20110146

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Robert Hale,

Plaintiff/Appellant,

vs.

State of North Dakota, et al.,

Defendants/Appellees.

Supreme Ct. No. 20110146

District Court No. 08-10-C-1951

APPEAL FROM THE DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE DAVID E. REICH

BRIEF OF DEFENDANTS/APPELLEES STATE OF NORTH DAKOTA

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STATEMENT OF THE CASE

On August 5, 2010, Plaintiff Robert Hale (Hale) filed a Complaint naming the State of North Dakota; John Hoeven,[1] in his official capacity as Governor of North Dakota; Shane Goettle,[2] in his official capacity as Director of the Department of Commerce; the North Dakota Department of Commerce (collectively referred to as "the State"), and others as defendants. App. 1-76. Succinctly summarized, the Complaint alleges various state statutes violate Article X, section 18 of the North Dakota Constitution (Section 18) because they permit the State to disburse funds, provide grants, guarantee loans, or give credit to private persons, associations, and corporations, or accept stock. Id. at 15-16, 65-67 (¶¶ 23, 78).

The next day Hale filed a motion for declaratory judgment. The State responded by filing a Motion to Dismiss and supporting brief and a Brief in Opposition to Motion for Declaratory Judgment. The other defendants also filed dispositive motions and opposition briefs. Oral argument was held on November 23, 2010.

The district court issued its Order granting defendants' motions and denying Hale's motion for declaratory judgment on May 11, 2011. Id. at 446-60. The Order held the challenged statutes authorizing economic development are facially constitutional. Id. at 450-54. The Order further held Hale's as applied claims were not supported by sufficient citation, argument, relevant precedent,

[1] Jack Dalrymple is the current Governor of North Dakota.
[2] Al Anderson is the current Director of the Department of Commerce.

persuasive reasoning, or were deficient as a matter of law. Id. at 457-58. Hale subsequently filed a notice of appeal. Id. at 462.

STATEMENT OF THE FACTS

The claims against the State were dismissed on motion to dismiss, meaning the district court construed "the pleadings in [the] light most favorable to the plaintiff and accept[ed] well-pleaded allegations as true." App. 449. The allegations relevant to the State's motion, and admitted by the State, are:

- The North Dakota Legislative Assembly has authorized the distribution of public funds for economic development.
- In accordance with statutory authority, the State, typically through the North Dakota Department of Commerce (Department), has and does disburse funds, provide grants, and provide loans to private persons, associations, or corporations in conjunction with economic development programs administered by it.
- The State, through the Department, has taken equity positions in companies in conjunction with economic development programs administered by it.

See Br. in Supp. of Mot. to Dism. (Doc. 14) at 1-2; App. 372-75.

ARGUMENT

I. The district court properly dismissed Hale's facial challenge.

It is undisputed that economic development activities are authorized by the Legislative Assembly and occur in North Dakota. Thus, the primary issue on appeal is whether the Legislative Assembly may constitutionally authorize the distribution of public funds for economic development. Because it can, the district court's dismissal of Hale's facial challenge should be upheld.

A. To be struck down, a statute must be found unconstitutional beyond a reasonable doubt.

"A statute carries a heavy presumption of constitutionality. . . . A legislative enactment is conclusively presumed to be constitutional unless it is clearly shown that the act contravenes the state or federal constitution." Caldis v. Bd. of County Comm'rs, Grand Forks County, 279 N.W.2d 665, 669-72 (N.D. 1979).

"The power to hold an Act of the Legislature invalid is one of the highest functions of the courts, and such power should be exercised with great restraint." Montana-Dakota Utils. Co. v. Johanneson, 153 N.W.2d 414, 416-17 (N.D. 1967). "In considering the constitutionality of an Act, every reasonable presumption in favor of its constitutionality prevails. And the courts will not declare a statute void unless its invalidity is, in the judgment of the court, beyond a reasonable doubt." Menz v. Coyle, 117 N.W.2d 290, 295 (N.D. 1962) (citations omitted); see also MCI Telecomms. Corp. v. Heitkamp, 523 N.W.2d 548, 552 (N.D. 1994). This stringent burden for establishing unconstitutionality is mandated by the various roles the state constitution assigns to the three branches of our government. See Verry v. Trenbeath, 148 N.W.2d 567, 570 (N.D. 1967).

Furthermore, in the guise of judicial review, a court should not substitute its own view of policy considerations for those of the Legislative Assembly. MCI Telecomms., 523 N.W.2d at 552. A court's inquiry is limited to whether the Legislative Assembly acted in violation of the Constitution. Rosedale Sch. Dist. No. 5 v. Towner County, 216 N.W. 212, 214 (N.D. 1927).

B. The Legislative Assembly may authorize disbursement of public funds for economic development.

Section 18 provides:

> The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution,[3] but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

The North Dakota Constitution is not a grant but a limitation on legislative power. Thus, the Legislative Assembly may enact any law not expressly or inferentially prohibited by the Constitution. See State v. Ertelt, 548 N.W.2d 775, 776 (N.D. 1996); Nw. Bell Tel. Co. v. Wentz, 103 N.W.2d 245, 252 (N.D. 1960).

1. Economic development is a public purpose.

Section 18 in its present form is the result of a constitutional amendment which was proposed by an initiative petition and approved at the general election held on November 5, 1918. See 1919 N.D. Sess. Laws ch. 89. Following the adoption of Section 18, the Legislative Assembly, in 1919, established the Industrial Commission to conduct and manage, on behalf of the State, certain industries, enterprises, and businesses then established or to be established by law. See 1919 N.D. Sess. Laws ch. 151. The industries, enterprises, and businesses established by law during that legislative session included the Bank

[3] Article XX of the North Dakota Constitution, which concerned the manufacture, import, and sale of liquor, was repealed by constitutional amendment in 1932. 1933 N.D. Sess. Laws p. 492; Egbert v. City of Dunseith, 24 N.W.2d 907, 909 (N.D. 1946).

of North Dakota (the "Bank") and the Mill and Elevator Association (the "Mill and Elevator"), both of which are conducted and managed by the Industrial Commission. See 1919 N.D. Sess. Laws chs. 147, 152.

