

FORMAL BAR COMPLAINT AND REQUEST FOR DECLARATION OF A CONFLICT OF INTEREST IN FURTHER REPRESENTATION BY THE ATTORNEY GENERAL

BACKGROUND:

The Attorney General was sued in Federal Court by North Carolina A. Philip Randolph Institute (APRI) and Action NC on September 24, 2020, seeking an injunction from enforcing N.C.G.S. 163-275(5), which prohibits convicted felons from voting until their citizenship rights are restored. On October 16, 2020, the Attorney General filed a Motion to Dismiss and Memorandum of Law in Support of the Motion to Dismiss. The Attorney General argued that he was not a proper party to the lawsuit and that the District Attorneys were the proper party under the North Carolina General Statutes. He argued he had never been called upon to defend a conviction under N.C.G.S. 163-275(5) nor had he ever issued an Attorney General Opinion on this statute. On February 23, 2021, APRI filed an Amended Complaint removing the Attorney General and adding every North Carolina District Attorney to the lawsuit.

On January 15, 2021, the Court denied Plaintiff's Motion for Preliminary Injunction and dismissed North Carolina Attorney General Josh Stein.

On February 12, 2021, the Attorney General's Office requested all District Attorneys to allow the Attorney General to accept service of the proposed amended lawsuit. The office provided a copy of the proposed lawsuit. This lawsuit did not name Michael K. Hardin (DA Hardin) or Suzanne Mathews as defendants, but did name their predecessors Kristy Newton District 19, Maureen Krueger District 29, and Vernon Stewart District 12.

On February 18, 2021, the Attorney General sent a follow up email asking to accept service of the lawsuit.

On February 23, 2021, DA Hardin received an email requesting him to allow the Attorney General to accept service. This email again included a proposed lawsuit that did not name him or Ms. Mathews. DA Hardin thereafter communicated with the Attorney General's Office and indicated that he was not named in the lawsuit and did not consent to acceptance of service by the Attorney General.

On February 23, 2021, APRI filed an Amended Complaint that included Michael K. Hardin and Suzanne Mathews as named defendants. It is upon information and belief that this communication with DA Hardin was relayed directly to the Plaintiff by the Attorney General to allow the Plaintiff to amend the complaint on the same date as this communication.

On April 19, 2021, the Attorney General filed a Motion to Dismiss on behalf of the District Attorneys. On the same date the Legislature sought to intervene in the lawsuit.

On May 10, 2021, the Plaintiff's filed a Memorandum of Law in Opposition to the Motion to Intervene. In this document the Plaintiff's indicated that;

The Original Defendant's vigorously defended this action. They successfully defeated Plaintiff's motion for a preliminary injunction and won the dismissal of the Attorney General. The Original Defendants also moved to dismiss the complaint and opposed Plaintiffs' motion to amend the complaint. ***After extensive briefing and negotiation, the parties reached a stipulation pursuant***

to which Plaintiffs moved to amend their complaint, with the Original Defendant's consent, to name the NCSBE Defendants and the state's District Attorneys as defendants; and the Original Defendants agreed to withdraw their motion to dismiss, which they did not renew. (emphasis added)

No written consent has ever been requested by the Attorney General from any of the elected District Attorneys. The Attorney General has never reasonably communicated with the District Attorneys regarding this lawsuit, or any potential conflicts raised by his actions. The Attorney General has never made the District Attorneys aware that he consented and stipulated to them being added to a lawsuit, nor did he ever consult with them prior to this action.

The Attorney General has the same ethical responsibilities as any other lawyer. All North Carolina lawyers must follow the code of ethics under the Rules of Professional Conduct. A North Carolina General Statute cannot relieve the Attorney General or any other lawyer of ethical responsibilities under the Rules of professional responsibility.

N.C.G.S. 147-17 allows the Attorney General to determine whether representation of his office is "impracticable". Therefore, this statute does not relieve the Attorney General from following the requirements of the Rules of Professional Conduct regarding conflicts of interest. The Rules of Professional Conduct should be read together with other provisions, requiring the Attorney General to find that his representation is impracticable when it violates any provision of the Rules of Professional Conduct. This appears evident since the N.C.G.S. 147-17(d) recognizes that if private counsel were employed, the representation shall be "consistent with the Rules of Professional Conduct".

Under Rule 1.7 Conflict of Interest: Current Clients; a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. In the official comments this rule recognizes that loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Therefore, if the representation of one client will be directly adverse to another client, or the representation of one or more clients may be materially limited by the lawyer's responsibility to another client, or by personal interest of the lawyer, the lawyer must obtain written informed consent from each affected client. There are no exceptions for the Attorney General.

The Attorney General has pointed to RPC 55 which he asserts relieves him of this responsibility. However, this opinion was specific to allowing a member of the Attorney General's staff to prosecute appeals of adverse Medicaid decisions against the Department of Human Resources, which was represented by another member of the Attorney General's staff. This RPC does not fit the current situation. First, neither agency was asserting a conflict of interest, therefore the requirement of a signed consent was never addressed. This is probably because the Ethics Committee assumed the Attorney General would recognize clear conflicts in the future. Second, the Attorney General was not the cause of one of the agencies being sued, nor did he consent to them being sued without their permission. Finally, representing these agencies did not involve the representation of another North Carolina Constitutional Officer. Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. The Attorney General currently represents ALL defendants in this lawsuit.

TIMELINE FOR COMPLAINT:

On March 9, 2021, DA Hardin sent a letter to the Attorney General laying out these issues and pointing out the reasons for the conflict in the Attorney General's continued representation. DA Hardin asked the Attorney General to find a conflict on his own or request a formal opinion from the North Carolina State Bar. (Attached 1)

On April 11, 2021, DA Hardin received a letter from the Attorney General's Office indicating that they did not have a conflict of interest and essentially threatening to withdraw and leave him without counsel if he did not cooperate with them. (Attached 2)

On May 14, 2021, DA Hardin emailed the Attorney General's Office indicating that the letter sent on April 11, 2021, from the Attorney General's Office did not indicate that the Attorney General would not seek a formal opinion from the State Bar although Mr. Young had told me this by telephone. (Attached 3)

On May 17, 2021, the Attorney General's Office responded indicating again that they had the duty to represent the District Attorneys and that they had reached out to the State Bar to inquire about DA Hardin's concerns over a conflict of interest. (Attached 4)

On May 19, 2021, the Attorney General's Office responded by email to the request that the Attorney General file a motion to dismiss on his behalf alleging inserting him in a pending lawsuit filed before his district existed was grounds for dismissal against DA Hardin. The Attorney General's Office asked for clarification on his concerns over the conflict of interest so that they could communicate with the State Bar. (Attached 5)

On May 26, 2021, DA Hardin sent a letter detailing the conflict of interest and the requests that he had made to the Attorney General's Office for formal opinions both from his office and the request for him to seek a formal opinion from the State Bar. (Attached 6)

On June 7, 2021, DA Hardin received an email from the Attorney General's Office that they had contacted the State Bar and were waiting on a response. (Attached 7)

On June 7, 2021, DA Hardin received an email forwarded to me by the Attorney General's Office from the State Bar. The letter laid out the conflict issue under Rule 1.7 indicating that generally it is a conflict for a lawyer to represent a client in a lawsuit in which the lawyer was previously a party if that lawyer caused the client to be sued without the client's consent. The letter recognized there is a general statute that provides for representation of the District Attorney's but did not address the issue within the general statute requiring the Attorney General to recognize conflicts of interest. The correspondence ends asking the Attorney General if he had a different rendition of the facts to respond. (Attached 7)

On June 10, 2021, DA Hardin emailed the Attorney General's Office indicating his belief that the State Bar was recognizing a conflict of interest under Rule 1.7 and that RPC 55 the opinion the Attorney General was relying on was not on point. He further indicated that he did not believe a general statute could relieve an attorney from ethical obligations as a lawyer. The Attorney General's Office indicated that they were continuing to work through a few issues and would contact him back. (Attached 8)

On June 30, 2021, DA Hardin received a letter from the Attorney General's Office indicating that they did not have a conflict of interest. The Attorney General's Office never responded to the last email from the North Carolina State Bar and did not request any further opinion from the State Bar. (Attached 9)

On July 1, 2021, DA Hardin sent an email to the Attorney General's Office pointing out the fact that he believed they were aware that a conflict existed and were refusing to ask the State Bar for a Formal Opinion. He indicated that since the Attorney General was refusing to recognize the conflict that he be provided with all information regarding the filings and status of the pending lawsuit against me and that they keep him informed of all new court dates, filings, and decisions regarding this case as they occurred. (Attached 10)

On July 8, 2021, DA Hardin sent an email to the Attorney General's Office indicating that he had contacted the State Bar and would be asking for formal opinion and asked the Attorney General's Office to notify the Federal Court of the potential conflict and ethical issue and to ask for a stay in Federal Court until this matter was resolved. (Attached 11)

On July 13, 2021, DA Hardin received an email from the Attorney General's Office with attached filings from the case and acknowledging that he wanted to be kept informed of updates in this case. (Attached 12)

On July 13, 2021, after a review of the pleadings provided, DA Hardin requested a copy of the original pleadings before the amendment including the District Attorneys and a copy of the motion to dismiss filed on behalf of the Attorney General to remove himself from the case. (Attached 13)

On July 13, 2021, DA Hardin contacted the State Bar to supplement the information provided to them with the information he found in the Plaintiff's pleadings. This is the brief of the plaintiff in opposition to the legislature intervening in this case. The plaintiff clearly asserted that after negotiation the Attorney General consented and stipulated to the District Attorneys being amended to the lawsuit and withdrew the motion to dismiss and did not renew the motion to dismiss. He agreed with the plaintiffs for the District Attorneys being named as defendants. This was never disclosed to the District Attorneys by the Attorney General's Office, nor did they consent to this adverse position. (Attached 14)

On July 14, 2021, the Attorney General's Office sent a copy of the original pleadings (before the District Attorneys were added) to DA Hardin. He requested a time to speak to the Attorney General's Office in regards, to this information found within the Plaintiff's pleadings and to request they file a Motion to Stay in Federal Court. (Attached 16)

On July 22, 2021, DA Hardin received an email from the Attorney General's Office indicating that they had considered his request for a Motion to Stay, however this was not favorable to the defense of the other District Attorney's and therefore they would not file the motion. It is alleged that no other District Attorney was informed or was consulted about this request by DA Hardin. DA Hardin responded that the Attorney General was on notice that an express waiver of consent may be required from each of the District Attorneys and that he still believed they had a duty to request an opinion from the State Bar. (Attached 17)

On July 30, 2021, DA Hardin emailed the State Bar to inquire about whether he could request a formal opinion from the State Bar or was the only option to file a bar complaint. DA Hardin was told the State

Bar could not give advice about another lawyer's conduct. They did indicate they would inquire whether the Ethics Committee would consider a formal opinion. (Attached 18)

On May 17, 2022, DA Hardin finally received a response from the State Bar that the Ethics Committee that they decided not to issue a formal ethics opinion. (Attached 19)

On May 17, 2022, DA Hardin emailed the State Bar asking if the Ethics Committee gave a reason for not issuing an opinion. The response that was given is that the Attorney General is authorized by statute to represent the District Attorneys but gave no further explanation on how this absolved the Attorney General from a conflict of interest. (Attached 20)

On July 25, 2023, DA Hardin received an email directed as a general mailing to the elected District Attorneys as a "quick update on two pending lawsuits". This email indicates that there have been court dates and filings that have occurred in this matter as late as June 15, 2023. This email also references a response was due on July 31, 2023. (Attached 21)

DA Hardin has had no further contact with the Attorney General's Office regarding this case, the status of the case, new court dates or any of the additional information requested. The Attorney General has made no effort outside of the above general email to have any contact with DA Hardin regarding this litigation and has evidenced the clear conflict of interest in his representation. DA Hardin specifically requested on July 21, 2021, to be "informed of all information regarding the filings and status of the pending lawsuit...and that they keep him informed of all new court dates, filings, and decisions regarding this case as they occurred". DA Hardin requested any internal communications regarding this suit and communications with opposing counsel and has never received any additional information.

