

series of multimillion dollar handouts to a private entity which made no agreements in return—no capital investments or jobs were tied to the \$10 million gift pledged by State officials.

The heart of the issues rest squarely on the time honored concept that our Constitution is the cornerstone of all law and that any act of the Legislature inconsistent with that Constitution must fail. Plaintiffs neither ask this Court to intervene in any political controversy nor offer “broad” and “sweeping” constitutional theories. Instead these taxpayers have resorted to the very constitutional rights afforded them as citizens and taxpayers to challenge the acts of the Legislature and to demand equal treatment under law. Plaintiffs ask only that this Court give meaning to a truism put forth nearly eighty years ago in *Great Atl. & Pac. Tea Co. v. Maxwell*, 199 N.C. 433, 154 S.E. 838 (1930): “[t]he principle of equal rights to all, and special privileges to none” *Id.* at 438-39, 154 S.E. at 841.

STATEMENT OF FACTS

This action arises from multiple pieces of legislation adopted by the North Carolina General Assembly beginning in 2003 providing millions of dollars in cash grants to Johnson and Wales University (“Johnson and Wales”), a private, nonprofit culinary school, in connection with its location in Charlotte, North Carolina. Such legislation was the result of, among other things, a commitment by then Speaker of the North Carolina House of Representatives Jim Black to provide \$10 million of state funds to support Johnson and Wales’ relocation and expansion in Charlotte, North Carolina. The awards to Johnson and Wales violate various provisions of the North Carolina Constitution as alleged in the Complaint. The Plaintiffs, Jason R. Saine and Donald D. Reid, are citizens, voters and taxpayers of North Carolina. Neither of them has received or been promised cash handouts from the State coffers. They, however, are among the millions of taxpayers in the State who are footing the bill for Speaker Black’s promise to give

\$10 million to Johnson and Wales, a Rhode Island based corporation operating cooking and hospitality schools in several states, including North Carolina.

Political Promises of Legislative Grants to Johnson and Wales

As alleged in the Complaint, the State's handouts to Johnson and Wales began with the promise of a single official. Upon information and belief, on or about May 23, 2002, then Speaker of the North Carolina House of Representatives Jim Black wrote a letter to Johnson and Wales President Jack Yena in which former Speaker Black promised: "You have my personal commitment of support for a \$10 million investment over the next five years by the State of North Carolina for this project." That "*personal commitment*" was followed by a similar pledge on June 4, 2002, by President Pro Tem of the North Carolina Senate Marc Basnight who wrote a letter to Dr. Yena promising: "You have my commitment to make our best efforts to secure \$1 million immediately for the Johnson & Wales University campus in Charlotte and the remaining \$9 million over the next five years by the state of North Carolina for this project." Also, on June 3, 2002, then Governor Michael F. Easley wrote a letter to Dr. Yena in which he expressed support for grants by the State to Johnson and Wales but made no specific financial promise.

On June 20, 2002, about a month after Black's purported personal commitment of public money, Johnson and Wales, in conjunction with the City of Charlotte, announced plans for a new campus to be developed in Charlotte at a cost of approximately \$82 million dollars. Johnson and Wales announced plans to open the new campus in the fall of 2004. At the time of the announcement, news organizations reported that Bank of America, the Charlotte Chamber of Commerce, Center City Partners, Compass Group North America, and city officials had put together an incentives package for Johnson & Wales. Months later, the offers by Black, Basnight, and Easley were revealed in November 2002.

Legislative Gifts to Johnson and Wales

The General Assembly has spent several years fulfilling Jim Black's personal commitment by authorizing a series of appropriations for the sole and exclusive benefit of Johnson and Wales. Session Law 2003-284 ("2003 Budget Act") at § 12.4A called for the Department of Commerce to allocate funds appropriated in the 2001-2003 fiscal biennium to the One North Carolina-Industrial Recruitment Competitive Fund in the amount of one million dollars for the 2003-2004 and 2004-2005 fiscal years to provide financial assistance to Johnson and Wales. The use of funds was restricted to equipment purchase and installation and construction expenses. Session Law 2005-276 ("2006 Appropriations Act") mandated "the Department of Commerce shall allocate one million dollars (\$1,000,000) for the 2005-2006 fiscal year to Johnson and Wales University in Charlotte for the purpose of providing financial assistance to the University." S.L. 2005-276 § 13.6(b). Session Law 2006-66 modified the 2006 Appropriations Act to mandate that the Department of Commerce "shall allocate one million dollars (\$1,000,000) for the 2006-2007 fiscal year to Johnson and Wales University in Charlotte for the purpose of providing financial assistance to the University." S.L. 2006-66 § 13.6(b). Neither the 2006 Appropriations Act nor Session Law 2006-66 contained recitation as to the public purpose of the allocations to Johnson and Wales. Neither the 2006 Appropriations Act nor Session Law 2006-66 contained any restriction on the purposes for which the funds allocated to Johnson and Wales could be expended. Both the 2006 Appropriations Act and Session Law 2006-66 allocated \$1 million dollars to Johnson and Wales "notwithstanding the provisions of G.S. 143B-437.71."

Session Law 2007-323 ("2007 Appropriations Act"), section 32.2(a), specifies: "The Joint Conference Committee Report on the Continuation, Expansion, and Capital Budgets, dated July 27, 2007, which was distributed in the House of Representatives and the Senate and used to explain this act, shall indicate action by the General Assembly on this act and shall therefore be used to construe this act, as provided in the State Budget Act, Chapter 143C of the General

Statutes, or the former Executive Budget Act, Article 1 of Chapter 143 of the General Statutes, as appropriate, for these purposes shall be considered a part of this act and as such shall be printed as a part of the Session Laws.”

The Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets (“2007 Committee Report”), dated July 27, 2007, and adopted by both houses of the General Assembly on July 30, 2007, allocates \$2 million thusly: “provides funds to Johnson and Wales University in Charlotte, a private university that specializes in the culinary and hospitality industries.”

Session Law 2008-107, section 30.2(a) states: “The Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets dated July 3, 2008, shall indicate action by the General Assembly on this act and shall therefore be used to construe this act, as provided in the State Budget Act, Chapter 143C of the General Statutes, and for these purposes shall be considered a part of this act and as such shall be printed as a part of the Session Laws.”

The Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets (“2008 Committee Report”), dated July 3, 2008, modified the 2007 Appropriations Act to “provide[] funds to Johnson and Wales University in Charlotte, a private university that specializes in the culinary and hospitality industries.” The amount allocated was \$1.5 million.

Session Law 2003-284, Session Law 2005-276, Session Law 2006-66, Session Law 2007-323 and Session Law 2008-107 are collectively referred to herein as “Johnson and Wales legislation.”

These appropriations are expressly for Johnson and Wales' benefit. Unlike economic development packages, the appropriations for Johnson and Wales include no qualifying criteria. That is to say, Johnson and Wales is not required to make minimum capital investment, create new jobs, retain existing jobs or do anything else in order to receive its gift. This is in stark contrast to economic development investments which courts have approved.

Creation and Usual Operation of the One North Carolina Fund

The One North Carolina Fund was established as a special revenue fund in the Department of Commerce, G.S. § 143B-437.71(a), upon legislative findings that “[i]t is the policy of the State of North Carolina to stimulate economic activity and to create new jobs” and enactment of the One North Carolina Fund “will maintain consistency and accountability in a key economic development program and will ensure that the program benefits the State and its citizens.” G.S. § 143B-437.70. An elaborate statutory scheme controls the disbursement of funds from the One North Carolina Fund and sets forth detailed prerequisites which the State, local governments and ultimate recipients must satisfy in order for a grantee to receive a grant from the One North Carolina Fund. This statutory framework was simply set aside for Johnson and Wales. As alleged in the Complaint, the following requirements must be met for a grantee—other than Johnson and Wales—to get money from the One North Carolina Fund.

Funds may be disbursed from the One North Carolina Fund only in accordance with agreements entered into between the State and one or more local governments and between the local government and a grantee business. G.S. § 143B-437.72(a). Any agreement between the State and one or more local governments must contain the following specific provisions:

- 1) A commitment by the local government to match the funds allocated by the State;

- 2) A provision requiring the local government to recapture any funds to which the local government is entitled under the performance agreement with the grantee business;
- 3) A provision requiring the local government to reimburse the State for any funds improperly disbursed or funds recaptured by the local government;
- 4) A provision allowing the State access to all records possessed by the local government necessary to ensure compliance with the performance agreement by the grantee business and with statutory requirements;
- 5) A provision establishing a schedule for the disbursement of funds from the One North Carolina Fund to the local government that reflects the disbursement schedule established in the performance agreement with the grantee business; and
- 6) Any other provision the State finds necessary to ensure the proper use of State funds.

G.S. § 143B-437.72(c).

An agreement between a local government and a grantee business must contain the following provisions:

- 1) A commitment to create or retain a specified number of jobs within a specified salary range at a specific location and commitments regarding the time period in which the jobs will be created or retained and the minimum time period for which the jobs must be maintained;
- 2) A commitment to provide proof of new jobs created or existing jobs retained and the salary level of those jobs;
- 3) A provision that funds received under the agreement may be used only for a purpose specified at G.S. § 143B-437.71(b);

- 4) A provision allowing the State or the local government to inspect all records of the business that may be used to confirm compliance with the agreements and statutory requirements;
- 5) A provision establishing the method for determining compliance with the agreement;
- 6) A provision establishing a schedule for disbursement of funds under the agreement that allows disbursement of funds only in proportion to the amount of performance completed under the agreement;
- 7) A provision requiring the recapture of funds if a business subsequently fails to comply with the terms of the agreements; and any other provisions the State or the local government finds necessary to ensure the proper use of State or local funds.

G.S. § 143B-437.72(b).

As alleged in the Complaint, upon information and belief, no agreement exists between the State and Johnson and Wales or between the State and any local government which would satisfy the requirements of G.S. § 143B-437.72. The One North Carolina Fund rules just did not apply to Johnson and Wales. Although G.S. § 143B-437.71(b) mandates that “money in the One North Carolina Fund may only be allocated pursuant to this subsection,” grants from the State to Johnson and Wales have been made “notwithstanding the provisions of G.S. § 143B-437.71” which establishes the One North Carolina Fund and specifies the purposes for which moneys in the fund may be distributed. Additional facts will be provided below in argument as necessary.

STANDARDS OF CONSTITUTIONAL INTERPRETATION

It is a long-standing principle in North Carolina law that “[a]ll power which is not expressly limited by the people in our State Constitution remains with the people, and an act of

the people through their representatives in the legislature is valid unless prohibited by that Constitution.” *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989) (citing *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961)).

While it is true that the legislature serves “as the lawmaking agent of the people,” *Martin*, 325 N.C. at 448, 385 S.E.2d at 478, this affirmation of the legislature’s responsibility is consistently coupled with the mandate that any law enacted must be valid *pursuant to* North Carolina’s State Constitution. In fact, the judiciary has the power and the duty to declare a legislative act unconstitutional when such is “plainly and clearly the case.” *Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, 647, 360 S.E.2d 756, 761 (1987) (quoting *Glenn v. Bd. of Education*, 210 N.C. 525, 529, 187 S.E. 781, 784 (1936)); *see also Kornegay v. Goldsboro*, 180 N.C. 441, 445-46, 105 S.E. 187, 189 (1920) (discussing scope of judicial review of legislative acts).

In determining whether government action is valid under the State Constitution, North Carolina law has firmly established that “issues concerning the proper construction and application of North Carolina laws and the Constitution of North Carolina can only be answered with finality by [the North Carolina Supreme Court].” *Martin*, 325 N.C. at 449, 385 S.E.2d at 479 (citing *State v. Arrington*, 311 N.C. 633, 643, 319 S.E. 2d 254, 260 (1984)). In a brief review of North Carolina’s history of state constitutional jurisprudence, the Court noted the immemorial significance of the doctrine of judicial review:

Prior to the creation of the United States of America by the ratification of the Constitution of the United States, North Carolina courts applied the doctrine of judicial review to strike down a legislative act as contrary to the Constitution of North Carolina. *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). Thus, approximately sixteen years before *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 135 (1803), North Carolina’s courts were among the first to recognize the doctrine of judicial review.

Martin, 325 N.C. at 448, 385 S.E.2d at 478. Further emphasizing this crucial judiciary duty, the Court stated in *Moore v. Knightdale Bd. Of Elections*, 331 N.C.1, 413 S.E.2d 541 (1992):

The Constitution is the supreme law. It is ordained and established by the people, and all judges are sworn to support it. When the constitutionality of an act of the General Assembly is questioned, the courts place the act by the side of the Constitution, with the purpose and the desire to uphold it if it can be reasonably done, but under the obligation, if there is an irreconcilable conflict, to sustain the will of the people as expressed in the Constitution, and not the will of the legislators, who are but agents of the people.