In Green v. Frazier, 176 N.W. 11 (N.D. 1920), aff'd, 253 U.S. 233 (1920), this Court addressed whether establishment of the Mill and Elevator and the Bank violated Section 185 of the North Dakota Constitution, the predecessor to Section 18. In doing so, the Court distinguished between private and public businesses, explaining a private business seeks gain or financial profit exclusively for private purposes, while "a public purpose or public business has for its objective the promotion of the general welfare of all the inhabitants or residents within a given political division, as, for example, a state, the sovereignty and sovereign powers of which are exercised to promote the public health, safety, morals, general welfare, security, prosperity, contentment, and equality before the law of all the citizens of the state." Id. at 17.

In a later case, the Court explained "Section 185 does not prohibit the making of loans or giving of credit or making donations in connection with a city's engaging in any industry, enterprise, or business except engaging in liquor traffic." Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237 (N.D. 1964). It continued: "What it does prohibit is for a city 'otherwise' to make loans or give its credit or make donations. In other words, making loans or giving credit may be done in connection with the city's engaging in any permissible industry, enterprise, or business, but not otherwise." Id. at 237-38 (emphasis added).

The following year, in Kelly v. Guy, 133 N.W.2d 853 (N.D. 1965), the

Court focused on the public purpose to which the borrower would put the loan proceeds. The statute in question authorized and appropriated funds to the Industrial Commission to make loans to privately or cooperatively owned enterprises for facilities to convert North Dakota natural resources into low cost power and to generate and transmit the low cost power. Id. at 855. Discussing whether it would be a violation of Section 185 for the Commission to make such a loan, the Court stated Section 185 "authorizes the state and any county or city to engage in any industry, enterprise, or business, except the business of dealing in intoxicating liquor." Id. at 856. It then explained a loan could be made to a private entity to accomplish a public purpose:

> It seems clear that if the state were to engage directly in the business of transmitting power generated by lignite generation plants as a means of making electric power available to the consuming public, the public purpose test would be met.
>
> The making of a loan to further the same purpose, i.e., the generation of electric energy and distribution of the same to the consuming public attains the same goal.

Id.

Section 185 was next addressed in Patterson v. City of Bismarck, 212 N.W.2d 374 (N.D. 1973). In Patterson the Court found the construction of a combined multi-level parking ramp with a rentable commercial facility, financed by a special assessment, lending or giving credit, not violative of Section 185. Id. at 387. Alleviating traffic congestion and implementing orderly plans for urban development was an enterprise with a public purpose. Id.

These cases make it clear the State may disburse funds, provide grants, guarantee loans, and give credit through an industry, business, or enterprise it is

engaged in for a public purpose. A public purpose promotes the public health, safety, morals, general welfare, security, prosperity, and contentment of the state's or political subdivision's citizens. See Gripentrog, 126 N.W.2d at 237; Green, 176 N.W. at 11. An incidental private benefit will not render an action unconstitutional if the action itself is primarily for a public purpose. See Stutsman v. Arthur, 16 N.W.2d 449, 454 (N.D. 1944); cf. City of Jamestown v. Leevers Supermarkets, Inc., 552 N.W.2d 365, 372 (N.D. 1996) ("Generally, if a use for which property is taken is public, the taking is not invalid merely because of an incidental benefit to private individuals.").

The State's interest in its economic development is a public purpose. See Leevers Supermarkets, 552 N.W.2d at 369 (explaining "[e]conomic development is generally recognized as a valid public use or purpose," and finding "the stimulation of commercial growth and removal of economic stagnation . . . are objectives satisfying the public use and purpose requirement"); Kelo v. City of New London, Conn., 545 U.S. 469, 484-85 (2005) ("Promoting economic development is a traditional and long-accepted function of government. . . . Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose."); Minn. Energy & Econ. Dev. Auth. v. Printy, 351 N.W.2d 319, 340 (Minn. 1984) ("It is well settled that economic development financing is a proper function of government. . . . It is well established that Minnesota and the great majority of other jurisdictions hold that government financing for economic development serves a public purpose."); Franco v. Nat'l Capital Revitalization Corp., 930 A.2d 160, 172 (D.C. 2007)

(stating "promoting economic development is a valid public purpose"); Gen. Bldg. Contractors, L.L.C. v. Bd. of Shawnee County Comm'rs, 66 P.3d 873, 883 (Kan. 2003) (holding "the development of an industrial park here fits within the valid public purpose of encouraging economic development"); Bd. of Dirs. of Indus. Dev. Bd. v. All Taxpayers, Property Owners, Citizens, of Gonzales, 938 So.2d 11, 29 (La. 2006) ("The promotion of economic development, which ultimately serves the public as a whole, is a legitimate governmental goal."); see also N.D.A.G. Letter to Nelson (Feb. 19, 1991) ("By enacting N.D.C.C. ch. 10-30.3, the Legislative Assembly has declared that the development of business in North Dakota is a public purpose."); N.D.A.G. Letter to Martin (Feb. 11, 1991) ("By enacting chapters 11-11.1 and 40-57.4, the Legislative Assembly has declared that the development of employment by a job development authority is a public purpose."). A public purpose also includes the promotion of a general business district, see Patterson, 212 N.W.2d at 387-89, the construction and leasing of a sugar processing plant to improve local economy, see Gripentrog, 126 N.W.2d at 238, and removing slums and creating sanitary low cost housing, see Ferch v. Housing Auth., 59 N.W.2d 849, 858 (N.D. 1953). Many other public purposes also exist.

When the Legislative Assembly determines a particular activity will promote the welfare of the residents of North Dakota, the courts defer to the Legislative Assembly's judgment on that issue. See Green, 253 U.S. at 239-40; Leevers Supermarkets, 552 N.W.2d at 369. The scope of activities which may be classified as involving a public purpose is very broad. See Leevers

Supermarkets, 552 N.W.2d at 369; see also Ferch, 59 N.W.2d at 856 ("'Views as to what constitutes a public use necessarily vary with changing conceptions of the scope and functions of government, * * *. As governmental activities increase with the growing complexity and integration of society, the concept of "public use" naturally expands in proportion.'" (quoting Dornan v. Phila. Housing Auth., 200 A. 834, 840 (Pa. 1938))). As noted above, this and other courts have held economic development constitutes a "public purpose."