That DA Hardin has requested the Attorney General to declare the conflict of interest and request new counsel for DA Hardin, which he has refused. That DA Hardin has requested the Attorney General to request a formal state bar opinion, which he has refused. That DA Hardin has requested the Attorney General inform the Federal Courts of this conflict, which he has refused. DA Hardin has made every effort to resolve this issue through means other than filing a bar complaint. DA Hardin has even requested the State Bar Ethics Committee consider this matter. It is imperative that this conflict be resolved based on the history and status of this case. DA Hardin contends the Attorney General is subject to the Rules of Professional Conduct in his representation of clients the same as any other lawyer and has violated the Rules of Professional Conduct in his representation of DA Hardin.

Specifically, DA Hardin contends the Attorney General has violated the Rules of Professional Conduct:

Under Rule 1.7 Conflict of Interest; Current Clients; The Attorney General has violated the Rules of Professional conduct by causing the District Attorneys (including DA Hardin) to be sued. The Attorney General was a named party to a lawsuit and used the District Attorneys as a defense thereby causing them to be named in the lawsuit and allowing the Attorney General to be dismissed from the lawsuit. He is required by the Rules of Professional conduct to seek written consent of the client to continue his representation, which he has failed and refused to do.

Under Rule 1.7 Conflict of Interest; Current Clients; the Attorney General has violated the Rules of Professional conduct by consenting and stipulating to the District Attorneys (including DA Hardin) being added to a lawsuit, without any of the District Attorneys' written consent.

Under Rule 1.7 Conflict of Interest; Current Clients; the Attorney General has violated the Rules of Professional conduct by making decisions regarding how to proceed on behalf of DA Hardin in the current lawsuit based on the interests of other clients he represents in the same lawsuit, without obtaining written consent of DA Hardin.

Under Rule 1.8 Conflicts of Interest of Current Clients Special Rules; the Attorney General has violated the Rules of Professional Conduct by using information relating to the representation of a client to the disadvantage of the client without giving informed consent.

Under Rule 1.8 Conflicts of Interest of Current Clients Special Rules; the Attorney General has violated the Rules of Professional conduct by representing two or more clients in a lawsuit and participating in an aggregate settlement of the claims of or against the client, without the informed consent of each of the clients in writing.

Under Rule 1.6 Confidentiality of Information; the Attorney General has violated the Rules of Professional Conduct by revealing information obtained during the professional relationship.

Under Rule 1.4 Communication; the Attorney General has violated the Rules of Professional conduct by failing to properly communicate with his client. It is alleged that he has not promptly informed the clients of circumstances with respect to which the client's informed consent is required. It is alleged that he has not reasonably consulted with the clients, kept the clients reasonably informed about the status of the matter, promptly complied with reasonable requests for information, nor consulted with the clients. Reasonable communication between the lawyer and the client is necessary for the clients to effectively participate in the representation.

Sincerely,

Michael K. Hardin
District Attorney
29th Prosecutorial District



*State of North Carolina
General Court of Justice
Prosecutorial District Twenty-Nine*

MICHEAL K. HARDIN
DISTRICT ATTORNEY

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Post Office Box 668
Raeford, NC 28376
910-878-4141

Moore County Courthouse
Post Office Box 429
Carthage, NC 28327
910-722-5010

To North Carolina Attorney General Josh Stein,

As you may be aware, I serve as the District Attorney in District 29. On March 2, 2021, I was served with pleadings in a lawsuit 1:20-cv-00876 *APRI vs. NC State Board of Elections* ("the Litigation"). The Litigation was originally filed on September 24, 2020 in which you were a named defendant, along with certain other parties. The Litigation seeks to enjoin District Attorneys from enforcing North Carolina's statute(s) governing voting by felons under N.C.G.S. Sec. 163-275(5).

I am writing this letter pursuant to NC Gen. Stat. Sec. 143-300.3 and NC Gen. Stat. Sec. 147-17 requesting that your office acknowledge the conflict presented in your purported representation of me and my office, and consider the same conflict for other North Carolina District Attorneys ("the State") in the Litigation. I am further requesting that you take steps to allow outside counsel to be appointed, and that you seek from the legislature the necessary funds to pay for outside counsel's representation of my office (District 29) in the Litigation.

In support of this request, I hereby present the following facts:

1. On September 24, 2020 Plaintiffs commenced an action against The North Carolina State Board of Elections Board members and the Attorney General.
2. The Attorney General then argued that his office had never been called upon to defend a conviction under the statute and had never issued an opinion on this statute and were unaware of any instance of being requested to prosecute a violation of the referenced statute(s).
3. The Attorney General was successful in being dismissed as a defendant in the Litigation based on his representation to the Federal Court that he had no connection to the prosecutions that were asserted by Plaintiffs in the Litigation.
4. The Attorney General appeared instead to point to the State district attorneys (who had not been named at the time) as the parties to whom specific statutory authority to prosecute violations of the statute were conferred, indicating that Plaintiffs should substitute the State district attorneys for him as the proper defendants in the Litigation.

5. The Attorney General further appeared to argue that the conduct alleged by Plaintiffs in the Litigation was traceable to the NCSBE and the district attorneys of Alamance and Hoke Counties, in separate proceedings but failed to argue that Plaintiffs' claims did not create a causal connection between Plaintiffs and the referenced counties.
6. Using the Attorney General's rationale, the Federal Court dismissed the action against the Attorney General on January 15, 2021.
7. On February 12, 2021 the State received an email from Kathryn Shields, Special Deputy Attorney General with a copy of a proposed amended complaint, asking all District Attorneys in the State to allow the Attorney General to accept service of the Litigation.
8. The Plaintiff mistakenly included in this amended filing a suit against Kristy Newton (the former elected District Attorney for former Prosecutorial District 19, Hoke and Scotland), Maureen Krueger (the former District Attorney for the former Prosecutorial District 29 Moore), and Vernon Stewart (the former District Attorney for Prosecutorial District 12 Harnett and Lee).
9. Current Prosecutorial District 29 comprising Moore and Hoke Counties was created on January 1, 2021 and that I, Michael Hardin became the District Attorney of this newly created district on that date. That the old districts of Hoke and Scotland (District 19) and Moore (District 29) ceased to exist and are no longer capable of being sued.
10. I, Michael Hardin (current District Attorney for Prosecutorial District 29, as of January 1, 2021) and Suzanne Mathews (current District Attorney for Harnett and Lee) were not named in the Litigation until after the Attorney General suggested that we be included as defendants in the Litigation.
11. I, Michael Hardin emailed the Special Deputy Attorney General on February 12, 2021 requesting that someone from the Attorney General's office contact me regarding service and other issues related to the Litigation.
12. At the time, I had not been named in the Litigation.
13. **I did not and have not received a call from anyone from the Attorney General's Office in response to my request.**
14. On February 23, 2021 I received an email from the NCAOC Office of General Counsel indicating that the Plaintiffs had asked for the Attorney General to receive service on my behalf and asking me to allow service. The email indicated that the Attorney General had reached out but had not heard back from me. This email also contained a copy of an amended complaint that did not name District Attorney Mathews or me as Defendants.
15. On February 24, 2021 I emailed NCAOC Assistant Legal Counsel Corrine Lusic and indicated that I had responded on February 12, 2021 and asked for a call back from the Attorney General's office; however, no response was received.
16. On February 25, 2021 I emailed NCAOC Assistant Legal Counsel Corrine Lusic and indicated that I did not authorize anyone to accept service on my behalf because I was not a named party in the Litigation. I indicated that I hesitated to make the statement because I believed it would be communicated to Plaintiffs' counsel to correct the error and to then include me in the Litigation as a defendant.
17. I also indicated that I did not believe the Attorney General had my best interests in mind, and had seen nothing to suggest the Attorney General was willing to defend the duly enacted statute, and further believed that the Attorney General had an inherent conflict of interest, having been successful in arguing to the Court that he should be dismissed as a defendant and that the District Attorneys should be substituted as defendants.
18. I then received a call from Ms. Lusic advising me that being named as a defendant was inconsequential since the suit followed the official capacity claim of that particular district. I reminded counsel that I represent a brand new District that did not exist when the Litigation was originally filed, and it seemed that this would be something that

would exclude me from this suit and something the Attorney General would have immediately raised.

19. When I raised the inherent conflict in being represented by the Attorney General, who successfully sought his dismissal as a defendant but made no effort to challenge the underlying nature of the Litigation, I was told this matter would typically be "Chinese walled" within the Attorney General's Office as a way as a way to address any conflicts.
20. On March 2, 2021, my office was served with an amended complaint filed on February 23, 2021 that corrected the suit naming me and District Attorney Mathews and removing the predecessor District Attorneys.
21. Upon information and belief the Attorney General's Office communicated with other previously named proposed co-defendants and other concerned parties, and learned that Plaintiff had sued three District Attorneys that were no longer holding office.
22. That thereafter the Plaintiff amended their proposed lawsuit to include me and Ms. Mathews. That it appears this information leading to the amendment may have originated from the Attorney General's Office.
23. That based on the totality of the circumstances the Attorney General should not remain as counsel for the State in the Litigation, for the following reasons:
 - a. He has a conflict with respect to having been named originally as a co-defendant. A prior co-defendant in the Litigation under these circumstances cannot now ethically represent a current co-defendant.
 - b. It is not possible ethically to "Chinese wall" these issues within the Attorney General's Office.
 - c. There are differing interests between the Attorney General and the District Attorneys, creating a conflict.
 - d. That he was dismissed as a defendant in the Litigation by laying blame on the officials now named as defendants in the Litigation.
 - e. That the Attorney General escaped the Litigation by claiming he had no connection to enforcement of the statute because he has not had to defend a conviction.
 - f. That the District Attorneys would not be a party to this suit, but for the actions of the Attorney General suggesting to the Court and to Plaintiffs that the District Attorneys are the proper defendants in the Litigation.
 - g. The North Carolina Attorney General is lawfully required to notify the legislature when such lawsuits are filed and yet the Attorney General failed to notify the legislature of the filing of the Litigation, as required.
24. That the Attorney General indicated his office has never been requested to issue an opinion on the challenged statute and that he was unaware of instances in which he was asked to prosecute violations of the statute.
 - a. That on August 20, 2018 the North Carolina State Board of Election forwarded an investigation to the Hoke County District Attorney's Office alleging information that individuals had illegally voted in Hoke County during the 2016 election as convicted felons without having their citizenship rights restored.
 - b. That I, Michael Hardin, was an Assistant District Attorney in the Hoke Office at that during that time frame. That I personally reached out to the Attorney General's Office on numerous occasions and left messages in attempt to get insight, advice and opinions regarding potential State's experts and how to proceed under the contested statute. That I believed this was important understanding that these cases would likely be appealed. However, I was consistently ignored and never received a returned phone call from anyone at the Attorney General's Office in regards to these matters. That the lack of nexus in

the Plaintiff's suit that lead to the dismissal of the Attorney General as a defendant, appears to have been self-created.