Id., 331 N.C. at 4, 413 S.E.2d at 543 (citing *State v. Knight*, 169 N.C. 333, 351-52, 85 S.E. 418, 427 (1915)).

To determine whether an act of the General Assembly conflicts with the State Constitution, the Court is typically guided by the principle that a statute is presumed valid. *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E.2d 887, 889 (1991). Nevertheless, “[t]he presumption of constitutionality is not . . . and should not be conclusive.” *Moore*, 331 N.C.at 4, 413 S.E.2d at 543. The judiciary has a clearly established duty to “ascertain and declare the intent of the framers of the Constitution and to reject any legislative act which is in conflict therewith.” *Mitchell v. N.C. Indus. Dev. Fin. Auth.*, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968).

In the present case, an “irreconcilable conflict” exists between the action of Defendants in creating give-aways for the sole benefit of Johnson and Wales, on one hand, and the will of the People that government operate according to the constitutional framework adopted by the People, on the other. The actions of Defendants are contrary to Article I, §19, Article V, § 2(1), and Article I, § 32 of the North Carolina Constitution. The State “exceed[ed] its limitations,” *see*

State v. Harris, 216 N.C. 746, 764, 6 S.E. 2d 854, 866 (1940); it is imperative, therefore, for the Court to exercise its duty to declare the legislation unconstitutional.

ARGUMENT

- I. THE CASH HANDOUTS TO JOHNSON AND WALES ARE UNCONSTITUTIONAL EXCLUSIVE EMOLUMENTS IN THAT THE STATE HAS AWARDED A SPECIAL AND EXCLUSIVE BENEFIT TO JOHNSON AND WALES NOT IN CONSIDERATION OF PUBLIC SERVICE.

The North Carolina Constitution states: “No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.” N.C. Const. art. I, § 32.

The North Carolina Supreme Court has articulated a two part test to determine whether a benefit is constitutional: (1) “the exemption [or benefit] is intended to promote the general welfare rather than the benefit of the individual,” and (2) “there is a reasonable basis for the legislature to conclude the granting of the exemption [or benefit] serves the public interest.” *Town of Emerald Isle v. State*, 320 N.C. 640, 652, 360 S.E.2d 756, 764 (1987). If the test is satisfied, “[e]xemptions [or benefits] in favor of a specified group of persons are not an exclusive emolument or privilege.” *Id.* The test remains the same whether a court is considering a direct benefit or an exemption, such as a tax exemption. *See generally Blinson v. State*, 186 N.C. App. 328, 341, 651 S.E.2d 268, 278 (2007).

In short, the Exclusive Emolument Clause requires courts to determine whether a challenged expenditure meets “the fundamental democratic principle: ‘Equal rights and opportunities to all, special privileges to none.’” *State v. Felton*, 239 N.C. 575, 587, 80 S.E.2d 625, 635 (1954). Largely, the determination hinges on whether the expenditure is “in consideration of public services.” *See* N.C. Const. art. I, § 32. In *Leete v. Warren County*, the

Court struck down a six week severance package for a county employee who voluntarily resigned. 341 N.C. 116, 462 S.E.2d 476 (1995). The *Leete* Court in relevant part stated that a public office “is created for the purpose of carrying on the operations of government,” but the challenged emolument was a benefit for an individual. *Id.* at 119, 462 S.E.2d at 477 (citing *De Marco v. Bd. of Chosen Freeholders*, 36 N.J. Super. 382, 386, 115 A.2d 635, 637 (1955), *aff’d*, 21 N.J. 136, 121 A.2d 396 (1956)). As a benefit for an individual, the severance package failed the first prong of the test and amounted to an exclusive emolument. The *Leete* Court held that the expenditure at issue there did not satisfy the second prong of the exclusive emoluments test for another reason: it was not in consideration for public services. *Id.* The Constitution forbids exclusive emoluments *not in consideration of public service*. *Id.* The emolument in *Leete* was essentially a reward to a retiring employee for *past* work.

The instant case is on all fours with *Leete*. As the Complaint alleges, a series of appropriations purport to authorize multi-million dollar giveaways to Johnson and Wales. The legislation does not offer such awards in consideration of anything, much less a public service. The Constitution permits conferral of a special benefit only in exchange for a public service; this is not the same as a public benefit as contemplated by the public purpose clauses addressed above. Here, the challenged legislation does not compensate for a public service. It does not even compensate for a public benefit. As alleged in the Complaint, Johnson and Wales will be providing no service to the State or the public, nor will Johnson and Wales provide an indirect benefit by committing to make minimum capital investment or create new or retain existing jobs.

Even were one to assume that an emolument may be awarded in consideration of a public benefit, a standard which Plaintiffs maintain is not correct for an exclusive emoluments analysis, the Johnson and Wales’ gifts still fail. Johnson and Wales is not required to do anything in return

for a grant. The appropriations do not include statutorily defined qualification criteria. To the contrary, the appropriations to Johnson and Wales specifically circumvent the usual statutory requirement of contractual agreements by and among a grantee and government. The gifts from the State to Johnson and Wales are not tied by either statute or contract to Johnson and Wales doing anything whatsoever.

Even were one to assume solely for the sake of argument that the grants are in consideration of Johnson and Wales' establishment of a campus in North Carolina, the grants are nonetheless unconstitutional. In June 2002, Johnson and Wales announced plans to open a new campus in the fall of 2004. All appropriations at issue were made *after* Johnson and Wales decided to open its Charlotte facility and most appropriations were actually made to Johnson and Wales after it opened that campus. For that reason, an argument that the grants were in consideration of the new campus is specious because it rests on the proposition that the appropriations authorize a cash award for something previously undertaken, that is to say, for past consideration. As explained in *Critcher v. Watson*, "past consideration is no consideration." 146 N.C. 150, 151, 59 S.E. 544, 545 (1907). Thus, just as with *Leete*, the appropriations to Johnson and Wales provide rewards to a private entity for past performance. And, just as with *Leete*, the award is unconstitutional.

