal organization could do in
25 bringing this lawsuit; three and a half months does not

1 constitute laches.

2 On the merits, four brief points. The State again talks
3 about forced contributions and that somehow this is all
4 voluntary. I reiterate the 35 percent is not voluntary, it has
5 to be paid and it goes to the general purpose of government,
6 public education. It's just like a gas tax; you pay your price
7 at the pump and the tax is included in it and that goes to the
8 State. So clearly the State is wrong in that regard. State
9 somehow, I'm not even going to dwell on it, that our objection
10 is to the fact that the money goes to education. I'd be happy
11 if all of it went to education, Your Honor, but the bottom line
12 is the purpose of the challenge is to the constitutionality of
13 the process and not where the money goes. The Rocky Mount case
14 it's -- you know, utility provides service; power, water, sewer,
15 whatever. A lottery raises revenue, you know, there's
16 absolutely no comparison there. A number of cases have been
17 cited by the State. We think that the North Carolina cases in
18 their treatment of what constitutes a tax based upon the purpose
19 of the legislation, the use of the money, should control. And
20 as to the State's argument that somehow this does not -- the
21 operation of the lottery does not result in obtaining money with
22 a promise to pay later, simply defies logic as to how the
23 lottery operates. The whole premises is the State obtains money
24 with a representation that somewhere down the line, some number
25 of citizens are going to be owed some amount of money. And so

1 clearly, in that context, money is being obtained with a promise
2 to pay at a subsequently date.

3 So again, in conclusion, Your Honor, we feel that we have
4 handled this in as timely and expeditious manner as possible.
5 We all have to be mindfully of Rule 11 to make sure the
6 pleadings are well documented. And we feel that based upon the
7 constitution, based upon the concessions the State has made,
8 that the Lottery Act is unconstitutional, and we would
9 respectfully request the Court to so order.

10 Thank you, sir.

11 THE COURT: Anything further?

12 MR. HOLTZMAN: Nothing further, Your Honor.

13 THE COURT: Anything in response?

14 MS. HARRELL: No, Your Honor.

15 THE COURT: Okay. You'll have my ruling this week,
16 same as you did before. We'll be at ease until 11:30.

17 (Thereupon, the proceedings were concluded at
18 11 a.m.)

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