

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
Case No. 09 CVS 18806

<p>JASON R. SAINÉ and DONALD D. REID,</p> <p style="text-align: right;">Plaintiffs,</p> <p>vs.</p> <p>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; and JOHNSON AND WALES UNIVERSITY,</p> <p style="text-align: right;">Defendants.</p>	<p style="text-align: center;"><b>JOHNSON AND WALES UNIVERSITY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS</b></p>
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This case presents a legally unsupportable constitutional challenge to legislation enacted by the General Assembly and signed into law by the Governor providing direct appropriations to Johnson and Wales University for consolidation of its university campus in Charlotte. The challenged Session Laws provide a total of \$10 million in funding to a private nonprofit university providing degree programs in business, hospitality and culinary arts, to be used by the University for construction of educational facilities and the purchase of educational equipment. Plaintiffs take the position that these appropriations are constitutionally infirm under the Public Purpose Clause, the Exclusive Emoluments Clause, and the Equal Protection and Law of the Land Clauses of the North Carolina Constitution. However, both the North Carolina Supreme Court and the North Carolina Court of Appeals have repeatedly and consistently held that economic incentives of this type to private nonprofit educational institutions fulfill two important public purposes - education and economic development – and do not violate the Constitution of North Carolina. Plaintiffs' Complaint fails to state any viable theory under which they can obtain relief as a matter of law and thus all claims in the Complaint should be dismissed with prejudice.

### **FACTUAL BACKGROUND**

The Complaint was filed with this Court on September 16, 2009, asking this Court to declare unconstitutional certain fiscal appropriations enacted by the North Carolina General Assembly in the course of the legislative budget process. See Complaint, attached hereto as Exhibit 1. The Plaintiffs are individuals, citizens and residents of North Carolina. Exh. 1, ¶¶ 1-2. The Defendants are the Johnson & Wales University, a nonprofit private university which operates a campus in Charlotte, North Carolina offering degree programs in business, hospitality,

and culinary arts (the “University”); and, in their official capacities, the Governor of North Carolina, Beverly E. Perdue, and the Secretary of the North Carolina Department of Commerce, J. Keith Crisco. Exh. 1, ¶¶ 4-7.

**A. Plaintiffs’ Contentions Regarding “Political Promises” By Members of the General Assembly Are Overblown and Are Of No Legal Relevance.**  
*(Section One of the Complaint - ¶¶ 11-15)*

After the identification of the parties and jurisdiction, the Complaint is broadly structured in four fact sections and four “Counts”. The first section of the Complaint alleges that certain members of the General Assembly and the Governor made “political promises” of legislative grants to the University. Exh. 1, ¶¶ 11-15. On the face of the Complaint, these allegations establish only that the Speaker of the North Carolina House of Representatives and the President Pro Tempore of the North Carolina Senate both provided personal commitments of support to secure funding for the University’s relocation of its South Carolina and Virginia campuses to Charlotte, North Carolina. *Id.* at ¶¶ 11-12, 14. The Complaint specifically alleges that the Governor expressed “support for the grants... to [the University] but made no specific financial promise.” *Id.* at ¶ 13.

These commitments of support by members of the legislative branch are not actionable promises. However, even if they were, as discussed below the matters at issue here involved enacted Session Laws -- which are activities of the majority of the entire General Assembly, not of one or two politicians. Thus, even if the commitments of support by the Speaker of the North Carolina House of Representatives and the President Pro Tempore of the North Carolina Senate could even colorably be stretched into “promises”, such alleged promises have no factual or legal relevance to the constitutional challenges being mounted in the Complaint.

**B. Plaintiffs' Description of the Challenged Budget Appropriations Conspicuously Omits the General Assembly's Findings Regarding the Important Public Purposes Served by the Appropriations.**

*(Section Two of the Complaint - ¶¶ 16-30)*

The second section of the Complaint outlines five (5) appropriations made in budget legislation enacted by the North Carolina General Assembly:

1. Session Law 2003-284, § 12.4A;
2. Session Law 2005-276, § 13.6(b);
3. Session Law 2006-66, § 13.6(b);
4. Session Law 2007-323, § 32.2(a) (incorporating by reference to "The Joint Conference Committee Report on Continuation, Expansion, and Capital Budgets, dated July 27, 2007" the appropriations authorized therein); and
5. Session Law 2008-107, § 30.2(a) (incorporating by reference to "The Joint Conference Committee Report on Continuation, Expansion, and Capital Budgets, dated July 27, 2007" the appropriations authorized therein).