2. Undertaking to develop the economy is an enterprise.

The term "enterprise" is broad. An enterprise means an activity or undertaking which is of some scope, complication, or risk. See N.D.A.G. 93-F-11; The American Heritage Dictionary 456 (2d coll. ed. 1991). Examples of some possible governmental enterprises include providing a physical fitness program for a city's citizens or developing a grant program to provide funds to organizations for promoting the health and welfare of a city's citizens, N.D.A.G. 98-F-30; establishing and maintaining programs and activities for senior citizens, N.D.A.G. 97-F-08; forming a health care services organization, N.D.A.G. 97-L-47; providing funds for the use of a private nursing home, N.D.A.G. 96-L-147; providing county ambulance service, N.D.A.G. 95-L-186; giving grants and making loans to private entities for job development purposes, N.D.A.G. 93-F-11; the Land Board investing coal severance tax trust fund monies, N.D.A.G. 92-13; entering into an urban renewal project, N.D.A.G. 82-26; providing educational assistance, N.D.A.G. 81-19; and historical promotion and historical work, N.D.A.G. 73-122.

Because economic development is a public purpose, see Leevers Supermarkets, 552 N.W.2d at 369, the State does not violate Section 18 by disbursing funds, providing grants, guaranteeing loans, and giving credit when it undertakes the enterprise (activity) of economic development. Whether by the State or a political subdivision, the activity of developing the state or local economy is of some scope, complication, or risk. Black's Law Dictionary defines "governmental enterprise" as "[a]n enterprise undertaken by a governmental body, such as a park district that creates a public park." Black's Law Dictionary 611 (9th ed. 2009). If a park district's undertaking to create a park is an enterprise, so is the Department's undertaking, in accordance with legislative directive, to develop the state and local economy. The latter is an activity or undertaking of even greater scope, complication, or risk.[4]

Opinions by the Attorney General support the conclusion economic activity is an enterprise. See N.D.A.G. 2000-F-01 (determining "a home rule city, if authorized by its home rule charter and properly implemented through an ordinance, may promote or sponsor the issuance of equity securities by a private company which would be sold to the general public in this state if done for a public purpose such as economic development or job creation"); N.D.A.G. 93-F-02 (opining "enactment of Growing North Dakota, including the Future Fund, Inc., is a public purpose and public moneys may be spent to affect that purpose"); N.D.A.G. 95-L-133 (concluding a county may "loan uncommitted monies from its

[4] Economic development activity also constitutes "[i]ndustrious and systematic activity", which is a further definition of "enterprise." The American Heritage Dictionary 456 (2d coll. ed. 1991).

general fund to a private entity for economic development" "if made through a county job development authority or economic development organization pursuant to N.D.C.C. ch. 11-11.1). Although not binding on this Court, opinions of the Attorney General are entitled to respect. See State v. Brown, 2009 ND 150, ¶ 20, 771 N.W.2d 267; Saefke v. Stenehjem, 2003 ND 202, ¶ 13, 673 N.W.2d 41.

It is undisputed the Legislative Assembly has determined economic development is a public purpose and that economic development is an enterprise or activity in which the State can participate. See, e.g., N.D.C.C. § 54-60-02 (creating Division of Economic Development and Finance); N.D.C.C. § 54-34.3-04(3), (4) (stating the director of the Division of Economic Development and Finance is responsible to develop, implement, and coordinate a comprehensive program of economic development); N.D.C.C. ch. 4-14.1 (explaining purpose and authority of the agricultural fuel tax fund and the Agricultural Products Utilization Commission); N.D.C.C. § 10-30.5-02 (explaining purposes of North Dakota Development Fund); N.D.C.C. ch. 17-02 (providing for ethanol production incentives). This Court should defer to the Legislative Assembly's judgment that economic development will promote the welfare of the residents of North Dakota. See Green, 253 U.S. at 239-40; Leevers Supermarkets, 552 N.W.2d at 369.

Hale asserts an "enterprise" is limited to a government owned and operated business. Appellant's Br. ¶ 38. Not only is that position inconsistent with the cited attorney general opinions, it ignores the commonly accepted

meaning of the term. Words in the Constitution are to be understood in their ordinary sense. N.D.C.C. § 1-02-02.

Hale acknowledges an enterprise is an undertaking of some scope, complication, or risk. Appellant's Br. ¶ 44 n.18. He does not articulate why an economic development program does not fit within that definition. Rather, he argues "enterprise" should be interpreted to mean "business." Id. at ¶ 45. But interpreting "enterprise" to mean "business" makes use of the term "enterprise" redundant. When interpreting the Constitution, courts give meaning to every word. See Skogen v. Hemen Twp. Bd. of Twp. Supervisors, 2010 ND 92, ¶ 20, 782 N.W.2d 638 ("The language of a statute must be interpreted in context and according to the rules of grammar, giving meaning and effect to every word, phrase, and sentence."). Hale's suggested interpretation of Section 18 renders the term "enterprise" inoperative and superfluous.

Nothing in Section 18 qualifies the terms industry, enterprise, or business to require the industry, enterprise, or business to be a for-profit venture, as argued by Hale. See Appellant's Br. ¶¶ 44-45. The industry, enterprise, or business needs to have a public purpose, which in no way requires the industry, enterprise, or business to make a profit. In Green the Court explained the objective of a public purpose is the promotion of the general welfare of the inhabitants or residents within a given political division, including promoting "the public health, safety, morals, general welfare, security, prosperity, contentment, and equality before the law of all the citizens of the state". 176 N.W. at 17. State v. Blunt, 2008 ND 135, ¶ 23, 751 N.W.2d 692, confirmed that "a public

purpose is defined as 'the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within a given political division.'" (Quoting Adams County Record v. Greater N.D. Ass'n, 529 N.W.2d 830, 836 n.1 (N.D. 1995)). Neither these cases nor the language of Section 18 in any way indicate that an industry, enterprise, or business must make a profit to have a public purpose.

In addition to the plain language of Section 18, cases demonstrate Section 18 does not require the public purpose of an industry, enterprise, or business to be to make a profit. The public purpose in Kelly was to help private or cooperatively owned enterprises develop facilities to convert North Dakota natural resources into low cost power and generate and transmit the low cost power. 133 N.W.2d at 855. In Patterson the public purpose was to alleviate traffic congestion and implement orderly plans for urban development. 212 N.W.2d at 377-78. Economic development, the promotion of a general business district, improving the local economy, and removing slums and creating sanitary low cost housing are also not for-profit activities recognized by this Court as valid public purposes. See Leevers Supermarkets, 552 N.W.2d at 369; Patterson, 212 N.W.2d at 387-89; Gripentrog, 126 N.W.2d at 238; Ferch, 59 N.W.2d at 858. Contrary to Hale's assertion, there is no requirement the public purpose include raising revenues, i.e., making a profit.

