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

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, EMMANUEL BAPTIST CHURCH, NEW OXLEY HILL BAPTIST CHURCH, BETHEL A. BAPTIST CHURCH, COVENANT PRESBYTERIAN CHURCH, CLINTON TABERNACLE AME ZION CHURCH, BARBEE'S CHAPEL MISSIONARY BAPTIST CHURCH, INC., ROSANELL EATON, ARMENTA EATON, CAROLYN COLEMAN, BAHEEYAH MADANY, JOCELYN FERGUSON-KELLY, FAITH JACKSON, MARY PERRY, and MARIA TERESA UNGER PALMER Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina, KIM WESTBROOK STRACH, in her official capacity as Executive Director of the North Carolina State Board of Elections, JOSHUA B. HOWARD, in his official capacity as Chairman of the North Carolina State Board of Elections, RHONDA K. AMOROSO, in her official capacity as Secretary of the North Carolina State Board of Elections, JOSHUA D. MALCOLM, in his official capacity as a member of the North Carolina State Board of Elections, PAUL J. FOLEY, in his official capacity as a member of the North Carolina State Board of Elections and MAJA KRICKER, in her official capacity as a member of the North Carolina State Board of Elections, Defendants.	**PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS** **Case No.: 1:13-CV-658**

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, A. PHILIP RANDOLPH INSTITUTE, UNIFOUR ONESTOP COLLABORATIVE, COMMON CAUSE NORTH CAROLINA, GOLDIE WELLS, KAY BRANDON, OCTAVIA RAINEY, SARA STOHLER, and HUGH STOHLER,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, JOSHUA B. HOWARD in his official capacity as a member of the State Board of Elections, RHONDA K. AMOROSO in her official capacity as a member of the State Board of Elections, JOSHUA D. MALCOLM in his official capacity as a member of the State Board of Elections, PAUL J. FOLEY in his official capacity as a member of the State Board of Elections, MAJA KRICKER in her official capacity as a member of the State Board of Elections, and PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina,

Defendants.

Case No.: 1:13-CV-660

UNITED STATES OF AMERICA,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and KIM W. STRACH, in her official capacity as Executive Director of the North Carolina State Board of Elections,

Defendants.

Case No.: 1:13-CV-861

INTRODUCTION

Defendants have ignored this Court's admonition from the Initial Pretrial Conference that discovery should proceed expeditiously in this case. Accordingly, the Court must set a firm deadline for Defendants to meet their discovery obligations—with consequences for any failure to comply. From the first conference with the Court, Plaintiffs expressed their deep concern that Defendants would delay in complying with their discovery obligations. Unfortunately, Plaintiffs' concern has come true, even ***after*** this Court explained that Defendants must undertake an "expedited push of discovery early so that plaintiffs' have what they need for a preliminary injunction." Ex. G, Tr. of Rule 16 Conf. at 47:12-22. With elections coming closer each day—and preparations for those elections starting even sooner—Defendants' delay is further imperiling the rights of North Carolinians. This is truly a case of justice delayed will be justice denied.

When Plaintiffs filed their Motion to Compel, Defendants had produced a mere 153 documents—despite the fact that Plaintiffs' requests had been outstanding for nearly eight weeks. Since that time, Defendants have produced the SEIMS and SADLS databases (after weeks of delay) and approximately 2,000 hard copy documents. To date, ***Defendants have not produced a single electronic document***. Although Plaintiffs have engaged in a series of meet-and-confers in an attempt to resolve any obstacles to production, those efforts have been met at every turn with either an outright refusal to produce entire categories of documents or further excuses for why productions must be delayed. In light of Defendants' continued efforts to put off discovery and the swiftly approaching deadlines in this case, this Court must compel Defendants' to (1) complete

their document production by a date certain; (2) produce all relevant pre-enactment documents; and (3) produce all relevant post-enactment documents.

BACKGROUND

Defendants' recounting of the Background facts that led Plaintiffs to file this motion is belied by the correspondence evidencing the series of conferences between the parties preceding Plaintiffs' Motion to Compel.[1] *See* Defs. Opp. at 9-14. Plaintiffs several times met-and-conferred with Defendants in advance of filing this motion, including in telephone conferences on January 7 and January 23. In each instance Defendants' continued their pattern of delay. *See, e.g.*, Ex. J (01/26/2014 Email from B. O'Connor to A. Pocklington). For example, Plaintiffs specifically requested the January 23 conference to discuss "Defendants' written responses to Plaintiffs' Requests for Production." *See* Defs.' Opp. at Ex. 9 (01/16/2014 Email from W. Allen to A. Pocklington). Despite that specific request—and although Plaintiffs' requests had been served months before, Defendants had filed their written objections weeks previously, Defendants were overdue in producing documents, and many of Defendants' attorneys were on the call—Defendants inexplicably claimed that they were not prepared to discuss their written objections and would not be prepared to do so for another week. When pressed to explain why they would not discuss their objections, Defendants' counsel said