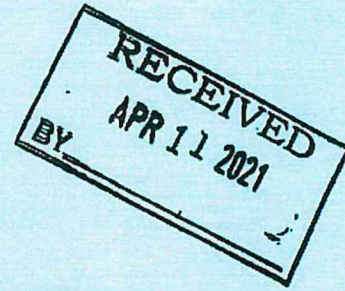
25. Further, N.C.G.S. Sec. 147-17 appears to be an unconstitutional restriction as it purports to require a District Attorney, a North Carolina Constitutional Officer, to accept the Attorney General as counsel and further purports to give the Governor and the Attorney General the authority to refuse outside legal counsel and to determine the presence or absence of perceived conflicts. The conflicts presented here are particularly acute when the lawsuit seeks only declaratory or injunctive relief, rather than payment of monies from the State Treasury.
26. I would formally request the Attorney General to issue a Formal Opinion on the Constitutionality of N.C.G.S. Sec. 147-17, as it purports to require me as a North Carolina Constitutional Officer to be *required* by law to be represented by the Attorney General.
27. As the District Attorney in Prosecutorial District 29, I would formally request that the Attorney General issue a formal opinion on the statute challenged in the Litigation, pursuant to N.C.G.S. Sec. 163-275(5), to ascertain if the Attorney General fully supports and would enforce the statute or if his opinion of the enforceability of statute is inconsistent with his willingness to vigorously defend the State in the Litigation.
28. If the Attorney General does not voluntarily withdraw as counsel for the State in the Litigation, and work with the Governor to appoint and retain outside counsel to represent the Defendants, then I would request that the Attorney General formally request an opinion from the North Carolina State Bar as to whether his continued representation of the State in this lawsuit represents a conflict of interest on his part, in that he was originally a named defendant, and was successful in substituting the District Attorneys for himself as the named defendants in the Litigation, and that there is no ability of an internal "Chinese wall" to overcome the inherent conflict of interest in the Attorney General's continued representation of the State and my office.

Sincerely,

Michael K. Hardin
District Attorney
Moore and Hoke Counties
29th Prosecutorial District
O 910-722-5010
F 910-722-5011



JOSH STEIN
ATTORNEY GENERAL



March 26, 2021

The Honorable Mike Hardin
District Attorney
103 W Saunders St.
Carthage, NC 28327

Re: Representation by N.C. Department of Justice – *North Carolina A. Phillip Randolph Institute, Inc. v. North Carolina State Board of Elections*, United States District Court for the Middle District of North Carolina, File Number 20 CV 876

Dear District Attorney Hardin:

On behalf of the North Carolina Attorney General, I have reviewed your standing request that the State of North Carolina provide for your legal defense in the above-referenced lawsuit. According to information provided to me, the plaintiff's claim is based on acts or omissions that allegedly occurred in the course and scope of your employment as a State employee working for the North Carolina Administrative Office of the Courts.

N.C. Gen. Stat. § 143-300.3 authorizes a current or former employee of the State to request legal representation for the defense of any civil or criminal action brought against him or her in an official or individual capacity. It is the duty of the Attorney General to determine whether such legal representation should be provided. N.C. Gen. Stat. § 143-300.4 requires the Attorney General to refuse to provide legal representation if he makes any of the determinations listed in § 143-300.4(a)(1) through (4).

Upon review of this litigation, this office has determined that there is not a conflict of interest in this case that would preclude our representation in this matter. Based upon the information made available to me and the criteria established by N.C. Gen. Stat. § 143-300.4, the State is willing to defend you in the above-referenced matter, pursuant to the terms and conditions of N.C. Gen. Stat. §§ 143-300.2 to 300.10 and this letter.

The State's offer of representation applies to the above-referenced matter only.

N.C. Gen. Stat. §§ 143-300.6 to 143-300.10 establish the terms of the State's obligation to pay money judgments or monetary settlements against persons represented by the State. By accepting legal representation by the State, you agree not to accept without the Attorney General's approval any settlement that would require the State to pay money on your behalf.

The Honorable Mike Hardin

March 26, 2021

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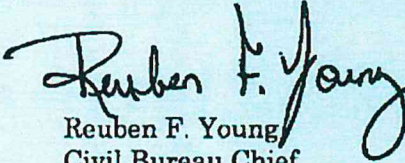
You will be represented by one or more attorneys assigned to you from the North Carolina Department of Justice. The State cannot pay for private counsel in this matter. Should you wish to obtain private attorneys instead of using the Department of Justice attorneys assigned to you, as is your right, the State would withdraw from defending you under N.C. Gen. Stat. § 143-300.3.

In this matter, your attorneys at the Department of Justice will be jointly representing you and the Agency, in addition to their duties to the State. Your attorneys also may jointly represent, along with you, other State employees, officials, or departments who are named, or become named, as defendants in the matter. In this joint representation, your attorneys at the Department of Justice may share any information you provide with any other State defendants they represent in the matter and with the Agency. If a conflict develops between you, the Agency, or other State defendants, your attorneys at the Department of Justice may withdraw from representing you but continue representing the other State defendants and the Agency.

The Attorney General may determine that the State should no longer provide for your defense if, during the course of the case, circumstances arise which demonstrate any of the following items listed in N.C. Gen. Stat. 300.4(a)(1) to (4): (1) the acts allegedly committed by you and upon which the lawsuit are based were not within the scope and course of your State employment; (2) the acts allegedly committed by you and upon which the lawsuit are based involved actual fraud, corruption, or actual malice on your part; (3) providing a defense to you would result in a conflict of interest between you and the State, or (4) providing a defense would not be in the State's best interests. Also please note that any representation of you will be contingent upon your full and continuing cooperation with the attorney or attorneys assigned to represent you. Your failure to promptly and fully cooperate with the attorneys representing you may lead to the Attorney General's immediate withdrawal from your representation.

We look forward to speaking with you in the near future to begin our representation of you in this case.

Sincerely,


Reuben F. Young
Civil Bureau Chief

State of North Carolina
Department of Justice
P. O. Box 629
Raleigh, NC 27602

RALEIGH NC 275
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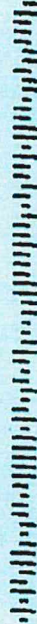
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The Honorable Mike Hardin
District Attorney
P.O. Box 429
Carthage, North Carolina 28327

28327-042929



RECEIVED
APR 11 2021
BY _____

Attachment 3

Hardin, Michael K.

From: Young, Reuben <ryoung@ncdoj.gov>
Sent: Monday, May 17, 2021 7:50 AM
To: Hardin, Michael K.
Subject: FW: Letter Regarding NC APRI v. NC State Board of Elections

Mr. Hardin,

I am in receipt of your email. I will contact you later today with more information.

RFY



Reuben F. Young
Civil Bureau Chief
Legal Services
(919) 716-6400
ryoung@ncdoj.gov
114 W. Edenton St., Raleigh, NC 27603
ncdoj.gov

Please note messages to or from this address may be public records.

From: Lovell, Melissa <MLOVELL@ncdoj.gov>
Sent: Friday, May 14, 2021 1:00 PM
To: Young, Reuben <ryoung@ncdoj.gov>
Subject: Fwd: Letter Regarding NC APRI v. NC State Board of Elections

From: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Sent: Friday, May 14, 2021 12:26 PM
To: Lovell, Melissa
Subject: RE: Letter Regarding NC APRI v. NC State Board of Elections

Mr. Young,

Thank you for your letter. It does not say what you have said to me orally, which is that the Attorney General will not seek a Formal Opinion from the State Bar on the conflict of interest; and that the Attorney General will not issue a formal opinion on the statute in question; nor will he issue a formal opinion on the statute requiring the Attorney General to represent me without my consent. I have read the opinion of the North Carolina State Bar in RPC 55 from January 13, 1989. This opinion is dealing with the Attorney General's staff member representing the State Hospital appealing denials of Medicaid Assistance brought against the Department of Human Resources which was also represented by the Attorney General's staff. This opinion is far from on point to the current situation. This opinion notes that the term "firm" is not defined in the Rule itself and then indicates it would be impractical to apply a broad reading of the term to government attorneys. However, this rule does not address a situation where the Attorney General is/or was a party to the lawsuit in his own capacity; where 42 different District Attorney's are parties; where the Legislature is

a party; and where the Board of Elections is a party. There is a wide body of law and legal opinions dealing with a government lawyer's duty when there are conflicts between his public officer or public agency clients outside of this vague opinion. The rules with regards to conflicts often require a party that may be subject to the conflict to consent to representation. I want to make it clear that forcing me to be represented by the Attorney General by quoting a North Carolina Statute and this opinion, is NOT consent on my part. As I have indicated to you and by letter I believe I have a unique position and so far the Attorney General has not acted in my interest as my lawyer. The North Carolina Bar Rules also say that ALL North Carolina lawyers must follow the code of ethics. The Legislature has no authority to abrogate this responsibility. Government lawyers are under an ethical obligation to follow the client's instructions when acting in a representative capacity. The comment to Rule 1.2 of the ABA Model Rules of Professional Conduct state "The client has the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations". By disregarding this duty you are deciding for yourself which conflicting interest to represent and creating a situation of divided loyalties.

I have asked for the Attorney General to ask for a formal opinion from the North Carolina State Bar on whether this representation is a conflict. It seems to me that in any situation where the client believed there was conflict the attorney would have a duty to ascertain whether a conflict exists. I am not sure how ethically you can make this decision if I am the "client". It appears that you are avoiding this request as you have avoided my request for a formal opinion on the legality and constitutionality of both the statute in question and the statute requiring that I be represented by the Attorney General. If you do not believe it is a conflict then why will you not ask the State Bar for an opinion? Then you will not have to rely on this old vague opinion. If the North Carolina State Bar indicates this is not a conflict of interest I will concede. Otherwise, I believe the Attorney General is violating the Rules of Professional Conduct in this continued representation. I do not believe requiring a Constitutional Officer to have to choose to either concede the conflict, or seek representation on their own without compensation was what was contemplated by the State Bar in RPC 55. There are separation of powers in our Constitution for a reason and the Rules of Ethics still apply to the Attorney General.