3. The cases cited by Hale do not support his position.

Hale provides a string cite of cases he asserts interpret Section 18. See Appellant's Br. ¶ 42 n.9. Many of those cases support the State's position. The

others provide no assistance in resolving the pending issue.[5]

Blunt addressed the public purpose test in relation to Section 18. The Court explained Section 18 restricts expenditures of public funds to public purposes. 2008 ND 135, ¶ 23, 751 N.W.2d 692. It then stated "a public purpose is defined as 'the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within a given political division.'" Id. (quoting Adams County Record, 529 N.W.2d at 836 n.1). The inclusion of "prosperity" in the definition of "public purpose" demonstrates activities aimed at increasing prosperity, such as economic development, meet the public purpose test. That economic development is a valid public purpose, of course, was specifically addressed and held in Leevers Supermarkets, 552 N.W.2d at 369.

Adams County Record also supports the State's position. In that case the Court stated Section 18 does "not prohibit the state from making donations to private enterprise. It clearly can." 529 N.W.2d at 836 n.1. It continued, explaining Section 18 "gives the state the right to make loans, extend credit, or make donations in connection with any industry, enterprise, or business." Id. The Court then explained Section 18's limitation: "Any loan or donation must be for a public purpose." Id. A public purpose, of course, includes the promotion of prosperity, i.e., economic development. Id.; Blunt, 2008 ND 135, ¶ 23, 751

[5] Because Hale simply cited a number of the cases in footnotes, the State will not discuss those cases. A discussion of each case was provided to the district court, and can be found at pages 16-21 of the State's Brief in Support of Motion to Dismiss (Doc. 14).

N.W.2d 692; Gripentrog, 126 N.W.2d at 237; Leevers Supermarkets, 552 N.W.2d at 369; Green, 176 N.W. at 17.

In Gripentrog, the Court held a city could issue revenue bonds for the purpose of constructing and leasing a sugar processing plant to improve the local economy. Assuming for the sake of argument the city was making a loan or giving credit, the Court held the city's action did not violate Section 185 because the city was engaged in the enterprise of leasing a sugar processing plant. 126 N.W.2d at 238. In reaching its decision, the Court made it unequivocally clear that "Section 185 does not prohibit the making of loans or giving of credit or making donations in connection with a city's engaging in any industry, enterprise, or business except engaging in liquor traffic. What it does prohibit is for a city 'otherwise' to make loans or give its credit or make donations." Id. at 237. "In other words," the Court explained, "making loans or giving credit may be done in connection with the city's engaging in any permissible industry, enterprise, or business, but not otherwise." Id. at 237-38.

The challenged law was also found constitutional in Northwestern Bell. In that case the plaintiff challenged the constitutionality of the relocation of utility facilities law, which provided "that utilities shall be reimbursed out of State Highway funds for costs of changing, removing or relocating utility facilities in connection with interstate and defense highway projects when determined and ordered by the State Highway Commissioner." 103 N.W.2d at 248. In reaching its decision, the Court discussed the history of Section 185. Id. at 253. It then stated the intent of Section 185 as amended is "perfectly clear." Id. The Court

explained "the limitation placed upon the legislative bodies of the governmental units named in the section does not apply to legislation for the making of internal improvements or engaging in industry, enterprise or business." Id. at 254. Accordingly, as interpreted by the Court, Section 185 prohibited the state or political subdivisions from making loans of giving credit except when making internal improvements or engaging in any industry, enterprise, or business. Id. Because the construction and maintenance of highways constitutes internal improvements, which the state may make, state funds can constitutionally be used to reimburse utilities the costs for changing, removing, or relocating utility facilities in connection with highway projects. Id. Northwestern Bell stands for the proposition the State can make loans, give credit, etc., when it is engaged in an industry, enterprise, or business. Because economic development is a statutorily authorized enterprise, the State's challenged actions do not violate Section 18.

Stutsman held the challenged statutes violated Section 185 "in so far as they may be construed to permit the issuance of bonds to refund special improvement warrants issued prior to the time the city became generally liable for improvement fund deficiencies . . . ." 16 N.W.2d at 456. That holding is not relevant to this proceeding. However, the Court's language regarding public purpose is. In Stutsman, the Court stated "where an appropriation of public funds is primarily for public purposes it is not necessarily rendered violative of constitutional provisions against gifts and loans of public credit by an incidental result which may be of private benefit." Id. at 454. Thus, although recipients of

economic development loans or funds may receive a private benefit, that does not change the fact that economic development funds are appropriated for the public purpose of economic development.

The above principle was also applied in Marks v. City of Mandan, 296 N.W. 39 (N.D. 1941). In Marks the Court found "the construction of a sewer system is of general utility to the entire population of the city," "even though the more direct and proximate benefits accrue to the owners of property abutting on the sewer mains." Id. at 45. Although there was direct benefit to the property owners, because of the public benefit, the city could constitutionally bear the expense of the sewer system through general taxes, "even to the extent of permitting or requiring the city to assume certain deficiencies that may arise in the collection of assessments levied against private property . . . ." Id. "The question of the extent to which the city may go in bearing the expense of such a system through general taxation lies within the field of legislative discretion . . . ." Id. Similarly, although there is a direct benefit to recipients of economic development loans or funds, because economic development benefits the public and is a long-accepted function of government, state funds may be used for that purpose.

Teigen v. State, 2008 ND 88, 749 N.W.2d 505, sheds no light on this case. The case did not involve economic development, nor did it involve the State giving a loan or credit as part of an industry, enterprise, or business. Rather, the case involved a contract for services, which the Court held does not constitute a gift. Id. ¶ 30.

A challenge to a law authorizing nonprofit associations to erect, operate, equip, and maintain dormitories at state educational institutions was rejected in State ex rel. Kaufman v. Davis, 229 N.W. 105 (N.D. 1930). The Court explained that under the statute "the state makes no donation, nor does it loan or give its credit." Id. at 112. Rather, "[u]nder the express provisions of the act there is no obligation on the part of the state to pay one cent of any moneys that are to be expended, or of debts that may be contracted, in the construction, maintenance, and equipment of a dormitory. Any person contracting with the institutional holding association acquires no contract rights whatsoever against the state." Id. Furthermore, although "the statute permits a portion of the campus to be occupied by a dormitory erected by the institutional holding association," "the dormitory may be operated only for the benefit and use of the educational institution. In short, it may be used only to facilitate the work of that institution." Id. After noting construction of the dormitories would benefit the state and affected educational institutions named in the act, the Court concluded: "If there is a necessity for the construction of such buildings to facilitate the work of the particular educational institutions at which they are authorized to be constructed, then there is obviously ample consideration for the use of the sites on which dormitories may be constructed. This being so, there is, of course, no donation." Id. The significance of this case is it shows, like Stutsman and Marks, that a public purpose does not cease being a public purpose simply because private benefits also accrue.