[1] Defendants' opposition also contains an extended discussion of the merits of Plaintiffs' claims. Defs.' Opp. at 6-9. Plaintiffs strongly disagree with Defendants' arguments, but because this is not the context in which to brief those disputes, Plaintiffs will limit this response to the discovery matters at issue and will reserve their response to Defendants ill-founded merits arguments for the appropriate time.

that there was little to discuss: they believed their objections were "very clear" and they explained that Defendants would not produce documents to which they had objected. *See, e.g.*, Ex. J (01/26/2014 Email from B. O'Connor to A. Pocklington).

In light of Defendants' continued pattern of delay, their failure to produce documents after Plaintiffs' requests had been outstanding for two months, and Defendants' statement that their objections were "very clear," Plaintiffs could not wait any longer for Defendants to start complying with their obligations under the Federal Rules and this Court's instructions. Plaintiffs thus filed this motion, while promising that they would continue to try in good faith to resolve the parties' disagreements through future meet-and-confers. *See* Pls.' Mot. to Compel. at 5. Plaintiffs have followed through on that promise by participating in additional meet-and-confers with Defendants on January 31, February 6, and February 18, during which the parties were able to resolve some of their disputes. Nonetheless, because Defendants have continued to refuse to produce documents in a timely fashion, this Court's intervention is still necessary.

ARGUMENT

Defendants state in their opposition brief that the parties have resolved all outstanding issues "with the exception of Defendants' objections to produc[ing] post-enactment documents." Defs.' Opp. at 14. That is not even close to reality. The only dispute the parties have resolved to date is Defendants' obligations to produce the SADLS and SEIMS Databases. Plaintiffs still request that this Court enter an order:

> (1) compelling Defendants to complete their document productions by a date certain;

(2) unequivocally requiring Defendants to produce all pre-enactment documents that are responsive to Plaintiffs' requests for production; and

(3) requiring Defendants to produce all post-enactment documents that are responsive to Plaintiffs' requests for production.

I. Defendants Should Be Compelled To Complete Document Productions By A Date Certain.

This Court should compel Defendants to complete their document productions by a date certain, so that plaintiffs will have an adequate opportunity to conduct meaningful depositions and other discovery activities in advance of the preliminary-injunction deadline of May 5, 2014. Plaintiffs served their requests for production almost twelve weeks ago, *see* Ex. A, McCrory RFPs; Ex. B, SBE RFPs, and since that time Defendants have produced no electronic documents at all and only a limited set of hard-copy documents. That delay in producing relevant documents is fundamentally inconsistent with this Court's prior admonition that "we're all under an expedited response [timeline] in the sense that there's not going to be routine extensions of discovery periods." Ex. G, Tr. of Rule 16 Conf. at 51:10-15.

To justify their delay, Defendants allege that "Plaintiffs are ***requiring*** Defendants to use over 380 advanced Boolean search terms to search the individual email boxes and electronic files of over 60 custodians," and that those searches have resulted in "million[s]" of responsive documents. Defs.' Opp. at 3 (emphasis added). Defendants' attempt to blame Plaintiffs for their own delays, however, is at best wrong and at worst disingenuous.

To begin, as evidenced by the list of search-terms responses Defendants provided

Plaintiffs for the first time on February 17, 2014, Defendants are running only around 45 different searches—not the "over 380 advanced Boolean" searches that they claim.[2] In any event, it was ***Defendants***, not Plaintiffs, who formulated the list of search terms in this case. Although Plaintiffs proposed edits to Defendants' list of search terms, Defendants "agreed to the majority of th[o]se proposed terms." *See* Ex. H (01/16/14 Email from A. Pocklington to Plaintiffs' Counsel). And to the extent the parties could not agree, Plaintiffs told Defendants to "proceed to search for documents using the current list of search terms, ***with Defendants' modifications***." Defs.' Opp. Ex. 9 (emphasis added). In other words, Defendants' current search terms were all either proposed or agreed to by Defendants themselves—Plaintiffs in no sense "requir[ed]" Defendants to use terms to which they were not agreeable.[3]

The parties' meet-and-confer activities have also revealed that Defendants are greatly overstating things when they claim that the "application" of search terms has "yielded approximately 10 million emails." Defs.' Opp. at 3. Defendants' have since explained that the use of search terms in fact yielded only around 770,000 documents—far fewer that the "million[s]" they claim in their brief. Moreover, to the extent

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[2] Inexplicably, Defendants have not even reviewed and produced the responsive documents from the searches that provided as few as nine results.