Sincerely,

Michael K. Hardin
District Attorney
Moore and Hoke Counties
29th Prosecutorial District
O 910-722-5010
F 910-722-5011

From: Lovell, Melissa <MLOVELL@ncdoj.gov>
Sent: Thursday, May 13, 2021 11:19 AM
To: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Cc: Young, Reuben <ryoung@ncdoj.gov>
Subject: Letter Regarding NC APRI v. NC State Board of Elections

Mr. Hardin,

Please find the attached letter from Reuben Young, Civil Bureau Chief. The original has been sent through the U.S. mail.

Melissa Lovell



Melissa A. Lovell
Legal Services Practice Manager
(919) 716-6433
mlovell@ncdoj.gov
114 W. Edenton St., Raleigh, NC 27603
ncdoj.gov

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Hardin, Michael K.

From: Young, Reuben <ryoung@ncdoj.gov>
Sent: Monday, May 17, 2021 5:30 PM
To: Hardin, Michael K.
Cc: Lovell, Melissa
Subject: Follow up
Attachments: DE 47 Memo in Support of DA Def MTD.pdf

Mr. Hardin,

As a follow up to our previous conversations and your most recent email, I want to address several concerns that you have mentioned.

As you are aware, the Plaintiffs in the pending action, *North Carolina A. Phillip Randolph Institute, Inc. v. North Carolina State Board of Elections, United States District Court for the Middle District of North Carolina, 20 CV 876*, are challenging the validity and the constitutionality of NCGS 163-275(5), which prohibits a convicted felon from voting in elections when that person's rights have not been restored. As we have discussed, generally our office does not issue formal opinions when the opinion requested involves an issue pending before the courts, as is the case here. Once a lawsuit has been filed, the courts have the authority to determine the issue in controversy. For this office to issue an opinion while the matter is pending before the courts creates a confusing situation particularly if the court's ruling/holding is contrary to the issued opinion. This office gives great deference to the courts and will not interfere with the courts' ability to make fair and impartial rulings.

Pursuant to NCGS 114-2(2), the AG has the duty "to represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State." You and the other District Attorneys in this state have been sued in this action in your "official capacities", and as a result under the law, the Attorney General has the duty to represent the named District Attorneys.

As evident by the attached Memorandum in Support of District Attorney Defendants' Motion To Dismiss, the state is advocating the very position supported by the North Carolina Conference of District Attorneys: and that is that the statute is constitutional. Previously you discussed that a conflict existed because the Attorney General was initially a defendant in the case, but subsequently was dismissed because the court found that he was not a proper party. However, that fact alone does not establish a conflict, such that this office could not ethically represent you and your colleagues in this matter.

I have reached out to the State Bar regarding your concerns of a conflict of interest, but have not talked to them as of this email, I will certainly keep you posted.

RFY



Reuben F. Young
Civil Bureau Chief
Legal Services
(919) 716-6400
ryoung@ncdoj.gov
114 W. Edenton St., Raleigh, NC 27603
ncdoj.gov

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Hardin, Michael K.

From: Young, Reuben <ryoung@ncdoj.gov>
Sent: Wednesday, May 19, 2021 4:28 PM
To: Hardin, Michael K.
Cc: Lovell, Melissa
Subject: Follow up
Attachments: DE 24 recommendation of magistrate judge.pdf; DE 34 Biggs Order.pdf; DE 36 - first amended complaint.pdf

Mr. Hardin,

Thank you for your follow up email. I have reviewed several documents related to this case and find the below referenced timeline to be helpful in addressing your question regarding the filing of a Motion to Dismiss on your behalf.

- **September 24, 2020,**
Action commenced by Plaintiffs, NC A. Phillip Randolph Institute and Action NC
Defendants: NC Board of Elections, various members of the Board and the Attorney General
- **November 4, 2020,** Recommended Decision issued by U.S. Magistrate Judge recommending dismissal of the Attorney General. (See Attachment)
- **January 1, 2021.** You are sworn in and take office as the District Attorney for Prosecutorial District 29.
- **January 15, 2021.** United States District Judge Loretta Biggs adopts the Recommended Decision of the United States Magistrate Judge which dismisses the Attorney General. (See Attachment)
- **February 23, 2021.** The complaint in this matter is amended to name the District Attorneys, including you, as defendants in this lawsuit. This is the first time that you and your colleagues were named as defendants in this action. (See Attachment)
- **April 19, 2021.** This office files a Motion to Dismiss all the named District Attorneys. That motion is still pending.

Based on this timeline, you were sworn in as DA in the new prosecutorial district before the amended complaint was filed naming you and all the District Attorneys as defendants. Therefore, we have no legal basis to file a separate Motion to Dismiss on your behalf. If my facts regarding this timeline are incorrect, please advise.

To ensure that my communications with the State Bar are accurate, please advise what you perceive as the conflict of interest in this case as it pertains to our office. Thank you.

RFY



Reuben F. Young
 Civil Bureau Chief
 Legal Services
 (919) 716-6400
ryoung@ncdoj.gov
 114 W. Edenton St., Raleigh, NC 27603
ncdoj.gov

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Reuben F. Young
Civil Bureau Chief
Legal Services
(919) 716-6400
ryoung@ncdoj.gov
114 W. Edenton St., Raleigh, NC 27603
ncdoj.gov

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From: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Sent: Wednesday, May 26, 2021 9:26 AM
To: Young, Reuben <ryoung@ncdoj.gov>
Subject: RE: Follow up

Mr. Young,

I asked you and all those before you to provide me with an opinion as to whether a lawsuit filed before my district existed could be amended to include a new district. You told me you would look into this as did those I have spoke to before being referred to you. Everyone seemed as if this was not an easy question to answer. You are now telling me you have answered this question. Could you point me to the legal opinions supporting this position?

I wrote a very detailed letter to your office. We have spoken now several times. I have been abundantly clear that I believe the Attorney General has an inherent conflict because he was a named party in this same action and that had his matter dismissed by referring to the District Attorneys as the proper party to sue. This lead to his charges being dismissed and the lawsuit being amended to include the District Attorneys. He now represents all 42 of the District Attorneys. He also represents the State Board of Elections and the Legislature. I do not believe the Rules of Ethics would allow this broad of representation under the term "firm". The Model Rules do not allow this type of multi representation for a reason because there are inherent conflicts and it certainly makes the "client" feel they are under- represented. As I have said many times now the "Chinese Wall" does not cure this. For example the former District Attorney for Hoke and Scotland Counties contacted the Attorney General's office to inform him that she was no longer the District Attorney and she was named in the lawsuit that was circulated. (I was not named in the lawsuit at that time) Following that conversation the lawsuit was amended again and I was then named. No firm could ever represent this many clients with differing interests ethically. I do not believe this complex of a multi-client case was envisioned in the RPC 55 decision.

As the client I have requested three formal opinions and all three requests have been denied. The Attorney General has decided he should not give a formal opinion in two of these matters, even though I have requested him to do so. I have asked for a formal bar opinion on the conflict on numerous occasions and you have declined citing your own opinion and RPC 55 from 1989 that is not on point.

Sincerely,

Michael K. Hardin
District Attorney
Moore and Hoke Counties
29th Prosecutorial District
O 910-722-5010
F 910-722-5011

Hardin, Michael K.

From: Young, Reuben <ryoung@ncdoj.gov>
Sent: Monday, June 7, 2021 9:12 AM
To: Hardin, Michael K.
Cc: Lovell, Melissa

Mr. Hardin,

By way of update, I emailed the State Bar this morning regarding your inquiry, and my email, and was advised that some employees were in training last week and were not able to respond. I have been advised that the Bar will respond to the inquiry this week. I will keep you posted.

RFY



Reuben F. Young
Civil Bureau Chief
Legal Services
(919) 716-6400
ryoung@ncdoj.gov
114 W. Edenton St., Raleigh, NC 27603
ncdoj.gov

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To: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Cc: Lovell, Melissa <MLOVELL@ncdoj.gov>
Subject: FW: Follow up

Mr. Hardin,

Please see the forwarded response from the State Bar.

RFY



Reuben F. Young
Civil Bureau Chief
Legal Services
(919) 716-6400
ryoung@ncdoj.gov
114 W. Edenton St., Raleigh, NC 27603
ncdoj.gov

Please note messages to or from this address may be public records.

From: Nichole McLaughlin <NMcLaughlin@ncbar.gov>
Sent: Monday, June 7, 2021 5:08 PM
To: Young, Reuben <ryoung@ncdoj.gov>
Cc: Lovell, Melissa <MLOVELL@ncdoj.gov>
Subject: Re: Follow up

Reuben,

I know have a better understanding of why Mr. Hardin believes there is a conflict. However, RPC 55 is the only ethics opinion we have, and that opinion allows the Attorney General to treat each section of the AG's office as independent law firms. RPC 55 is correct. However, Mr. Hardin is also complaining that the AG has a conflict because his interest in getting dismissed from the lawsuit is adverse to the DAs namely because but for the AG's argument the complaint would not have been amended to name the DAs. That is a different conflict issue. Generally, it is a conflict for a lawyer to represent a client (the DAs) in a lawsuit in which the lawyer (the AG) was previously a party if that lawyer caused the client to be sued. The client must give consent. Rule 1.7. However, the statute provides that the AG shall represent the DAs. There is nothing the State Bar can do about the statute. If the AG is disqualified and independent counsel is retained the question becomes who pays the independent counsel. That is a legal issue the State Bar cannot opine on.

The above is based on what Mr. Hardin has to say. Does the AG have a different rendition of the facts?

Please let me know if I can assist you further.

Nichole P. McLaughlin

Assistant Ethics Counsel

District Bar Liaison

North Carolina State Bar

217 E. Edenton St.

Raleigh, NC 27601

919-719-9238 Direct Dial

COMMUNICATIONS WITH STATE BAR – EMAIL ONLY

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From: Young, Reuben <ryoung@ncdoj.gov>
Sent: Wednesday, June 2, 2021 9:00 AM
To: Nichole McLaughlin <NMcLaughlin@ncbar.gov>
Cc: Lovell, Melissa <MLOVELL@ncdoj.gov>
Subject: Follow up

[EXTERNAL EMAIL] DO NOT CLICK links or attachments unless you recognize the sender and know the content is safe.

Ms. McLaughlin,

For your further consideration I am forwarding you the initial letter sent to us from Mr. Hardin. Thank you for your time and consideration of this matter.

RFY



Reuben F. Young
Civil Bureau Chief
Legal Services
(919) 716-6400
ryoung@ncdoj.gov
114 W. Edenton St., Raleigh, NC 27603
ncdoj.gov

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Hardin, Michael K.

From: Young, Reuben <ryoung@ncdoj.gov>
Sent: Tuesday, June 15, 2021 5:12 PM
To: Hardin, Michael K.
Subject: Re: State Bar Formal Opinion as to Conflict

Thank you for the correction.

Get [Outlook for iOS](#)

From: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Sent: Tuesday, June 15, 2021 4:45:29 PM
To: Young, Reuben <ryoung@ncdoj.gov>
Subject: Re: State Bar Formal Opinion as to Conflict

Thank you. My last name is Hardin.