- II. THE GRANTS TO JOHNSON AND WALES VIOLATE THE PUBLIC PURPOSE CLAUSE OF THE STATE CONSTITUTION IN THAT THE GRANTS ARE FOR THE BENEFIT OF JOHNSON AND WALES AND ARE NOT FOR A PUBLIC PURPOSE.

Plaintiffs have raised a claim based upon the Public Purpose Clause of Article V, § 2(7) of the North Carolina Constitution, which states:

The General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only.

The government is not free to spend the public purse without restraint. The Constitution limits the power to spend public money and to collect taxes by requiring that each of those powers be exercised “in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.” N.C. Const., art. II, § 2(1); *see also Mitchell v. North Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 143, 159 S.E.2d 745, 749 (1968) (citing *Horner v. Chamber of Commerce*, 231 N.C. 440, 57 S.E. 2d 789 (1950)). “The power to appropriate money *from* the public treasury is no greater than the power to levy the tax which put the money in the treasury.” *Id.* Governmental expenditures must comply with the letter of the Constitution “no matter how benevolent” the government’s intent may be. *Id.* Here, the General Assembly has provided handouts to a single, cherry-picked private entity. Johnson and Wales need not hire a single new employee and invest a single cent. Legislative handouts expressing the sole and exclusive recipient and requiring no performance or even promise to perform by the recipient do not satisfy a public purpose. Any argument to the contrary strains logic. Indeed, absent any performance criteria, one is at a loss to glean what the public benefit even could be.

In order for an appropriation to satisfy the public purpose clauses, two conditions must be satisfied: (1) “the appropriation must be for a ‘public purpose’ consistent with *article V, § 2(7) of the N.C. Constitution*; [and (2)]...there must be statutory authority for the appropriation.” *Watagua County Bd. of Educ. v. Town of Boone*, 106 N.C. App. 270, 273, 416 S.E.2d 411, 413 (1992) (internal citations omitted).

The focus of the public purpose analysis here is whether the benefit of the Johnson and Wales grants inures to the public or a private entity, not the manner by which that purpose is achieved. Although the Supreme Court has held that the direct disbursement of public funds to private entities is “a constitutionally permissible *means* of accomplishing a public purpose,” it is nevertheless necessary to scrutinize the purpose itself. *Hughey v. Cloninger*, 297 N.C. 86, 95, 253 S.E.2d 898, 904 (1979). (emphasis added). However, where the appropriations not only do not include performance criteria but actually exempt the grants from ordinary requirements including contractual prerequisites and limitations on the use of funds, the opportunity to scrutinize the public purpose is virtually nonexistent. One cannot but wonder what the public purpose *is*, much less analyze whether the handouts *further* such a public purpose.

Nearly every business in a community provides some benefit to the community, but that is not the test. In *Mitchell*, the Supreme Court recognized that any lawful business in a community promotes the public good, but the Court still held that the “Authority’s primary function, to acquire sites and to construct and equip facilities for private industry is not for a public use or purpose.” *Id.* at 159, 159 S.E.2d at 761. Subsequently in *Maready v. City of Winston-Salem*, the Supreme Court pointed out that the *Mitchell* court “rightly concluded that direct state aid to a private enterprise, with only limited benefits accruing to the public contravenes fundamental constitutional precepts.” 342 N.C. 708, 718, 467 S.E.2d 615, 622 (1996). Yet, the Johnson and Wales appropriations do just that—they provide direct state aid to a private enterprise while only limited, if any benefits, accrue to the public.

“The power to appropriate money from the public treasury is no greater than the power to levy the tax which put the money in the treasury. Both powers are subject to the constitutional proscription that the tax revenues may not be used for private individuals or corporations. *No*

matter how benevolent.” *Foster v. North Carolina Medical Care Comm’n.*, 283 N.C. 110, 124-125, 195 S.E.2d 517, 527 (1973) (quoting *Mitchell v. Fin. Auth.*, 273 N.C. 137, 143, 159 S.E.2d 745, 749-50 (1968)) (emphasis added). “The task of the judiciary is to determine whether the aim of the legislation is primarily public and not to weigh the public benefit against the private benefit by making findings as to the projected monetary value of each.” *Blinson v. State*, 186 N.C. App. at 340-41, 651 S.E.2d at 277-278.

Both *Maready* and *Blinson* addressed the constitutionality of the use of incentives to induce economic development and to compete with inducements offered by other states. *Maready* and *Blinson* each involved incentives *aimed* at inducing new economic development or competing with other jurisdictions. Discussing the merits of these aims, both cases quoted the dissent of former Chief Justice Parker:

North Carolina is no longer a predominantly agricultural community. We are developing from an agrarian economy to an agrarian and industrial economy. North Carolina is having to compete with the complex industrial, technical, and scientific communities that are more and more representative of a nation-wide trend. All men know that in our efforts to attract new industry we are competing with inducements to industry offered through legislative enactments in other jurisdictions as stated in the legislative findings and purposes of this challenged Act.

Maready, 342 N.C. at 727, 467 S.E.2d at 627 (quoting *Mitchell*, 273 N.C. at 164, 159 S.E.2d at 7640; *Blinson*, 186 N.C. App. at 328, 651 S.E. 2d at 277.)

Here, the grants to Johnson and Wales were not offered to induce economic development. The handouts to Johnson and Wales were fulfillments of Jim Black’s “personal commitment” to the cooking school. The aim of the Johnson and Wales grants is constitutionally flawed since they did not induce, and logically *could not have induced*, Johnson and Wales to relocate or expand in North Carolina. The word “induce” means “to call forth or bring about by influence or stimulation.” *Merriam Webster’s Collegiate Dictionary*, (10th ed., 1998). One simply cannot

“bring about by influence” that which has already been committed to be done. Nor can the Johnson and Wales grants be said to “induce” capital investment or job creation where no performance criteria exist which would tie the grants to either capital investment or jobs.

The determination of whether an expenditure is for a public purpose must be made by application of a two-part test articulated in *Madison Cablevision v. City of Morganton*. 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989). The first prong is that the governmental act must have a “reasonable connection with the convenience and necessity” of the government. *Id.* (citing *Airport Auth. v. Johnson*, 226 N.C. 1, 36 S.E.2d 803 (1946)). The second prong is a requirement that “the activity benefits the public generally, as opposed to special interests or persons.” *Id.* (citing *Martin v. Hous. Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970)). The Public Purpose Doctrine has not been defined objectively, but rather requires “each case to be determined by its own peculiar circumstances as from time to time it arises.” *Maready*, 342 N.C. at 716, 467 S.E.2d at 620. Applying the *Madison Cablevision* test to the facts of this case admits of no conclusion but that the Johnson and Wales grants are not for a public purpose.

