

COURT OF APPEALS OF NORTH CAROLINA

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JASON R. SAINÉ; DONALD D. REID, )  
Plaintiff-Appellants, )

v. )

STATE OF NORTH CAROLINA; )  
BEVERLY PERDUE, Governor )  
of the State of North Carolina, in her )  
official capacity; J. KEITH CRISCO, )  
Secretary of the North Carolina )  
Department of Commerce, in his )  
official capacity; JOHNSON AND )  
WALES UNIVERSITY, )  
Defendants. )

From Wake County

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PLAINTIFF-APPELLANTS' BRIEF

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### QUESTIONS PRESENTED

- I. Did the Court err in granting Defendants' motions to dismiss as to counts one, two, and four under 12(b)(6) for failure to state a claim upon which relief may be granted?**
- II. Did the trial court err in granting Defendants' motions to dismiss as to count three of the Complaint under 12(b)(1) for lack of standing?**

### STATEMENT OF THE CASE

This action was brought pursuant to the Uniform Declaratory Judgment Act, N.C. GEN. STAT. § 1-253, to challenge the constitutionality of appropriations made to Johnson and Wales University, a private, nonprofit culinary school, by the General Assembly. Plaintiffs filed their Complaint and Petition for Declaratory Judgment on 16 September 2009. (R pp. 3-19)

Defendants filed their Motions to Dismiss on 16 November 2009. (R pp. 20-28) Honorable Michael R. Morgan heard the Motions to Dismiss on 15 February 2010. At the conclusion of the hearing, Judge Morgan dismissed in open court counts one, two, and four pursuant to N.C.R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted and dismissed claim three for lack of standing. A written Order was filed thereafter on 4 March 2010. (R pp. 29-34)

Plaintiffs appealed on 31 March 2010. (R pp. 35-36) State Defendants submitted their Objections and Amendments to Plaintiffs' Proposed Record on Appeal on 3 June 2010. (R pp. 39-41) Johnson and Wales submitted its own Objections on 10 June 2010. (R pp. 42-46) The record was settled by stipulation (R p. 49), and filed in the Court of Appeals on 12 July 2010. The record on appeal was docketed on 20 July 2010.

## STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This appeal is from a final judgment of the trial court and is pursuant to N.C. GEN. STAT. § 7A-27(b).

### STATEMENT OF THE FACTS

This case centers on successive gifts by the General Assembly to the private, nonprofit culinary school, Johnson and Wales, in connection with its consolidation project in Charlotte, North Carolina. The story begins with political promises of legislative grants to Johnson and Wales and ends with millions of dollars in handouts to the school from the One North Carolina Fund with few and ultimately no conditions upon the money's usage, contrary to ordinary economic development rules found at N.C. GEN. STAT. §§ 143B-437.71 and 143B-437.72.

#### **Political Promises of Legislative Grants to Johnson and Wales**

Several politicians promised money to Johnson and Wales in 2002. As alleged in the Complaint, on 23 May 2002, then Speaker of the North Carolina House of Representatives Jim Black wrote a letter to the president of Johnson and Wales, Jack Yena, promising, "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." President Pro Tem of the North Carolina Senate Marc Basnight wrote his own letter to Yena on 4 June 2002 pledging, "You have my commitment to make our best efforts to secure \$1 million immediately for the Johnson and Wales University campus in Charlotte and the remaining \$9 million over the next five years by the state of North Carolina for this project." On 3 June 2002, then Governor Michael F. Easley voiced his own support of unspecified financial support in a letter to Yena. These promises were kept from the public for several months until finally being revealed in November of 2002.

However, within a month of receiving these politicians' pledge of public handouts, on 20 June 2002, Johnson and Wales, along with the City of Charlotte, announced their plans for a new Johnson and Wales campus in Charlotte, which would cost approximately \$82 million and was projected to open in the fall of 2004. The purpose of this project was to consolidate the Johnson and Wales campuses of Norfolk, VA and Charleston, SC to a central location. Close to this announcement, various media outlets revealed that several organizations had put together a so-called incentives package for Johnson and Wales; these organizations included the Bank of America, the Charlotte Chamber of Commerce, Center City Partners, Compass Group North America, and several city officials. This incentives package was separate from the State officials' own pledges.

### **Legislative Gifts to Johnson and Wales**

The State made its first gift with Session Law 2003-284, which called for the Department of Commerce to give \$1 million to Johnson and Wales from funds appropriated in the 2001-2003 fiscal biennium to the One North Carolina-Industrial Recruitment Competitive Fund for the 2003-2004 and 2004-2005 fiscal years. The General Assembly tried to justify such allocations in section 12.4A:

The General Assembly finds that institutions of higher education play an essential role in maintaining and strengthening the economic health of the State. As our economy evolves from its traditional manufacturing and agricultural base to a diverse structure, including many technological, information, and service-based business, innovative educational institutions are essential to providing appropriate workforce preparation and training to maintain the State's viability as an attractive location for new and expanding businesses. Recruiting new educational institutions to the State to fulfill this role also benefits the State and local governments by providing new jobs, a stronger tax base, support for the satellite businesses, and investment that will permanently enhance the infrastructure necessary to support long-term growth and prosperity. The General Assembly recognizes that the significant efforts by Johnson and Wales University to

establish and expand in North Carolina are vital to a healthy and growing State economy. Providing incentives to support these activities is a critical opportunity for our State to address the possibility irreversible damage from the current economic recession and restructuring.

S.L. 2003-284 § 12.4A. The first appropriation, unlike *all* subsequent gifts, placed conditions on the use of the \$1 million award. Specifically, funds from the 2001-03 biennium had to be used for enumerated capital expenditures in North Carolina. *Id.*

The 2003 handout was just the beginning; over the next several years, several millions more were gifted to Johnson and Wales, all without declaration of specific legislative intent, all without condition or restriction.