Michael Hardin
District Attorney
29th Prosecutorial District
Moore and Hoke Counties

On Jun 15, 2021, at 3:25 PM, Young, Reuben <ryoung@ncdoj.gov> wrote:

Mr. Harding,

We are continuing to work through a few issues and will be back to you in response to your email.

RFY

From: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Sent: Thursday, June 10, 2021 12:24 PM
To: Young, Reuben <ryoung@ncdoj.gov>
Subject: State Bar Formal Opinion as to Conflict

Mr. Young,
It appears Ms. McLaughlin is indicating the "only" ethics opinion they have is RPC 55. Obviously it will remain the only one they have unless a formal opinion on this situation is requested by the Attorney General. I am still requesting a Formal Opinion not an email to your office. I believe the North Carolina State Bar would have to find there are limits to the representation of the Attorney General of multiple parties with adverse positions. Then there will be a clear parameter for the Attorney General and those he purports to represent. As I have said a General Statute cannot excuse an ethical obligation of counsel.

There is a lot of discussion about this under the Model Rules and ethics opinions outside of North Carolina.

However, it seems clear that she agrees that the Attorney General has a conflict requiring consent of the client under Rule 1.7. Your office has an obligation to notify the District Attorneys of this conflict and ask for their express consent to waive the conflict. For those that do not waive the conflict then it is clear under NCGS 147-17 (b) the Attorney General should find this conflict exists and should direct the Governor of the same. A request should be made for an appropriation of the General Assembly of funds for litigation services for the elected District Attorneys that do not expressly waive the conflict.

Sincerely,

Michael K. Hardin
District Attorney
Moore and Hoke Counties
29th Prosecutorial District
O 910-722-5010
F 910-722-5011

From: Young, Reuben <ryoung@ncdoj.gov>
Sent: Tuesday, June 8, 2021 8:59 AM
To: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Cc: Lovell, Melissa <MLOVELL@ncdoj.gov>
Subject: FW: Follow up

Mr. Hardin,

Please see the forwarded response from the State Bar.

RFY

<image001.jpg> **Reuben F. Young**
Civil Bureau Chief
Legal Services
(919) 716-6400
ryoung@ncdoj.gov
114 W. Edenton St., Raleigh, NC 27603
ncdoj.gov

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From: Nichole McLaughlin <NMcLaughlin@ncbar.gov>
Sent: Monday, June 7, 2021 5:08 PM
To: Young, Reuben <ryoung@ncdoj.gov>
Cc: Lovell, Melissa <MLOVELL@ncdoj.gov>
Subject: Re: Follow up

Reuben,

I know have a better understanding of why Mr. Hardin believes there is a conflict. However, RPC 55 is the only ethics opinion we have, and that opinion allows the Attorney General to treat each section of the AG's office as independent law firms. RPC 55 is correct. However, Mr. Hardin is also complaining that the AG has a conflict because his interest in getting dismissed from the lawsuit is adverse to the DAs namely because but for the AG's argument the complaint would not have been amended to name the DAs. That is a different conflict issue. Generally, it is a conflict for a lawyer to represent a client (the DAs) in a lawsuit in which the lawyer (the AG) was previously a party if that lawyer caused the client to be sued. The client must give consent. Rule 1.7. However, the statute provides that the AG shall represent the DAs. There is nothing the State Bar can do about the statute. If the AG is disqualified and independent counsel is retained the question becomes who pays the independent counsel. That is a legal issue the State Bar cannot opine on.

The above is based on what Mr. Hardin has to say. Does the AG have a different rendition of the facts?

Please let me know if I can assist you further.

Nichole P. McLaughlin

Assistant Ethics Counsel

District Bar Liaison

North Carolina State Bar

217 E. Edenton St.

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919-719-9238 Direct Dial

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From: Young, Reuben <ryoung@ncdoj.gov>
Sent: Wednesday, June 2, 2021 9:00 AM
To: Nichole McLaughlin <NMcLaughlin@ncbar.gov>
Cc: Lovell, Melissa <MLOVELL@ncdoj.gov>
Subject: Follow up

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Ms. McLaughlin,

For your further consideration I am forwarding you the initial letter sent to us from Mr. Hardin. Thank you for your time and consideration of this matter.

RFY

<image001.jpg> **Reuben F. Young**
Civil Bureau Chief
Legal Services
(919) 716-6400
ryoung@ncdoj.gov
114 W. Edenton St., Raleigh, NC 27603
ncdoj.gov

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JOSH STEIN
ATTORNEY GENERAL



REUBEN F. YOUNG
CIVIL BUREAU CHIEF

June 30, 2021

The Honorable Mike Hardin
District Attorney
P.O. Box 429.
Carthage, NC 28327

Re: *North Carolina A. Phillip Randolph Institute, Inc. v. North Carolina State Board of Elections*, United States District Court for the Middle District of North Carolina, File Number 20 CV 876

Dear District Attorney Hardin,

This letter is pursuant to several prior communications regarding your March 2021 letter to Attorney General Josh Stein requesting private counsel pursuant to N.C.G.S. § 147-17 in *North Carolina A. Phillip Randolph Institute v. N.C. State Board of Elections, et al.*, Middle District North Carolina Case No. 1:20-cv-876 (hereinafter referred to as the "lawsuit"). In the lawsuit, Plaintiffs bring a facial challenge to N.C.G.S. § 163-275(5), asserting that it is unconstitutionally vague, and therefore void, in violation of the Due Process Clause, and was enacted with racially discriminatory intent in violation of the Equal Protection Clause. Plaintiffs seek to have this statute declared unconstitutional and enjoin further enforcement.

Your request for private counsel arises from your belief that a conflict of interest exists such that the Office of the Attorney General cannot represent your interests in the lawsuit filed against you in your official capacity as the District Attorney for Prosecutorial District 29.

You have stated that you believe that a conflict of interest exists because Attorney General Josh Stein was originally a named Defendant in the lawsuit, in his official capacity, and the District Court dismissed him from the lawsuit after attorneys for Attorney General Stein, the North Carolina State Board of Elections, and its members (hereinafter referred to collectively as the "SBOE Defendants"), moved to dismiss Attorney General Stein from the lawsuit on the basis that the Attorney General is not a proper party. You further assert that a conflict of interest exists because the attorneys for Attorney General Stein and the SBOE Defendants, claimed that the Attorney General is not a proper party to the lawsuit, by referring the District Court to relevant state statutes, including N.C.G.S. § 163-278, which expressly give prosecutorial authority to the state's District Attorneys, and not to the Attorney General, to prosecute alleged violations of Article 22 of Chapter 163 of the General Statutes, including N.C.G.S. § 163-275(5). In presenting

The Honorable Mike Hardin
June 30, 2021
Page 2

the applicable law to the court, the attorneys for Attorney General Stein and the SBOE Defendants, zealously represented their clients and did not cause, as you have alleged, Plaintiffs to amend their complaint to name the state's District Attorneys, in their official capacities, as Defendants to the lawsuit.

After much consideration of your concerns, and in conjunction with considering Rules 0.2, 1.7 and 1.10 of the North Carolina Rules of Professional Conduct (RPC), a conflict of interest does not exist such that it is impracticable for the Office of the Attorney General, to represent you in your official capacity as the District Attorney for Prosecutorial District 29 in this lawsuit. RPC 55 directly addresses the concerns that you have raised and a conflict does not exist because the defendants to the lawsuit are represented by attorneys in the Attorney General's office who work in, and represent clients in, different divisions of this office.

Additionally, a conflict of interest was also not created, as you have suggested, when the Attorney General was dismissed from the lawsuit and counsel for the plaintiffs sought to amend their complaint to name each of the state's District Attorneys, in their official capacities, as Defendants. This is because Attorney General Stein did not represent himself in the lawsuit and did not cause himself to be dismissed from the lawsuit. In this lawsuit, attorneys from the Special Litigation Section within the Litigation Division of the Attorney General's office represented Attorney General Stein and the SBOE Defendants in the lawsuit. The legal arguments were made on behalf of their clients, the Attorney General and the SBOE Defendants, and not those of Attorney General Stein himself as his own counsel.

As you are aware, the Attorney General has a constitutional and statutory duty to defend the State, including its State officials, in civil actions and proceedings. N.C.G.S. § 114-2 (2021). The Attorney General's office is a large office comprised of attorneys that work in separate divisions and sections, in order to represent the interests of different State departments, officers, and employees. The office is organized in this way to ensure that the needs of clients, who have different and sometimes adverse interests, are met and advocated for at all times, even when a conflict arises between different State agencies or State officers. Furthermore, the attorneys that work in the Attorney General's office are specifically authorized by the North Carolina Rules of Professional Conduct to represent several government agencies in litigation where there are intragovernmental legal controversies, where attorneys in private practice would be otherwise prohibited from doing so. N.C. St. B. R. Prof. Conduct 0.2[5] (2021).

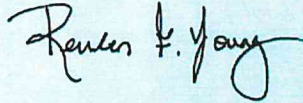
Because the North Carolina Rules of Professional Conduct and RPC 55 are clear and unambiguous that no conflict of interest exists to prevent representation of you and the other District Attorneys by two attorneys in the Civil Division of the Attorney General's office, there is no legal basis for your request of a formal ethics opinion from the State Bar. There is also no legal basis to find that it is impracticable for the Office of the Attorney General, through two attorneys

The Honorable Mike Hardin
June 30, 2021
Page 3

in the Civil Division of this office, to represent you in the lawsuit such that your request to obtain private counsel may be recommended pursuant to N.C.G.S. § 147-17.

Thank you for bringing these concerns to our attention and we look forward to continuing to work with you in defending the interest of all District Attorneys in this lawsuit.

Sincerely,

A handwritten signature in cursive script that reads "Reuben F. Young". The signature is written in dark ink and is positioned above the typed name.

Reuben F. Young
Civil Bureau Chief

Hardin, Michael K.

From: Lovell, Melissa <MLOVELL@ncdoj.gov>
Sent: Thursday, July 1, 2021 11:31 AM
To: Hardin, Michael K.
Cc: Young, Reuben
Subject: Re: North Carolina A. Philip Randolph Institute v. N.C. State Board of Elections, et al.,

DA Hardin,

I wanted to acknowledge receipt of your email. Judge Young is currently away from the office until next week.

Melissa Lovell

From: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Sent: Thursday, July 1, 2021 11:15:01 AM
To: Lovell, Melissa <MLOVELL@ncdoj.gov>
Cc: Young, Reuben <ryoung@ncdoj.gov>
Subject: RE: North Carolina A. Philip Randolph Institute v. N.C. State Board of Elections, et al.,

Mr. Young,

I have repeatedly asked the Attorney General for a formal opinion from the State Bar. He is the attorney and I am the client. I believe there are at least two clear ethical issues with the Attorney General representing me. I do not believe RPC 55 allows the Attorney General to represent multiple adverse parties in all situations. It is the ONLY opinion but there will never be another opinion unless it is requested. Even the language in the opinion itself indicates there are parameters and ethical concerns. The informal opinion from the State Bar you sought clearly indicates the Attorney General has a conflict under Rule 1.7 without the consent of the client. (the DA's) I do not consent. The State Bar asked if the Attorney General had an argument or response in regards to that point. Rather than responding to the State Bar and clarifying this issue, you wrote me a letter indicating there is no conflict. I do not believe that is your decision to make. It is clear now the Attorney General is aware there may be a conflict and refuses to ask the State Bar for an opinion. This could be interpreted as an effort to prevent being directly told by the State Bar there is a conflict. If the Attorney General proceeds without an opinion from the State Bar that indicates he has the ethical ability to do so, I will file a bar complaint against the Attorney General. The Attorney General is not above ethical obligations. The Attorney General acts just like any other attorney and has a duty to his client. NCGS 147-17 cannot relieve him from his ethical obligations to his client. I have faith that the State Bar will consider the repeated attempts I have made to request clarification on this conflict, the refusal to seek clarification from the State Bar, and the clear refusal to act in the client's best interest.