A. *The Johnson and Wales grants have no reasonable connection with the convenience and necessity of the governmental entity.*

The nature of the handouts to Johnson and Wales is unique when compared to previous expenditures challenged on public purpose grounds in a fundamental way. The grants here do not hinge on either job creation or retention nor capital investments. The Johnson and Wales appropriations fail the first prong of the *Madison Cablevision* test because the State gains nothing as a result of the expenditures.

In *Maready*, the Supreme Court applied the first prong of *Madison Cablevision* stating, “whether an activity is within the appropriate scope of governmental involvement and is

reasonably related to communal needs may be evaluated by determining how similar the activity is to others which the Court has held to be within the permissible realm of governmental action.” 342 N.C. 708, 722, 467 S.E.2d 615, 624 (1996). In this case, the problem is not merely that appropriations were made. Simply put, the problem is this: the grants do not encourage or entice a business to do anything for the benefit of the State and its People. The Johnson and Wales appropriations create grants unlike those previously upheld. Johnson and Wales have received millions of dollars though it has not created new jobs, made capital investments or promised to do that as a result of the grants. Any job creation or investments connected to Johnson and Wales Charlotte campus are dissociated from the appropriations. Other than use of funds limitations appearing in a single appropriation, nothing—either in statute or contract—connects the grants to the school’s Charlotte campus.

Maready is particularly illuminating. *Maready*, considering only a facial challenge, held G.S. § 158-7.1 constitutional. The *Maready* court held that under G.S. § 158-7.1, a county or city may expend public money on incentive programs designed to attract industry that will create new jobs to replace lost jobs. In fact, Justice Whichard in *Maready* quoted the dissent in *Mitchell* stating, “All men know that in our efforts to attract *new industry* we are competing with inducements to industry offered through legislative enactments in *other jurisdictions* as stated in the legislative findings and purpose of this challenged Act.” *Id.* at 727, 467 S.E.2d at 627 (emphasis added) (quoting *Mitchell*, *supra* at 164, 159 S.E.2d at 764 (Parker, C.J., dissenting)). Even a cursory consideration of Justice Whichard’s words sets in bold relief the difference between the Johnson and Wales handouts and true incentives schemes considered previously by the courts.

The wording of the first prong of the *Madison Cablevision* test focuses on the “convenience and necessity of government.” Giving away public money to a private company which is not required to do anything new or even continue doing everything it had been doing offers no convenience to the government and is surely not necessary. Where, as here, a private entity gets public money but is required to provide no new benefit, the convenience and necessity of government are not furthered. At a minimum, a genuine question of material fact exists about whether the grants here bear a reasonable connection to the convenience and necessity of government and whether the aim of those grants was primarily public.

B. The Johnson and Wales grants are not generally for public benefit, but rather for private gain.

“Men set up systems of government in order to subserve certain public ends, and reach advantages that could not otherwise be made available.” *Briggs v. City of Raleigh*, 195 N.C. 223, 226, 141 S.E. 597, -- (1928). The *Briggs* Court articulated a critical point about the ends of government spending in stating, “[i]t is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.” *Id.* at 229. The public purpose of the Johnson and Wales handouts should not be judged in connection with whether economic incentives are good, generally constitutional or within public policy generally. Indeed, the Johnson and Wales grants should not be considered in the context of incentives at all. Rather, the Johnson and Wales grants should be examined in light of the facts and circumstances alleged in the Complaint, specifically that the General Assembly gave millions of dollars to

Johnson and Wales to fulfill Jim Black's "personal commitment" and not as an economic development incentive.

The essential character of the Johnson and Wales grants is wholly different from any incentive upheld by a North Carolina court and totally out of sync with the rationale and concerns historically used to justify so-called economic development incentives. The appropriations are specifically removed from the statutory framework applicable to every other appropriation from the One North Carolina Fund. Here, a private entity, Johnson and Wales, has simply received a series of cash gifts from the State and done nothing whatsoever in return.

As Chief Justice Stacy noted in *Briggs*, "[t]he power to tax *only for a public purpose*, and not arbitrarily, is one of the chief distinctions between representative government and autocracy; and unless this difference is to be observed, the tyranny of the one, in matters of taxation, may become just as burdensome as the tyranny of the other." *Id.* at 228. It is for this reason that the inquiry before this court is more than a mere rhetorical question to be answered by pro forma recitations contrived only after the appropriations have been made.

This Court has one overarching issue before it: whether an expenditure that rewards a private entity for adding nothing new to the State falls within the public purpose doctrine. The answer is a resounding "NO."

"Every citizen has a right to insist that no majority, however large, shall take his property, under the guise of taxation or otherwise, for strictly private uses or for objects which do not concern the public welfare." *Id.* at 228. As a constitutional limitation, it is equally clear that "[a]n activity cannot be for a public purpose unless it is properly the 'business of government.'" *Stanley v. Dept. of Conservation and Dev.*, 284 N.C. 15, 33, 199 S.E.2d 641, 653 (1973)

When government spends the People's money, it must have a true public purpose, which benefits the public as a whole. The public purpose doctrine requires "the greater benefits flow to the people as they have constitutionally directed, with their understanding that there will be incidental benefits to private companies involved." *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 343, 554 S.E.2d 331, 335 (2001) (reaffirming the two prong analysis from *Madison Cablevision*). This statement reflects the notion that what constitutes a public purpose reflects the beliefs, customs, and usages of society at the time the expenditure is challenged. It is required that the public benefits outweigh those that are given to the private company. *Id.* Here, the People of North Carolina receive no benefit they would not have received but for the appropriations to Johnson and Wales. The benefits to Johnson and Wales do not merely outweigh the public benefit, but overwhelm it.

III. THE JOHNSON AND WALES APPROPRIATIONS VIOLATE THE EQUAL PROTECTION AND LAW OF THE LAND CLAUSE IN THAT JOHNSON AND WALES HAS BEEN ARBITRARILY SELECTED FOR SPECIAL PRIVILEGES IN THE FORM OF MULTIMILLION DOLLAR HANDOUTS FROM THE STATE.

Defendants have requested dismissal of Count 3 pursuant to Rule 12(b)(1) for lack of standing.

