

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

WAKE COUNTY

09 CVS 18806

JASON R. SAINÉ, and DONALD D.

REID,

Plaintiffs,

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.

**STATE DEFENDANTS’  
MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS**

**INDEX**

STATEMENT OF THE CASE AND FACTS ..... 2

ARGUMENT ..... 6

    I.    PLAINTIFFS’ PUBLIC PURPOSE CLAIM SHOULD BE  
          DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH  
          RELIEF MAY BE GRANTED ..... 8

    II.   PLAINTIFFS’ EXCLUSIVE EMOLUMENTS CLAIM SHOULD BE  
          DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH  
          RELIEF MAY BE GRANTED ..... 17

    III.  PLAINTIFFS’ EQUAL PROTECTION AND “LAW OF THE  
          LAND” CLAIMS SHOULD BE DISMISSED BECAUSE  
          PLAINTIFFS LACK STANDING AND FOR FAILURE TO STATE  
          A CLAIM UPON WHICH RELIEF MAY BE GRANTED ..... 19

        A.   THE STANDARDS FOR ANALYZING EQUAL  
              PROTECTION CLAIMS ..... 20

        B.   THE STANDARDS FOR ANALYZING DUE PROCESS OR  
              “LAW OF THE LAND” CLAIMS ..... 22

        C.   PLAINTIFFS’ COUNT 3 PRESENTS NO VALID EQUAL  
              PROTECTION OR DUE PROCESS CLAIMS ..... 22

        D.   PLAINTIFFS LACK STANDING TO BRING THEIR  
              EQUAL PROTECTION AND DUE PROCESS CLAIMS OF  
              COUNT 3 ..... 27

    IV.  PLAINTIFFS’ DECLARATORY JUDGMENT CLAIM MUST BE  
          DISMISSED ..... 33

CONCLUSION ..... 33

CERTIFICATE OF SERVICE ..... 35

## TABLE OF AUTHORITIES

### CASES

<i>American Woodland Indus. v. Tolson</i> , 155 N.C. App. 624, 574 S.E.2d 55 (2002), disc. review denied, 357 N.C. 61, 579 S.E.2d 283 (2003) .....	28
<i>Baker v. Martin</i> , 330 N.C. 331, 410 S.E.2d 887 (1991) .....	6,7
<i>Blinson v. State</i> , 186 N.C. App. 328, 651 S.E.2d 268 (2007), appeal dismissed and disc. review denied, 362 N.C. 355, 661 S.E.2d 240, 241 (2008) .....	10,14,17,18,19,24,28,32,33
<i>Blue R. I. R. Co. v. Oates</i> , 164 N.C. 167, 80 S.E. 398 (1913) .....	23
<i>Burgess v. Your House of Raleigh, Inc.</i> , 326 N.C. 205, 388 S.E.2d 134 (1990) .....	27
<i>Coker v. Daimler Chrysler Corp.</i> , 172 N.C. App. 386, 617 S.E.2d 306 (2005), aff'd per curiam, 360 N.C. 398, 627 S.E.2d 461 (2006) .....	28
<i>County of Fresno v. State of California</i> , 268 Cal. Rptr. 266 (Cal. App. 5th Dist. 1990), judgment aff'd, 53 Cal. 3d 482, 808 P.2d 235 (1991) .....	7
<i>Department of Transportation v. Rowe</i> , 353 N.C. 671, 549 S.E.2d 203 (2001), cert. denied, 534 U.S. 1130, 122 S. Ct. 1070, 151 L. Ed. 2d 972 (2002) .....	21
<i>Dunn v. Pate</i> , 334 N.C. 115, 431 S.E.2d 178 (1993) .....	28
<i>Gardner v. Reidsville</i> , 269 N.C. 581, 153 S.E.2d 139 (1967) .....	6
<i>Goldston v. State</i> , 361 N.C. 26, 637 S.E.2d 876 (2006) .....	29,30
<i>Grace Baptist Church</i> , 320 N.C. 439, 358 S.E.2d 372 (1987) .....	21
<i>Hughey v. Cloninger</i> , 297 N.C. 86, 253 S.E.2d 898 (1979) .....	15,16,24
<i>In re Appeal of Barbour</i> , 112 N.C. App. 368, 436 S.E.2d 169 (1993) .....	31,32
<i>In re Appeal of Martin</i> , 286 N.C. 66, 209 S.E.2d 766 (1974), disc. review denied, 353 N.C. 525, 549 S.E.2d 858 (2001) .....	31,32
<i>In re Consolidated Appeals of Certain Timber Cos.</i> , 98 N.C. App. 412, 391 S.E.2d 503 (1990) .....	26,27

<i>In re Spivey</i> , 345 N.C. 404, 480 S.E.2d 693 (1997) .....	6
<i>Jackson v. Bumgardner</i> , 318 N.C. 172, 347 S.E.2d 743 (1986) .....	27
<i>Jones v. Weyerhaeuser Co.</i> , 141 N.C. App. 482, 539 S.E.2d 380 (2000) .....	31
<i>Jordan v. Crew</i> , 125 N.C. App. 712, 482 S.E.2d 735, disc. review denied, 346 N.C. 279, 487 S.E.2d 548 (1997) .....	27
<i>Kornegay v. Goldsboro</i> , 180 N.C. 441, 105 S.E. 187 (1920) .....	23
<i>Lamb v. Wedgewood South Corp.</i> , 308 N.C. 419, 302 S.E.2d 868 (1983) .....	25,26
<i>Lowe v. Tarble</i> , 313 N.C. 460, 329 S.E.2d 648 (1985) .....	22
<i>Madison Cablevision v. City of Morganton</i> , 325 N.C. 634, 386 S.E.2d 200 (1989) .....	11,15,24
<i>Maready v. City of Winston-Salem</i> , 342 N.C. 708, 467 S.E.2d 615 (1996) .....	7,9,10,11,12,15,24
<i>Martin v. North Carolina Housing Corp.</i> , 277 N.C. 29, 175 S.E.2d 665 (1970) .....	7
<i>Meyer v. Walls</i> , 347 N.C. 97, 489 S.E.2d 880 (1997) .....	27
<i>Minnesota v. Clover Leaf Creamery Co.</i> , 449 U.S. 456, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981) .....	26
<i>Neuse River Found., Inc., v. Smithfield Foods, Inc.</i> , 155 N.C. App. 110, 574 S.E.2d 48 (2002), disc. review denied, 356 N.C. 675, 577 S.E.2d 628 (2003) .....	28
<i>Nordlinger v. Hahn</i> , 505 U.S. 1, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992) .....	21
<i>Peacock v. Shinn</i> , 139 N.C. App. 487, 533 S.E.2d 842, disc. review denied, 353 N.C. 267, 546 S.E.2d 110 (2000) .....	12,13,18
<i>Piedmont Canteen Serv., Inc. v. Johnson</i> , 256 N.C. 155, 123 S.E.2d 582 (1962) .....	30
<i>Piedmont Triad Airport Auth. v. Urbine</i> , 354 N.C. 336, 554 S.E.2d 331 (2001), cert. denied, 535 U.S. 971, 122 S. Ct. 1438, 152 L. Ed. 2d 381 (2002) .....	14
<i>Powe v. Odell</i> , 312 N.C. 410, 322 S.E.2d 762 (1984) .....	21