Session Law 2005-276, which was signed into law by then Governor Easley on 13 August 2005, allocated one million for the 2005-2006 fiscal year to Johnson and Wales “for the purpose of providing financial assistance to the University.” S.L. 2005-276 § 13.6(b). Session Law 2006-66 copied the language of Session Law 2005-276, only it modified Session Law 2005-276 to allocate \$1 million to Johnson and Wales for the 2006-2007 fiscal year. Both Session Laws 2005-276 and 2006-66 gave money to Johnson and Wales “notwithstanding the provisions of G.S. 143B-437.71.” N.C. GEN. STAT. § 143B-437.71 is the provision which governs the use of the One North Carolina Fund money to ensure a public benefit is served through the appropriations.

Officials continued these gifts in Session Laws 2007-323 and 2008-107. Session Law 2007-323 gave Johnson and Wales \$2 million and Session Law 2008-107 amended Session Law 2007-323 to provide \$1.5 million. Section 32.2(a) of Session Law 2007-323 specified that the Joint Conference Committee Report of 27 July 2007 [2007 Committee Report] would detail the

State Budget and be considered a part of the State budget. The 2007 Committee Report gave the abovementioned \$2 million to Johnson and Wales.

Session Law 2008-107 followed similar procedure in its amendment to provide Johnson and Wales \$1.5 million. The Joint Conference Committee Report, dated 3 July 2008 [2008 Committee Report] provided for a \$1.5 million award to Johnson and Wales. (Session Laws 2003-284, 2005-276, 2006-66, 2007-323, and 2008-107 regarding Johnson and Wales are collectively referred to herein as “Johnson and Wales legislation.”)

### **Creation and Usual Operation of the One North Carolina Fund**

The money given to Johnson and Wales was appropriated from the One North Carolina Fund. This fund is a special revenue fund in the Department of Commerce, created by N.C. GEN. STAT. § 143B-437.71(a) upon findings that “[i]t is the policy of the State of North Carolina to stimulate economic activity and to create new jobs.” N.C. GEN. STAT. § 143B-437.70 (2009). Ironically, the General Assembly claimed that creating the fund would “maintain consistency and accountability in a key economic development program and [would] ensure that the program benefits the State and its citizens.” *Id.*

N.C. GEN. STAT. § 143B-437.72(a) quite clearly states that money may be disbursed from the One North Carolina Fund only according to “agreements entered into between the State and one or more local governments and between the local government and a grantee business.” Such agreements must contain certain provisions. N.C. GEN. STAT. § 143B-437.72(b) covers agreements between the local government and a grantee business and provides that the following provisions must be included:

- (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.

According to N.C. GEN. STAT. § 143B-437.72(c), any agreement between the State and one or more local governments must contain:

- (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 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.
- (6) Any other provision the State finds necessary to ensure proper use of State funds.

There is no such agreement between the State and Johnson and Wales or the State and the appropriate local government; the General Assembly simply disregarded these laws and the policy they embraced. As stated above, the allocations were made “notwithstanding the provisions of G.S. § 143B-437.71(b).” Jim Black, Mike Easley and others simply cherry-picked Johnson and Wales for \$10 million in handouts and abandoned existing legal requirements to do it.

N.C. GEN. STAT. § 143B-437.71(b) mandates that One North Carolina Fund money can be allocated only pursuant to subsection (b). It allows the money, which is not to exceed \$3 million, to be given to local governments to secure commitments for the recruitment, expansion or retention of new and existing business and to the One North Carolina Fund. Furthermore, funds can only be used for:

- (1) Installation or purchase of equipment.
- (2) Structural repairs, improvements, or renovations to existing buildings to be used for expansion.
- (3) Construction of or improvements to new or existing water, sewer, gas, or electric utility distribution lines or equipment for existing buildings.
- (4) Construction of or improvements to new or existing water, sewer, gas, or electric utility distribution lines or equipment for new or proposed buildings to be used for manufacturing and industrial operations.
- (5) Any other purposes specifically provided by an act of the General Assembly.

N.C. GEN. STAT. § 143B-437.71(b)(1)-(5).

But for Johnson and Wales none of this mattered. Ordinary procedure just did not apply. As alleged in the Complaint, Plaintiffs are taxpayers of North Carolina and have suffered harm through the Johnson and Wales legislation's noncompliance with the law surrounding the One North Carolina Fund since such spending lessened public funds that could have been spent toward other pursuits which would have guaranteed the public welfare through enforceable agreements. Furthermore, Plaintiffs are also harmed by the exclusivity of the money granted to Johnson and Wales; though they are private citizens, just as Johnson and Wales is a private entity, they cannot qualify for the grants to Johnson and Wales.

#### STANDARD OF REVIEW

The standard of review for the Court of Appeals regarding a dismissal pursuant to 12(b)(6) and 12(b)(1) is de novo since the dismissal concerns questions of law. *Welch Contracting, Inc. v. N.C. Dept. of Transportation*, 175 N.C. App. 45, 622 S.E.2d 691 (2005). The question on review is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000). All pleaded facts are taken as true on review.

