

Attorney General failed to call the court's attention to specific statutory provisions confirming the long-standing practice regarding the rights and responsibilities of the Attorney General and the General Assembly in the case of facial challenges to statutes such as this action, even after citing different parts of Chapter 114 and Chapter 147 to advance his incorrect interpretation and acknowledging in footnote 3 of his filing the very session law that incorporated these statutory changes. Accordingly, the legislative defendants feel obliged to ensure that these omissions by the Attorney General are brought to this Court's attention.

ARGUMENT

THE ATTORNEY GENERAL DOES NOT SPEAK EXCLUSIVELY FOR THE STATE OF NORTH CAROLINA IN THIS MATTER UNDER THE PLAIN LANGUAGE OF THE NORTH CAROLINA CONSTITUTION AND STATUTORY PROVISIONS THAT THE ATTORNEY GENERAL HAS FAILED TO DISCLOSE TO THE COURT.

The Attorney General's statement asserts, without supporting citation, that his "authority to represent the State has overlapping roots in the North Carolina Constitution, common law, and statutes." D.E. 162 at p. 6. A cursory review of North Carolina law demonstrates this statement is incorrect.

First, and most glaringly, while asserting that his authority has "roots" in the North Carolina Constitution, the Attorney General neglects to cite or even mention the supposed source of that authority in the State Constitution. This is not surprising because the North Carolina Constitution confers *no* authority on the Attorney General at all, much less the right to exclusively speak for the State as he asserts in this case. North Carolina's Constitution simply creates "an Attorney General" among numerous other state officers

and provides the manner of these officers' selection: through election. N.C. Const. art. III, § 7(1). Nothing in the Constitution defines, describes, or even mentions the "authority" of the Attorney General or any of the other state officers identified in that section. To the contrary, that very same section vests in the General Assembly the *sole* authority to determine the scope of those officers' responsibilities: "[t]heir respective duties shall be prescribed *by law*." N.C. Const. art. III, § 7(2) (emphasis added). Thus, far from providing the Attorney General "roots" of authority to speak for the State in this or any other case, the North Carolina Constitution firmly entrenches in the General Assembly the right to decide whether and to what extent the Attorney General may do so as part of his duties "prescribed by law."

Consistent with the State Constitution's committing to the General Assembly the exclusive right to determine the Attorney General's responsibilities, the Attorney General's duty to represent the State rests entirely on the North Carolina General Statutes, laws which can be modified at any time by the General Assembly. The General Assembly has, through statute, created the Department of Justice and designated the Attorney General as the head of that agency. N.C. Gen. Stat. § 114-1. It has also assigned him a litany of duties, which the legislature may add to, delete from, or modify at its choosing. N.C. Gen. Stat. § 114-2. These duties include representing state agencies as well as appearing "for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested." N.C. Gen. Stat. §§ 114-2(1), (2). The General Assembly recently clarified what is already inherent in the state constitution as well as past practices by prior Attorneys General, that in cases

challenging the validity of a North Carolina statute (such as in the instant case), the Attorney General must “abide by and defer to the final decision-making authority exercised by the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly.” N.C. Gen. Stat. § 114-2(10), as amended by 2017 N.C. Sess. Law 57, § 6.7.(m).

Additionally, to the extent that the Attorney General has any common law duty to represent the State, he only has such duty because it has been confirmed by statute. The General Assembly by statutory command has “reaffirm[ed]” that the Attorney General “continues to be vested with” common law power. N.C. Gen. Stat. § 114-1.1. However, the legislature has conditioned this grant on “not [being] repugnant or inconsistent with the Constitution *or laws* of North Carolina.” *Id.* (emphasis added). The General Assembly is historically vested by the people through their State Constitution with the right to modify the Attorney General’s common law power as it sees fit. It is the General Assembly—not the Attorney General—who establishes and vests the authorities and duties of the Office of Attorney General. Moreover, black letter law in North Carolina provides that, when the General Assembly legislates in a particular area of the common law, the statutes it enacts replace the common law. N.C. Gen. Stat. § 4-1 (common law is in force in this State provided that it is not “abrogated” or “repealed”); *State v. Green*, 124 N.C. App. 269, 477 S.E.2d 182 (1996), *cert. denied*, 345 N.C. 644, 483 S.E.2d 714 (1997).³