(hereinafter, the "Session Laws"). See Exh. 1, ¶¶ 16-30. The Session Laws require that the Department of Commerce allocate to the University, from funds appropriated to the One North Carolina Fund (formerly the "Industrial Recruitment Competitive Fund"), the following amounts: \$1,000,000 for the 2003-2004 fiscal year, \$1,000,000 for the 2004-2005 fiscal year, \$1,000,000 for the 2006-2007 fiscal year, \$2,000,000 for the 2007-2008 fiscal year, and \$1,500,000 in the 2008-2009 fiscal year. Id.

While certain portions of the Session Laws are cited in the Complaint, other critical sections, such as the General Assembly's findings in making the first such appropriation, are omitted from the Complaint. Therefore, copies of each of the Session Laws are provided herewith as Exhibits 2-6.<sup>1</sup> The Complaint characterizes these appropriations as "legislative gifts". However, in enacting the first legislation appropriating funds to the University, the

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<sup>1</sup> On a Rule 12(b)(6) motion, the Court may consider the text of these Session Laws, because the Court may take judicial notice of a public law of this state, Walker v. Moss, 246 N.C. 196, 97 S.E.2d 836 (1957); Miller v. Roberts, 212 N.C. 126, 193 S.E. 286 (1937), or an amendment thereof, Wing v. Godwin, 271 N.C. 426, 156 S.E.2d 683 (1967).

General Assembly made detailed findings justifying the appropriations and also imposed significant restrictions on the use of the funds. See Session Law 2003-284, § 12.4A (Exh. 2).

The General Assembly's findings provide that:

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.

Id. Further, the General Assembly directed that:

Funds allocated under this subsection shall be used only for one or more of the following capital expenditures:

- (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.

Id. at § 12.4A(b).

**C. Plaintiffs' Recitations Concerning the One North Carolina Fund Are Misleading and Have No Relevance To Their Constitutional Claims.**  
(Section Three of the Complaint - ¶¶ 31-41)

The third section of the Complaint discusses the “Creation and Usual Operation of the One North Carolina Fund.” See Exh. 1, ¶¶ 31-41. The Session Laws direct the North Carolina Department of Commerce to use funds allocated to the One North Carolina Fund as the source of these direct appropriations to the University. For some indiscernible reason, Plaintiffs appear to believe therefore that the “Creation and Usual Operation of the One North Carolina Fund” is somehow relevant to their *constitutional* challenges.

The Complaint alleges that “The One North Carolina Fund was established as a special revenue fund in the Department of Commerce by N.C. Gen. Stat. § 143B-437.71(a)....” Exh. 1, ¶ 31. It is axiomatic that the power of the purse resides in the Legislative branch of our government. See N.C. Const., Art. V, sec 7(1). Moreover, “[u]nder our Constitution, Art I, sec. 9, the three departments of government are ‘forever separate and distinct from each other.’ To the Legislature belongs exclusively the function of raising money for the public treasury and directing its disbursement.” White v. Worth, 126 N.C. 570, 605, 36 S.E. 132, 143 (1900), citing Garner v. Worth, 122 N.C. 250, 29 S.E. 364 (1898).

It is further without question that the Legislature, having created the One North Carolina Fund, may modify, adjust, eliminate or condition the funding on whatever terms are constitutionally permissible. Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 304, 177 S.E.2d 513, 517 (1970) (“The Legislature has the power to abrogate, amend or make exceptions to its own acts.”). “What laws shall be changed and when they are to be changed is within the prerogative of the Legislature, not the Judiciary.” Simmons v. Wilder, 6 N.C. App. 179, 182, 169 S.E.2d 480, 482 (1969). Therefore, to the extent there is any “usual

operation” of this program, the Legislature has complete power to modify such “usual operation” in any way it deems fit, so long as no constitutional principle is violated. As discussed below, there is no constitutional principle standing in the way of the General Assembly and the Governor providing incentive funds to the University in the manner at issue here, and therefore discussion of the “usual operation” of the One North Carolina Fund is of no relevance.

To the extent this Court determines that any of the factual allegations related to the One North Carolina Fund have any legal relevance in this matter, it is important to note that the Complaint’s discussion of the One North Carolina Fund is misleading in two critical respects. In the same budget legislation providing for the first appropriation to the University, the General Assembly stated that funds allocated to the One North Carolina-Industrial Recruitment Competitive Fund could be used for purposes outside of the “usual operation” of the fund. See Session Law 2003-284, § 12.4(a) (“...unless specifically allocated in this act for another purpose...”), and § 12.4(b) (“... (4) Any other purposes specifically provided by an act of the General Assembly.”) (Exh. 2). Second, the One North Carolina Fund was not “created” in its present “usual operation” until the year following the initial appropriation to the University when the statutory provisions of N.C. Gen. Stat. §§ 143B-437.70-437.74 were first codified. See Session Law 2004-88 (Exh. 3). Given that the initial appropriation to the University was made prior to this codification, it is not surprising that later appropriations were made “notwithstanding the provisions of G.S. 143B-437.71.” See Session Law 2005-276, § 13.6(b) as amended by Session Law 2006-66, § 12.2 (Exhs. 4 and 5).