<i>Reese v. Mecklenburg County</i> , 685 S.E.2d 34, 2009 N.C. App. LEXIS 1710 (N.C. Ct. App. 2009) .....	13
<i>Rhyne v. K-Mart Corp.</i> , 358 N.C. 160, 594 S.E.2d 1 (2004) .....	6,21,22,25,26,32
<i>Royal v. State</i> , 153 N.C. App. 495, 570 S.E.2d 738 (2002) .....	7
<i>State Education Assistance Authority v. Bank of Statesville</i> , 276 N.C. 576, 174 S.E.2d 55 (1970) .....	15,24
<i>State ex rel. Edmisten v. Tucker</i> , 312 N.C. 326, 323 S.E.2d 294 (1984) .....	28
<i>State ex rel. Martin v. Preston</i> , 325 N.C. 438, 385 S.E.2d 473 (1989) .....	7
<i>State ex rel. Util. Comm'n v. Edmisten</i> , 294 N.C. 598, 242 S.E.2d 862 (1978) .....	10
<i>State v. Greenwood</i> , 280 N.C. 651, 187 S.E.2d 8 (1972) .....	25
<i>State v. Knight</i> , 269 N.C. 100, 152 S.E.2d 179 (1967) .....	18
<i>State v. Trantham</i> , 230 N.C. 641, 55 S.E.2d 198 (1949) .....	31,32
<i>Swanson v. North Carolina</i> , 330 N.C. 390, 410 S.E.2d 490 (1991), <i>vacated on other grounds</i> , 509 U.S. 916, 113 S. Ct. 3025, 125 L. Ed. 2d 713 (1993), <i>on remand</i> , 335 N.C. 674, 441 S.E.2d 537, <i>cert. denied</i> , 513 U.S. 1056, 115 S. Ct. 662, 130 L. Ed. 2d 598 (1994) .....	22
<i>Town of Emerald Isle v. State</i> , 320 N.C. 640, 360 S.E.2d 756 (1987) .....	18
<i>Town of Highlands v. Hendricks</i> , 164 N.C. App. 474, 596 S.E.2d 440, <i>disc. review denied</i> , 359 N.C. 75, 605 S.E.2d 149 (2004) .....	19
<i>Treants Enterprises, Inc. v. Onslow County</i> , 320 N.C. 776, 360 S.E.2d 783 (1987) .....	22
<i>White v. Pate</i> , 308 N.C. 759, 304 S.E.2d 199 (1983) .....	21

## CONSTITUTIONAL PROVISIONS AND STATUTES

N.C. Const. art. I, § 19 .....	3,20,22,25,27
N.C. Const. art. I, § 32 .....	17,18,19
N.C. Const. art. V, § 2 .....	14

N.C. Const. art. V, § 2(1) .....	3,8,15,16,17
N.C. Const. art. V, § 2(7) .....	16
N.C. Const. art. IX, § 1 .....	15
N.C.G.S. § 1-253 .....	3
N.C.G.S. §§ 1A-1, Rule 12(b)(1) .....	1,2,20,27,33
N.C.G.S. § 1A-1, Rule 12(b)(6) .....	1,2,8,12,17,20,27,33
N.C.G.S. § 143B-437.70(1) .....	5
N.C.G.S. § 143B-437.71(a) .....	6
N.C.G.S. § 143B-437.71(b) .....	6
N.C.G.S. § 143B-437.72(a) .....	6
N.C.G.S. § 143B-437.72(b) .....	6
N.C.G.S. § 143B-437.72(c) .....	6
N.C.G.S. § 158-7.1 .....	9,14
N.C. Sess. Laws 2003-284 § 12.4A .....	3
N.C. Sess. Laws 2003-284 § 12.4A.(a) .....	8,9,11,17,24
N.C. Sess. Laws 2003-284 § 12.4A.(b) .....	4
N.C. Sess. Laws 2005-276 § 13.6(b) .....	4
N.C. Sess. Laws 2006-66 § 13.6(b) .....	5
N.C. Sess. Laws 2007-323 § 32.2(a) .....	5
N.C. Sess. Laws 2008-107 § 30.2 (a) .....	5

**OTHER AUTHORITY**

*Walter Hellerstein & Dan T. Coenen, Commerce Clause Restraints on State Business  
Development Incentives*, 81 Cornell L. Rev. 789 (1996) ..... 10

STATE OF NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
09 CVS 18806

JASON R. SAINÉ, and DONALD D. REID,  
Plaintiffs,

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.

**STATE DEFENDANTS’  
MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS**

NOW COME the State of North Carolina, Beverly Perdue, Governor of the State of North Carolina, in her official capacity, and J. Keith Crisco, Secretary of the North Carolina Department of Commerce, in his official capacity (hereinafter jointly referred to as the “State defendants”), by and through their undersigned counsel, and urge the Court to dismiss plaintiffs’ action as against the State defendants in its entirety. Specifically, the State defendants submit that plaintiffs’ entire complaint should be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Additionally, plaintiffs’ Count 3 (state constitutional equal protection and “law of the land” claims) should also be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12 (b)(1) for lack of subject matter jurisdiction on the grounds that plaintiffs lack standing to pursue those claims. For the reasons set out below, this Court should grant the State defendants’ motion to dismiss, filed on 16 November 2009, and enter judgment for the State defendants.

## STATEMENT OF THE CASE AND FACTS

Plaintiffs filed this action on 16 September 2009 seeking to have this Court declare unconstitutional certain grants made to defendant Johnson and Wales University (hereafter “Johnson and Wales”) as the result of legislation enacted by the General Assembly in 2003, 2005, 2006, 2007, and 2008. Among other remedies, plaintiffs also seek to have this Court require the repayment or reimbursement by Johnson and Wales of any funds paid to them pursuant to the legislation in question. Plaintiffs bring their action pursuant to state constitutional provisions and the declaratory judgment act in what is in reality an effort to have the courts of this State embrace their philosophical or political disagreement with the actions of the General Assembly.

Plaintiffs are individual citizens of Lincoln and Mecklenburg Counties who allege that they pay State taxes, including state income tax. (Compl. ¶¶ 1-2) The State defendants are the State of North Carolina, the Governor in her official capacity, and the Secretary of Commerce in his official capacity. (Compl. ¶¶ 4-6) Defendant Johnson and Wales is a private, non-profit, corporation which operates a non-profit, private university for business and culinary arts, hospitality, and related fields with a campus in Charlotte, North Carolina. (Compl. ¶ 7)

Plaintiffs filed their complaint on 16 September 2009. All defendants obtained extensions of time to respond. On 16 November 2009 the State defendants and Johnson and Wales filed their respective motions to dismiss pursuant to N.C.G.S. §§ 1A-1, Rules 12(b)(1) and (6), asserting that all the claims of the complaint are subject to dismissal for failure to state a claim upon which relief may be granted and that at least Count 3 of the complaint is subject to dismissal on jurisdictional grounds due to plaintiffs’ lack of standing.

Plaintiffs' complaint alleges in Count 1 that certain payments made to Johnson and Wales as the result of legislative action violate the exclusive emoluments clause of Article I, Section 32 of the Constitution of North Carolina. (Compl. ¶¶ 45-46) In Count 2, plaintiffs allege that the same legislative grants violate the public purpose clause of Article V, Section 2(1) of the Constitution. (Compl. ¶¶ 47-48) In Count 3, they allege that the legislative grants in question violate the equal protection and "law of the land" clauses of Article I, Section 19 of the state constitution. (Compl. ¶¶ 49-52) Plaintiffs' Count 4 simply sets out their claim for a declaratory judgment pursuant to N.C.G.S. § 1-253 and makes no additional specific claims.

The grants to which plaintiffs object, and which they refer to as "legislative gifts" to Johnson and Wales (Compl. p. 5), are contained in five separate pieces of legislation. In North Carolina Session Law 2003-284, the current operations and capital improvements appropriations act for that year, the General Assembly set out the reasons for making grants to Johnson and Wales:

SECTION 12.4A.(a) 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 technology, information, and service-based businesses, 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 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 possibly irreversible damage from the current economic recession and restructuring.

In Section 12.4A.(b), the General Assembly directed the Department of Commerce (hereafter “the Department”) to “allocate from funds appropriated in the 2001-2003 fiscal biennium to the One North Carolina - Industrial Recruitment Competitive Fund [hereafter the “One North Carolina Fund”] one million dollars (\$1,000,000) for the 2003-2004 fiscal year to provide financial assistance to Johnson and Wales University.” The legislation also instructed the Department to “allocate one million dollars (\$1,000,000) for the 2004-2005 fiscal year to provide financial assistance to Johnson and Wales University” from the One North Carolina Fund. The funds allocated for those two years were limited to the following uses:

- (1) Installation or purchase of equipment for educational facilities in this State.
- (2) Structural repairs, improvements, or renovations of existing academic buildings in this State 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 new or existing academic facilities in this State.
- (4) Construction of new academic facilities in this State.

N.C. Sess. Laws 2003-284 § 12.4A.(b). *See also* Compl. ¶ 16.

In subsequent years, the General Assembly made unrestricted grants to Johnson and Wales.

In the 2005 current operations appropriations act, the legislature specified that

[n]otwithstanding the provisions of G.S. 143B-437.71, of the funds appropriated in this act to the One North Carolina Fund, the Department of Commerce shall allocate one million dollars (\$1,000,000,000) for the 2005-2006 fiscal year to Johnson and Wales University in Charlotte for the purpose of providing financial assistance to the University.