[3] Plaintiffs also did not "require[]" Defendants to search "over 60 custodians." Defs.' Opp. at 3. To the contrary, Defendants proposed the list of relevant custodians, and Plaintiffs consented to that list without modification because "only Defendants possess[ed] [the] information" necessary to determine who would be an appropriate custodian. Defs.' Opp. Ex. 9. Defendants themselves have thus selected the custodian list in this case.

Defendants' search terms are proving over-inclusive, Defendants should have immediately contacted Plaintiffs and sought to refine the list of search terms based upon the search results they were seeing. To date, Defendants still have not made such a request. In fact, despite the series of meet-and-confers between the parties during which the search terms and results have been discussed, Defendants' opposition brief was the first time that Plaintiffs were made aware that certain search terms were producing "an overwhelming number of 'hits,' most of which are likely not even responsive." Defs.' Opp. at 11. Had Plaintiffs been alerted to this issue earlier, they would have worked with Defendants to revise the search-term list accordingly to limit the number of unresponsive "hits." Such a refinement process is common in electronic discovery efforts of this kind, and is typically initiated by the party reviewing the documents, who is best positioned to identify problematic terms. To date, however, and despite having asked the question repeatedly, we have not heard that Defendants have ***even begun to review*** the potentially responsive documents, let alone to produce responsive documents from that set or to identify opportunities to refine search terms based upon that review.

Finally, Defendants fault Plaintiffs for not agreeing to their proposal to "conduct … discovery in stages." Defs.' Opp. at 4. But as Plaintiffs have previously explained to Defendants, "stage[d]" discovery is simply not possible in this case given Plaintiffs' intent to move for a preliminary injunction on all challenged aspects of H.B. 589. Moreover, Defendants have not explained how "prioritizing" discovery will make their discovery obligations more efficient—responsive documents will still need to be produced. That said, Plaintiffs ***have agreed*** to Defendants' prioritizing the review and

production of documents created after January 2013 and have repeatedly offered to "meet and confer with [Defendants] regarding potential arrangements that could narrow [the] requests or reduce burdens on the Defendants." Defs. Opp. Ex. 5 (12/23/13 Email from D. Donovan to T. Farr). To that end, Plaintiffs asked Defendants to "identify the specific requests that [they] would like to discuss and the reasons [Defendants] believe they are overbroad." *Id.* Although Plaintiffs made that offer two months ago, Defendants have ***never*** agreed to discuss specific requests with Plaintiffs or potential ways of narrowing those requests.

II. The Parties Have Resolved Their Dispute Over Databases.

Plaintiffs finally received the SIEMS database and the SADLS database from the Defendants on February 3 and February 5 2014. Defendants represented to Plaintiffs that there are no other databases responsive to Plaintiffs' requests for production beyond these two databases. Based on Defendants' production of these databases, and their representations about the databases, Plaintiffs withdraw their request to compel the production of databases responsive to Plaintiffs' discovery requests.

III. Defendants Must Be Compelled To Produce Pre-Enactment Documents.

Defendants' shifting-sands position with respect to producing pre-enactment documents only illustrates Defendants' continued efforts to delay and block discovery at every opportunity. In their written objections to Plaintiffs' requests, Defendants objected to producing any "pre-enactment information that exceeds a reasonable time frame." Ex. C, McCrory RFP Resp. at 5-8; Ex. D SBE RFP Resp. at 6-11 (same). When Plaintiffs sought clarification about Defendants' position during the January 23 meet-and-confer,

Defendants stated that their position was "very clear" that they would not produce documents to which they had objected. *See* Ex. K (01/24/2014 Email from B. O'Connor to P. Strach). After the January 23 conference, however, Defendants backtracked on that assertion, and claimed that they had not been prepared to discuss their specific objections—even though the meet-and-confer had been convened for that very purpose. Ex. J (01/26/2014 Email from B. O'Connor to A. Pocklington). During the parties' subsequent conferences, Defendants changed their position yet again, stating that although they did not intend to specifically withhold documents on the basis of their pre-enactment objections, they were reserving the right to impose certain (as-yet unidentified) date restrictions if they later determined those restrictions to be necessary. Now Defendants finally do away with that last limitation and provide a straight answer to a simple question: "they [will] produce relevant, non-privileged pre-enactment documents and communications notwithstanding their stated objections." Defs.' Opp. at 16.