#### ARGUMENT

This court is being asked to reverse the decision of the Wake County Superior Court dismissing Plaintiffs' case. The trial court erroneously decided that: (1) the financial gifts to Johnson and Wales from the General Assembly fulfilled a public purpose, thereby satisfying N.C. CONST. Art. V, § 2(1); (2) because the gifts served a public purpose, they necessarily were not exclusive emoluments under N.C. CONST. Art. I, § 32; (3) that Plaintiffs lacked standing to contest the action under equal protection or due process claims in N.C. CONST. Art. I, § 19 since

Plaintiffs are not of a legally protected class nor do they assert violations of a fundamental right; and (4) given the dismissal of all other claims, Plaintiffs lacked a justiciable claim upon which a declaratory judgment could be granted. This is not a plea for the Court to intervene in a philosophical or political controversy but rather for the Court to define 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), *Great Atl. & Pacific Tea Co. v. Maxwell*, 199 N.C. 433, 438-39, 154 S.E. 838, 841 (1930), as it applies to the circumstances of this case, by holding that the trial court erred.

At the outset, Plaintiffs are compelled to highlight the striking differences between this case and other recent challenges to so-called economic development incentives packages. Here, five separate appropriations to Johnson and Wales are challenged. None of the challenged appropriations was made pursuant to an existing economic development program like those at issue in *Blinson, et al. v. State, et al.* To the contrary, the gifts to Johnson and Wales were expressly made outside the scope of the One North Carolina Fund’s statutory framework. Here, Johnson and Wales is not required to meet minimum investment requirements, minimum employment requirements or any other performance requirement whatsoever. No recent court challenge to economic development incentives has addressed the kind of free-for-all with the public purse that the Johnson and Wales’ appropriations constitute. Considering the circumstances attendant to the appropriations, namely the personal promises to Johnson and Wales from Jim Black, Marc Basnight, and Governor Easley which brought about this legislation, these expenditures amounted to handouts and not economic incentives. They were gifts amounting to exclusive emoluments and were not for a public purpose.

In determining the constitutionality of a legislative act, the judiciary is obligated 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). Furthermore, it is the judiciary’s duty to protect those political rights reserved to the people:

We are not inadvertent to the uses of a written Constitution and the arguments that have been addressed to the propriety of a liberal construction so that it may aid, rather than retard, the march of progress. . . . But when the Constitution provides how orderly progress may be fostered and advanced, and the process involves political rights reserved or expressly secured to the people, the courts will be careful not to encroach on that prerogative, will be included to find in the provision itself the liberality and flexibility which the Constitution intends.

*Purser v. Ledbetter*, 227 N.C. 1, 5-6, 40 S.E.2d 702, 706 (1946).

In this case, an “irreconcilable conflict” exists between the Defendants gifting Johnson and Wales alone with millions of dollars and the will of the people that government should be limited by the constitution. Under this State’s Constitution, the people are guaranteed that their tax money shall only be used for public purposes, N.C. CONST. Art. V, § 2(1), that no exclusive emoluments may be given except in consideration of public services, N.C. CONST. Art. I, § 32, and that the law of the land will be equally applicable to all, N.C. CONST. Art. I, § 19. However, this case demonstrates a preference for a private cooking school that abrogates fundamental rights of Plaintiffs’ and all North Carolinians in the interest of fulfilling a handful of politicians’ initially secretive promises. Neither democratic principles nor constitutional constraints permit the issues in this case to be dismissed since the government’s actions in these circumstances, if left unchecked, could lead to unfettered government spending for private entities in such a way that does not even attempt to guarantee the general welfare. Therefore, Appellants ask this Court

to reverse the lower court's dismissal of Plaintiffs' claims and allow this case to proceed upon the merits.

I. THE LOWER COURT ERRED IN GRANTING DEFENDANTS' MOTIONS TO DISMISS AS TO PLAINTIFFS' PUBLIC PURPOSE, EXCLUSIVE EMOLUMENTS, AND DECLARATORY JUDGMENT CLAIMS UNDER 12(b)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Contrary to the lower court's Opinion, all of Plaintiffs' claims which were dismissed under N.C. R. Civ. P. 12(b)(6) are ones upon which relief may be granted. The Johnson and Wales legislation does not serve a public purpose because the University is the sole named beneficiary of funds from the One North Carolina Fund and all benefits inure to it with only incidental, if any, benefits falling to the public; therefore, Plaintiffs' second claim should not have been dismissed. Furthermore, the grants to the University were not given in consideration of public services but were in fact gifts from the tax coffers intended to fulfill a few politicians' illusory promises; thus, the lower court should not have dismissed Plaintiffs' first claim. Finally, because a declaratory judgment would be appropriate relief to this controversy, Plaintiffs' fourth claim is also valid.

A. Plaintiffs present a claim upon which relief may be granted since the grants to Johnson and Wales violate the Public Purpose Clause of the State Constitution in that the benefits under the grants inure to Johnson and Wales principally and are not for a public purpose.

Article V, § 2(1) of the North Carolina Constitution maintains: "The power of taxation shall be exercised in a just and equitable manner, for *public purposes only*, and shall never be surrendered, suspended, or contracted away." (emphasis added) Furthermore, Article V, § 2(7) of the North Carolina Constitution stipulates: "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.” (emphasis added) While the General Assembly’s police power allows it to legislate to provide for the protection of the general health, safety, and welfare of the people, and while it may experiment with new ways to address these concerns, it is still limited by the Constitution. *Maready v. City of Winston-Salem*, 342 N.C. 708, 714, 467 S.E.2d 615, 619-620 (1996). It is a truism that the State can tax only to provide for public purposes, and it has no authority to tax for merely private interests. *Foster v. North Carolina Med. Care Comm’n*, 283 N.C. 110, 127, 195 S.E.2d 517, 528 (1973); *Briggs v. City of Raleigh*, 195 N.C. 223, 228, 141 S.E. 597, 599 (1928) (citing *Jones v. City of Portland*, 245 U.S. 217, 221 (1917)). For,

[t]o lay, with one hand, the power of the government on the property of a citizen, and with the other to bestow it upon favored individuals to aid private enterprise and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

*Briggs*, 195 N.C. at 228, 141 S.E. at 602 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 326 (1819)).