Since the Attorney General continues to refuse to recognize this conflict, I would like an update on the current status of the litigation. I would also like to be informed of any and all conversations regarding this case, including communications between counsel within the Attorney General's Office and with opposing counsel, new court dates, filings, and any other activity dealing with this case. I would like all emails and notes regarding conversations internally at the Attorney General's office about this case, about the conflict issues being presented, contact with the Attorney General regarding his knowledge of these conflicts and his decision to move forward without permission from his client. I would like any item that would be included as the "client file" emailed or mailed to me. I would like this file to be updated if any new information is produced or received. I would like to be consulted directly regarding any settlement, defense, or position taken on my behalf. If you have any questions about this request please contact me.

Sincerely,

• **Michael K. Hardin**
District Attorney
Moore and Hoke Counties
29th Prosecutorial District
O 910-722-5010
F 910-722-5011

From: Lovell, Melissa <MLOVELL@ncdoj.gov>
Sent: Wednesday, June 30, 2021 12:48 PM
To: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Cc: Shields, Kathryn <KShields@ncdoj.gov>
Subject: North Carolina A. Philip Randolph Institute v. N.C. State Board of Elections, et al.,

District Attorney Hardin,

Please find the attached correspondence from Reuben Young, Civil Bureau Chief.



Melissa A. Lovell
Legal Services Practice Manager
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114 W. Edenton St., Raleigh, NC 27603
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E-mail correspondence to and from this address may be subject to the North Carolina public records laws and if so, may be disclosed.

Hardin, Michael K.

From: Lovell, Melissa <MLOVELL@ncdoj.gov>
Sent: Thursday, July 8, 2021 2:55 PM
To: Hardin, Michael K.
Cc: Shields, Kathryn
Subject: RE: North Carolina A. Philip Randolph Institute v. N.C. State Board of Elections, et al.,

DA Hardin,

Acknowledging receipt of your email. Kathryn Shields in our office will be in contact with you early next week.

Melissa Lovell

From: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Sent: Thursday, July 8, 2021 11:20 AM
To: Lovell, Melissa <MLOVELL@ncdoj.gov>
Subject: RE: North Carolina A. Philip Randolph Institute v. N.C. State Board of Elections, et al.,

The State Bar has informed me they are considering whether to issue a formal opinion in this matter. I would ask the Attorney General to notify the judge of the impasse in the pending case and of this potential ethical issue. I would ask the Attorney General ask for a stay in the proceedings until this issue is resolved. I would appreciate a status update regarding this case as soon as possible.

Sincerely,

Michael K. Hardin
District Attorney
Moore and Hoke Counties
29th Prosecutorial District
O 910-722-5010
F 910-722-5011

From: Lovell, Melissa <MLOVELL@ncdoj.gov>
Sent: Thursday, July 1, 2021 11:31 AM
To: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Cc: Young, Reuben <ryoung@ncdoj.gov>
Subject: Re: North Carolina A. Philip Randolph Institute v. N.C. State Board of Elections, et al.,

DA Hardin,

I wanted to acknowledge receipt of your email. Judge Young is currently away from the office until next week.

Melissa Lovell

From: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Sent: Thursday, July 1, 2021 11:15:01 AM
To: Lovell, Melissa <MLOVELL@ncdoj.gov>

Hardin, Michael K.

From: Hardin, Michael K.
Sent: Tuesday, July 13, 2021 9:23 AM
To: Caulder, Christine L.
Subject: FW: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876
Attachments: DE 36 First Amended Complaint_File Stamped Copy.pdf; DE 47 Memo in Support of DA Def MTD.pdf; DE 46 - DA def MTD.pdf; DE 48 Plaintiff's response to DA MTD.pdf; DE 45 GA Memo ISO Motion to Intervene.pdf; DE 45-1 proposed answer of intervenors.pdf; DE 49 p opp to mtn to intervene by GA.pdf; DE 50 Notice of Exhibits to amended complaint.pdf; DE 52 Legislative Ds Reply to Motion to Intervene.pdf; DE 53 DA Def Reply Brief.pdf; DE 54 Ps Not of Subsequent Authority re Resp to Leg Mot Intervene.pdf; DE 44 - motion to intervene.pdf

Michael K. Hardin
District Attorney
Moore and Hoke Counties
29th Prosecutorial District
O 910-722-5010
F 910-722-5011

From: Shields, Kathryn <KShields@ncdoj.gov>
Sent: Thursday, July 8, 2021 2:26 PM
To: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Subject: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876

Mr. Hardin,

I hope you are well.

Per your request to Reuben Young, please see the attached documents which have been filed since Plaintiffs amended their complaint to name each elected District Attorney, in their official capacity only, as a Defendant to this civil action. As of now, the motions that are pending in this case – the motion to dismiss by the District Attorney Defendants and the motion to intervene by the Legislative Defendants – have been referred to the Magistrate Judge assigned to the case for a memorandum and recommendation on the motions. The court has not set a hearing for the motions and will issue its memorandum and recommendation on the briefs.

It's my understanding from your request to Judge Young that you would like updates on substantive motions and rulings as this case moves forward. I will be happy to send those to you. It is my practice to send substantive case updates to the judicial officials that I represent in an action when they occur. I will be sure to send you, and all the other elected District Attorneys, an update when the court rules on the pending motion to dismiss. I will also advise you, and the other elected District Attorneys, of all other substantive filings and developments in the case as it moves forward.

If you have any additional questions about the case, please contact me directly.

Thanks!
Kathryn



Kathryn H. Shields

Special Deputy Attorney General
Services to State Agencies Section

Phone: 919.716.6879

Fax: 919.716.6755

Email: kshields@ncdoj.gov

114 W. Edenton St., Raleigh, NC 27603

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ncdoj.gov

Please note messages to or from this address may be public records.

Hardin, Michael K.

From: Hardin, Michael K.
Sent: Tuesday, July 13, 2021 2:37 PM
To: Shields, Kathryn
Subject: RE: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876

Please provide me the original pleadings including the motion to dismiss on behalf of the AG and the order of the judge allowing the dismissal. You can reach me whenever you have time.

Sincerely,

Michael K. Hardin
District Attorney
Moore and Hoke Counties
29th Prosecutorial District
O 910-722-5010
F 910-722-5011

From: Shields, Kathryn <KShields@ncdoj.gov>
Sent: Tuesday, July 13, 2021 2:15 PM
To: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Subject: RE: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876

Good afternoon, Mr. Hardin,

I am on the road today. I will give you a call in the morning, if that works for you. If not, please let me know a good time to reach you tomorrow afternoon.

Thanks,
Kathryn

From: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Sent: Tuesday, July 13, 2021 9:22 AM
To: Shields, Kathryn <KShields@ncdoj.gov>
Subject: RE: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876

Please call ME.
Thanks,

Michael K. Hardin
District Attorney
Moore and Hoke Counties
29th Prosecutorial District
O 910-722-5010
F 910-722-5011

Michael K. Hardin
District Attorney
Moore and Hoke Counties
29th Prosecutorial District
O 910-722-5010
F 910-722-5011

From: Nichole McLaughlin <NMcLaughlin@ncbar.gov>
Sent: Tuesday, July 13, 2021 9:34 AM
To: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Subject: Re: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876

Thank you. We will let you know if we need additional information. Right now we are still at the stage of deciding whether to issue a formal opinion. Thank you for your patience.

Please let me know if I can assist you further.

Nichole P. McLaughlin
Assistant Ethics Counsel
District Bar Liaison
North Carolina State Bar
217 E. Edenton St.
Raleigh, NC 27601
919-719-9238 Direct Dial

COMMUNICATIONS WITH STATE BAR – EMAIL ONLY

Effective immediately and until further notice, please communicate with the State Bar through email only. Attempts to communicate with the State Bar via United States Mail, UPS, FedEx, telephone, or facsimile may result in substantial delay.

Please be advised that the contents of this message and any reply may be subject to disclosure under North Carolina law. Informal ethics inquiries and advisories communicated via electronic mail are confidential pursuant to Rule 1.6 of the Rules of Professional Conduct. Attorney Client Assistance Program communications and Lawyer Assistance Program client communications via electronic mail are also treated as confidential pursuant to Rule 1.6 of the Rules of Professional Conduct and N.C. Gen. Stat. 84-32.1.

From: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Sent: Tuesday, July 13, 2021 9:20 AM
To: Nichole McLaughlin <NMcLaughlin@ncbar.gov>
Subject: FW: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876

[EXTERNAL EMAIL] DO NOT CLICK links or attachments unless you recognize the sender and know the content is safe.

I would like this added to the information considered by the ethics committee. Please look at the (DE 49p opp to mtn to intervene by GA) on page 2;

“The Original Defendants also moved to dismiss the complaint, and opposed Plaintiffs’ motion to amend the complaint. After extensive briefing and negotiation, the parties reached a stipulation pursuant to which Plaintiffs moved to amend their complaint, with the Original Defendants’ consent, to name the NCSBE Defendants and the state’s district attorneys (“District Attorneys”) as defendants (together, the

"Current Defendants"); and the Original Defendants agreed to withdraw their motion to dismiss, which they did not renew."

This is the brief of the plaintiff in opposition to the legislature intervening in this case. The plaintiff clearly asserts that after negotiation the Attorney General consented and stipulated to the District Attorneys being amended to the lawsuit and withdrew the motion to dismiss and did not renew the motion to dismiss. He agreed with the plaintiffs for the District Attorneys being named as defendants. This was never disclosed to me by the Attorney General nor have I consented to this adverse position.

Sincerely,

Michael K. Hardin
District Attorney
Moore and Hoke Counties
29th Prosecutorial District
O 910-722-5010
F 910-722-5011

From: Shields, Kathryn <KShields@ncdoj.gov>
Sent: Thursday, July 8, 2021 2:26 PM
To: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Subject: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876

Mr. Hardin,

I hope you are well.

Per your request to Reuben Young, please see the attached documents which have been filed since Plaintiffs amended their complaint to name each elected District Attorney, in their official capacity only, as a Defendant to this civil action. As of now, the motions that are pending in this case – the motion to dismiss by the District Attorney Defendants and the motion to intervene by the Legislative Defendants – have been referred to the Magistrate Judge assigned to the case for a memorandum and recommendation on the motions. The court has not set a hearing for the motions and will issue its memorandum and recommendation on the briefs.