II. The district court properly dismissed Hale's as applied challenges.

The district court found Hale's as applied challenges failed to state a claim, stating they were not supported by sufficient citation, argument, relevant precedent, persuasive reasoning, or were deficient as a matter of law. App. 457-58. This holding should be upheld.

A. The Complaint fails to adequately plead the as applied challenges.

1. To survive a motion to dismiss, a complaint must contain sufficient factual matter to state a claim.

Although factual allegations in a complaint are taken as true when a court considers a motion to dismiss, see Williams v. State, 405 N.W.2d 615, 620 (N.D. 1987), conclusory statements unsupported by allegations of factual circumstances are disregarded, see Brakke v. Rudnick, 409 N.W.2d 326, 333 (N.D. 1987). Hale's Complaint fails to meet this minimum pleading requirement with regard to his purported as applied challenges.

The minimal pleading requirements were reviewed by the United States Supreme Court in Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). In Iqbal, the Court explained the Rule 8 pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Id. at 1949. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 557 (2007)). Rather, as explained by the Supreme Court:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Id. (quoting Twombly, 550 U.S. at 556, 557, 570).

The Supreme Court reiterated "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. It also emphasized that "only a complaint that states a plausible claim for relief survives a motion to dismiss," and that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.'" Id. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)).

2. The Complaint does not provide a factual basis for the as applied challenges.

Hale's as applied challenges fail to meet the minimum pleading requirements of Rule 8. For example, Hale asserts paragraph 66 of the Complaint raises as applied due process and equal protection challenges. See Appellant's Br. ¶ 72. Yet that paragraph contains general legal arguments, not well-pleaded facts raising an as applied challenge to any specific disbursement of economic development funds. Paragraph 66 does not identify a single

economic development fund, much less provide a factual basis on which it could be found disbursement of the fund violated due process and equal protection.

Similarly, Hale asserts paragraph 67 of the Complaint raises a takings claim. See id. Yet that paragraph contains conclusory legal arguments, not factual allegations raising an as applied takings claim regarding any specific disbursement of economic development funds.[6]

Finally, Hale references paragraphs 58 through 61 of the Complaint as factual support for his as applied challenge to N.D.C.C. chs. 4-14.1, 10-30.5, and 15-69. See id. 79. Those paragraphs contain quotes from a Performance Audit Report (Report) on aspects of the Department, including administration of the Agriculturally Derived Fuel Tax Fund, the North Dakota Development Fund, and the Centers of Excellence program. The Report determined there are areas where improvement is needed and made recommendations. See generally App. 308-68. The Report, however, does not provide the requisite basis to state a cognizable constitutional claim.

a. *The Performance Audit Report does not assert a single dollar of public funds was unconstitutionally distributed.*

Although the Report notes possible areas of improvement and makes recommendations, nothing in the Report provides a factual basis to support Hale's allegation funds were unconstitutionally distributed. Significantly, neither the quoted sections of the Report nor the Complaint identify a factual basis to conclude a single dollar of public funds was unconstitutionally distributed. To

[6] The federal court held Hale failed to allege a taking. Hale v. North Dakota, No. 1:09-cv-60, 2010 WL 1254924, at *4 (D.N.D. Mar. 24, 2010).

survive a motion to dismiss, the Complaint must allege particularized facts which, if true, would state a valid constitutional claim. General concerns expressed in a performance audit report do not provide the required factual enhancement to state a claim.

By way of illustration, N.D.C.C. ch. 15-69 provides the State Board of Higher Education "shall establish a centers of excellence program relating to economic development." N.D.C.C. § 15-69-02. Under the program, the Board may award matching funds to Centers of Excellence for purposes of economic development in the state. See N.D.C.C. §§ 15-69-02, 15-69-04, 15-69-05. Recipients of funds under the Centers of Excellence Program must be Centers of Excellence, which may include state institutions of higher education (governmental entities) and their foundations (arguably private entities). See N.D.C.C. § 15-69-02. Yet Hale has not alleged a single dollar has been distributed to a private entity under N.D.C.C. ch. 15-69, much less alleged specific facts which, if true, would indicate the funds were distributed in violation of any constitutional provision. Simply identifying the fund and a report that recommends areas of improvement is inadequate to raise a constitutional claim.

The same is true of the other identified funds. There is no allegation as to the amount of funds distributed, what private entity received the funds, and what aspect of the application or distribution process was conducted unconstitutionally.

b. *The Performance Audit Report's recommendations do not allege unconstitutional activity.*

Furthermore, the Report's recommendations do not concern funds being, or indicate funds were, unconstitutionally distributed. For example, a large

number of the recommendations concerned "internal policy or procedural changes," such as "specific policies and procedures . . . on issues such as cell phone policies, records management, using secured websites, improving or in some cases formalizing the way [the Department] document[s] activities, and making sure all of [its] program board members sign a code of ethics." Reply Br. in Supp. of Mot. to Dism. (Doc. 49), Attach. 1 at 1 (hereafter "Attach. 1").[7] These internal policy issues do not directly relate to the application process or distribution of public funds, and in no way indicate or imply funds were unconstitutionally distributed.

Other recommendations concerned "formalizing procedures in writing." Id. at 2. "In many cases [that meant] taking current practice and developing a written policy that reflects the practice." Id. The fact policies existed but were not in writing does not indicate or imply funds were unconstitutionally distributed.