The exercise of the taxing power for merely private interests was long ago characterized as taxation “to load the tables of the few with bounty that the many may partake of the crumbs that fall therefrom.” *Briggs*, 195 N.C. at 228, 141 S.E. at 600. The millions of tax dollars gifted to Johnson and Wales provided a feast to the cooking school, and the government took inadequate action to ensure that more than mere crumbs fell to benefit its people. Only the first grant placed limits upon the use of the Johnson and Wales appropriation and expressed a general intent to benefit the State. *See* S.L. 2003-284 § 12.4A. Beyond this first year, the State simply gave money to the school “for the purpose of providing financial assistance to the University,” S.L. 2005-276 § 13.6.(b), S.L. 2006-66 § 13.6.(b), and later simply to “provid[e] funds,” S.L. 2007-323, S.L. 2008-107, thereby leaving one to wonder what public purpose the later

appropriations served. Indeed, legislative handouts to a cherry-picked recipient which are unaccompanied by any requirements for performance beyond the first appropriation do not satisfy a public purpose.

In order for an appropriation to satisfy the public purpose clause, two conditions must be satisfied: first, the governmental act must have a “reasonable connection with the convenience and necessity” of the government, *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989) (citing *Airport Auth. v. Johnson*, 226 N.C. 1, 36 S.E.2d 803 (1946)); second, the act must benefit “the public generally, as opposed to special interests or persons.” *Id.* (citing *Martin v. Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970)). In applying this test, one must consider the particular facts of each case presented. *Maready*, 342 N.C. at 716, 467 S.E.2d at 620. When assessing the case, the judiciary must “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. 328, 240-41, 651 S.E.2d 268, 277-78 (2007). This involves delving deeply into the facts to see whether the purpose of the act promotes the general welfare, remembering that direct aid to a private enterprise, while a constitutionally permissible means of accomplishing a public purpose, *Hughey v. Cloninger*, 297 N.C. 86, 95, 253 S.E.2d 898, 904 (1979), will violate the Public Purpose Clause if there are only limited benefits to the public. *Maready*, 342 N.C. at 718, 467 S.E.2d at 622.

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

The handouts to Johnson and Wales are unlike those incentives previously found to comply with fundamental public purpose principles in that they do not hinge on economic

stimulation. The Johnson and Wales appropriations fail the first prong of the *Madison Cablevision* test because there is no *quid pro quo* that benefits the State.

*Maready* applied the first prong of the test by first looking to the language of the challenged statute and then by comparing the challenged activity with those other activities previously held to be within the permissible realm of government action to see whether they were similar. 342 N.C. 708, 722, 467 S.E.2d 615, 624 (1996). In *Maready*, the Court determined that since N.C. GEN. STAT. §158-7.1 explicitly expressed that actions taken pursuant to the Act would “increase the population, taxable property, agricultural industries and business prospects of any city or county,” it was sufficiently related to a necessity of the government. *Id.* at 715, 476 S.E.2d at 620 (citing N.C. GEN. STAT. §158-7.1(a) (1994)). However, this statement alone was not enough to hold the statute constitutional under the Public Purpose Clause; even though public purpose declarations by the legislature should be given their due weight, such statements cannot save an enactment that is inconsistent with the public purpose doctrine. *Id.* at 716, 476 S.E.2d at 620 (citing *State v. Felton*, 239 N.C. 575, 578, 80 S.E.2d 625, 628 (1954)). After listing many public purpose cases, the Court determined that it could not forbid the government to alleviate the problems of its citizens through economic incentives while it had in the past allowed similar help through more traditionally humanitarian means. *Id.* at 720-22, 476 S.E.2d at 623-24.

When these principles are applied to the case at hand, one finds that the Johnson and Wales appropriations do not satisfy the first prong of the test. While the General Assembly did express in Session Law 2003-284 § 12.4A that it “recognizes that the significant efforts by Johnson and Wales University to establish and expand in North Carolina are vital to a healthy and growing State economy” and did place a few conditions on the use of the first appropriation, this does not satisfy the test. While the statute challenged in *Maready* justified its expenditures

precisely and applied to all expenditures stemming from that statute, the statement recognizing Johnson and Wale's contribution to the North Carolina economy does not extend to later appropriations. Furthermore, no benefits are assured beyond the first appropriation since no conditions were placed upon the use of the 2005, 2006, 2007, and 2008 appropriations. S.L. 2005-276 § 13.6.(b); S.L. 2006-66 § 13.6.(b); S.L. 2007-323; S.L. 2008-107. While these expenditures did say "to Johnson and Wales in Charlotte," they failed to limit their use to the Charlotte campus or in any other way which would guarantee benefits to North Carolina. *Id.* Johnson and Wales has campuses in Providence, RI, Miami, FL, and Denver, CO, in addition to the Charlotte location, and these are collectively known as the University. So when the appropriations state the money is "for the purpose of providing financial assistance to the University," there is nothing to prohibit North Carolina tax money passing outside the state to benefit other states and their citizens. *Id.*

The first prong of the *Madison Cablevision* test centers on the "convenience and necessity of government." 325 N.C. at 646, 386 S.E.2d at 207 (1989) (citing *Airport Auth. v. Johnson*, 226 N.C. 1, 36 S.E.2d 803 (1946)). Giving away tax money without placing conditions on its use offers no convenience to North Carolina or its local governments and surely is not necessary. Without limiting the use of the money, the General Assembly failed to ensure any of its interests would be furthered; rather, it appears that Jim Black, Marc Basnight, and Mike Easley were simply inserting an earmark into the budget to meet their personal promises. At the minimum, a genuine question of material fact exists as to whether the grants here bear a reasonable connection to the convenience and necessity of government or were merely gifts and should not have been dismissed for failing to state a claim upon which relief could be granted.

