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February 21, 2017

By Email

William C. McKinney
General Counsel
Office of the Governor
20301 Mail Service Center
Raleigh, NC 27699-0301

Grayson Kelley
Chief Deputy Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

RE: Your letter of February 21 re *United States v. State of North Carolina, League of Women Voters at al. v. State of North Carolina at al.*, and *NC NAACP et al. v. McCrory et al.*

Dear Mr. McKinney and Mr. Kelley:

We are in receipt of your letter of February 21, 2017, of which we had no prior notice or discussion.

We are perplexed by the contents of your letter for several reasons. And we are stunned by the receipt of a news release from the Governor and Attorney General Stein indicating that you have apparently asked the Supreme Court to withdraw the pending *certiorari* petition, a step that was made without notice to or consent of the General Assembly. As of this letter, neither we nor the General Assembly has received a copy of any submission made by you to the Supreme Court. Please provide us immediately with a copy of anything you have submitted or submit in the future regarding these matters.

We first point out that neither our firm, nor Schaerr Duncan LLP, were ever engaged to represent Governor McCrory in this case. Neither firm has received any payment of fees in this case from the Governor's office. Governor McCrory was instead represented by Butch Bowers and Bob Stephens. We do not dispute your authority to discharge these lawyers from further representation of the Governor's office.

We have enclosed an engagement letter dated October 22, 2013, issued by Ogletree to our clients in this case, the State of North Carolina (the "State") as represented by the leadership of the General Assembly. The Attorney General's office was copied on the engagement letter.

We understand that both Governor Cooper (acting at the time as Attorney General) and Mr. Kelley agreed with the legislative leadership that the true clients and decision makers in cases of this nature are the legislative leadership in the General Assembly.

For over three years, we worked intensely with Alec Peters defending the State and the North Carolina State Board of Elections ("SBE") in this litigation. Consistent with our understanding of prior representations by then-Attorney General Cooper, Mr. Kelley, and others in the Attorney General's office, at no time did the Attorney General object to the right of the legislative leaders to employ outside counsel to represent the State. We are sure that, in many instances, filings made in this case signed by our firm were reviewed and approved by Mr. Kelley and others in senior positions in the Attorney General's office. All filings were signed by Alec Peters until shortly after the Fourth Circuit ruling. We expect that then-Attorney General Cooper also reviewed these filings or was briefed on them.

On August 1, 2016, when Mr. Peters first notified us that the Attorney General's office would no longer participate in these cases, no issue was raised about our ability to continue representing the State in the Fourth Circuit or Supreme Court. After being notified that the Attorney General's office no longer intended to participate in these cases, we specifically asked Mr. Peters whether he intended to file a motion to withdraw from the case and he responded that withdrawal of the Attorney General was not needed because the Fourth Circuit case was "closed" and the appeal to the Supreme Court was considered a "new case" in which his office would not appear. A copy of this email correspondence is attached to this letter. In addition to the fact that the Attorney General's office did not object to our continued representation of the State in that email exchange or at any other time before the letter you sent this morning, we are perplexed as to how the Attorney General's office can now purport to represent the State before the Supreme Court in a matter in which it previously declined to appear.

For the Governor (who served as Attorney General during the course of this litigation) or the Attorney General's office to now take the position that they can override the legislature's authority to hire outside counsel to represent the State, or move to dismiss the pending *certiorari* petition without notice to the General Assembly or its counsel, is completely inconsistent with the position taken by Governor Cooper as Attorney General and the Department of Justice in cases involving the Democratic leadership of the General Assembly and the actual conduct and representation of then-Attorney General Cooper, Mr. Kelley, and Mr. Peters in this case.