The one recommendation that arguably tangentially relates to whether funds were properly distributed was for the Centers of Excellence Commission to ensure compliance with N.D.C.C. § 15-69-04(5) "and determine whether Centers of Excellence are having the desired economic impact." Id. The Department's comment demonstrates this was and will continue to be done. After noting the Department agrees with the recommendation, it points out an economic impact study of the Centers of Excellence was conducted in 2007. Id. The Report

[7] Attachment 1 to the State's reply brief can be found at http://www.commerce.nd.gov/uploads%5Cresources%5C145%5Cauditcomments-111009.pdf.

referenced a mathematical error contained in the economic impact report. That error "was an error in the totaling of direct and indirect jobs." Id. Following up on the error, the Department "checked with Dr. Larry Leistritz who conducted the economic impact study and the math error did not affect the overall economic impact figures of the study nor do the audit findings refute the credibility of the economic impact study as a whole." Id. The Department also confirmed that, "[i]n the future, [the Department] will make site visits to verify all the information reported by campuses in their functional reviews." Id. As noted, the mathematical error in the economic impact report "did not affect the overall economic impact figures of the study nor do the audit findings refute the credibility of the economic impact study as a whole." Id.

To survive the motion to dismiss, Hale was required to identify specific funds he claims were being distributed unconstitutionally and to provide a factual basis for that claim. Because nothing in the Report provides the required factual basis, Hale's reliance on the Report does not assist him.

c. *The Performance Audit Report concerns past, not current, activity.*

Even if the Report provided some general factual basis to support Hale's as applied challenges, which it does not, the Report could not be relied on to seek injunctive relief because it only concerns past activity. The performance audit examined activities at the Department between the timeframe of July 1, 2005 and December 31, 2008. See id. at 1. What occurred up to six years ago is not evidence of what is occurring today. The Department agreed with and

implemented many of the audit's suggestions. See generally id.; App. 314-52. Any injunctive relief would need to be based on what is currently happening, not recommendations regarding what may have happened years ago. The Complaint, of course, makes no particularized factual allegations as to current actions by the Department allegedly in violation of the Constitution.

The Centers of Excellence program is a prime example of circumstances that may have existed years ago but do not exist now. As explained in the Comments on Performance Audit:

> After the 2007 Legislative session, Commerce officially received the authority to build a monitoring function with direct access to the data and information generated by each Center. So for much of the timeframe of this audit the Department of Commerce was either not charged with monitoring the Centers (2005-2007 biennium) or was in the beginning stages of building these monitoring procedures (July 1, 2007, through December 2008).

Attach. 1 at 2. That the law had recently been modified to require the Department of Commerce monitor the Centers of Excellence was noted in the Report. See App. 313.

How the Department monitored the Centers of Excellence from July 2007 through December 2008, when it was initially assigned that function, is different than how it monitors them today. In fact, as of November 2009, the Department had or was in the process of implementing the Performance Audit's recommendations. See Attach. 1 at 1. For example, many of the recommendations concern the Department formalizing procedures in writing. "In many cases [that meant] taking current practice and developing a written policy that reflects the practice." Id. at 2. The Department has done that. See, e.g., id.

at 3-5. By November 2009 the Department had also implemented other recommendations made in the Report. See, e.g., id. at 4-7. As noted in Attachment 1, other changes have also been made in response to the Report.

Injunctive relief is to address current, not past, action. See N.D.C.C. § 32-06-02 (providing an injunction may be granted to restrain "the commission or continuance of some act" or when the defendant "is doing or threatening, or is about to do," an act). Because the Report concerns past activity, not circumstances as they exist today, Hale's reliance on the Report is misplaced.

3. The State cannot meaningfully respond to the Complaint's vague factual allegations.

It is an indication a complaint fails to state a claim upon which relief can be granted when the defendant cannot meaningfully respond to the complaint. Although the State addressed the general legal issue raised by the Complaint, the State could not meaningfully respond to or address the Complaint's vague, conclusory as applied challenges. It could not do so because there are no specific facts requiring a response. The Complaint does not identify specific public funds that were allegedly unconstitutionally distributed; it does not identify a private entity who allegedly unconstitutionally received public funds; and it does not identify specific acts that allegedly made distribution of the public funds unconstitutional. It was not the burden of the State to prove every dollar expended for economic development was expended in accordance with the Constitution. Rather, it was Hale's burden to specifically identify in his complaint the alleged unconstitutional expenditure so the State could meaningfully respond

to the allegation. Hale failed to do so. Accordingly, the district court properly held Hale's conclusory, factually unsupported Complaint fails to allege adequate facts to raise the as applied challenges to the State's disbursement of public monies for economic development purposes.

B. Hale's as applied challenges fail as a matter of law.

In addition to not being adequately pled factually, Hale's as applied challenges fail as a matter of law.

1. Disbursement of public funds for economic development does not violate the Equal Protection clause.

"The equal protection clauses of the state and federal constitutions do not prohibit legislative classifications or require identical treatment of different groups of people." State v. Leppert, 2003 ND 15, ¶ 7, 656 N.W.2d 718. "Rather, the equal protection clause prohibits the government from treating individuals differently who are alike in all relevant aspects." In re P.F., 2008 ND 37, ¶ 15, 744 N.W.2d 724; see also Bogren v. Minnesota, 236 F.3d 399, 408 (8th Cir. 2000) ("In general, the Equal Protection Clause requires that state actors treat similarly situated people alike.").

Hale lacks standing to bring an equal protection claim. Hale has not alleged he applied for economic development funds, that he was qualified to receive economic development funds, or that individuals similarly situated to him received economic development funds while he did not. He simply asserts he does not receive economic development funds and others do. App. 61 (¶ 69). Because Hale does not allege he has been treated unequally, he lacks standing to bring an equal protection claim. See State v. Carpenter, 301 N.W.2d 106, 107

(N.D. 1980) (stating that to have standing "the plaintiff must have suffered some threatened or actual injury resulting from the putatively illegal action" and "the asserted harm must not be a generalized grievance shared by all or a large class of citizens").

Hale's equal protection claim also fails on the merits because Hale does not allege any state economic development statute or program "treat[s] individuals differently who are alike in all relevant aspects." In re P.F., 2008 ND 37, ¶ 15, 744 N.W.2d 724. Legislatures may (and must) make classifications to determine where to disburse economic development funds; qualifications can be established to determine eligible recipients of economic development funds. "The equal protection guarantee does not forbid classifications, but simply keeps government decisionmakers from treating differently persons who are in all relevant respects alike." See Hamich, Inc. v. State ex rel. Clayburgh, 1997 ND 110, ¶ 31, 564 N.W.2d 640. Hale has not challenged any state law based on the classification it makes; his challenge is simply because the statutes authorize disbursement of public funds for economic development purposes. A challenge on those grounds does not adequately raise an as applied equal protection claim.