N.C. Sess. Laws 2005-276 § 13.6(b). *See also* Compl. ¶ 18. In the 2006 current operations appropriations act, the legislature adopted an almost identical provision, except for the years specified, designating one million dollars (\$1,000,000,000) to be paid to Johnson and Wales for the

2006-07 fiscal year from funds appropriated to the One North Carolina Fund. N.C. Sess. Laws 2006-66 § 13.6(b). *See also* Compl. ¶20. (N.C.G.S. § 143B-437.71 specifies that money from the One North Carolina Fund may only be allocated for recruitment, expansion, or retention of new or existing businesses and only for certain purposes, similar to those for which the money granted to Johnson and Wales for fiscal years 2003-04 and 2004-05 was to be used.)

In the current operations appropriations act of 2007, the General Assembly incorporated the Joint Conference Committee Report on the Continuation, Expansion, and Capital Budgets. N.C. Sess. Laws 2007-323 § 32.2(a). Included in that Conference Committee Report was a provision for \$2,000,000 to be paid to Johnson and Wales. *See also* Compl. ¶¶ 24-27. Similarly, the current operations appropriations act of 2008 adopted the comparable committee report for that year, which provided for \$1.5 million to go to Johnson and Wales for fiscal year 2008-09. *See* N.C. Sess. Laws 2008-107 § 30.2 (a); *see also* Compl. ¶¶28-30.

Plaintiffs allege, and it is not disputed, that the funds paid to Johnson and Wales pursuant to the various legislatively-established grants are not paid according to the procedures that ordinarily govern payments from the One North Carolina Fund. The One North Carolina Fund is a special fund which the legislature declared is intended to stimulate economic activity, create new jobs, and recruit and attract new business and industry to North Carolina. N.C.G.S. § 143B-437.70(1). Money from the One North Carolina Fund is normally distributed to local governments for their use in obtaining commitments for recruitment, expansion, or retention of businesses. The funds are limited to use for such purposes as installing or purchasing equipment; making structural repairs, improvements, or renovations of buildings for expansion; building or improving utility lines; and building or improving utility lines or equipment for new or planned buildings for manufacturing or industrial

purposes. N.C.G.S. § 143B-437.71(a), (b). The distribution of funds ordinarily requires an agreement between the State and a local government and a separate agreement between the same local government and a grantee business. N.C.G.S. § 143B-437.72(a). The grantee must agree to create or retain a certain number of jobs within a specified salary range and for a specified time period, and provision must be made to ensure compliance and for recovery of the funds if the conditions are not met. N.C.G.S. § 143B-437.72(b). The local government must agree to match the funds provided by the State, whether in cash, services, or by other means. N.C.G.S. § 143B-437.72(c). *See also* Compl. ¶¶ 31-34, 38.

### ARGUMENT

Plaintiffs face a heavy burden in pursuing their claims disputing the validity of the grant legislation as enacted by the General Assembly of North Carolina. Indeed, it is often said that “[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.” *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (alteration in original) (quoting *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967)). Our courts “give[] acts of the General Assembly great deference, and a statute will not be declared unconstitutional under our Constitution unless the Constitution clearly prohibits that statute.” *In re Spivey*, 345 N.C. 404, 413, 480 S.E.2d 693, 698 (1997); *accord Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004). In North Carolina, more so than in some jurisdictions, the decisions of the General Assembly are entitled to great weight because the people act through their General Assembly by enacting legislation. This is so because

our State Constitution is not a grant of power. *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961). All 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. *Id.* See *Lassiter v. Board of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958); *Airport Authority v. Johnson*, 226 N.C. 1, 8, 36 S.E.2d 803, 809 (1946).

*State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989); accord *Baker*, 330 N.C. at 337-38, 410 S.E.2d at 891. Moreover, “[i]f there is any doubt as to the Legislature’s power to act in any given case, the doubt should be resolved in favor of the Legislature’s action.” *Id.* at 338, 410 S.E.2d at 891 (quoting *County of Fresno v. State of California*, 268 Cal. Rptr. 266, 270 (Cal. App. 5th Dist. 1990), *judgment aff’d*, 53 Cal. 3d 482, 808 P.2d 235 (1991)). See also *Maready v. City of Winston-Salem*, 342 N.C. 708, 714, 467 S.E.2d 615, 619 (1996) (“The Constitution restricts powers, and powers not surrendered inhere in the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, its wisdom and expediency are for legislative, not judicial, decision.”).

It is the General Assembly, not the courts, that is entrusted with the responsibility and authority to make policy decisions; thus, whether a particular policy “is wise or unwise is for determination by the General Assembly.” *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 29, 175 S.E.2d 665, 665 (1970). See also *Royal v. State*, 153 N.C. App. 495, 499, 570 S.E.2d 738, 740-41 (2002) (questions of public policy were for legislative, not judicial, determination, with regard to the plaintiffs’ challenge of the primary election system which they claimed favored wealthy candidates and their supporters). In this case, plaintiffs hope to have the courts nullify the judgment of the General Assembly because plaintiffs disagree with the legislative policy decisions favoring grants for Johnson and Wales that invest heavily in both economic development and educational opportunities. This Court should reject plaintiffs’ specific arguments as well as their underlying

premise that the courts should in effect overrule the legislature on a policy question which the General Assembly has decided in favor of economic and educational incentives.

Plaintiffs' specific constitutional claims will be addressed below in an order that facilitates the presentation of the arguments demonstrating their lack of merit.

**I. PLAINTIFFS' PUBLIC PURPOSE CLAIM SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.**

In Count 2 of their complaint, plaintiffs allege that the grants to Johnson and Wales are "direct government subsidies for a private institution," and that they violate Article V, Section 2(1) of the Constitution because they are not for a public purpose within the meaning of that constitutional provision. (Compl. ¶ 48) Article V, Section 2(1), in relevant part, directs that "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only . . . ." Plaintiffs are mistaken in their view of the public purpose clause, and their Count 2 should be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

The General Assembly explained its actions in the grants which it made for the 2003-04 and 2004-05 fiscal years as promoting the establishment of Johnson and Wales and its educational activities. In particular, the legislature noted that "institutions of higher education play an essential role in maintaining and strengthening the economic health of the State." N.C. Sess. Laws 2003-284 § 12.4A.(a). With our changing economic structure, "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." *Id.* By recruiting educational institutions such as Johnson and Wales to the State, both the State and local governments benefit

though “new jobs, a stronger tax base, support for satellite businesses, and investment that will permanently enhance the infrastructure necessary to support long-term growth and prosperity.” *Id.* Further, “[t]he 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 possibly irreversible damage from the current economic recession and restructuring.” *Id.* In sum, the General Assembly viewed the recruitment and presence of Johnson and Wales as promoting economic development directly and indirectly through the educational activities it would, and does, perform.

The grants to Johnson and Wales are clearly within the range of activities which our appellate courts have recognized as meeting the requirements of the public purpose clause. The most significant recent case analyzing the public purpose clause is that of *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996). In *Maready*, the Court concluded that local economic development incentive grants, as authorized by N.C.G.S. § 158-7.1, were for public purposes despite the fact that “private actors will necessarily benefit from the expenditures authorized.” 342 N.C. at 725, 467 S.E.2d at 625.<sup>1</sup> The Court explained that, even before its decision in that case, “[e]conomic development has long been recognized as a proper governmental function.” *Id.* at 723, 467 S.E.2d

---

<sup>1</sup> Twenty-four separate economic development projects entered into by the City of Winston-Salem or Forsyth County were at issue. *Maready v. City of Winston-Salem*, 342 N.C. 708, 712-13, 467 S.E.2d 615, 618-19 (1996). Grants were made for expenditures such as reimbursement for on-the-job training, site preparation, facility upgrading, and even parking. *Id.* at 713, 467 S.E.2d at 619. The dissent noted the specific amounts of the grants and their purposes. *See Maready*, 342 N.C. at 734-37, 467 S.E.2d at 48-52 (Orr, J., dissenting). It even pointed out that the grants included such items as spousal relocation expenses and a parking deck. *Id.* at 741, 467 S.E.2d at 635-36 (Orr, J., dissenting).