³ Nothing in *Martin v. Thornburg*, 320 N.C. 533, 359 S.E.2d 472 (1987), cited (but not explained) by the Attorney General, is to the contrary. *Martin* involved a dispute

Whatever authority the Attorney General may have in complying with his duty to represent the State in this or any other case, it is beyond dispute that the General Assembly may modify that duty by statute. Remarkably, however, in his statement to this Court, the Attorney General failed to disclose multiple statutes enacted by the General Assembly doing just that. North Carolina statutes authorize the North Carolina General Assembly to act on the State’s behalf and hire outside counsel where “the validity or constitutionality of an act of the General Assembly” is challenged in any state or federal court. N.C. Gen. Stat. § 120-32.6(b) (2017). The law exempts the General Assembly from provisions limiting the authority of other government entities to hire outside counsel. *Id.* § 120-32.6(a) (providing that N.C. Gen. Stat. §§ 114-2.3 and 147-17(a)–(c), regarding “Use of Private Counsel,” “shall not apply to the General Assembly”). When acting pursuant to this authority, the General Assembly is “deemed to be a client of the Attorney General for purposes of that action as a matter of law” and pursuant to express provisions in the North Carolina Constitution. N.C. Gen. Stat. § 120-32.6(b) (2017). Furthermore, the General Assembly’s leaders “may jointly designate” retained counsel as “lead counsel,” who “shall possess final decision-making authority” with respect to the representation; any other counsel for the General Assembly—including the Attorney

between the Governor and the Council of State regarding which office or set of offices was given authority under the North Carolina General Statutes to approve and negotiate a lease agreement. *Martin*, 320 N.C. at 535-39, 359 S.E.2d at 473-75. As to the Attorney General, the court simply held that the legislature’s statute assigning the duty to the Attorney General to represent the State in litigation did not violate the Governor’s authority under the Article III, § 1 of the North Carolina Constitution.

General—“shall, consistent with the Rules of Professional Conduct, cooperate with such designated lead counsel.” N.C. Gen. Stat. § 120-32.6(c) (2017).

North Carolina law also expressly recognizes that, in cases challenging the constitutionality of an act of the General Assembly, the “State” includes *both* the executive branch of state government and the legislative branch. N.C. Gen. Stat. § 1-72.2(a) (2017). The Attorney General’s duty under these laws is to ensure that the legislature’s proper role as part of the State of North Carolina in such cases is recognized and respected.

North Carolina law also expressly authorizes the General Assembly to act on behalf of the State in retaining private counsel to defend challenged laws and to designate that counsel as lead counsel with “final decision-making authority.” N.C. Gen. Stat. § 120-32.6(c). The General Assembly did so with respect to the proceedings in this case, as evidenced by numerous pleadings on the Court’s docket in which undersigned counsel were designated as co-counsel for all of the defendants, including the State, along with the Attorney General. Consistent with past practices, the prior Attorney General consented to the ultimate decision-making authority of the General Assembly and the joint representation of the State by the Attorney General’s office and private counsel retained by the General Assembly. Any action by the new Attorney General to the contrary violates state law and the Attorney General’s obligation to his client, the General Assembly.

CONCLUSION

For the foregoing reasons, in addressing the remedial issues that remain to be decided in this matter, the Court should respect and defer to the clear statutory authority allowing the General Assembly, through its leadership, to speak on behalf of the State in this matter and reject the Attorney General's incomplete and incorrect position on this issue.

This the 10th day of July, 2017.

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CERTIFICATE OF SERVICE

I, Phillip J. Strach, hereby certify that I have this day electronically filed the foregoing **LEGISLATIVE DEFENDANTS' RESPONSE TO POSITION STATEMENT BY THE NORTH CAROLINA ATTORNEY GENERAL ON THE ISSUE OF REPRESENTATION OF THE STATE** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 10th day of July 2017.

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