Even if Hale was challenging a particular classification in an economic development statute, because economic development is social and economic legislation, the classification would be constitutional as long as it was rational. See Lartnec Inv. Co. v. Fort Wayne-Allen Co. Convention & Tourism Auth., 603 F. Supp. 1210, 1226 (D.C. Ind. 1985); Bd. of Dirs. of Indus. Dev. Bd., 938 So.2d

at 28; Mid-Mich. Farm & Grain Ass'n v. Henning, 339 N.W.2d 243, 246-47 (Mich. Ct. App. 1983). Courts have uniformly held economic development programs are rational and do not violate equal protection even though they distinguish between and benefit some businesses but not others. See, e.g., Lartnec Inv. Co., 603 F. Supp. at 1226 (holding authority's subsidizing mortgage on hotel as part of economic development program did not violate competing hotel owner's federal or state rights to equal protection); Bd. of Dirs. of Indus. Dev. Bd. v. All Taxpayers, Property Owners, 929 So.2d 743, 752 (La. Ct. App. 2005) (rejecting the argument "that public assistance to one retailer while denying such assistance to other retailers clearly violates notions of equal protection," the court held public funding of project to develop private retail sporting goods store and park did not unfairly discriminate against other retailers in violation of equal protection guarantees of the state and federal constitution; the funding of the project was rationally related to the legitimate governmental purposes of economic development and enhancement of future revenues), aff'd, 938 So.2d 11 (La. 2006); Mid-Mich. Farm & Grain Ass'n, 339 N.W.2d at 246 (holding the Economic Development Corporation Act does not violate the equal protection clauses of State or Federal Constitutions because all businesses do not derive benefits under the Act).

Hale lacks standing to bring an equal protection claim. Hale has also not identified any classification he claims violates equal protection. Finally, classifications for purposes of determining recipients of economic development

funds are rational. Hale's equal protection claim lacks merit and was properly dismissed.

2. Disbursement of public funds for economic development does not violate substantive due process.

A court may declare a statute unconstitutional on substantive due process grounds if (1) the Legislative Assembly lacked power to act in the particular matter or, (2) having power to act. the Legislative Assembly exercised the power in an arbitrary and unreasonable manner. See Hoff v. Berg, 1999 ND 115, ¶ 14, 595 N.W.2d 285. A statute is not arbitrary and passes the rational basis test, and thus withstands a substantive due process challenge, if there is a legitimate state interest the Legislative Assembly could have rationally concluded is served by the statute. Id.

As demonstrated above, disbursement of public funds for economic development does not violate Section 18. Accordingly, the Legislative Assembly has power to pass statutes authorizing the distribution of public funds for economic development. Hale's claim to the contrary should be rejected. See App. 59 (¶ 68).

Furthermore, statutes providing for economic development are rational because the Legislative Assembly could rationally conclude they serve a legitimate state interest. As demonstrated above and held by this Court, the State has a legitimate interest in economic development. See Leevers Supermarkets, 552 N.W.2d at 369; see also Kelo, 545 U.S. at 484-85. Hale's assertion economic development programs lack a public purpose is at odds with the clear holding of this Court.

The case State v. Nelson County, 45 N.W. 33 (N.D. 1890), does not assist Hale. That case simply stated "it is essential to the validity of a tax that it be laid for a public purpose." Id. at 34. But Hale is not challenging the validity of any tax. Furthermore, taxes laid for economic development are laid for a public purpose. See Leevers Supermarkets, 552 N.W.2d at 369; Kelo, 545 U.S. at 484-85. Hale's unwillingness to acknowledge or accept the abundant and controlling case law that economic development is a public purpose does not vitiate that case law.

3. Disbursement of public funds for economic development is not a takings.

Hale asserts that disbursement of public funds for economic development is an unconstitutional takings because doing so contravenes the North Dakota Constitution. See App. 56 (¶ 67(a)). Hale's argument must be rejected because, as demonstrated above, disbursement of public funds for economic development does not violate Section 18. Furthermore, because economic development is a valid public purpose, public funds can rationally be expended for economic development. Like his other claims, Hale's takings claim is meritless.

a. *Kelo is an eminent domain case.*

Justice Kennedy's concurrence in Kelo does not assist Hale for multiple reasons, the first of which is Kelo is an eminent domain case.

Kelo found a city's exercise of eminent domain power in furtherance of an economic development plan satisfied the "public use" requirement of the Fifth Amendment. 545 U.S. at 488. Hale is not bringing an eminent domain case. Thus, although Kelo supports the State's position, it does not have direct

application to this case. Kelo's relevance to this case is limited to the Court's unequivocal holdings that economic development is a public use, see id. at 480-85, that a public purpose can immediately, directly, and significantly benefit private entities, see id. at 481-86, and that courts will not second-guess legislative judgments regarding what constitutes a public purpose, id. at 481, 483, 488-89.[8]

The Supreme Court's analysis in Kelo strongly supports the State's position and the constitutionality of the challenged economic development programs. It does not, however, have direct application to the issues before this Court because it involved an eminent domain takings under the Fifth Amendment, not the expenditure of public funds.

b. *Concurring opinions are not binding.*

Not only does Hale inappropriately rely on an eminent domain case, he exclusively relies on a single justice's concurrence while studiously avoiding reference to the opinion of the Court, an opinion which strongly supports the State's position. Concurring opinions, however, have no legal effect and are in no way binding on any court. See Bronson v. Bd. of Educ. of Sch. Dist., 510 F. Supp. 1251, 1265 (D.C. Ohio 1980); Cane Tenn., Inc. v. United States, 62 Fed. Cl. 703, 713 (Fed. Cl. 2004). "[A] concurring opinion is a view personal to the

[8] The cases discussed by the Supreme Court demonstrate the broad meaning of public purpose, that a direct and substantial benefit can be provided to private entities while pursuing a public purpose, and that substantial deference is given legislative judgments regarding what constitutes a public purpose. See Kelo, 545 U.S. at 480-82.

concurring judge and not the opinion of the court." In re Gibson, 157 B.R. 366, 372 n.4 (Bankr. S.D. Ohio 1993).

Hale's need to resort to a non-binding, single justice's personal opinion demonstrates the lack of authority to support his position. Furthermore, even if it was binding, the concurring opinion does not support Hale's claims.

c. *Kelo* does not assist Hale.