at 624. In fact, “[s]timulation of the economy is an essential public and governmental purpose and the manner in which this purpose is to be accomplished is, within constitutional limits, exclusively a legislative decision.” *Id.* at 723, 467 S.E.2d at 625 (quoting *State ex rel. Util. Comm’n v. Edmisten*, 294 N.C. 598, 242 S.E.2d 862 (1978)). Indeed, economic incentives are increasingly necessary in light of the changing economic climate in this State, with the decreased roles of traditional foundations of the State’s economy such as agriculture and manufacturing. *Maready*, 342 N.C. at 725, 467 S.E.2d at 625-26. Under contemporary circumstances, the State is compelled to provide and facilitate economic incentives in light of the competition with other States to attract the same investments. In *Maready* the Court pointed out that economic development incentives had been upheld in forty-six other states, and “it would be unrealistic to assume that the State will not suffer economically in the future if the incentive programs created pursuant to N.C.G.S. § 158-7.1 are discontinued.” *Id.* at 726-27, 467 S.E.2d at 627. *See also Blinson v. State*, 186 N.C. App. 328, 329, 651 S.E.2d 268, 271 (2007), *appeal dismissed and disc. review denied*, 362 N.C. 355, 661 S.E.2d 240, 241 (2008) (“[t]oday, every state provides tax and other economic incentives as an inducement to *local* industrial location and expansion”) (quoting Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 790 (1996)). In these times of economic distress and changing economic infrastructure, as recognized by our General Assembly, it would be wrong to assume that legislation designed to encourage development and enhancement of our economic structure through increased educational opportunities does not promote the State’s very economic survival.

In any public purpose case, there are two questions that must be answered: (1) “whether an activity is within the appropriate scope of governmental involvement and is reasonably related to

communal needs”; and (2) whether “the activity benefits the public generally, as opposed to special interests or persons.” *Maready*, 342 N.C. at 722, 467 S.E.2d at 624 (citing *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989)). The Court in *Maready* made it very clear that economic incentives meet, or can meet, both prongs.

The fact that an incentive benefits a private company or companies, or in this case an educational institution, does not mean that it fails the public purpose test. Rather, “under the expanded understanding of public purpose, even the most innovative activities . . . are constitutional so long as they primarily benefit the public and not a private party.” *Maready*, 342 N.C. at 724, 467 S.E.2d at 625. “Moreover, an expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose.” *Id.* As the Court pointed out,

New and expanded industries in communities within North Carolina provide work and economic opportunity for those who otherwise might not have it. This, in turn, creates a broader tax base from which the State and its local governments can draw funding for other programs that benefit the general health, safety, and welfare of their citizens. The potential impetus to economic development, which might otherwise be lost to other states, likewise serves the public interest.

*Maready*, 342 N.C. at 727, 467 S.E.2d at 627. In other words, providing incentives benefits the State, local governments, and their citizens, just as the General Assembly recognized in North Carolina Session Laws 2003-284 § 12.4A.(a).

*Maready*, in effect, interprets the public purpose test, and especially the public versus private benefit prong, from a different angle than that employed in many older cases. Older cases seemingly focused more on the benefit to private individuals or entities, as plaintiffs seemingly wish to do. In

contrast, *Maready* and more recent cases concentrate on the public motive and expected public benefit to determine whether a particular action serves a public purpose within the meaning of the constitutional restrictions. Where the public benefit is the motivation for the enactment, the benefit to private individuals is incidental, even though substantial. Thus, “an expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose.” *Id.* at 724, 467 S.E.2d at 625.

Applying the principles set down in *Maready*, our appellate courts have continued to reject public purpose challenges despite what might be viewed as benefits to private entities. Thus, the Court of Appeals rejected public purpose challenges to agreements concerning the Charlotte Coliseum and funds paid to George Shinn and George Shinn Sports, Inc., in connection with the use of the Coliseum by the then-Charlotte Hornets of the National Basketball Association. Plaintiffs especially objected to agreements with the Charlotte Coliseum Authority by which the Shinn defendants would receive profits from Coliseum operations other than Hornets games, claiming that certain amendments were made to the original agreement “to subsidize the Shinn defendants, increase the Shinn defendants’ own revenue, and make the Hornets a more competitive basketball team.” *Peacock v. Shinn*, 139 N.C. App. 487, 494, 533 S.E.2d 842, 847, *disc. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000). In upholding the dismissal of the complaint under N.C.G.S. § 1A-1, Rule 12(b)(6), the Court of Appeals concluded:

Here, as in *Maready*, a private party ultimately conducts activities which, while providing incidental private benefit, serve a primary public goal. Despite the Shinn defendants’ benefit from the provisions of the agreements which plaintiff has singled out, where

the Authority's primary purpose is for the public benefit, the Authority has discretion as to the manner of implementation.

The face of plaintiff's complaint, along with the incorporated agreements, when all allegations are taken as true, not only reveals an absence of facts to support a claim under N.C. CONST. art. V, § 2, but also discloses facts which necessarily defeat the claim. The claim was properly dismissed.

*Peacock*, 139 N.C. App. at 495, 533 S.E.2d at 848.<sup>2</sup>

Following the same mode of analysis, the Supreme Court upheld a condemnation of land by an airport authority as being for public use against a challenge based on the contention that the land would be used for the construction by Federal Express of a facility that it would then rent from the airport. The Court noted the distinction that condemnation must be judged by the "public use" standard rather than the "public purpose" standard, but the Court nevertheless evaluated the taking under the same two-part *Madison Cablevision* test used in *Maready* and other cases to analyze public purpose claims. Despite the argument that the condemnation was for the private benefit of Federal Express, the Court concluded that

[t]he arrangement advances the primary goal of giving effect to the people's general desire for better seaports and airports. As such, 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. Under these facts, the legislative declarations of public purpose, and the constitutional directives of the people, we are persuaded that both prongs of our analysis are satisfied.

---

<sup>2</sup> Continuing the trend of upholding the use of public funds for professional sports activities in Mecklenburg County, the Court of Appeals has recently held that the purchase of land by Mecklenburg County and its lease to a minor league professional baseball team to build and operate a stadium on the property constitutes a public purpose. *Reese v. Mecklenburg County*, 685 S.E.2d 34, 39-40, 2009 N.C. App. LEXIS 1710, at \*\* 15-17 (N.C. Ct. App. 2009).

*Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 343, 554 S.E.2d 331, 335 (2001), *cert. denied*, 535 U.S. 971, 122 S. Ct. 1438, 152 L. Ed. 2d 381 (2002).

Lest anyone doubt the message communicated by the *Maready*, *Peacock*, and *Piedmont Triad* decisions, the Court of Appeals recently upheld once again economic incentives challenged as being for the benefit of private parties rather than for a public purpose. *Blinson v. State*, 186 N.C. App. 328, 651 S.E.2d 268. *Blinson* involved challenges both to economic incentives enacted by state statute to promote computer manufacturing plants and to local incentives offered to Dell Corporation by the City of Winston-Salem and Forsyth County pursuant to N.C.G.S. § 158-7.1. The Court of Appeals concluded that, “under *Maready*, the need to offer economic incentive programs to attract industry that will replace lost jobs is necessarily a public purpose.” *Blinson*, 186 N.C. App. at 339, 651 S.E.2d at 276. The Court of Appeals also rejected plaintiffs’ arguments that the fact that challenged benefits went to a specific company (Dell) prevented the legislation and incentives from being for a public purpose. The *Blinson* court observed that the “challenged benefits in *Maready* also went to specific companies”; the court further relied on its decision in *Peacock* for the principle “that the mere fact that the agreements benefitted private parties was not dispositive” and did not prevent the challenged actions from being for a public purpose. *Blinson*, 186 N.C. App. at 340, 651 S.E.2d at 277.

In sum, our appellate courts have established without any doubt that economic incentives do serve a public purpose. The grants made to Johnson and Wales fall within the scope of the economic incentives which our appellate courts have repeatedly endorsed as satisfying the public requirements of Article V, Section 2 of the Constitution of North Carolina. They serve a public purpose because

they benefit the State and locality through economic development, increased tax base, and educational opportunities for the citizens of the State as well as the locality.