Refined to its simplest terms and most essential character, this lawsuit questions the constitutionality of a sweetheart deal crafted and being executed for the sole benefit of a single entity. Defendants have moved to dismiss Count Three for lack of standing and for failure to state a claim upon which relief may be granted. The former alleged basis for dismissal asks whether ordinary, everyday taxpayers can ask for judicial answers to constitutional questions relating to governmental actions that reduce the funding available for lawful use and whether the State may cherry-pick a single entity to receive a handout without establishing criteria by which Plaintiffs or anybody else in the State may gain such an advantage. It asks whether common

citizens can challenge the constitutionality of special deals dolling out the People's money. It asks whether individual taxpayers can demand that the laws of the State put everyone on an equal footing. And, the answer to those questions is a resounding "Yes."

At Count Three, Plaintiffs alleged a violation of the law of the lands provision of Article I, § 19. The State Defendants maintained that Plaintiffs have failed to allege facts sufficient to show that they have suffered any harm as a result of the matters alleged in their complaint or that they are in the class or group of persons protected by the constitutional principles upon which they rely or to show the existence of a case or controversy." State Defendants' Motion to Dismiss ¶4. Defendant Johnson and Wales more generally states, "Plaintiffs have not presented allegations that would, if taken as true, establish their standing to advance their claims under the Law of the Land Clause of the North Carolina Constitution." Def. Johnson and Wales' Motion to Dismiss, p. 3.

Plaintiffs raised constitutional challenges to the Johnson and Wales grants based on the equal protection and the law of the land clause, Article I, § 19. At paragraphs 47-49 of the Complaint, Plaintiffs specifically alleged that they have been harmed by the handouts to Johnson and Wales:

47. Plaintiffs as citizens and taxpayers have been harmed by the cash grants to Johnson and Wales in that the unconstitutional award of direct cash grants to Johnson and Wales has diminished the moneys available to the State for other, lawful purposes.

48. Plaintiffs have been deprived of the benefit of the lawful expenditure by the State of moneys paid to the State treasury by Plaintiffs and other taxpayers in the form of taxes.

49. Plaintiffs have not and cannot qualify for direct cash grants authorized by the Johnson and Wales grants in that such statutes provide cash grants which are expressly and unequivocally limited to Johnson and Wales. Neither Plaintiffs nor any other taxpayer or entity have or could conceivably qualify for the cash grants provided to Johnson and Wales and challenged herein.

Grants given to Johnson and Wales result in the diminution of available funds from which the State can pay for government services. As a result, Plaintiffs will either have to shoulder a larger portion of the expense of government or do without the full measure of government services. Additionally, Plaintiff specifically alleged that a special benefit has been conferred by the State on Johnson and Wales, and further that Plaintiffs and all other taxpayers are ineligible to partake of that benefit. Thus, Plaintiffs complain that they are not being treated equally, but rather must suffer from a diminution of government resources so that Johnson and Wales may enjoy a truly unique, specially crafted perk.

1. Taxpayers have standing to challenge the constitutionality of special legislation which results in a diminution of the public fisc.

The seminal taxpayer standing case in North Carolina, *Goldston v. State*, 361 N.C. 26, 637 S.E.2d 876 (2006), clearly set forth the long standing principle that, in North Carolina, a taxpayer has standing to challenge unconstitutional government expenditures. "If the governing authorities are preparing to put public property to an unauthorized use, citizens . . . have the right to seek equitable relief." *Wishart v. Lumberton*, 254 N.C. 94, 96, 118 S.E.2d 35, 36 (1961). Standing to challenge the unconstitutional misuse or misappropriation of public funds was acknowledged and reaffirmed by our Supreme Court in *Goldston*. There the Supreme Court began its decision simply: "Our cases demonstrate that a taxpayer has standing to bring an action

against appropriate government officials for the alleged misuse or misappropriation of public funds.” *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881. The justification of *Goldston* was simply that the misuse or misappropriation of public money results in a loss of funds available for legitimate public purposes.

North Carolina appellate jurisprudence has evolved over the last forty years to view taxpayers, generally, as having an interest in avoiding unfair tax burdens and unfair government expenditures. The North Carolina Supreme Court has permitted taxpayers to mount such suits provided litigants demonstrate a connection between the challenged statute and an injury to “persons, property, or constitutional rights.” However, that injury may amount to nothing more than a *de minimis* increase in the plaintiff’s tax burden. *Piedmont Canteen Service, Inc. v. Johnson*, 256 NC 155, 123 S.E.2d 582, 589 (1962); accord *Stanley v. Dept. of Conservation and Dev.*, 284 N.C. 15, 199 S.E.2d 641 (1973).

In *Stanley*, a case eerily similar to the instant case, Justice Sharp, writing for the North Carolina Supreme Court, enunciated a conception of standing in line with the United States Supreme Court’s holding in *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952 (1968) (question of standing is whether the party seeking relief has alleged such a personal stake in the outcome to assure the concrete adverseness which sharpens presentation of issues). *Stanley*, 284 N.C. at 28, 199 S.E.2d at 650. The *Stanley* plaintiffs mounted challenges to a tax-exempt State bond issue which was to finance construction of pollution-abatement facilities for the use of private paper mills. The *Stanley* plaintiffs argued that the bond issue amounted to a state subsidy for private enterprise in contravention of the North Carolina Constitution, and that exempting the bonds from tax yielded an unfair tax burden for all other North Carolina taxpayers. En route to

agreeing with the plaintiffs on the merits, the Court held that the plaintiffs' allegation of unfair tax burden based upon the exemption was sufficient for standing:

. . . petitioners will be injured unless [the statute's] 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. 'A taxpayer injuriously affected by a statute may generally attack its validity. Thus, he may attack a statute which . . . exempts person or property from taxation, or imposes on him in its enforcement an additional financial burden, *however slight*.'

Stanley, 284 at 29, 199 S.E.2d at 650-51 (citation omitted)(emphasis added).

Other states have recognized the right of taxpayers to bring challenges to tax exemptions awarded to other taxpayers. *See, e.g., Beattie v. East China Charter Township*, 157 Mich. App. 27, 403 N.W.2d 490 (1987) (residents had standing to challenge tax exemptions awarded to power company as part of employment development act); *Anchorage Baptist Temple v. Coonrod*, 166 P.3d 29 (2007) (standing unquestioned in lawsuit filed by taxpayers groups challenging tax exemptions for educators' residences owned by private religious or parochial schools). The effect *Goldston* and its predecessors deemed sufficiently injurious to warrant standing, i.e. diminution in the public fisc, is exactly the same injury of which Plaintiffs complained at paragraphs 47 and 48 of the Complaint.