Quoting Hawaii Housing Authority v. Midkiff, the Kelo Court explained: "'When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings-no less than debates over the wisdom of other kinds of socioeconomic legislation-are not to be carried out in the federal courts.'" 545 U.S. at 488 (quoting Midkiff, 467 U.S. 229, 242-43 (1984)). Justice Kennedy noted this deferential standard of review in his concurrence, explaining the "Court has declared that a taking should be upheld as consistent with the Public Use Clause, U.S. Const., Amdt. 5, as long as it is 'rationally related to a conceivable public purpose.'" Id. at 490 (quoting Midkiff, 467 U.S. at 241). Thus, for purposes of eminent domain, the takings simply needs to be "rationally related to a conceivable public purpose," and the courts will not second-guess the wisdom behind the takings.

This case involves the distribution of public funds for purposes of economic development, not a takings. However, assuming arguendo the challenged laws must meet the same deferential standard articulated in Kelo, they easily do so.

N.D.C.C. ch. 10-30.5 creates the North Dakota Development Fund. The purpose of the Development Fund is "to create a statewide nonprofit development corporation that will have the authority to take equity positions in, to provide loans to, or to use other innovative financing mechanisms to provide capital for new or expanding businesses in this state, or relocating businesses to this state." N.D.C.C. § 10-30.5-02(1). The law further states "[t]he corporation's principal mission is the development and expansion of primary sector business in this state. The corporation may form additional corporations, limited liability companies, partnerships, or other forms of business associations in order to further its mission of primary sector economic development." Id. The law also states "[t]he exclusive focus of this corporation is business development in this state." N.D.C.C. § 10-30.5-02(2).

N.D.C.C. ch. 4-14.1 creates the Agriculturally Derived Fuel Tax Fund. N.D.C.C. § 4-14.1-01 declares it is "the public policy of the state of North Dakota to protect and foster the prosperity and general welfare of its people by improving the agricultural economy of the state." It further provides, "[i]n furtherance of this policy, it is the purpose of this chapter to provide necessary assistance to the research and marketing needs of the state by developing new uses for agricultural products, byproducts, and by seeking more efficient systems for processing and marketing agricultural products and byproducts, and to promote efforts to increase productivity and provide added value to agricultural products and stimulate and foster agricultural diversification and encourage processing innovations." Id. The Agriculturally Derived Fuel Tax Fund is "used

to fund programs for the enhancement of agricultural research, development, processing, technology, and marketing." N.D.C.C. § 4-14.1-02.

N.D.C.C. ch. 15-69 establishes the Centers of Excellence program "relating to economic development." N.D.C.C. § 15-69-02. Under the program, the Board may award matching funds to Centers of Excellence for purposes of economic development in the state. See N.D.C.C. §§ 15-69-02, 15-69-04, 15-69-05.

Hale may disagree that expending public funds for the above public purposes is the best use of state funds. But that is not the test. Even under Kelo, a case involving a takings by imminent domain, the test is one of rationality. 545 U.S. at 488, 490. That test is clearly met with regard to the challenged funds.

d. Hale does not challenge a specific expenditure of public money.

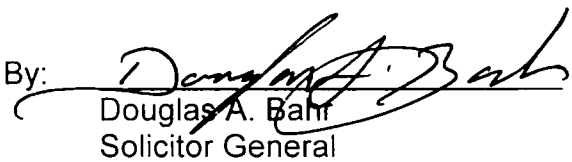
Justice Kennedy's concurrence is not substantive, binding law. Even if it was, however, Hale's as applied challenge would fail. This is because Hale has not identified a single dollar of public funds he alleges was distributed with the intent "to favor a particular private party, with only incidental or pretextual public benefits . . . ." Kelo, 545 U.S. at 491 (Kennedy, J., concurring). Furthermore, Hale has failed to allege specific facts which, if true, would demonstrate any particular funds were unconstitutionally distributed. Because Hale failed to meet the requisite pleading requirements, there was no need for a factual hearing. Rather, his conclusory, factually unsupported as applied challenges were properly dismissed.

CONCLUSION

For the above reasons, the State of North Dakota respectfully requests that this Court affirm the district court's Order dismissing with prejudice the complaint against it.

Dated this 17th day of August, 2011.

State of North Dakota
Wayne Stenehjem
Attorney General

By: 

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Robert Hale,	)	**AFFIDAVIT OF SERVICE BY MAIL**
	)	
Plaintiff/Appellant,	)	**Supreme Ct. No. 20110146**
	)	
vs.	)	**District Court No. 08-10-C-1951**
	)	
State of North Dakota, et al.,	)	
	)	
Defendants/Appellees.	)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

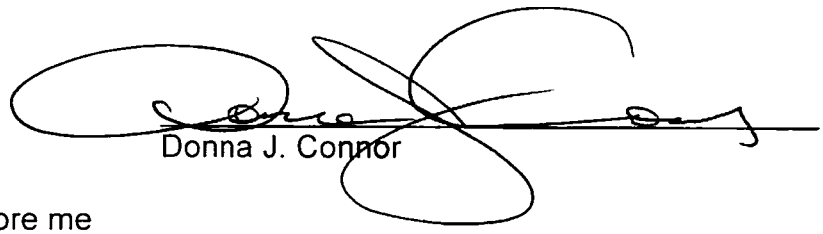
2. I am of legal age and on the 17th day of August, 2011, I served the attached **BRIEF OF DEFENDANTS/APPELLEES STATE OF NORTH DAKOTA,** upon Lynn M. Boughey, Randall J. Bakke, and Bryan Van Grinsven, by placing a true and correct copy thereof in an envelope addressed as follows:

Lynn M. Boughey
Attorney at Law
PO Box 836
Bismarck, ND 58502-0836

Randall J. Bakke
Attorney at Law
PO Box 460
Bismarck, ND 58502-0460

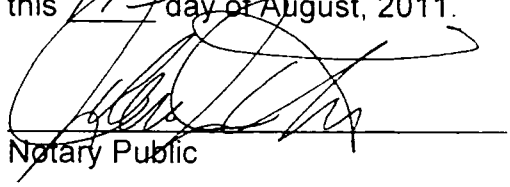
Bryan Van Grinsven
Attorney at Law
Wells Fargo Bank Center
15 2nd Ave. SW. # 305
PO Box 998
Minot, ND 58702-0998

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.



Donna J. Connor

Subscribed and sworn to before me
this 17 day of August, 2011.



Notary Public

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JOLENE J. THIEL
Notary Public
State of North Dakota
My Commission Expires June 14, 2017