Not only have economic incentives been repeatedly recognized as falling within the public purpose rule, but education itself stands independently as a public purpose. In *Maready*, the Court listed purposes which have been recognized as satisfying the public purpose requirement of Article V, Section 2 of the Constitution. It specifically listed education as one of the recognized public purposes. *See Maready*, 342 N.C. at 720-21, 467 S.E.2d at 623; *see also Madison Cablevision*, 325 N.C. at 650, 386 S.E.2d at 209-10. The Supreme Court made it clear that education is itself a public purpose when it upheld the validity of revenue bonds issued by the State Education Assistance Authority on the grounds that use of the proceeds of the revenue bonds for student loans constituted a public purpose within the meaning of what is now Article V, Section 2(1) (then Article V, Section 3). *State Education Assistance Authority v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 55 (1970). It cited to Article IX, Section 1 of the Constitution to point out that the people of this State have adopted the principle that “the means of education shall forever be encouraged.” *Id.* at 586, 174 S.E.2d at 559. It further explained that “[u]nquestionably, the education of residents of this State is a recognized object of State government. Hence, provision therefor is for a public purpose.” *Id.* at 587, 174 S.E.2d at 559. Further, the fact that individual students would benefit from the loans “cannot be considered sufficient ground to defeat the execution of ‘a paramount public purpose.’” *Id.* at 588, 174 S.E.2d at 560 (citation omitted).

In addition to recognizing education itself as a public purpose, our Supreme Court has approved direct grants to educational institutions as constitutionally permissible. *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1979). In *Hughey*, Gaston County had made a direct

appropriation of funds to the non-profit Dyslexia School of North Carolina, Inc. The Supreme Court held that the county lacked statutory authority to make the grant. However, the Court specifically rejected the idea that the grant violated Article V, Section 2(1)'s public purpose requirement. It noted that Article V, Section 2(7) of the Constitution authorizes the General Assembly to enact laws permitting the State or a local government to "contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only." Therefore,

*direct disbursement* of public funds to private entities is a constitutionally permissible *means* of accomplishing a public purpose provided there is statutory authority to make such appropriation. Had there been such statutory authority in this case the direct appropriation of funds by Gaston County to the Dyslexia School of North Carolina would have presented no "public purpose" difficulties as it is well established that both appropriations and expenditures of public funds for the education of the citizens of North Carolina are for a public purpose. *Education Assistance Authority v. Bank*, 276 N.C. 576, 174 S.E. 2d 551 (1970).

*Hughey*, 297 N.C. at 95, 253 S.E.2d at 904.

*Hughey* teaches that the direct grants to Johnson and Wales are constitutionally permissible. In this case, the General Assembly expressly provided for the grants at issue in ratified legislation; thus, there was the necessary statutory authority for the direct grants to Johnson and Wales, the authority that was the only component denying validity to the grant in *Hughey*. Therefore, there can be no question that the grants to Johnson and Wales satisfied the public purpose provisions of Article V, Section 2(1) of the Constitution inasmuch as Johnson and Wales is a non-profit educational institution, as was the recipient in *Hughey*. Indeed, the General Assembly made it clear that the educational aspect of Johnson and Wales was a key factor in its appropriating the grants when it declared its finding "that institutions of higher education play an essential role in maintaining and

strengthening the economic health of the State” as part of its explanation of the original grants. N.C. Sess. Laws 2003-284 § 12.4A.(a).

In sum, the grants to Johnson and Wales are for public purposes because they further economic development and education, both recognized public purposes within the meaning of Article V, Section 2(1) of the Constitution of North Carolina. Accordingly, plaintiffs’ Count 2 must be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

**II. PLAINTIFFS’ EXCLUSIVE EMOLUMENTS CLAIM SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.**

In Count 1 of their complaint, plaintiffs allege that the grants to Johnson and Wales violate Article I, Section 32 of the Constitution of North Carolina “in that the preferential benefits, grants and/or subsidies provided to Johnson and Wales accrue to Johnson and Wales’s private financial benefit and are thus exclusive and separate emoluments not in exchange for any public service.” Compl. ¶ 46. Article I, Section 32 reads as follows: “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 grants awarded to Johnson and Wales are not exclusive or separate emoluments, and this Court should dismiss plaintiffs’ Count 1 pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

Contrary to plaintiffs’ view as revealed in their complaint, “not every classification that favors a particular group of persons is an ‘exclusive or separate emolument[] or privilege[]’ within the meaning of the constitutional prohibition.” *Blinson v. State*, 186 N.C. App. 328, 341-42, 651 S.E.2d 268, 278 (2007), *appeal dismissed and disc. review denied*, 362 N.C. 355, 661 S.E.2d 240,

241 (2008) (citations omitted). As our Supreme Court has explained, the prohibition on exclusive emoluments contained in Article I, Section 32

does not apply to an exemption from a duty imposed upon citizens generally if the purpose of the exemption is the promotion of the general welfare, as distinguished from the benefit of the individual, and if there is a reasonable basis for the Legislature to conclude that the granting of the exemption would be in the public interest.

*Town of Emerald Isle v. State*, 320 N.C. 640, 653, 360 S.E.2d 756, 764 (1987) (quoting *State v. Knight*, 269 N.C. 100, 108, 152 S.E.2d 179, 184 (1967)). Rather,

a statute which confers an exemption that benefits a particular group of persons is not an exclusive emolument or privilege within the meaning of Article I, section 32, if: (1) the exemption 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 serves the public interest.

*Id.* at 654, 360 S.E.2d at 764. Nor is this exclusive emolument analysis limited to exemptions as opposed to affirmative benefits. Thus, in *Peacock v. Shinn*, 139 N.C. App. 487, 496, 533 S.E.2d 842, 848, *disc. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000), the Court of Appeals concluded that an agreement providing for a percentage of Charlotte Coliseum Authority profits to go to Hornets owners “was intended to promote the public benefit and plaintiff’s second claim must fail on its face, even though a benefit resulted, as well, to the Shinn defendants.” For the same reasons that the challenged actions do not violate the public purpose provisions of the Constitution, the grants at issue fall well within the permissible limits of Article I, Section 32. As the Court of Appeals held in rejecting a similar claim, “when legislation is determined to ‘promote the public benefit’ under the Public Purpose Clauses, it necessarily is not an exclusive emolument.” *Blinson*, 186 N.C. App. at 342, 651 S.E.2d at 278 (quoting *Peacock*, 139 N.C. App. at 496, 533 S.E.2d at

848). Regardless of any benefits that redound to Johnson and Wales through the grants provided to it, “the primary purpose was the promotion of the general public welfare and not a private interest.” *Town of Highlands v. Hendricks*, 164 N.C. App. 474, 479-80, 596 S.E.2d 440, 445, *disc. review denied*, 359 N.C. 75, 605 S.E.2d 149 (2004).

Plaintiffs, however, further allege that the grants in question are not for any “public service.” (Compl. ¶ 46) Because Article I, Section 32 forbids “exclusive or separate emoluments or privileges from the community but in consideration of public services,” the constitutional prohibition is violated only if the Court can determine first that there is an “exclusive or separate emolument[] or privilege[] from the community” and, second, that that emolument or privilege was not “in consideration of public services.” Here, as in *Town of Emerald Isle, Peacock, Town of Highlands* and *Blinson*, there was no exclusive emolument. Consequently, the Court need not reach the second portion of the Article I, Section 32 test. Once the Court has “concluded that the disputed incentives and subsidies were not exclusive emoluments, it is immaterial whether they were provided ‘in consideration of public services.’” *Blinson*, 186 N.C. App. at 342, 651 S.E.2d at 279. Therefore, plaintiffs’ exclusive emoluments claims must be dismissed for failure to state a claim upon which relief may be granted.

### **III. PLAINTIFFS’ EQUAL PROTECTION AND “LAW OF THE LAND” CLAIMS SHOULD BE DISMISSED BECAUSE PLAINTIFFS LACK STANDING AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.**

In Count 3 of their complaint, plaintiffs contend that the grants to Johnson and Wales are not rationally related to the purposes of the One North Carolina Fund in that Johnson and Wales receives the grants without qualifying criteria and without creating or promising to create new jobs or economic growth. (Compl. ¶¶ 50-51) According to plaintiffs, they are denied their rights to equal

protection and due process under Article I, Section 19 of the Constitution of North Carolina because it is arbitrary and irrational to award the challenged grants to Johnson and Wales while depriving plaintiffs of the same grants. (Compl. ¶ 52) Plaintiffs are mistaken, and their Count 3 should be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Moreover, plaintiffs lack the standing to bring these claims, so their Count 3 is equally subject to dismissal pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) for lack of jurisdiction.