The long-standing tradition in North Carolina now entrenched in our jurisprudence is that a taxpayer has standing to challenge an unconstitutional expenditure. Plaintiffs have standing to pursue the equal protection and due process claims at Counts Three. *Goldston* provides a sweeping precedent allowing a taxpayer to challenge constitutional violations without demonstration of a specific, personal, direct injury. Even assuming that Plaintiffs must show an

injury in order to pursue their fair tax claims, Plaintiffs have alleged that they face a diminution in available funds for lawful government purposes. No greater injury need be alleged.

2. *Standing for discrimination claims is not applicable because Plaintiffs did not raise discrimination claims.*

Notwithstanding the sweeping precedent of *Goldston* and Plaintiffs' allegations of injury, the trial court concluded that Plaintiffs lacked standing to pursue their fair tax claims because they were not in the class or group of persons protected by the constitutional principles upon which they rely. This reasoning misses the mark on two fronts. First, *Goldston* establishes the right of a taxpayer to challenge the constitutionality of government action that results in a diminution in the public fisc. Plaintiffs did not, contrary to the apparent theory of the State Defendants, raise a true discrimination claim. Thus, the standing calculus for such claims is inapplicable. Second, even assuming solely for the sake of argument that Plaintiffs must be discriminated against by the challenged government action, they specifically alleged that they "have not and cannot qualify for direct cash grants authorized by the Johnson and Wales grants in that such statutes provide cash grants which are expressly and unequivocally limited to Johnson and Wales. Neither Plaintiffs nor any other taxpayer or entity have or could conceivably qualify for the cash grants provided to Johnson and Wales." Compl. ¶ 44.

The State Defendants' motion states Plaintiffs are not in the class of persons "protected by the constitutional principles upon which they rely." However, Article 1, § 19—upon which Plaintiffs rely at Count Three—states in pertinent part: "No person shall be denied the equal protection of the laws; . . ." Plaintiffs alleged they are citizens and taxpayers of the State and that they have not and cannot qualify for the Johnson and Wales grants. In fact, the only entity which can qualify for the Johnson and Wales grants is Johnson and Wales. The appropriations are

expressly limited to Johnson and Wales. There are as a result of the legislation two groups of persons in North Carolina: first, Johnson and Wales, and second, everyone else. Every person who is not Johnson and Wales is expressly ineligible for the Johnson and Wales handouts and so is among those who are not enjoying treatment equal to that afforded Johnson and Wales.

Defendants will likely argue that Plaintiffs must jump some higher standing hurdle in order to prosecute their equal protection claims because such claims are discrimination claims requiring a special standing analysis. But, Plaintiffs have not raised a discrimination claim. They have not alleged that the qualifying criteria operate in a discriminatory manner. Rather, they have alleged that the *creation* of a special benefit for the sole enjoyment of a single named entity—without regard to the details of qualifying criteria—is unconstitutional. The basis of their claim is that the Johnson and Wales appropriations treat the cooking school differently from how the State treats Plaintiffs and everyone else in the State.

3. The Johnson and Wales handouts violate the Equal Protection and Law of the Land Clause by singling out a single entity for a special privilege denied to every other person in North Carolina.

Plaintiffs acknowledge that economic development may be a legitimate government interest. Thus, the issue is whether the provisions of the Johnson and Wales appropriations were genuinely intended to promote that interest and whether they are rationally related to achieving that goal. For the reasons discussed below, Plaintiffs submit that the Johnson and Wales handouts are fulfillments of a personal promise made by an individual elected official, specifically former Speaker Jim Black, and not as part of an economic development program. But, even if the Johnson and Wales grants were intended to stimulate economic development, the legislation creating the handouts provide for an irrational and arbitrary means of achieving the goal of economic development in North Carolina. There is no fundamental difference between

Johnson and Wales, on the one hand, and any other entity or legal person, on the other hand, yet the Johnson and Wales appropriations, by their design, plain language and effect, single out a single recipient for multimillion dollar awards.

As the Supreme Court explained more than a half century ago, "The equal protection clause and law of the land clause of the North Carolina Constitution imposes upon law-making bodies the requirement that any legislative classification "provide a reasonable means to a legitimate state objective." *Powe v. Odell*, 312 N.C. 410, 412, 322 S.E.2d 762, 763 (1984). Further, in order to be constitutional, legislation may not categorize "arbitrarily either as between similarly situated persons, or groups of persons, or as between activities which are prohibited and those which are permitted." *State v. Greenwood*, 280 N.C. 651, 657, 187 S.E.2d 8, 11-12 (1972) (quoting *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 666-667, 174 S.E.2d 542, 546 (1970)). The test then is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation." *Guthrie v. Taylor*, 279 N.C. 703, 714, 185 S.E.2d 193, 201 (1971) (*cert. denied*, 406 U.S. 920, 92 S.Ct. 1774, 32 L.Ed.2d 119 (1972) (citing *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E.2d 18 (1968)).

While the law of the land clause is generally considered the functional equivalent of the due process clause of the United States Constitution, it has its own jurisprudence and exacting standards. For cases in which the law of the land clause arises outside the context of traditional due process, the Supreme Court has articulated a two-part test for determining the constitutionality of legislation:

Although this Court often considers the "law of the land" synonymous with "due process of law," we have reserved the right to grant Section 19 relief against unreasonable and arbitrary state statutes in circumstances where relief might not be obtainable under the

Fourteenth Amendment to the United States Constitution. Nonetheless, the two-fold constitutional inquiry under both the North Carolina and United States Constitutions is the same: (1) Does the regulation have a legitimate objective; and (2) if so, are the means chosen to implement that objective reasonable?

In re North Carolina Pesticide Bd. File Nos. IR94-128, IR94-151, IR94-155, 349 N.C. 656, 671, 509 S.E.2d 165, 175 (1998) (internal citations omitted). Thus, the question for this Court is whether the Johnson and Wales appropriations have a legitimate objective and, if so, whether the grants created by that legislation are a reasonable means of achieving that objective. Although deference to the legislative branch is appropriate, judicial review is still a necessary and proper constitutional control. Whether the State's exercise of its authority "is a violation of the Law of the Land Clause or a valid exercise of the police power is a question of degree and of reasonableness in relation to the public good likely to result from it." *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 550, 193 S.E.2d 729, 735 (1973).

a. The Johnson and Wales appropriations are not economic development efforts and cannot be justified by economic development rationale.