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

Plaintiff presents a genuine question of material fact as to whether the Johnson and Wales grants serve a public purpose, also. The appropriations to Johnson and Wales should not be considered economic incentives or aids to education; rather, they were gifts given to satisfy personal commitments with no legitimate government interest furthered, as alleged in the Complaint. Because there were no conditions placed upon the money, such as creating jobs or maintaining capital within the state, the appropriation served no public economic purpose and did not guarantee the money would be used for educating North Carolinians. Because Johnson and Wales is a private, nonprofit culinary school not in the business of providing a sound basic education, the government acted outside its legitimate interest area by granting the cooking school public funds.

*Maready* held that while economic stimulation is an essential public and governmental purpose, the manner in which it is accomplished is subject to constitutional limitations. 342 N.C. at 719, 467 S.E.2d at 622 (citing *Stanley v. Dep't of Conservation and Dev.*, 284 N.C. 15, 34, 199 S.E.2d 641, 653 (1973)). The public purpose doctrine requires that “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*, 353 N.C. 336, 343, 554 S.E.2d 331, 335 (2001). When analyzing public versus private benefits, the court must look to the aim of the legislation without engaging in economic projections, notwithstanding Appellee’s arguments to the contrary below or the misunderstanding of the trial court. *Blinson v. State*, 186 N.C. App. 328, 340-41, 651 S.E.2d 268, 277-78 (2007).

The aim of the Johnson and Wales legislation is demonstrated most clearly by what it lacks: no limitations were placed on the use of most of the appropriations. *Maready* and the three other economic incentives cases relied on below demonstrate that in order for appropriations to private parties to be upheld, there must be a clear public purpose served by or expressed in the Act or contract in question or there must be conditions placed upon the money's use to ensure a public purpose is served. As already discussed, in *Maready*, the statute there explicitly provided that its purpose was to create jobs and expand the tax base of the area. 342 N.C. at 714-15, 467 S.E.2d at 619-20. In *Peacock v. Shinn*, the contract between the City of Charlotte and George Shinn stated its purpose was "to establish a framework for an operating agreement of the Coliseum to maximize the profitability and use of the Coliseum" and "for the purpose of staging NBA basketball games." 139 N.C. App. 487, 494-95, 533 S.E.2d 842, 848 (2000). In other words, the city's expenditures were for the express purpose of making one of its properties more lucrative, and the private contract parties were only incidental beneficiaries. In *Piedmont Triad Authority v. Urbine*, the Court upheld the municipal corporation's use of eminent domain to expand the airport for a public purpose since the Authority had created a plan of expansion before Fed Ex's inquiries into use of the property in question and it clearly furthered the peoples' expressed desire in N.C. CONST. Art. V, § 13 for better seaports and airports. 354 N.C. 336, 343, 554 S.E.2d 331, 335 (2001). Again, the private party to the contract only incidentally benefitted from the Authority's betterment of the property. *Blinson* is no different in that the tax credits to Dell which were upheld by the Court were supported by legislation with clear and detailed public purposes and expected public benefits expressed which would apply to all expenditures made under the statute; also there was a contract in place to help ensure public benefit. 186 N.C. at 330-32, 651 S.E.2d at 271-72.

All this condemns the Johnson and Wales legislation. Here, Johnson and Wales is the expressed primary beneficiary: “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). The other appropriations contain similar language. *See* S.L. 2003-284 § 12.4A; S.L. 2006-66 § 13.6.(b); S.L. 2007-323; S.L. 2008-107. And four of the five appropriations do not even attempt to express a public purpose or bring about one through limiting the money’s use. S.L. 2005-276 § 13.6.(b); S.L. 2006-66 § 13.6.(b); S.L. 2007-323; S.L. 2008-107. Only the 2003 appropriation attempts to express a public purpose, and there is no indication that this same intent extends throughout the later grants. S.L. 2003-284 § 12.4A. Considering the circumstances attendant to the appropriations, namely the personal promises to Johnson and Wales from Jim Black, Marc Basnight, and Government Easley which brought about this legislation, and the inadequate language of the appropriations, these expenditures amounted to handouts and not economic incentives.

Nor do they pass as serving a public purpose on the grounds that Johnson and Wales is an educational facility. N.C. CONST. Art. I, § 15 and N.C. CONST. Art. IX, § 2 together guarantee to every *child* of North Carolina an opportunity to receive a “sound basic education.” *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 614-15, 599 S.E.2d 365, 376 (2004) (citing *Leandro v. State*, 346 N.C. 336, 351, 488 S.E.2d 249, 257 (1997)). Such a sound basic education amounts to providing students with educational fundamentals that would allow the student to function in society, make informed decisions which affect themselves and our democracy, pursue higher education if they so choose, and allow them to compete for employment. *Leandro*, 346 N.C. at 351, 488 S.E.2d at 257. Thus, the focus of *Leandro* was public school education of children in

grades kindergarten through twelfth grade, not cooking classes for grown-ups. Through the Constitutional principles outlined in *Leandro*, the government is authorized to spend public money on *children* of the State to help them gain the potential to pursue higher education. Johnson and Wales does not educate children and it is a place of vocational and higher education and therefore lies beyond the realm of *Leandro*. The Legislature's constitutionally-mandated interests allowing unconditional funding simply do not justify the Johnson and Wales handouts.