**A. THE STANDARDS FOR ANALYZING EQUAL PROTECTION CLAIMS.**

The standards for judging equal protection and “law of the land” claims are similar. First, the standards for analyzing equal protection claims under the Constitution of North Carolina, as well as under the United States Constitution, are well-established:

The court must first determine which of several tiers of scrutiny should be utilized. Then it must determine whether the regulation meets the relevant standard of review. Strict scrutiny applies when a regulation classifies persons on the basis of certain designated suspect characteristics or when it infringes on the ability of some persons to exercise a fundamental right. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17, 36 L. Ed. 2d 16, 33, 93 S. Ct. 1278 (1973); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). If a regulation receives strict scrutiny, then the state must prove that the classification is necessary to advance a compelling government interest; otherwise, the statute is invalid. *San Antonio*, 411 U.S. at 16-17, 36 L. Ed. 2d at 33; *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149. Other classifications, including gender and illegitimacy, trigger intermediate scrutiny, which requires the state to prove that the regulation is substantially related to an important government interest. *Clark v. Jeter*, 486 U.S. 456, 100 L. Ed. 2d 465, 108 S. Ct. 1910 (1988); *Craig v. Boren*, 429 U.S. 190, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976). If a regulation draws any other classification, it receives only rational-basis scrutiny, and the party challenging the regulation must show that it bears no rational relationship to any legitimate government interest. If the party cannot so prove, the regulation is valid. *Nordlinger v. Hahn*, 505 U.S. 1, 10,

120 L. Ed. 2d 1, 12, 112 S. Ct. 2326 (1992); *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149.

*Department of Transportation v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001), *cert. denied*, 534 U.S. 1130, 122 S. Ct. 1070, 151 L. Ed. 2d 972 (2002). Plaintiffs here are not members of a protected group, and they have not alleged that the challenged provisions impinge on any fundamental right, so neither strict scrutiny nor intermediate scrutiny is required. Accordingly, the equal protection guarantee of Article I, Section 19 requires only that “the legislative classification in the statute could provide a reasonable means to a legitimate state objective.” *Powe v. Odell*, 312 N.C. 410, 412, 322 S.E.2d 762, 763 (1984). Plaintiffs’ burden is thus to show that there is no legislative or governmental justification for the provisions to which they object. In doing so, they cannot simply argue that distinctions exist or that lines could have been drawn differently.

Rational basis review is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

*Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180-81, 594 S.E.2d 1, 15 (2004) (citing *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S. Ct. 2326, 2332, 120 L. Ed. 2d 1, 13 (1992) (citations omitted)). The “rational basis” standard merely requires that the governmental classification bear some rational relationship to a conceivable legitimate interest of government. Additionally, in instances in which it is appropriate to apply the rational basis standard, the governmental act is entitled to a presumption of validity. *White v. Pate*, 308 N.C. 759, 766-67, 304 S.E.2d 199, 204 (1983); *accord Grace Baptist Church*, 320 N.C. 439, 446-47, 358 S.E.2d 372, 377 (1987).

**B. THE STANDARDS FOR ANALYZING DUE PROCESS OR “LAW OF THE LAND” CLAIMS.**

Plaintiffs shoulder a similar burden in their claims based on Article I, Section 19’s “law of the land” clause, which is essentially a guarantee of due process. *Rhyne*, 358 N.C. at 180, 594 S.E.2d at 15. *See also Swanson v. North Carolina*, 330 N.C. 390, 395, 410 S.E.2d 490, 494 (1991), *vacated on other grounds*, 509 U.S. 916, 113 S. Ct. 3025, 125 L. Ed. 2d 713 (1993), *on remand*, 335 N.C. 674, 441 S.E.2d 537, *cert. denied*, 513 U.S. 1056, 115 S. Ct. 662, 130 L. Ed. 2d 598 (1994). Significant to the evaluation of plaintiffs’ claims is the extent to which “law of the land” analysis is similar to that of the equal protection rational-basis model. Indeed, “[a] single standard determines whether” a legislative body’s actions “pass[ ] constitutional muster imposed by both section 1 and the ‘law of the land’ clause of section 19: [the challenged provisions] must be rationally related to a substantial government purpose.” *Treants Enterprises, Inc. v. Onslow County*, 320 N.C. 776, 778-79, 360 S.E.2d 783, 785 (1987). Put another way, each of the legislative actions to which plaintiffs object is simply required to “have a rational relation to a valid state objective.” *Swanson*, 330 N.C. at 395, 410 S.E.2d at 494. As our Supreme Court has observed, “[s]imilar to the rational basis test for equal protection challenges, ‘as long as there could be some rational basis for enacting [the statute at issue], this Court may not invoke [principles of due process] to disturb the statute.’” *Rhyne*, 358 N.C. at 181, 594 S.E.2d at 15 (quoting *Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985)).

**C. PLAINTIFFS’ COUNT 3 PRESENTS NO VALID EQUAL PROTECTION OR DUE PROCESS CLAIMS.**

Plaintiffs have made no allegations in their Count 3 which would support the theory that the grants to Johnson and Wales fail the rational-basis test of the Constitution’s equal protection and

“law of the land” or due process provisions. First, plaintiffs object that the legislation providing grants to Johnson and Wales are not based on qualifying criteria and do not obligate the Governor or the Department to establish guidelines for payment of the grants. According to plaintiffs, “[a]llowing a direct cash grant to Johnson and Wales, without regard to any qualifying criteria whatsoever, while at the same time denying those same grants to any and all other taxpayers and entities is not rationally related to the stated purpose of the One North Carolina Fund.” (Compl. ¶ 50)

Plaintiffs miss the point when they complain that the grants to Johnson and Wales are not rationally related to the stated purpose of the One North Carolina Fund. The question is whether they are rationally related to any legitimate legislative goal. The fact that the General Assembly chose to use funds otherwise assigned to the One North Carolina Fund simply means that the legislature effectively used those funds for slightly different purposes from the other funds allotted to the Fund. The legislature created the One North Carolina Fund, and it can change or repeal it and change or repeal any limitations on the funds appropriated to it. One General Assembly traditionally cannot bind another. *Kornegay v. Goldsboro*, 180 N.C. 441, 451, 105 S.E. 187, 192 (1920); *Blue R. I. R. Co. v. Oates*, 164 N.C. 167, 170, 80 S.E. 398, 399 (1913). Therefore, what the General Assembly has said in the past about One North Carolina Fund disbursements is irrelevant when it assigns specific funds to be used for grants to Johnson and Wales.

Similarly, plaintiffs make no valid point when they allege that the direct grants to Johnson and Wales are not rationally related to the stated purpose of the One North Carolina Fund because no other taxpayer receives similar grants from the Fund without meeting economic development criteria. (Compl. ¶ 51) As noted above, the General Assembly can change the purpose or use of the

monies otherwise appropriated to the One North Carolina Fund and can in effect redirect the appropriations or amend the laws governing the Fund so that specific money is paid according to the explicit direction for grants to Johnson and Wales.

The General Assembly could well have determined that the grants to Johnson and Wales stimulate economic development and promote new educational directives that in themselves foster economic development. Indeed, it said as much when it set out the rationale for the first two grants, governing the 2003-04 and 2004-05 fiscal years, in Chapter 284 of the 2003 North Carolina Session Laws, Section 12.4A.(a). Moreover, the General Assembly could rationally have decided that the grants to Johnson and Wales further education by facilitating the University's establishment and continued operation, thereby allowing North Carolina citizens and persons who come to North Carolina for that purpose to obtain the educational training offered by Johnson and Wales. These are clearly legitimate government purposes as both economic development incentives and education have been recognized as valid governmental or public purposes. *See Maready*, 342 N.C. at 723, 467 S.E.2d at 624 (“[e]conomic development has long been recognized as a proper governmental function”); *id.* at 723, 467 S.E.2d at 624 (“[s]timulation of the economy is an essential public and governmental purpose and the manner in which this purpose is to be accomplished is, within constitutional limits, exclusively a legislative decision”); *Blinson*, 186 N.C. App. at 339, 651 S.E.2d at 276 (“under *Maready*, the need to offer economic incentive programs to attract industry that will replace lost jobs is necessarily a public purpose”); *Maready*, 342 N.C. at 720-21, 467 S.E.2d at 623 (recognizing education as a public purpose); *Madison Cablevision*, 325 N.C. at 650, 386 S.E.2d at 209-10 (same); *State Education Assistance Authority*, 276 N.C. at 587, 174 S.E.2d at 559 (“[u]nquestionably, the education of residents of this State is a recognized object of State

government. Hence, provision therefor is for a public purpose.”); *Hughey*, 297 N.C. at 95, 253 S.E.2d at 904 (“*direct disbursement* of public funds to” an educational institution “is a constitutionally permissible *means* of accomplishing a public purpose.”)