**D. Plaintiffs' Allegations of Standing Fail To Allege Any Cognizable Harm to Plaintiffs or to Allege That Plaintiffs Are Similarly Situated to the University.**  
(Section Four of the Complaint - ¶¶ 42-44)

The fourth section of the Complaint alleges, in three short paragraphs, that the Plaintiffs have been harmed by the Session Laws because the appropriations have “diminished the moneys available to the State for other, lawful purposes”; the Plaintiffs have been “deprived of the benefit of the lawful expenditure by the State of moneys paid to the State treasury by Plaintiffs ... in the form of taxes”; and “Plaintiffs have not and cannot qualify for [the] direct cash grants ... challenged herein.” Exh. 1, ¶¶ 42-44. Plaintiffs do not allege that they are nonprofit organizations or educational institutions, nor do they allege that they sought similar incentives from the State but failed to obtain them. Finally, Plaintiffs do not allege that they suffered any individual harm as a result of the Session Laws.

**LEGAL ARGUMENT**

The remaining paragraphs of the Complaint allege four “counts” (properly denominated as causes of action) asserted by Plaintiffs. Exh. 1, ¶¶ 45-58. For the reasons explained below, each of these causes of action fails to state a claim upon which relief can be granted and therefore should be dismissed under N.C. R. Civ. Pro. 12(b)(6), and Plaintiffs lack standing to bring one of the “counts” and therefore that cause of action should also be dismissed under N.C. R. Civ. Pro. 12(b)(1).

**A. The 12(b)(6) Standard and the Presumption of Constitutionality**

A particular cause of action is “clearly without merit” and should be dismissed if the face of the complaint reveals “an absence of law to support a claim of the sort made, [an] absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim.” Forbis v. Honeycutt, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981). At the Rule

12(b)(6) stage, only the well-pleaded material allegations of the complaint are taken as admitted; “conclusions of law or unwarranted deductions of fact are not.” Sutton v. Duke, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). In applying this standard, the Plaintiffs face a heavy burden in pursuing their constitutional claims seeking to invalidate a series of Session Laws providing funding to a private nonprofit educational institution.

Our Supreme Court has declared 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. City of 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 other states, 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 the 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. 5<sup>th</sup> Dist. 1990), judgment aff'd, 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, entrusted with policy decisions, and 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, 175 S.E.2d 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 plaintiffs’ challenge of primary system which they claimed favored wealthy candidates and their supporters). In this case, Plaintiffs implore this Court to supplant the judgment of the General Assembly because Plaintiffs disagree with a legislative policy choice providing funding to expand nonprofit educational opportunity for citizens of North Carolina. This Court should reject Plaintiffs’ specific arguments as well as their underlying premise that this court should in effect overrule the legislature on a policy question which the General Assembly has decided in favor of funding educational opportunities in North Carolina.

#### **The Four Causes of Action**

Count 1 of the Complaint, alleging a violation of the Exclusive Emoluments clause of the North Carolina Constitution, will be foreclosed if this Court finds that the challenged legislative appropriations promote the public benefit under the Public Purpose Clause, under the authority of Peacock v. Shinn, 139 N.C. App. 487, 496, 533 S.E.2d 842, 848 (2000), which holds that, when legislation is determined to “promote the public benefit” under the Public Purpose Clause,

it necessarily is not an exclusive emolument. As the case law and the undisputed evidence in this case indicate that the Plaintiffs cannot prevail on their cause of action under the Public Purpose Clause (Count 2), such a determination would also resolve any issues with their Exclusive Emoluments Clause claim (Count 1). Therefore, the University addresses the Public Purpose Clause allegations (Count 2) as its first argument in the following legal analysis.

**B. Plaintiffs' Claims Under Count 2 (Public Purpose Clause) Should Be Dismissed For Failure to State a Claim Upon Which Relief Can Be Granted.**

Count 2 of the Complaint should be dismissed for failure to state a claim upon which relief can be granted under Article V, § 2(1) of the North Carolina Constitution, the Public Purpose Clause. Article V, § 2(1) provides: “[t]he 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.” Plaintiffs’ only contention in Count 2 is that the Session Laws violate this constitutional provision because they “provide direct government subsidies for a private institution, namely Johnson and Wales, and are not for a ‘public purpose only.’”