*Foster* maintains that while the government may engage in certain activities, such as providing medical care or education, just because the activities these entities pursue are similar does not mean that contributing money to a private counterpart is for a public purpose. *Foster v. North Carolina Med. Care. Comm'n*, 283 N.C. 110, 125, 195 S.E.2d 517, 527 (1973). The primary benefit must go to the public, and just because the private organization that receives the money is engaged in meritorious activities in which the State may lawfully engage to some or other level does not mean appropriations to such an entity furthers a public purpose. *Id.* Just because the State can fund public school education and maintain public universities does not mean it can give money to a private cooking school with no guarantees placed upon the money that it will be used to benefit North Carolina. The Act contested in *Foster* had no purpose outside the operation and ultimate conveyance of a hospital facility to a private entity, *Id.* at 127, 195 S.E.2d 528; the appropriations to Johnson and Wales serve no purpose beyond providing funds to the University. S.L. 2005-276 § 13.6.(b); S.L. 2006-66 § 13.6.(b); S.L. 2007-323; S.L. 2008-107.

*Leandro* does point out that this sound basic education promise is the minimum constitutionally permitted, and therefore it would appear that there is an argument that the government could fund Johnson and Wales as it did since it furthers education higher than the

base-line created by the State Constitution. 346 N.C. at 354, 599 S.E.2d at 259. However, this argument has no precedent. The only cases that come even close are *Hughey v. Cloninger* and *State Education Assistance Authority*, which are relied on by Appellees below. *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1979); *State Ed. Assistance Auth. v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970).

In *Hughey*, the Court stated that direct disbursement of public funds to private entities to further public purposes was permissible. 297 N.C. at 95, 253 S.E.2d at 904. The only reason Gaston County's appropriation to the local Dyslexia School of North Carolina, Inc. was held impermissible was because the county had no statutory authority to do so. 297 N.C. at 94-95, 253 S.E.2d at 903. So it was not the fact that the school was a private corporation that caused the Court concern. However, the important point to remember here is that this case involved a certified special school for dyslexic school children, not adults who passed Johnson and Wales entrance standards. Most importantly, in *Hughey*, a private entity was performing a function, i.e. educating dyslexic students, which government actors were not. The State was simply hiring and accordingly paying a private corporation to perform the government function of educating dyslexic children. So the facts just do not support the assertion the State can give handouts to Johnson and Wales. If *Hughey* can be used to justify handouts to Johnson and Wales, one cannot but wonder: Is the State going to give handouts to every private school? What about online, distance learning schools like the University of Phoenix? What about bartending schools? What about exotic dance lessons? Will every school and supposed educator be eligible? Or, will the public purse open only for those with top gun lobbyists and entre to corridors of power with governors and house leaders?

*State Education Assistance Authority* is no help to Defendant-Appellees either. That case allowed a State agency to purchase bonds supporting small education loans to those State citizens in dire financial need. 276 N.C. at 592, 174 S.E.2d at 563. In *State Education Assistance Authority*, the loans would be paid absent default and they were helping North Carolinians who would not otherwise be able to afford higher education to obtain such education. 276 N.C. at 586, 174 S.E.2d at 558. The handouts to Johnson and Wales did not contain any conditions which would guarantee the proceeds would help North Carolina citizens in need, nor would they be repaid as the educational loans would be; in fact, there was absolutely nothing to guarantee the Johnson and Wales appropriations would benefit any North Carolinian.

The lower court noted *Green v. Kitchin* during oral arguments. Transcript of Oral Arguments at 78. In that case, the Court upheld the Town of Weldon's expenditure of tax revenues for a policeman to attend a training course. *Green v. Kitchin*, 229 N.C. 450, 459, 50 S.E.2d 545, 551 (1948). While this use of public funds did involve educating an adult, this case is not persuasive. First of all, this was money spent on a North Carolina policeman. *Id.* at 543-45, 50 S.E.2d at 547-49. As stated, there is no guarantee the Johnson and Wales legislation will benefit North Carolinians. The money given past the first appropriation, quite frankly, could all be transferred outside the state without violating any law. Second, giving money to help a policeman obtain training necessary for his job securing public safety is incomparable to giving money to a private cooking school. A police officer is a government employee and serves the obvious public purpose of enforcing the law. *Id.* Even if the money given to Johnson and Wales directly aided a North Carolina student attending the University -- note there is no guarantee it has or will -- such a North Carolinian would not be an employee of the state, nor would that person serve such a compelling public purpose as enforcing the law or protecting public safety.

“An 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).

Training and educating policemen is a business of the government, *Id.* at 455, 50 S.E.2d at 548; there is at least a justiciable issue which should survive dismissal as to whether the Johnson and Wales appropriations were within the business of government.

Chief Justice Stacy noted in *Briggs*, “the 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.” *Briggs v. City of Raleigh*, 195 N.C. 228, 226, 141 S.E. 597, 600 (1928). If such legislation as the Johnson and Wales legislation is upheld and others ensue, “private enterprise would of necessity be forced out . . . and our free private enterprise economy would be replaced by socialism.” *Mitchell v. North Carolina Indus. Dev. Financing Auth.*, 273 N.C. 137, 153, 159 S.E.2d 745, 756 (1968). In order to protect our democracy, this Court should hold that the lower court erred in granting Defendants’ dismissal. While the notion of public purpose changes as the society does, it must still be subject to meaningful limitations in order to preserve the Constitutional right that all tax moneys may only be used for a public purpose. *Id.* at 144, 159 S.E.2d at 750. The grants given to Johnson and Wales were inappropriate, unconstitutional gifts and nothing more; they were not incentives meant to further economic development or educational opportunities for the people of North Carolina. Therefore, Appellants ask the Court to hold that the lower court erred in dismissing Plaintiffs’ claim.

B. Plaintiffs present a claim upon which relief may be granted since the grants to Johnson and Wales violate the Exclusive Emoluments Clause of the State

Constitution in that the appropriations were not given in consideration of public services.