Not only are the goals of stimulating economic development and aiding education legitimate state objectives within the meaning of Article I, Section 19 of the Constitution, but it cannot be denied that providing funds to Johnson and Wales is rationally related to those goals. “[T]he rational basis test is the lowest tier of review, requiring a connection between the statute and ‘a conceivable,’ or ‘any,’ legitimate governmental interest.” *Rhyne*, 358 N.C. at 181, 594 S.E.2d at 16 (citations omitted). Even if some other means might be devised that could achieve the legislative goals, the effect of the General Assembly’s actions need not be perfectly congruent with the conceivable legitimate goals. Whether the legislative classifications are perfect is not the question before the Court. *See Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 435, 302 S.E.2d 868, 877 (1983) (“The equal protection clauses do not require perfection in respect of classifications.”) (quoting *State v. Greenwood*, 280 N.C. 651, 658, 187 S.E.2d 8, 13 (1972)).

While plaintiffs allege that they are denied equal protection and due process rights by denial of similar grants to them, plaintiffs have not alleged that they are or represent businesses or educational institutions that would profit from the grants in any way related to fostering educational opportunities and training or stimulating economic development. *See* Compl. ¶ 52. Nor have they explained how the fact that some other, hypothetical entity cannot receive similar grants violates equal protection or due process rights. Moreover, the question for equal protection and due process purposes is not whether the limitation extends to all businesses or educational institutions that might benefit from the grants. It is instead whether there could conceivably be a rational basis for the

limitation. In fact, plaintiffs could succeed in this litigation only if they could “‘negative every conceivable basis’ that could exist to support this legislation.” *In re Consolidated Appeals of Certain Timber Cos.*, 98 N.C. App. 412, 421, 391 S.E.2d 503, 508 (1990). Significantly, it is well-established in equal protection law that classifications need not be perfect, but instead may be overinclusive or underinclusive, without rendering governmental action irrational or arbitrary. *See Lamb v. Wedgewood South Corp.*, 308 N.C. at 435, 302 S.E.2d at 877. Thus, the General Assembly could rationally have determined that making the decision to provide these grants to Johnson and Wales was a reasonable decision to make to foster both economic development and new forms of education in view of the goals of the legislation balanced against financial restrictions faced by the State in these times of economic distress.

Whether plaintiffs, or even the court, agree with these rationales is irrelevant in rational-basis analysis. “Whether in fact the Act will promote” the state goals “is not the question: the Equal Protection Clause is satisfied by our conclusion that the . . . Legislature could rationally have decided that” such legislation “might foster” the stated goals. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466, 101 S. Ct. 715, 725, 66 L. Ed. 2d 659, 670 (1981). Plaintiffs “cannot prevail so long as ‘it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.’” *Rhyne*, 358 N.C. at 182, 594 S.E.2d at 16 (quoting *Clover Leaf Creamery Co.*, 449 U.S. at 464, 66 L. Ed. 2d at 669, 101 S. Ct. at 724). Indeed, relying on *Clover Leaf Creamery Co.*, our Court of Appeals has rejected arguments that specific legislation might actually frustrate the goals of the General Assembly:

Even if appellants’ argument here is valid, the proper forum for its assertion is in the legislative chambers of the General Assembly, not in this Court. It is unimportant whether or not the

General Assembly's use of a "public-private ownership" distinction to delineate between landowners who are "in need" of a tax incentive and ones who are not in fact frustrates one of the goals of the legislation. For the purposes of this proceeding, as long as it is arguable that the statutory scheme designed by our legislators *could* work, then we must uphold the challenged statute.

*In re Consolidated Appeals of Certain Timber Cos.*, 98 N.C. App. at 421, 391 S.E.2d at 508-09.

Plaintiffs' Count 3 must be dismissed because they have made no factual allegations that support their contention that the grants to Johnson and Wales violate any persons's rights under Article I, Section 19. Instead, "the complaint on its face reveals that no law supports plaintiff's claim" and further "the complaint on its face reveals the absence of fact sufficient to make a good claim." *Jackson v. Bumgardner*, 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986) (citation omitted). *Accord Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Plaintiffs cannot use their conclusory allegations of a supposed violation of the Constitution to avoid dismissal. *See Meyer v. Walls*, 347 N.C. 97, 114, 489 S.E.2d 880, 889 (1997); *Jordan v. Crew*, 125 N.C. App. 712, 718, 482 S.E.2d 735, 738, *disc. review denied*, 346 N.C. 279, 487 S.E.2d 548 (1997). Because plaintiffs have failed to allege any way in which the grants to Johnson and Wales violate the equal protection or due process clause of Article I, Section 19, their complaint should be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

**D. PLAINTIFFS LACK STANDING TO BRING THEIR EQUAL PROTECTION AND DUE PROCESS CLAIMS OF COUNT 3.**

Even if plaintiffs' Count 3 of their complaint did state a valid claim for relief, it would be subject to dismissal under N.C.G.S. § 1A-1, Rule 12(b)(1) for lack of jurisdiction because plaintiffs lack standing to bring their equal protection and due process claims.

Essential to a court's jurisdiction over *any claim*, including one brought for a declaratory judgment, is "an actual or real existing controversy between parties having adverse interests in the matter in dispute." *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d 294, 303 (1984). Significantly, "plaintiffs have the burden of *proving* that standing exists." *American Woodland Indus. v. Tolson*, 155 N.C. App. 624, 627, 574 S.E.2d 55, 57 (2002) (emphasis added), *disc. review denied*, 357 N.C. 61, 579 S.E.2d 283 (2003). *See also Blinson v. State*, 186 N.C. App. 328, 333, 651 S.E.2d 268, 273 (2007), *appeal dismissed and disc. review denied*, 362 N.C. 355, 661 S.E.2d 240, 241 (2008) ("As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing.") (citing *Coker v. Daimler Chrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005), *aff'd per curiam*, 360 N.C. 398, 627 S.E.2d 461 (2006)). Thus, in order to survive defendants' motions to dismiss their equal protection and "law of the land" claims, plaintiffs must demonstrate that they suffered (or will suffer) an "'injury in fact' in light of the applicable statutes or caselaw" specifically with regard to each of those claims. *Neuse River Found., Inc., v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002) (citations omitted), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). *See also Dunn v. Pate*, 334 N.C. 115, 119, 431 S.E.2d 178, 181 (1993) (in order to succeed in equal protection case, plaintiffs "must allege [they have] sustained an 'injury in fact' as a direct result of" the challenged actions). This they cannot do.

Plaintiffs are in no jeopardy from the grants made to Johnson and Wales. Insofar as the complaint alleges, plaintiffs are individual taxpayers, not manufacturers or businesses or educational institutions or non-profit organizations. (Compl. ¶¶ 1-2) In plaintiffs' Count 3, they allege that providing grants to Johnson and Wales without requiring it to meet the conditions imposed on persons otherwise obtaining funds from the One North Carolina Fund is not rationally related to the

purpose of that Fund and that only Johnson and Wales can receive the grants in question “notwithstanding the economic impact and job growth affected by other corporations or universities.” (Compl. ¶ 50) Plaintiffs, however, make no specific allegations concerning any other corporations or universities that might have sought or benefitted from such grants. Plaintiffs also allege that allowing Johnson and Wales to be paid such grants without promising to create jobs or economic growth when no other taxpayer could receive grants from the One North Carolina Fund without satisfying such conditions is not rationally related to the goals of the One North Carolina Fund. (Compl. ¶ 51) Plaintiffs contend that making the grants in question to Johnson and Wales while denying the same grants to the named plaintiffs is arbitrary and irrational and, further, that it denies plaintiffs their rights to equal protection and due process under Article I, Section 19 of the Constitution of North Carolina. (Compl. ¶ 52) Nothing in those allegations suggests any meaningful way in which plaintiffs have themselves been denied equal protection of the law or been denied due process of the law. Nowhere do plaintiffs suggest that they sought grants or have been denied grants or that making any grants to them could in any way promote economic development or educational objectives. In other words, they make no allegations that would support standing for them to bring these challenges.

As the North Carolina Supreme Court has explained, standing depends on

whether the party seeking relief has “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”

*Goldston v. State*, 361 N.C. 26, 30, 637 S.E.2d 876, 879 (2006) (citation omitted). That “sharpness of presentation” is necessarily tied to the particular issue before the court. Standing to raise one

question does not establish standing in a plaintiff to raise any and all questions a plaintiff might wish, regardless of his lack of harm or relationship to such questions.