It's my understanding from your request to Judge Young that you would like updates on substantive motions and rulings as this case moves forward. I will be happy to send those to you. It is my practice to send substantive case updates to the judicial officials that I represent in an action when they occur. I will be sure to send you, and all the other elected District Attorneys, an update when the court rules on the pending motion to dismiss. I will also advise you, and the other elected District Attorneys, of all other substantive filings and developments in the case as it moves forward.

If you have any additional questions about the case, please contact me directly.

Thanks!
Kathryn



Kathryn H. Shields
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Services to State Agencies Section
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114 W. Edenton St., Raleigh, NC 27603

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA A. PHILIP RANDOLPH
INSTITUTE and ACTION NC,

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD OF
ELECTIONS, et al.,

Defendants.

Civil Action No.
1:20-cv-00876

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO
THE MOTION TO INTERVENE BY THE PRESIDENT PRO TEMPORE OF
THE NORTH CAROLINA SENATE AND THE SPEAKER OF
THE NORTH CAROLINA HOUSE OF REPRESENTATIVES**

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Plaintiffs the North Carolina A. Philip Randolph Institute and Action NC (together, "Plaintiffs") respectfully file this response in opposition to the Motion to Intervene by Philip E. Berger, the President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, the Speaker of the North Carolina House of Representatives (together, "Proposed Intervenors"). For the reasons set forth below, the Court should deny the Motion to Intervene.

INTRODUCTION

Nearly seven months ago, Plaintiffs filed suit challenging the constitutionality of N.C.G.S. § 163-275(5) (the "Strict Liability Voting law"), a racially discriminatory relic of the nineteenth century that imposes stringent criminal penalties on voting by North Carolina residents who are on parole, probation or post-release supervision for a felony conviction—even if those individuals mistakenly believe they are eligible to vote. Plaintiffs named as defendants the North Carolina State Board of Elections ("NCSBE"), the members of the NCSBE and the Executive Director of the NCSBE (collectively, the "NCSBE Defendants"), and the Attorney General (together with the NCSBE Defendants, the "Original Defendants"). Contemporaneously with the filing of the complaint, Plaintiffs filed a motion for a preliminary injunction to enjoin the Original Defendants from enforcing the Strict Liability Voting Law in time for eligible voters with criminal convictions to register to vote and vote in the November 3, 2020 General Election. Plaintiffs also issued a press release announcing the lawsuit, which was covered by

national media.¹

The Original Defendants vigorously defended this action. They successfully defeated Plaintiffs' motion for a preliminary injunction, and won the dismissal of the Attorney General. The Original Defendants also moved to dismiss the complaint, and opposed Plaintiffs' motion to amend the complaint. After extensive briefing and negotiation, the parties reached a stipulation pursuant to which Plaintiffs moved to amend their complaint, with the Original Defendants' consent, to name the NCSBE Defendants and the state's district attorneys ("District Attorneys") as defendants (together, the "Current Defendants"); and the Original Defendants agreed to withdraw their motion to dismiss, which they did not renew.

Throughout these extensive proceedings, Proposed Intervenors remained on the sidelines. They now move for permissive intervention pursuant to Rule 24(b) to assert "unique defenses," at least some of which do not overlap with the Current Defendants' defenses. Motion to Intervene (Dkt. 45) ("Motion"), at 5. The Court should exercise its broad discretion to deny Proposed Intervenors' Motion, both because it is untimely and because it will unduly delay and prejudice the adjudication of Plaintiffs' rights.

¹ See "Federal Lawsuit Challenges North Carolina Felony Voting Law," Southern Coalition for Social Justice (Sept. 24, 2020) (press release), *available at* <https://southerncoalition.org/federal-lawsuit-challenges-north-carolina-felony-voting-law/>; Associated Press, "Suit challenges NC's strict liability law on felons voting" (Sept. 25, 2020), *available at* <https://apnews.com/article/election-2020-race-and-ethnicity-lawsuits-north-carolina-voting-rights-39de30a1f26c17e6c07bd6b1e50e260e>.

ARGUMENT

I. The Court Should Exercise Its Broad Discretion to Deny Proposed Intervenor's Motion for Permissive Intervention.

A district court “*may* permit” intervention if the movant “has a claim or defense that shares with the main action a common question of law or fact.” FED. R. CIV. P. 24(b)(1)(B) (emphasis added). “In exercising its discretion, the court *must* consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” *Id.* 24(b)(3) (emphasis added).

“[A] decision to deny permissive intervention under Rule 24(b) lies within the sound discretion of the trial court.” *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003); *see also McHenry v. C.I.R.*, 677 F.3d 214, 219 (4th Cir. 2014) (a “particularly deferential” standard of review applies to a “court’s order denying permissive intervention” under Rule 24(b)).

A. Proposed Intervenor's Motion Is Untimely.

“[T]imeliness is a cardinal consideration of whether to permit intervention.” *Houston General Ins. Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999). District courts have “wide discretion” in determining whether a motion to intervene is timely. *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989); *see also Houston General Ins. Co.*, 193 F.3d at 839 (“The determination of timeliness is committed to the discretion of the district court and will not be disturbed on appeal except for an abuse of that discretion.”). Relevant factors include “how far the suit has progressed, the prejudice which delay might cause other parties, and the reason for tardiness in moving to intervene.” *Gould*,

883 F.2d at 286. In addition to considering the “time between the filing of the complaint and the motion to intervene,” a court should also take into account “all the circumstances of th[e] *particular* case” when assessing timeliness. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 475 (6th Cir. 2000).

Here, Proposed Intervenors waited nearly seven months after the commencement of this action to seek intervention. They do not and cannot contend that they were unaware of this action, which was publicly announced and covered by national media. Since this action was filed, the parties fully litigated Plaintiffs’ motion for a preliminary injunction; fully briefed the Original Defendants’ motion to dismiss and Plaintiffs’ motion to amend; and negotiated a stipulation pursuant to which Plaintiffs filed an Amended Complaint naming the NCSBE Defendants and the District Attorneys as defendants. Throughout those proceedings, Proposed Intervenors were entirely uninvolved. They offer no reason as to why they did not move to intervene sooner, nor any explanation as to why intervention is suddenly warranted.

Proposed Intervenors’ dilatory effort to intervene seven months after the filing of this particular case, which primarily concerns questions of law that affect the fundamental right to vote, should be rejected as untimely. *See, e.g., State v. City of Chicago*, 912 F.3d 979 (7th Cir. 2019) (district court did not err in denying as untimely proposed intervenors’ motion to intervene filed nine months after the commencement of the action, where the proposed intervenors were fully aware of the suit from the time it was filed).

B. Permitting Intervention Will Unduly Delay and Prejudice the Adjudication of Plaintiffs' Rights

The Fourth Circuit has recognized that “[a]dditional parties can complicate routine scheduling orders, prolong and increase the burdens of discovery and motion practice, thwart settlement, and delay trial.” *Stuart v. Huff*, 706 F.3d 345, 350 (4th Cir. 2013). Permitting Proposed Intervenors to intervene at this stage of the case to assert their “unique defenses” will unduly delay the resolution of this case and prejudice the adjudication of Plaintiffs’ rights. *See, e.g., North Carolina State Conference of NAACP v. Cooper*, 332 F.R.D. 161, 172 (M.D.N.C. 2019) (denying motion for permissive intervention by the President Pro Tempore of the North Carolina Senate and the Speaker of the North Carolina House of Representatives in a challenge to a state voter identification law because permitting intervention would “hinder, rather than enhance, judicial economy” and “unnecessarily complicate and delay the various stages of [the] case”)²; *Ansley v. Warren*, No. 1:16-cv-54, 2016 WL 3647979 (W.D.N.C. July 7, 2016) (denying motion for permissive intervention by the President Pro Tempore of the North Carolina Senate and the Speaker of the North Carolina House of Representatives in a constitutional challenge to a state statute because permitting intervention would

² In *North Carolina State Conference of NAACP*, the district court subsequently denied a renewed motion to intervene by the President Pro Tempore of the North Carolina Senate and the Speaker of the North Carolina House of Representatives. No. 1:18-cv-1034, 2019 WL 5840845 (M.D.N.C. Nov. 7, 2019). A panel of the Fourth Circuit vacated and remanded the district court’s decision. 970 F.3d 489 (4th Cir. 2020). The Fourth Circuit granted rehearing en banc. 825 F. App’x 122 (4th Cir. 2020).

“needlessly prolong and complicate [the] litigation, including discovery, and delay the final resolution of the case”).

The decisions to the contrary in *Democracy North Carolina v. North Carolina State Board of Elections*, No. 1:20-cv-457, 2020 WL 6589360 (M.D.N.C. June 15, 2020), *Carcano v. McCrory*, 315 F.R.D. 176 (M.D.N.C. 2016), and *United States v. North Carolina*, No. 1:16-cv-425, 2016 WL 3626386 (M.D.N.C. June 29, 2016), are inapposite. In each of those cases, the President Pro Tempore of the North Carolina Senate and the Speaker of the North Carolina House of Representatives moved to intervene in a timely manner. *See Democracy North Carolina*, 2020 WL 6589360, at *1-2 (motion to intervene filed “five days after Plaintiffs filed their motion for preliminary relief” and “before the original Defendants submitted any filings of their own”); *Carcano*, 315 F.R.D. at 178 (motion to intervene filed “just nine days after Plaintiffs filed their motion for [a] preliminary injunction” and “before any of the original Defendants made any filings in the case”); *North Carolina*, 2016 WL 3626386, at *1-2 (motion to intervene filed eight days after the commencement of the action). The district courts therefore concluded that permitting intervention would not unduly delay or prejudice the parties. None of those cases involved a seven-month delay in intervention during which significant proceedings took place that set the stage for the next phase of the litigation, as is the case here.

C. Proposed Intervenors' Interest in Defending the Constitutionality of the Strict Liability Voting Law Is Adequately Represented by the Current Defendants.

In deciding whether to grant permissive intervention under Rule 24(b), a court may consider whether “the existing defendants are zealously pursuing the same ultimate objectives as” the proposed intervenors. *Stuart*, 706 F.3d at 355; *see also Lee v. Virginia Bd. of Elections*, No. 3:15-cv-357-HEH, 2015 WL 5178993 (E.D. Va. Sept. 4, 2015) (denying motion to intervene by a Virginia legislator in a challenge to state voting laws where the Virginia State Board of Elections was already “present[ing] a ... fervent defense” of those laws); *T-Mobile Northeast LLC v. Town of Barnstable*, 969 F.3d 33, 41 (1st Cir. 2020) (“[A] district court considering requests for permissive intervention should ordinarily give weight to whether the original parties to the action adequately represent the interests of the putative intervenors.”); *New Orleans Public Svc., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 472 (5th Cir. 1984) (“In acting on a request for permissive intervention, it is proper to consider, among other things, whether the intervenors’ interests are adequately represented by other parties”).

Here, Proposed Intervenors seek permission to intervene based on their asserted “strong interest” in defending “the constitutionality of the General Assembly’s duly enacted statutes.” Motion at 3. But they expressly concede that this interest is adequately represented by the current defendants, who, like the Proposed Intervenors, are represented by the Attorney General. *Id.* (acknowledging that “the current defendants in this action are fully able to defend” the constitutionality of the Strict Liability Voting

Law).