It is clear that neither the Governor nor the Attorney General has the authority to move to dismiss the *certiorari* petition without the consent of the General Assembly or to discharge either our firm or Schaerr Duncan LLP from representing the State in these cases. The statutes you cite in your letter do not apply to the General Assembly pursuant to N.C. Gen. Stat. § 120-32.6. Further, § 120-32.6 clarifies past practice that, in cases of this nature, the General Assembly is the client of the Attorney General's office and, as the client, retains all decision-making authority

over litigation. *See* NC RPC 1.2 and 1.4. N.C. Gen. Stat. § 120-32.6 also clarifies past practice that, in cases of this nature, as previously confirmed by Mr. Kelley and as known to the Governor (then Attorney General Cooper), the General Assembly can hire outside counsel on its own volition and designate outside counsel as lead counsel—as it has done here.

Consistent with past practices and § 120-32.6, all litigation decisions in this case were made (and will continue to be made) by the General Assembly leadership. Prior to the decision of the Attorney General's office to not participate as counsel for the State or other defendants before the Supreme Court, the Attorney General's office consented to all litigation decisions made by the General Assembly's leadership.

After then-Attorney General Cooper directed the Department of Justice to refrain from participating in proceedings before the Supreme Court, the State remained represented by our firm and also by Schaerr Duncan LLP who was retained by the General Assembly for Supreme Court proceedings in this matter. Prior to your letter this morning, neither our firm nor Schaerr Duncan received any protest from the Attorney General's office that the General Assembly and its outside counsel lacked the authority to represent the State.

Finally, we believe that Governor Cooper, Attorney General Stein, and Mr. Kelley have serious conflicts of interest that bar them from playing any role related to this case. *See* NC RPC 1.7 and 1.10. As a candidate, Governor Cooper, despite his position as Attorney General in this litigation, made many public statements indicating that the election reform law at issue was unconstitutional. During the trial, Attorney General Stein, then a member of the State Senate, testified on behalf of the plaintiffs and, as a member of the State Senate, voted against the challenged statute and publicly spoke out against it. Attorney General Stein's father served as co-counsel for the plaintiffs.

In addition to these conflicts, Attorney General Stein has apparently engaged in settlement negotiations with plaintiffs without the knowledge or consent of his client, the leadership of the North Carolina General Assembly. Attorney General Stein has engaged in this conduct despite Mr. Kelley's repeated representations that the General Assembly leadership retained ultimate decision-making authority over litigation decisions and consented to this authority for over three years. The legislative leadership relied upon these representations for over three years. Further, we think very serious ethical issues have been raised by the unilateral decision of the Governor and the Attorney General to move to withdraw the *certiorari* petition without notice to or consent of the General Assembly, which by statute is entitled to speak for the State in this litigation.

Thus, after over three years of acquiescing to the ultimate decision making authority of the General Assembly in litigation matters related to these consolidated cases, two political opponents of the statute now seek to usurp the authority of the General Assembly as established by past practice, clarified by N.C. Gen. Stat. § 120-32.6, and as agreed upon by then-Attorney General Cooper and his staff.

Our clients take no position on any decision by Governor Cooper to discharge Mr. Bowers and Mr. Stephens. Our clients also take no position on whether Governor Cooper should or can move the Supreme Court to be substituted for Governor McCrory or whether Governor Cooper could then ask that he be dismissed as a petitioner.

Neither Governor Cooper nor the Attorney General has authority to discharge us as counsel for the State and other defendants in this case. Nor does Governor Cooper or the Attorney General have the authority to ask the Supreme Court to withdraw the petition on behalf of all petitioners. Nor does Governor Cooper or the Attorney General have the authority to move to dismiss the *certiorari* petition without notifying the General Assembly and obtaining the consent of its leadership.

We intend to continue representing our clients. We should have been notified of your intentions to attempt to withdraw the *certiorari* petition. Please immediately advise the Supreme Court that the defendants in this case, other than Governor Cooper, oppose the request to withdraw the *certiorari* petition and that we will be filing a response in opposition, as well as pursuing other relief.

Sincerely,

A handwritten signature in blue ink, appearing to read 'TAF', followed by a long horizontal line.

Thomas A. Farr

TAF:kmy

Cc: Senator Phil Berger, President Pro Tem of the Senate
Representative Timothy Moore, Speaker of the House
Mr. Kyle Duncan