The legislative appropriations complained of were made to a nonprofit educational institution to support education and occupational training. See Exh. 1, ¶ 1 (“...Johnson and Wales University, a private, nonprofit culinary school...”, and ¶ 7 (“...[the University] operates a nonprofit, private university specializing in business, culinary arts, hospitality and related fields...”); see also, Session Law 2003-284, § 12.4A.(a) (Exh. 2), stating:

The General Assembly finds that institutions of higher education play an essential role in maintaining and strengthening the economic health of the State.... [I]nnovative 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.

The concept that “the education of residents of this State is a recognized object of State government [and the] provision therefor is for a public purpose” is firmly rooted in our State Constitution and has been reinforced repeatedly by our state courts. State Education Assistance Authority v. Bank of Statesville, 276 N.C. 576, 587, 174 S.E.2d 551, 559 (1970), citing Green v. Kitchin, 229 N.C. 450, 455, 50 S.E.2d 545, 549 (1948) and Jamison v. City of Charlotte, 239 N.C. 682, 696, 80 S.E.2d 904, 914 (1954). See also N.C. Const. Art. IX, § 1 (providing: “Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged.”); Kiddie Corner Day Schools, Inc. v. Charlotte-Mecklenburg Board of Education, 55 N.C. App. 134, 285 S.E.2d 110 (1981) (“It is declared in both our Constitution and our statutes that the education of our citizens to their maximum capacities is the goal of our educational system, for education of our citizens is essential to good government, morality and a good economy.”) Based on the clear and express North Carolina governmental interest in supporting education, the constitutionality of direct appropriations from governmental bodies to private nonprofit educational entities was upheld by the North Carolina Supreme Court’s decision in Hughey v. Cloninger, 297 N.C. 86, 253 S.E.2d 898 (1979), a case directly on point for the matter sub judice.

In Hughey, a lawsuit was brought by a citizen taxpayer to enjoin Gaston County and its board of commissioners from appropriating funds to a private nonprofit school that served students with dyslexia. The Superior Court Judge, Sam J. Ervin, III, ruled that the disbursement of funds was for a public purpose and was permissible. On appeal, the Court of Appeals reversed the Superior Court, holding that the appropriation violated the Public Purpose Clause.

37 N.C. App. 107, 245 S.E.2d 543 (1978). The Court of Appeals stated “Clearly, both appropriations and expenditures of public funds for the education of the citizens of North Carolina are for a public purpose.” Id. at 111, 245 S.E.2d at 547. However, the Court of Appeals determined that “direct disbursements to and for a private nonprofit corporation, although clearly an attempt to attain a benevolent and commendable end, constitute a primary benefit to the private entity itself” and therefore concluded that such a direct appropriation violated the Public Purpose Clause. Id. at 111-112, 245 S.E.2d at 547.

The North Carolina Supreme Court granted discretionary review. In its decision, the Supreme Court concluded that the direct appropriation of funds by Gaston County to a nonprofit educational institution was *constitutionally permissible*, but was prohibited only because the County was *not statutorily authorized* to make the appropriation. In other words, “the Court of Appeals reached the right result but for the wrong reason.” Hughey, 297 N.C. at 94, 253 S.E.2d at 903.

Since the Court had already found that Gaston County’s appropriation was not statutorily authorized, it could have stopped its opinion right there. However, the Supreme Court made a particular effort to correct the Court of Appeals’ statements regarding direct governmental funding for nonprofit educational institutions. First, the Court explained that:

The constitutional problem under the public purpose doctrine perceived by the Court of Appeals is no longer present in view of the addition, effective 1 July 1973, of subsection (7) to Article V, section 2 of the North Carolina Constitution. Subsection (7) provides that the General Assembly may enact laws which permit the State, county, city or town, or any other public corporation, to “contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only.”

Id. at 94, 253 S.E.2d 903-04. The Hughey Court further explained that, due to this constitutional amendment, 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.” Id.

Second, the Court re-emphasized the public purpose underlying governmental support for private nonprofit educational entities, stating that:

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 citizens of North Carolina are for a public purpose.

Id., citing State Education Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970) (emphasis added).

The ruling in Hughey was followed by the Court of Appeals’ decision in Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Board of Education, 55 N.C. App. 134, 285 S.E.2d 110 (1981). In Kiddie Korner, the plaintiff day care companies challenged the authority of the school board to fund and conduct an extended day care program at a public elementary school. Plaintiffs contended that school funds were being used to benefit children in the extended day care program and that such expenditure was not for a public purpose. The Court followed the Hughey precedent, stating that “although a private benefit inures to the individual students enrolled in the program, the scheme and intent of the program is to further the educational achievements of these students .... Consequently, any costs to the school system which result from the program are permissible since they are cloaked with a public purpose.” The Hughey and Kiddie Korner cases foreclose any argument by Plaintiffs that the General Assembly was not constitutionally empowered to make the direct disbursements described in the Session Laws.