According to N.C. CONST. Art. I, § 31, “No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.” The Johnson and Wales legislation affronts this provision since these appropriations were not granted in consideration of any public service; rather, they were simply gifts from Jim Black, Marc Basnight, and Governor Easley taken from the public coffers. Therefore, we ask this Court to reverse the lower court’s dismissal of Plaintiff’s first claim.

The 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); *Blinson v. State*, 186 N.C. App. 328, 341, 651 S.E.2d 268, 278 (2007) (reasoning that the test applies to both benefits and exemptions). Only if the government action satisfies both parts of this test will it not constitute an impermissible emolument or privilege. *Id.*

As to the first prong, “in ascertaining the intent, the Court should consider the language of the statute, the spirit of the act and what the act seeks to accomplish.” *Town of Emerald Isle*, 320 N.C. at 654, 360 S.E.2d at 764 (citing *Stephenson v. Durham*, 281 N.C. 300, 188 S.E.2d 281 (1972)). The language of the appropriations and their clear disavowal of the law surrounding the fund from which the money came raises suspicions as to whether the intent behind the appropriations was to further the general welfare. The money for the later appropriations upon which no conditions were placed came from the One North Carolina Fund. As discussed in the

Statement of the Case (pp. 5-8), the legislation which created the One North Carolina Fund explicitly provides that the money within it is to be used for purposes outlined in the creating legislation. Yet, the 2005 and 2006 appropriations were made “notwithstanding the provisions of G.S. 143B-437.71 [of the One North Carolina Fund].” S.L. 2005-276 § 13.6.(b); S.L. 2006-66 § 13.6.(b). While one General Assembly is not bound by another, *Kornegay v. Goldsboro*, 180 N.C. 441, 451, 105 S.E. 187, 192 (1920), the fact that (1) the One North Carolina Fund legislation still stands, indicating the legislature still thinks it valid, and (2) the appropriations were made notwithstanding the law, indicates a less than wholesome intent. While this alone may only raise questions, when one pairs this with the fact that these appropriations stemmed from a group of political promises from Jim Black, Marc Basnight, and Mike Easley, one is left with a question of material fact as to whether the Johnson and Wales legislation passes the first prong of the exclusive emoluments test. This is precisely the kind of question to be answered after the Rule 12(b)(6) phase.

As to the second prong of the *Town of Emerald Isle* test, the General Assembly had no reasonable basis upon which they could conclude that the grants to Johnson and Wales would serve a public interest. This part of the test’s analysis is similar to the public purpose analysis, *Peacock v. Shinn*, 139 N.C. App. 487, 493, 533 S.E.2d 842, 847 (2000), and for the same reasons as stated above, the General Assembly could not have reasonably concluded that money sent to Johnson and Wales without conditions attached on its use would serve the public interest. That money, though sent to Charlotte, could have been transferred to Florida, Maine, or Colorado and benefitted those campuses in such a way that wholly eviscerates Defendants’ argument of derivative benefit to North Carolinians with only incidental benefit to Johnson and Wales. Under the Johnson and Wales legislation, the University is the one and only beneficiary and any

benefit that North Carolina received because of the appropriations happened only by accident, not by the intent of the General Assembly.

This is not the end of the analysis, however. According to *Blinson*, the issue as to whether an exemption or benefit is in consideration of public services follows a determination that the government action fails the *Emerald Isle* test and therefore is an exclusive emolument. *Blinson v. State*, 186 N.C. App 328, 342, 651 S.E.2d 268, 279 (2007). Plaintiffs believe this secondary issue should be central to an analysis under N.C. CONST. Art. I, § 31 since the plain language of the Constitution demands just this, but no matter what order in which the Court decides to consider the issues, the Johnson and Wales legislation was not given in consideration of public services. *Leete v. Warren County* is particularly instructive here. In that case, the Court held that the severance pay given to a county manager upon his voluntary resignation amounted to an exclusive emolument since the board was not legally obligated to pay it, nor was it to help someone who was dismissed with economic adjustment. *Leete v. Warren County*, 341 N.C. 116, 123, 462 S.E.2d 476, 480 (1995). Essentially, the severance pay was in consideration of the commissioner's past good service and was therefore unenforceable since past consideration is no consideration. *Critcher v. Watson*, 146 N.C. 150, 151, 59 S.E. 544, 545 (1907).

The handouts to Johnson and Wales are likewise unenforceable. There was no contract obligating the General Assembly to pay Johnson and Wales; only the illusory promises from a few politicians brought about these appropriations. Furthermore, Johnson and Wales announced its intent to move to Charlotte in June 2004, while all the appropriations at issue were made after this announcement. Johnson and Wales offered no action or promise in return for the money

than it had already done or intended to do. Therefore, the Johnson and Wales appropriations were merely gifts, exclusive emoluments for no consideration of public services.

For these reasons, the lower court should not have dismissed Plaintiff's first claim. Therefore, we ask this Court to allow this case to continue on the merits by reversing the lower court's decision to dismiss.

C. Plaintiffs present a claim upon which relief may be granted since the other claims presented are legitimate claims upon which relief afforded by declaratory judgment would be appropriate.

A declaratory judgment should issue when it will (1) "serve a useful purpose in clarifying and settling the legal relations at issue" and (2) "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Auger v. Auger*, 356 N.C. 582, 588, 73 S.E.2d 125, 130 (2002) (quoting Edwin Borchard, *Declaratory Judgments* 299 (2d ed. 1941)); *see also* N.C. GEN. STAT. § 1-257 (2009). This claim is based on the constitutional claims argued throughout this brief, and for the reasons stated throughout, Plaintiff's claims present legitimate issues for the Court to resolve and therefore this, too, should not be dismissed.