Because intervention is not necessary to protect the Proposed Intervenors' interests, the Court should exercise its discretion to deny permissive intervention. *See, e.g., Ansley*, 2016 WL 3647979, at *3 (denying motion for permissive intervention by the President Pro Tempore of the North Carolina Speaker of the North Carolina House of Representatives based, *inter alia*, on the court's determination that "the N.C. Department of Justice is zealously defending this case on behalf of the State"); *Arizonans for Fair Elections v. Hobbs*, 335 F.R.D. 269, 276 (D. Ariz. 2020) (denying motion for permissive intervention by the Speaker of the Arizona House of Representatives and the President of the Arizona Senate where the State of Arizona was already defending the constitutionality of the challenged statutes, and reasoning that "Proposed Intervenors' interests align with the State's, and the Court doesn't see how Proposed Intervenors can more adequately defend state laws than the State itself"); *One Wisconsin Institute, Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015) (denying motion for permissive intervention by state legislators in a challenge to state voting laws where "the attorney general [was] adequately pursuing the outcome the proposed intervenors seek").

Denying leave to intervene will not deprive Proposed Intervenors of the opportunity to be heard with respect to the constitutionality of the Strict Liability Voting Law, as they can seek the Court's leave to submit *amicus* briefs expressing their views. *See Stuart*, 706 F.3d at 355 (explaining that denying leave to intervene "does not leave [the proposed intervenors] without recourse," as they "retain the ability to present their

views in support of the [challenged statute] by seeking leave to file amicus briefs”); *North Carolina State Conference of NAACP*, 332 F.R.D. at 172 (“To the extent that Proposed Intervenors have special expertise they believe that they bring to the defense of [the Strict Liability Voting Law], such expertise can be provided through the submission of *amicus* briefs.”).

CONCLUSION

For the foregoing reasons, the Court should deny the Motion to Intervene by the President Pro Tempore of the North Carolina Senate and the Speaker of the North Carolina House of Representatives.

Dated: May 10, 2021

By: /s/ Mitchell D. Brown

SIMPSON THACHER & BARTLETT
LLP

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appearing*)
Nihara K. Choudhri (*specially appearing*)
425 Lexington Avenue
New York, NY 10017
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SOUTHERN COALITION FOR SOCIAL
JUSTICE

Allison J. Riggs (State Bar No. 40028)
Mitchell D. Brown (State Bar No. 56122)
1415 West Highway 54, Suite 101
Durham, NC 27707
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allisonriggs@southerncoalition.org
mitchellbrown@scsj.org

Attorneys for Plaintiffs

CERTIFICATE OF WORD COUNT

Pursuant to Local Rules 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Response in Opposition to the General Assembly's Motion to Dismiss contains 2,081 words (including headings and footnotes) as measured by Microsoft Word.

/s/ Mitchell D. Brown
Mitchell D. Brown

CERTIFICATE OF SERVICE

I certify that on the 10th day of May, 2021, the foregoing Response in Opposition to the District Attorneys Defendants' Motion to Dismiss was served by electronic mail to counsel for the District Attorney Defendants, Kathryn H. Shields, Special Deputy Attorney General, at the address kshields@ncdoj.gov, and Elizabeth Curran O'Brian, Special Deputy General, at the address eobrien@ncdoj.gov; and to counsel for the NCSBE Defendants, Terence Steed, Special Deputy Attorney General, at the address tsteed@ncdoj.gov, with consent of all counsel to accept service in this manner.

Hardin, Michael K.

From: Shields, Kathryn <KShields@ncdoj.gov>
Sent: Wednesday, July 14, 2021 5:25 PM
To: Hardin, Michael K.
Subject: RE: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876

Mr. Hardin,

I apologize that my day got away from me. I am on a deadline in another matter and my day went haywire. I will be free after 11 a.m. tomorrow. What time works best for you? My office number is 919-716-6879.

Thanks,
Kathryn

From: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Sent: Wednesday, July 14, 2021 4:57 PM
To: Shields, Kathryn <KShields@ncdoj.gov>
Subject: RE: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876

Thank you. When are you available for questions? And how can I reach you?

Michael K. Hardin
District Attorney
Moore and Hoke Counties
29th Prosecutorial District
O 910-722-5010
F 910-722-5011

From: Shields, Kathryn <KShields@ncdoj.gov>
Sent: Wednesday, July 14, 2021 4:48 PM
To: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Subject: RE: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876

Mr. Hardin,

Please find attached a copy of the documents that you requested – the original complaint and its' attachments, the motion to dismiss filed on behalf of the Attorney General and the State Board of Elections and its board members, the memorandum and recommendation of the magistrate judge, and the district court order.

Thanks,
Kathryn

From: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Sent: Tuesday, July 13, 2021 2:37 PM
To: Shields, Kathryn <KShields@ncdoj.gov>
Subject: RE: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876

Hardin, Michael K.

From: Hardin, Michael K.
Sent: Thursday, July 22, 2021 8:06 PM
To: Shields, Kathryn
Subject: Re: Motion to Stay - NCAPRI v. NCSBOE, et al.

Please be advised that there has been an informal statement from the North Carolina State Bar issued to the Attorney General that puts him on notice that an express waiver of consent may be required from each elected District Attorney. I have not consented. I do not speak for the remaining District Attorneys. The Attorney General provided the District Attorneys as a defense in his own lawsuit causing us to be sued in the first place. The Attorney General consented and stipulated to the District Attorneys being amended to the lawsuit without our consent. You are and were aware of this. If you were truly acting in our best interest you would have recognized this conflict and reported this to the State Bar yourself.

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From: Shields, Kathryn <KShields@ncdoj.gov>
Sent: Thursday, July 22, 2021 5:37:36 PM
To: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Subject: Motion to Stay - NCAPRI v. NCSBOE, et al.

Mr. Hardin,

I hope you are well.

As I promised, I researched and considered the motion to stay that you requested that I file solely on your behalf in the above federal action. I believe the motion to stay will delay a potentially favorable ruling on the pending motion to dismiss on behalf of you, in your official capacity, and the other District Attorneys, in their official capacities, and could also be harmful to the defense of this action on behalf of the District Attorneys.

Regards,
Kathryn



Kathryn H. Shields
Special Deputy Attorney General
Services to State Agencies Section
Phone: 919.716.6879
Fax: 919.716.6755
Email: kshields@ncdoj.gov
114 W. Edenton St., Raleigh, NC 27603
P.O. Box 629, Raleigh, NC 27602-0629
ncdoj.gov

Please note messages to or from this address may be public records.

Hardin, Michael K.

From: Nichole McLaughlin <NMcLaughlin@ncbar.gov>
Sent: Friday, July 30, 2021 5:10 PM
To: Hardin, Michael K.
Subject: Re: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876

Michael,

You would be asking about another lawyer's conduct and we cannot give advice about another lawyer's conduct. Yesterday, I talked to my boss about your request for a formal opinion. He will discuss it again with the chair of the ethics committee. There has not been a decision that the Ethics Committee will issue a formal opinion. I will keep you updated.

Please let me know if I can assist you further.

Nichole P. McLaughlin
Assistant Ethics Counsel
District Bar Liaison
North Carolina State Bar
217 E. Edenton St.
Raleigh, NC 27601
919-719-9238 Direct Dial

COMMUNICATIONS WITH STATE BAR – EMAIL ONLY

Effective immediately and until further notice, please communicate with the State Bar through email only. Attempts to communicate with the State Bar via United States Mail, UPS, FedEx, telephone, or facsimile may result in substantial delay.

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From: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Sent: Friday, July 30, 2021 9:46 AM
To: Nichole McLaughlin <NMcLaughlin@ncbar.gov>
Subject: RE: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876

[EXTERNAL EMAIL] DO NOT CLICK links or attachments unless you recognize the sender and know the content is safe.

Am I able to ask for an informal opinion from the State Bar? I contacted the Attorney General and they refuse to file a Motion to Stay the litigation pending a Bar opinion. I understood that I may not be able to request an opinion because I am the client and not the attorney? Is my only option to file a Bar Complaint to get an answer? I am not sure what my options are at this point.

Thank you for your help.

Attachment 19

Hardin, Michael K.

From: Nichole McLaughlin <NMcLaughlin@ncbar.gov>
Sent: Tuesday, May 17, 2022 12:27 PM
To: Hardin, Michael K.
Subject: Re: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876

Mike,

I talked to ethics counsel Brian Oten and he confirmed my recollection that the Chair of the Ethics Committee decided we would not issue a formal ethics opinion.

Please let me know if I can assist you further.

Nichole P. McLaughlin
Assistant Ethics Counsel
Judicial District Bar Liaison
North Carolina State Bar
217 E. Edenton St.
Raleigh, NC 27601
919-719-9238 Direct Dial

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From: Nichole McLaughlin <NMcLaughlin@ncbar.gov>
Sent: Tuesday, July 13, 2021 9:34 AM
To: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Subject: Re: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876

Thank you. We will let you know if we need additional information. Right now we are still at the stage of deciding whether to issue a formal opinion. Thank you for your patience.

Please let me know if I can assist you further.

Nichole P. McLaughlin
Assistant Ethics Counsel
District Bar Liaison
North Carolina State Bar
217 E. Edenton St.
Raleigh, NC 27601
919-719-9238 Direct Dial

Hardin, Michael K.

From: Nichole McLaughlin <NMcLaughlin@ncbar.gov>
Sent: Tuesday, May 17, 2022 1:55 PM
To: Hardin, Michael K.
Subject: Re: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876

I'm sorry. I meant to include that. It is because the AG's Office is authorized by statute to represent the district attorneys.

Please let me know if I can assist you further.

Nichole P. McLaughlin
Assistant Ethics Counsel
Judicial District Bar Liaison
North Carolina State Bar
217 E. Edenton St.
Raleigh, NC 27601
919-719-9238 Direct Dial

Please be advised that the contents of this message and any reply may be subject to disclosure under North Carolina law. Informal ethics inquiries and advisories communicated via electronic mail are confidential pursuant to Rule 1.6 of the Rules of Professional Conduct. Attorney Client Assistance Program communications and Lawyer Assistance Program client communications via electronic mail are also treated as confidential pursuant to Rule 1.6 of the Rules of Professional Conduct and N.C. Gen. Stat. 84-32.1.

From: Hardin, Michael K. <Michael.K.Hardin@nccourts.org>
Sent: Tuesday, May 17, 2022 1:41 PM
To: Nichole McLaughlin <NMcLaughlin@ncbar.gov>
Subject: RE: Filings and information re: NCAPRI, et al. v. State Board of Elections, et al., Case No. 1:20-cv-876

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Did they give a reason?

Michael K. Hardin
District Attorney
Moore and Hoke Counties
29th Prosecutorial District
O 910-722-5010
F 910-722-5011

From: Nichole McLaughlin <NMcLaughlin@ncbar.gov>
Sent: Tuesday, May 17, 2022 12:27 PM