In addition, numerous decisions of the appellate courts have held that the General Assembly may provide funding to private entities for economic development purposes, and that doing so does not violate the Public Purpose Clause. This series of decisions, highlighted by the

Supreme Court's landmark decision in Maready v. City of Winston-Salem, 342 N.C. 708, 467 S.E.2d 615 (1996), leave no doubt that the State's support of economic development is another public purpose which is constitutionally valid under Article V, § 2(1).

In Maready, the Supreme Court concluded that local economic development incentive projects, as authorized by N.C. Gen. Stat. 158-7.1, were for public purposes despite the fact that "private actors will necessarily benefit from the expenditures authorized." Maready, 342 N.C. at 725, 467 S.E.2d at 625. To make this determination, the Court applied the test set out in Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 386 S.E.2d 200 (1989) (holding that the two guiding principles for determining whether a particular undertaking was done for a public purpose are: "(1) it involves a reasonable connection with the convenience and necessity of the particular municipality; and (2) the activity benefits the public generally, as opposed to special interests or persons." Id. at 646, 386 S.E.2d at 207.) In Maready, the Court concluded that economic development incentives meet both prongs of this test because "the public advantages [of the incentives] are not indirect, remote or incidental; rather they are directly aimed at furthering the general economic welfare of the communities affected[,]" and because "[w]hile private actors will necessarily benefit from the expenditures authorized, such benefit is merely incidental." Id. at 725, 467 S.E.2d at 625-626. The Maready Court even cited back to its decision in Hughey to emphasize that direct disbursement of public funds to private entities is a constitutionally permissible method of accomplishing a valid public purpose. Id. at 720, 467 S.E.2d at 623.

The Court of Appeals has had occasion to apply the Maready precedent in multiple challenges to economic incentives. The results of those cases further demonstrate the shortcomings of Plaintiffs' Complaint. In Peacock v. Shinn, a challenge to the financing

agreements for the coliseum to be used by the then-Charlotte Hornets of the National Basketball Association, the Court of Appeals concluded that “as in Maready, a private party ultimately conducts activities which, while providing incidental private benefit, serve a primary public goal.” 139 N.C. App. at 495, 533 S.E.2d at 848. So too, in Blinson, the Court of Appeals upheld challenged State economic development incentives enacted by state statute and the local government incentives designed to promote the location of a major computer manufacturing plant in Forsyth County, finding “no meaningful distinction between the present case and Maready.” Blinson v. State, 186 N.C. App. 328, 338, 651 S.E.2d 268, 276 (2007).

As the court in Blinson explained, “the task of the judiciary is to determine whether the aim of the legislation is primarily public and not to weigh the public benefit against the private benefit by making findings as to the projected value of each.” Id. at 277-278, 651 S.E.2d at 340-341. Simply put, the courts “do not ‘pass upon the wisdom or propriety of legislation in determining *the primary motivation* behind a statute,” rather the courts must “look instead to whether the purpose of ‘an act will promote the welfare of a state or local government and its citizens.’” Id. citing Maready, 342 N.C. at 736, 467 S.E.2d at 626 (emphasis in original).

The sum of the foregoing authority is clear: the challenged Session Laws are constitutionally valid under Article V, § 2(1) because they serve the public purposes of education and economic development, both of which are goals of State government, even though private actors may incidentally benefit. The means of providing the funding to the University, through direct legislative appropriations, are constitutionally authorized under Article V, § 2(7), as held by the Supreme Court in Hughey v. Cloninger and Maready v. Town of Winston-Salem. For these reasons, it is clear that the Count 2 of the Complaint fails to state a claim upon which relief may be granted and should be dismissed.

C. **Plaintiffs' Claims Under Count 1 (Exclusive Emoluments Clause) Should Be Dismissed For Failure to State a Claim Upon Which Relief Can Be Granted.**

As stated above, Count 1 of the Complaint should be foreclosed under the precedent of Peacock v. Shinn, 139 N.C. App. 487, 496, 533 S.E.2d 842, 848 (2000) (when legislation is determined to “promote the public benefit” under the Public Purpose Clauses, it necessarily is not an exclusive emolument). Since the Session Laws comply with the Public Purpose Clause (as discussed in Count 2 infra.), this Court may quickly dispense with Plaintiffs’ Exclusive Emoluments clause arguments in Count 1 of the Complaint and may wish to move ahead to the arguments on Count 3 of the Complaint at page 20 of this Brief. However, should this Court wish to look more directly at the Exclusive Emoluments clause issue, the University provides the following further explanation why Count 1 should be dismissed.