The Johnson and Wales grants are the result of a series of bills which identify Johnson and Wales by name as the sole beneficiary of multimillion dollar grants. Absolutely no performance criteria exist anywhere in the multiple pieces of legislation giving rise to the handouts. Just the opposite is true. Grants from the State to Johnson and Wales come from the One North Carolina Fund, but those gifts are expressly exempted from the generally applicable provisions of the One North Carolina Fund, including requirements that the recipient enter a contract with government outlining its commitments for job creation and investment. Neither statutory no contractual requirements bind Johnson and Wales to do anything in return for receiving million from the State. This unprecedented give-away is drastically different from true economic development efforts in which a grantee commits to certain employment and capital

investment minimums. The One North Carolina Fund details not only eligibility requirements but also mandates that contracts with grantees include schedules for disbursements, performance verification and recapture of funds for noncompliance. G.S. § 143B-437.72(b). None of those safeguards are present in the handouts to Johnson and Wales. Another general economic development scheme, the Bill Lee Act, contains eligibility criteria and a statutory scheme similar to but more elaborate than that of the One North Carolina Fund which the Johnson and Wales grants avoided. *See* G.S. § 143B-43, et seq.

Even corporate incentive packages specifically geared toward a particular company contain minimum performance and eligibility criteria. *See generally* G.S. § 143B-437.012(d) (performance criteria in legislation creating Job Maintenance and Capital Development Fund, purportedly intended for Goodyear Tire and Rubber Company and Bridgestone Americas Holding, Inc.); G.S. § 105-129.62(a) (codifying minimum capital investment and employment performance criteria of the New Tax Credit for Major Computer Manufacturing Facilities, intended for Dell computer manufacturer).

As noted previously, the Johnson and Wales grants flowed by a “personal commitment” by then-Speaker Black. That commitment was echoed in a pledge from other officials. Yet, these promises made by a handful of individuals and funded by the People, do not hinge on jobs or investments. Any connection between the handouts to Johnson and Wales and economic development efforts is hypothetical. No existing economic development program is used; no contracts evince development commitments. The money flowing from the State to Johnson and Wales is a gift, pure and simple.

The Johnson and Wales appropriations are made by various bills, none of which require Johnson and Wales to do or even to agree to do anything. Nothing in the legislation explains the

rationale behind the award to Johnson and Wales. Nothing in the legislation even suggests that the grants are intended to stimulate economic development. To the contrary, if the purpose of the legislation is job retention and maintenance, exempting the Johnson and Wales grants from the normal procedure prescribed for the One North Carolina Fund serves no purpose whatsoever.

b. The Johnson and Wales appropriations irrationally single out Johnson and Wales for a special benefit denied to Plaintiffs and all other North Carolinians.

The handouts to Johnson and Wales specifically and expressly are available only to Johnson and Wales. NO other person, entity, corporation or individual can even attempt to qualify for the Johnson and Wales handouts. Yet, the legislation contains no explanation for why Johnson and Wales should enjoy a privilege denied to *everyone* else in the State. As set out above, the challenged grants are not justifiable as so-called economic development incentives. They are, plainly put, gifts. However, the constitution does not permit the legislature to single out a particular entity for privilege and deny that privilege to all others. The legislature has by repeatedly enactment of special give-aways to Johnson and Wales created two classes of North Carolinians: Johnson and Wales is *the* first-class member; everyone else is stuck in coach.

IV. PLAINTIFFS ARE ENTITLED TO DECLARATORY RELIEF PURSUANT TO THE DECLARATORY JUDGMENT ACT.


In the final count of the Amended Complaint, Plaintiffs bring a claim under the Declaratory Judgment Act which provides:

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

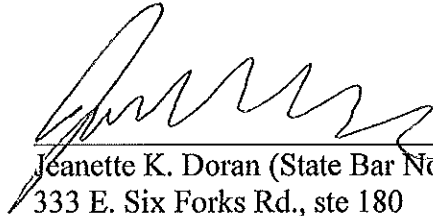
G.S. § 1-253.

Specifically, Plaintiffs here seek a declaration that the grants awarded to Johnson and Wales as codified at Session Law 2003-284, Session Law 2005-276, Session Law 2006-66, Session Law 2007-323 and Session Law 2008-107 are unauthorized, unlawful, arbitrary and in violation the Constitution and that the Court issue an order declaring that any other, resulting contractual agreement is unauthorized, unlawful, arbitrary and in violation of the State Constitution. (Compl. ¶¶A, B). Count 4 of the Complaint is based on the constitutional claims brought in the preceding counts of the Complaint, which are the subject of this brief. For all the reasons stated above, Plaintiffs' claims are valid and, accordingly, they are entitled to the prayed for declaration.

This 10th day of February, 2010.



Robert F. Orr (State Bar No. 6798)



Jeanette K. Doran (State Bar No. 29127)

333 E. Six Forks Rd., ste 180
Raleigh, North Carolina 27609
Phone: (919) 838-5313
Facsimile: (919) 838-5316

Attorneys for the Plaintiffs

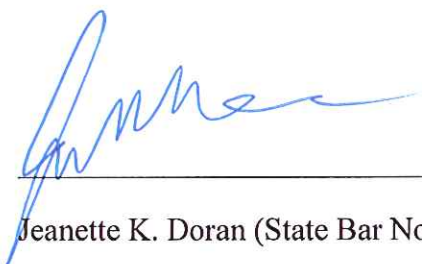
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS was served on all parties by depositing true copies thereof with the United States Postal Service, first class postage prepaid, addressed to the following:

Julia Wicker
Reed J. Hollander
Stephen D. Martin
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
Attorneys for Defendant for Johnson and Wales University

Norma Harrell
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602
Attorney for Defendants State of N.C.; Beverly Perdue; and J. Keith Crisco

This the 10th day of February, 2010.



Jeanette K. Doran (State Bar No. 29127)

333 E. Six Forks Road, Suite 180
Raleigh, North Carolina 27609
Phone: (919) 838-5313
Facsimile: (919) 838-5316

Attorney for the Plaintiffs