In *Goldston*, the Court concluded that taxpayers could sue to obtain a declaratory judgment as to the validity of past transfers of funds from the Highway Trust Fund to the General Fund on the grounds that “a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds.” *Id.* at 33, 637 S.E.2d at 881. The Court further concluded that “taxpayers have standing to seek equitable relief and a declaratory judgment when alleging government officials violated statutory or constitutional provisions by diverting tax levies appropriated for one purpose but disbursed for another.” *Id.* at 34, 637 S.E.2d at 881.

While *Goldston* may provide plaintiffs with standing to bring their public purpose and exclusive emoluments claims, *Goldston* does not confer on plaintiffs standing for all other types of claims, particularly those concerned with forms of discrimination and individual rights. The *Goldston* Court quoted with approval its earlier statement that “[o]nly those persons may call into question the validity of a statute [sic] who have been injuriously affected thereby in their persons, property or constitutional rights.” *Goldston*, 361 N.C. at 35, 637 S.E.2d at 882 (quoting *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962)). When it comes to discrimination-type claims, such as equal protection and “law of the land,” the action challenged by plaintiffs is constitutionally flawed only by reference to the differential treatment of groups of taxpayers or citizens that are alleged to be similarly situated to each other. Discrimination-type claims are not concerned with the alleged “misappropriation or misuse of public funds” that was addressed in *Goldston*. Instead, a discrimination claim asserts that a constitutional defect flows from the disparity of one person or entity being treated unfairly in comparison to a second person or entity.

Such claims are those of individual persons or entities not to be treated differently, in an unconstitutionally unfair manner, from persons similarly situated. Plaintiffs' status as general taxpayers does not entitle them under any theory of standing to present claims based on some general inequity in awarding grants to a specific non-profit educational institution or failing to require that institution to follow the procedures normally employed in making grants from the Fund from which the monies were paid to Johnson and Wales pursuant to legislative direction.

Importantly for this case, “[t]he general rule is that ‘a person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute.’” *Jones v. Weyerhaeuser Co.*, 141 N.C. App. 482, 484, 539 S.E.2d 380, 381 (2000) (quoting *In re Appeal of Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974)) (addressing equal protection challenge), *disc. review denied*, 353 N.C. 525, 549 S.E.2d 858 (2001). As explained by our Supreme Court:

When the class which includes the party complaining is in no manner prejudiced, it is immaterial whether a law discriminates against other classes or denies to other persons equal protection of the law. 11 A.J. 757. He who seeks to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is discriminated against.

*State v. Trantham*, 230 N.C. 641, 644, 55 S.E.2d 198, 200-01 (1949) (denying defendant's standing to raise due process and equal protection claims with regard to Sunday closing laws since he sold no items that were exempt from the Sunday closing prohibitions when sold by other types of businesses). *Accord In re Appeal of Barbour*, 112 N.C. App. 368, 373, 436 S.E.2d 169, 173 (1993).

*Barbour* is noteworthy in that the plaintiff in that case raised challenges to certain property tax provisions on equal protection and uniformity of taxation grounds claiming discrimination

against individual residential property holders and also against certain types of homes for the aged, sick and infirm. The Court, in an opinion written by then Judge Orr, considered only the challenges based on discrimination against general taxpayers like Barbour, while holding that he lacked standing to raise the same types of discrimination claims with regard to certain types of homes for the aged, sick, and infirm, a group to which he did not belong. *Barbour*, 112 N.C. App. 368, 436 S.E.2d 169. Not even the right to raise equal protection and uniformity claims as to one group entitled him to raise such claims with regard to the same provisions as to a different group to which he did not belong. Because neither plaintiff here is “a member of the class subject to the alleged discrimination,” the plaintiffs are “precluded from challenging” the actions they wish to contest in this litigation. *Appeal of Martin*, 286 N.C. at 75, 209 S.E.2d at 772 (citation omitted).

Because plaintiffs’ “law of the land” claims are analyzed substantively under the same standard as equal protection claims, *see Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181, 594 S.E.2d 1, 15 (2004), they should be equally subject to dismissal on grounds of lack of standing where plaintiffs cannot show they are prejudiced by the allegedly threatened harm to which they object. *See Trantham*, 230 N.C. at 644, 55 S.E.2d at 200-01; *Barbour*, 112 N.C. App. at 373, 436 S.E.2d at 173. Even if one does not consider the “law of the land” claim as a discrimination-type claim, it is certainly one based on an individual right contained within the Declaration of Rights of our Constitution, and plaintiffs should not be able to pursue such a claim except on the basis of an alleged violation of their own personal rights to due process or the “law of the land.”

In *Blinson*, the Court of Appeals concluded that plaintiffs challenging economic incentive legislation and local acts lacked standing to bring discrimination-type claims relating to those incentives. Their status as taxpayers did not permit them to challenge tax incentives and credits

provided to major computer manufacturing companies under the uniformity of taxation or other discrimination-based theories of relief. Plaintiffs here are in a similar predicament. Because “[p]laintiffs have not demonstrated that they belong to a class that is prejudiced by the operation of” the legislation awarding grants to Johnson and Wales, because they “lack any ‘personal stake in the outcome of the controversy’ with respect to their challenges,” plaintiffs have no standing to bring their discrimination or personal injury-based claims. *Blinson*, 186 N.C. App. at 334-35, 651 S.E.2d at 274. Accordingly, Count 3 should be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) for lack of jurisdiction over the subject matter as well as pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

#### **IV. PLAINTIFFS’ DECLARATORY JUDGMENT CLAIM MUST BE DISMISSED.**

For the reasons discussed above, plaintiffs’ declaratory judgment act claim in Count 4 of the complaint must be dismissed on the grounds that each claim outlined in the complaint is without merit as a matter of law and therefore should be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). Further, Count 3 is also subject to dismissal under N.C.G.S. § 1A-1, Rule 12(b)(1) because plaintiffs lack standing to raise their equal protection and “law of the land” claims contained in Count 3. Consequently, Count 4 of plaintiffs’ complaint must be dismissed.

#### **CONCLUSION**

For all the reasons discussed above, the State defendants submit that all of plaintiffs’ claims should be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Further, Count 3 of the complaint should be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) for lack of jurisdiction based on plaintiffs’ lack of standing to bring

these claims. The State defendants accordingly request that the Court grant their motion to dismiss, enter judgment for defendants, and tax costs to plaintiffs.

Respectfully submitted, this the 10<sup>th</sup> day of February, 2010.

ROY COOPER  
ATTORNEY GENERAL

---

Norma S. Harrell  
Special Deputy Attorney General  
N.C. State Bar No. 6654  
nharrell@ncdoj.gov

N.C. DEPARTMENT OF JUSTICE  
P.O. Box 629  
Raleigh, North Carolina 27602  
Telephone: (919) 716-6900  
Facsimile: (919) 716-6763

*Attorney for Defendants State of North Carolina;  
Beverly Perdue and J. Keith Crisco*

## CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **STATE DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** in the above titled action upon all other parties to this cause by:

- [ ] Hand delivering a copy hereof to each said party or to the attorney thereof;
- [ X] Transmitting a copy hereof to each said party via e-mail; and
- [ X] Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

Robert F. Orr  
[orr@ncicl.org](mailto:orr@ncicl.org)  
Jeanette K. Doran  
[doran@ncicl.org](mailto:doran@ncicl.org)  
North Carolina Institute for Constitutional Law  
333 E. Six Forks Rd., Suite 180  
Raleigh, NC 27609  
Attorneys for Plaintiffs

Dennis A. Wicker  
[dennis.wicker@nelsonmullins.com](mailto:dennis.wicker@nelsonmullins.com)  
Reed J. Hollander  
[reed.hollander@nelsonmullins.com](mailto:reed.hollander@nelsonmullins.com)  
Stephen D. Martin  
[steve.martin@nelsonmullins.com](mailto:steve.martin@nelsonmullins.com)  
Nelson Mullins Riley & Scarborough LLP  
Glen Lake One/2nd Floor  
4140 Parklake Ave.  
Raleigh, NC 27612  
Attorneys for Defendant Johnson and Wales University

This the 10<sup>th</sup> day of February 2010.

---

Norma S. Harrell  
Special Deputy Attorney General