Count 1 of the Complaint should be dismissed because Plaintiffs fail to state a valid claim under Article I, § 32 of the North Carolina Constitution, which provides: “No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.” “An emolument is defined as ‘[t]he profit arising from office, employment, or labor; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites.’” Crump v. Snead, 134 N.C. App. 353, 356, 517 S.E.2d 384, 387 (quoting Black’s Law Dictionary 524 (6<sup>th</sup> ed. 1999)), disc. review denied, 351 N.C. 101, 541 S.E.2d 143 (1999). The purpose of this provision is “to prevent ‘the community’ from surrendering its power to another ‘person or set of persons’ by grant of exclusive or separate emoluments or privileges unless they were granted in ‘consideration of public services.’” Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 655, 386 S.E.2d 200, 212 (1989).

As the Supreme Court has explained, an exemption that benefits a particular group of persons is not an exclusive emolument or privilege 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.” Town of Emerald Isle ex rel. Smith v. State, 320 N.C. 640, 654, 360 S.E.2d 756, 764 (1987). The Court of Appeals has applied the two-part test set out in Emerald Isle with equal force to “affirmative ‘benefits’” as well as “exemptions.” Blinson at 342, 651 S.E.2d at 278, citing Crump v. Snead, 134 N.C. App. 353, 357, 517 S.E.2d 384, 387, disc. review denied, 351 N.C. 101, 541 S.E.2d 143 (1999). As should be apparent from the discussion of Count 2, infra., the test applied under the Exclusive Emoluments clause is nearly identical to the test applied under the Public Purpose Clause, and therefore the expected results should be the same.

Plaintiffs complain that “direct cash grants” awarded to the University violate Article I, § 32 because they accrue to the University’s private financial benefit and are thus exclusive and separate emoluments not in exchange for any public service. Exh. 1, ¶ 46. Plaintiffs’ argument fails on its face because it applies the incorrect test and reaches an erroneous conclusion. Any benefits that the State of North Carolina is providing to the University are not exclusive and/or separate emoluments merely because the benefits accrue to the University’s financial benefit. Rather, the foregoing binding authority holds that the proper test in the case sub judice is (1) whether the “cash grant” is intended to promote the general welfare even if it also benefits the University, and (2) whether there was a reasonable basis for the General Assembly to conclude that the granting of the monies serves the public interest.

In making its initial appropriation to the University, the General Assembly made multiple findings regarding the positive benefits which would accrue to the State as a whole, the State’s

workforce, and the community where the University was expected to locate, thereby establishing the General Assembly's intent that the appropriations to the University will promote the general welfare. Session Law 2003-284, § 12.4A.(a) (Exh. 2). These findings, in addition to the restrictions on the use of the funds appropriated to the University, provide a rational basis for the General Assembly to conclude that appropriations to the University would promote the general welfare. In making its initial appropriation to the University, the General Assembly directed that:

Funds allocated under this subsection *shall be used only* for one or more of the following *capital expenditures*:

- (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*.

Session Law 2003-284, § 12.4A.(b) (emphasis added). In so restricting the use of funds allocated to the University, the General Assembly directed that the funding would be used for the construction of academic and educational facilities, while, at the same time ensuring that state funds would be spent on capital expenditures located in the State.

In conclusion, a plain reading of the Session Laws shows that any benefits the General Assembly is providing to the University promote the general welfare, and there is a rational basis for concluding that granting such benefits serves the public purposes of education, occupational training, job creation and economic development. Accordingly, the acts of the General Assembly do not confer on the University any exclusive or separate emolument. Further, even assuming arguendo that they do, the acts of the General Assembly are in consideration of a

public purpose. Accordingly, Count 1 should be dismissed with prejudice under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

**D. Plaintiffs' Claims Under Count 3 (Equal Protection Clause and Law of the Land Clause of the N.C. Constitution) Should Be Dismissed For Lack of Standing and For Failure to State a Claim Upon Which Relief Can Be Granted.**

1. *Lack of Standing*

Plaintiffs lack standing to bring the due process and equal protection claims described in Count 3 of the Complaint. In Blinson v. State, the Court of Appeals considered whether plaintiffs challenging certain economic incentives provided by the General Assembly had standing to assert claims under the Uniformity of Taxation Clauses of the North Carolina Constitution and the Dormant Commerce Clause of the United States Constitution. The court began by reciting the general rule that “a taxpayer, as such, does not have standing to attack the constitutionality of any and all legislation.” Blinson, 186 N.C. App. at 334, 651 S.E.2d at 274, quoting Nicholson v. State Educ. Assistance Authority, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969).