II. THE LOWER COURT ERRED IN GRANTING DEFENDANTS' MOTIONS TO DISMISS AS TO PLAINTIFFS' EQUAL PROTECTION CLAIM UNDER 12(b)(1) FOR LACK OF STANDING.

North Carolina law requires that a person seeking to challenge the validity of a discriminatory statute belong to the class which is prejudiced by the statute. *Munger v. State*, 689 S.E.2d 230, 236 (2010) (quoting *In re Appeal of Barbour*, 112 N.C. App. 368, 373, 199 S.E.2d 169, 173 (1993)). In *Munger*, the Court denied the plaintiffs standing because the "mere fact that a plaintiff pays North Carolina income and sales and use taxes, without more, does not give him standing to challenge a sales and use tax exemption afforded to eligible internet data centers." *Id.* at 239.

It would appear that there is a direct correlation between the circumstances of *Munger* and this case, but closer consideration reveals the distinction. Plaintiffs are North Carolinians who pay income taxes and are challenging the State's decision to supplement the income of Johnson and Wales. The difference lies in other facts past what this cursory glance shows. The difference is that in *Munger* there were qualifications for attaining the benefit, so carved to serve the public purpose sought. *Id.* at 233; *see also In re Appeal of Barber*, 112 N.C. App. 368, 371-72, 199 S.E.2d 169, 172 (1993)). However, with Johnson and Wales there were no qualifying criteria. The legislation simply states Johnson and Wales is the beneficiary. So this lack of qualifying standard at least raises the question of who has standing? Is it Johnson and Wales versus everyone else? Johnson and Wales versus other private non-profit universities? Johnson and Wales versus other businesses who want incentives? Who can tell what is the excluded class when no class is initially named? Appellants submit the class is Johnson and Wales versus all others.

In any case, Plaintiff taxpayers have been injuriously affected by the Johnson and Wales legislation since it has arbitrarily placed on Plaintiffs' shoulders an additional financial burden. Though the burden is slight when divided among all taxpayers, it is yet a harm that serves to sharpen the constitutional issues at hand. *In re Appeal of Barbour*, 112 N.C. App. 368, 373, 436 S.E.2d 169, 173 (1993) (quoting *Stanley v. Dep't of Conservation and Dev.*, 284 N.C. 15, 29, 199 S.E.2d 641, 651 (1973)). The General Assembly capriciously chose Johnson and Wales as beneficiary of its unconstitutional largess; it attached no qualifying criteria so that one cannot readily determine a class that would have standing if the offended class is not everyone else besides Johnson and Wales; it mandated no performance criteria to ensure the money benefitted the State; and it ignored the law surrounding the One North Carolina Fund and redirected tax

money to which Plaintiffs contributed from its intended purpose. By all this Plaintiffs have been harmed since awarding the cooking school these grants while denying them to Plaintiffs is arbitrary and irrational and deprives them of equal protection of the laws and due process guaranteed them by N.C. CONST. Art. I, § 19. The “gist” of the standing issue is whether the plaintiff has such a personal stake in the outcome of the case to assure “adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Stanley v. Dep’t of Conservation & Dev.*, 284 N.C. 15, 28, 19 S.E.2d 641, 650 (1973) (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968)). Plaintiffs have this. Therefore, the lower court erred in dismissing Plaintiff’s third claim.

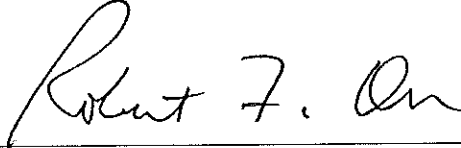
To deny Plaintiffs’ claim to continue on the merits is to deny Plaintiffs and all others access to the courts. The North Carolina Constitution demands that “[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.” The North Carolina courts need to define the class in this circumstance where there is only one named beneficiary and plaintiffs have been harmed just as much as another; so plaintiffs have standing to seek a declaratory judgment on this claim, even if the court only goes so far to define a class that may exclude Plaintiffs. Otherwise, no one will have standing to contest appropriations given to a named person or entity. For this reason, Appellants ask the Court to reverse the lower court’s dismissal of Plaintiff’s N.C. Const. Art. I, § 19 claim based on lack of standing.

### CONCLUSION

For the foregoing reasons, plaintiffs-appellants respectfully request that the decision of the Trial Court be reversed and the matter remanded for trial.

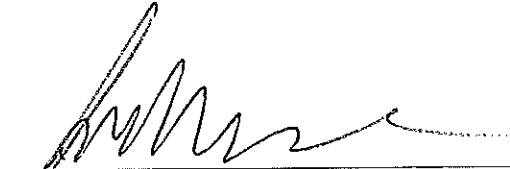
This the 20<sup>th</sup> day of August, 2010.

Respectfully Submitted,



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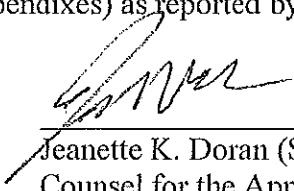
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the appellant certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software.



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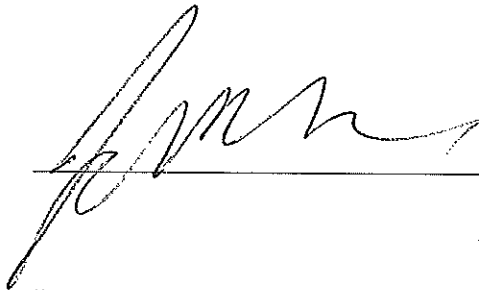
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Plaintiffs-Appellants' Brief was served on all parties by depositing a true copy thereof with the United States Postal Service, first-class postage prepaid, addressed to the following:

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