The standard identified by the Court was whether the Plaintiffs had “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.” Blinson at 334, 651 S.E.2d at 274, quoting Goldston v. State, 361 N.C. 26, 30, 637 S.E.2d 876, 879 (2006). Applying this standard, the Court found that the Blinson plaintiffs’ claims “do not relate to any injury plaintiffs themselves have sustained. Rather, plaintiffs’ claims under these provisions pertain only to a theoretical injury that might be suffered by other business that may attempt to compete with [the business receiving the incentives.]” Id.

Thus, since plaintiffs had failed to allege any facts showing that they were injured or prejudiced by the operation of the challenged legislation, the Blinson court held that the trial court had properly concluded that the plaintiffs lacked standing to bring their claims under the Uniformity of Taxation Clauses and the Dormant Commerce Clause. The same test should be applied here in dismissing Plaintiffs' claims under the Law of the Land Clause and the Equal Protection Clause because the Complaint fails to allege facts sufficient to show that the Plaintiffs occupy a class that is prejudiced by the operation of the Session Laws. Plaintiffs carry the burden of proof to establish the existence of standing, which is a requirement to invoke the court's jurisdiction. American Woodland Indus. v. Tolson, 155 N.C. App. 624, 627, 574 S.E.2d 55, 57 (2002), disc. review denied, 357 N.C. 61, 579 S.E.2d 283 (2003). See also Blinson at 333, 651 S.E.2d at 273 (2007). In order to carry their burden, Plaintiffs must be able to show this Court that they have suffered, or will suffer, a concrete, cognizable injury.

In considering standing to bring claims under the Law of the Land Clause, North Carolina courts have stated that "the constitutionality of a statute may only be contested by a litigant who is adversely affected by the statute." State v. Waters, 308 N.C. 348, 355, 302 S.E.2d 188, 193 (1983), citing State v. Memis, 281 N.C. 658, 190 S.E.2d 164 (1972) (holding that defendant lacked standing to bring claim under Due Process Clause where he failed to show that he was adversely affected by statute). It is long-standing law that "[a] party who is not personally injured by a statute is not permitted to assail its validity; If he is not injured, he should not complain because another may be hurt." Yarborough v. North Carolina Park Commission, 196 N.C. 284, 145 S.E. 563, 567 (1928) (upholding dismissal of complaint alleging violation of Law of the Land Clause where plaintiff had not suffered any injury and was not threatened with loss of property); see also, State v. Trantham, 230 N.C. 641, 644, 55 S.E.2d 198, 200-01 (1949)

(holding that defendant lacked standing to allege due process and equal protection claims regarding Sunday closing laws because defendant did not sell items that were exempt from Sunday closing laws sold by competing businesses).

With reference to the Equal Protection Clause, “[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) (citation omitted). Plaintiffs have failed to identify any class to which they belong which could be prejudiced by the Session Laws, other than their status as taxpayers. Having failed to identify (a) a class discriminated against by the Session Laws and (b) Plaintiffs’ membership in that class, Plaintiffs lack standing to assert their claims against Defendants under the Equal Protection Clause of the North Carolina Constitution. Accordingly, those claims should be dismissed under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure.

2. *Failure to State a Claim*

Count 3 of the Complaint should also be dismissed for failure to state a claim upon which relief can be granted under Article I, § 19, specifically the Equal Protection Clause and the Law of the Land Clause of the North Carolina Constitution. Article I, § 19 provides that:

No person shall be taken, imprisoned, or disseized of his freehold, liberty or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

The gravamen of the Complaint is that the General Assembly enacted these appropriations “without regard to any qualifying criteria,” that doing so is “not rationally related to the state purpose of the One North Carolina Fund” and “is arbitrary and irrational” and that Plaintiffs are

“non-beneficiaries” of the challenged appropriations. Exh. 1, ¶¶ 50, 51, and 52. As discussed below, case law applying Article I, § 19 shows that Plaintiffs incorrectly state the applicable test, and that an application of the proper test shows that the Session Laws fully comply with this constitutional provision. Thus, Plaintiffs have failed to state any valid claims that they have been denied any right guaranteed by Article I, § 19 and, accordingly, this Court should dismiss the Complaint under Rule 12(b)(6).

The North Carolina Supreme Court views the “law of the land” clause as equivalent to “due process of law.” State v. Collins, 169 N.C. 323, 84 S.E. 1049 (1915). The term “law of the land” is synonymous with “due process of law” as that term is applied under the 14<sup>th</sup> Amendment to the U.S. Constitution. In re Smith, 82 N.C. App. 107, 345 S.E.2d 423 (1986). Thus,

“Due process” has a dual significance as it pertains to procedure and substantive law. As to procedure it means ‘notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a competent and impartial tribunal having jurisdiction of the cause.’ In substantive law, due process may be characterized as a standard of reasonableness, and as such it is a limitation upon the exercise of the police power.

State v. Smith, 265 N.C. 173, 180, 143 S.E.2d 293, 299 (1965). Plaintiffs have not alleged that the Session Laws failed to comply with any procedural due process requirements of notice or opportunity for hearing. Rather, their assertion is that the Session Laws are “arbitrary and irrational”, thereby raising a substantive due process challenge.

The traditional substantive due process test under the Law of the Land Clause is that a statute must have a “rational relation to a valid state objective.” 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). Plaintiffs’ argument that these appropriations

violate the Law of the Land Clause must fail because the Complaint fails to establish how the challenged appropriations are unrelated to any valid governmental interest. For all of the reasons discussed in addressing Counts 1 and 2 above, it is clear that the challenged appropriations are rationally related to the interests of economic development, jobs creation, occupational training, and the education of North Carolina's citizens.

Plaintiffs' Equal Protection Clause claims must likewise fail. When a party challenges a particular statute as violative of the Equal Protection Clause of North Carolina, the courts generally evaluate that legislation using one or two levels of review: if the statute affects a fundamental right or classifies a person based upon a suspect characteristic, strict scrutiny is applied, but if the statute impacts neither a fundamental right nor a suspect class, the courts employ the rational basis test. Rhyne v. K-Mart Corp., 358 N.C. 160, 180, 594 S.E.2d 1, 41 (2004), citing State ex rel. Utilities Com'n v. Carolina Utility Customers Ass'n, Inc., 336 N.C. 657, 681, 446 S.E.2d 332, 346 (1994) and Richardson v. North Carolina Dept. of Correction, 345 N.C. 128, 135, 478 S.E.2d 501, 505 (1996). Plaintiffs make no allegation that a fundamental right has been impacted by the challenged appropriations, nor that discrimination has been made based upon a suspect class; neither can any such inference be drawn from the allegations in the Complaint. Thus, rational basis review is applicable here.

The rational basis test applied for equal protection claims is the same as the one applied for substantive due process: "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 180, 594 S.E.2d at 15, quoting Lowe v. Tarble, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985) (internal quotations omitted). "[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.” Id. at 181, 594 S.E.2d at 16.

The constitutional safeguard (of equal protection) is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it.

Roberts v. Durham County Hospital Corp., 56 N.C. App. 533, 539, 289 S.E.2d 875, 879 (1982), aff’d per curiam, 307 N.C. 465, 298 S.E.2d 384 (1983), quoting McGowan v. State of Maryland, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 1104-05, 6 L.Ed.2d 393, 399 (1961).

The statement of legislative intent shown in Exhibit 2 reveals that the General Assembly had in mind each of several legitimate governmental interests in making appropriations to the University, to wit, “maintaining and strengthening the economic health of the State,” “providing appropriate workforce preparation and training to maintain the State’s viability as an attractive location for new and expanding businesses,” “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.” Session Law 2003-284, § 12.4A.(a) (Exh. 2). What is more, in enacting the initial appropriation the General Assembly explicitly connected these interests with appropriations being made: “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.

This much being made clear by the General Assembly, it is the Plaintiffs’ burden to overcome the presumption that the appropriations are constitutionally valid. Plaintiffs utterly fail to meet this burden by their refusal to recognize what each and every modern court in this state has recognized -- the support of education and economic development are each legitimate state

interests and direct appropriations to a private entity is a rational means to achieve these interests. The Session Laws provide a rational means for achieving the State's legitimate interests in the public purposes of education, occupational training, jobs creation and economic development and, therefore, Plaintiffs have failed to allege legally cognizable claims that they have been denied any right guaranteed by Article I, § 19 of the North Carolina Constitution. Thus, Count 3 should be dismissed with prejudice under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

**E. Plaintiffs' Claims Under Count 4 (Declaratory Judgment Act) Should Be Dismissed For Failure to State a Claim Upon Which Relief Can Be Granted.**

Count 4 of the Complaint, which seeks a declaratory judgment, fails to state a claim because (as explained herein) all of the substantive claims underlying the request for declaratory judgment do not establish any violation of the North Carolina Constitution. Count 4 should therefore be dismissed with prejudice under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

**CONCLUSION**

WHEREFORE, Defendant Johnson and Wales University respectfully requests that the Court (1) grant its Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure; (2) enter an order dismissing all claims in the Complaint with prejudice; (3) order that the University's attorney's fees and costs incurred in the preparation and filing of this Motion and its presentation to the Court be taxed against the Plaintiff; and (4) grant other and such further relief as the Court deems just and proper.

Respectfully submitted this, the 11<sup>th</sup> day of February, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a copy of the foregoing document upon counsel of record by hand delivery, on this the 11<sup>th</sup> day of February, 2010, addressed as follows:

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