That tortured history of negotiations shows two things. *First*, it completely undermines Defendants' claim that Plaintiffs failed to meet and confer regarding pre-enactment documents in accordance with Rule 37. Defs.' Opp. at 16. *Second*, Defendants never "made clear" that they would produce pre-enactment documents until well after Plaintiffs moved to compel and this Court's intervention became imminent. Defs.' Opp. at 16. Indeed, Defendants have persisted in reserving their ability to impose an arbitrary (and as-yet unidentified) date restriction on their efforts to respond to pre-enactment discovery. And since Defendants have not produced a single electronic document responsive to these requests—either pre-, post-, or during enactment—they

have preserved full optionality for themselves as to what date limits they may attempt to impose down the road. In light of Defendants' constantly changing position on this issue, this Court should order Defendants to state unequivocally that they will produce all relevant documents created before the enactment of Session Law 2013-581.

IV. Defendants Should Be Compelled To Produce Post-Enactment Documents.

The Court should order Defendants to produce all relevant post-enactment documents. Post-enactment documents are plainly relevant to Plaintiffs' claims under Section 2 of the Voting Rights Act and the U.S. Constitution. For that reason, courts hearing the same and similar claims have granted motions to compel the production of post-enactment materials. *See* Pls.' Mot. to Compel at 13-18; *see also* Ex. I, *Favors v. Cuomo*, slip op. at 9-15 (E.D.N.Y. Aug. 27, 2013); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 2013 WL 690496 at *2 (E.D. Wis. Feb. 25, 2013).

Defendants' primary response is that "Plaintiffs bring a facial challenge [to] the constitutionality of [H.B. 589]" and purportedly have not "pled an 'as applied' challenge to any of the provisions of [H.B. 589]." Defs.' Opp. at 17. Not true. The various complaints in this case unquestionably assert as-applied, as well as facial, challenges to Session Law 2013-581, and numerous cases have rejected similar attempts to preclude plaintiffs from asserting as-applied challenges, *see* Pls. Mot. to Compel at 17-18 (citing cases). Tellingly, Defendants do not respond to ***any*** of case cited in Plaintiffs' opening brief on this point—much less explain why this Court should go against the weight of the case law and limit Plaintiffs' to facial challenges at this early stage of the case.

Defendants do attempt to distinguish *Favors* and *Baldus*, both of which granted

motions to compel the production of post-enactment documents in voting cases. But the fact that those cases involved "redistricting" challenges, Defs.' Opp. at 20, is a distinction without a difference in this context. If anything, the fact that "the impact of a redistricting statute is known once the statute is enacted" made post-enactment evidence ***less*** (not more) relevant in *Favors* and *Baldus* than in this case, and thus those Courts' decisions to nonetheless grant motions to compel are particularly instructive here. Post-enactment materials will be necessary to resolve a number of issues relating to Plaintiffs' claims, including but not limited to:

- "the objectives and motives of the legislators" in enacting H.B. 589, *Baldus*, 2013 WL 690496 at *2;
- the "present reality" of the challenged electoral system, *Gingles*, 478 U.S. at 45;
- the manner in which the State will implement an anticipated "dry run" of the voter-identification requirements of Session Law 2013-581;
- the impact that the elimination of same-day registration and reduced early-voting periods will have on waiting times and election turnout;
- the impact that the elimination of out-of-precinct voting will have on the ability of minority voters to have their votes properly counted;
- the impact the increased numbers of poll watchers and observers will have on waiting times, election turnout, and permissible challenges; and
- the State's efforts to educate the electorate about the provisions of the law.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion to compel production of documents.

Dated: February 18, 2014

Respectfully submitted,

By: /s/ *Adam Stein*

Adam Stein (N.C. State Bar # 4145)
Of Counsel
TIN FULTON WALKER & OWEN, PLLC
312 West Franklin Street
Chapel Hill, NC 27516
Telephone: (919) 240-7089
E-mail: astein@tinfulton.com

/s/ *Daniel T. Donovan*

Thomas D. Yannucci
Daniel T. Donovan
Susan M. Davies
Bridget K. O'Connor
K. Winn Allen
Uzoma Nkwonta
Kimberly D. Rancour
Jodi Wu
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
Telephone: (202) 879-5000
E-mail: tyannucci@kirkland.com

Penda D. Hair
Edward A. Hailes, Jr.
Denise D. Lieberman
Donita Judge
Caitlin Swain
ADVANCEMENT PROJECT
Suite 850
1220 L Street, N.W.
Washington, DC 20005
Telephone: (202) 728-9557
E-mail:
phair@advancementproject.com

Irving Joyner (N.C. State Bar # 7830)
P.O. Box 374
Cary, NC 27512
Telephone: (919) 319-8353
E-mail: ijoyner@nccu.edu

Attorneys for Plaintiffs in North Carolina Conference of NAACP, et al. v. McCrory, et al.

By: */s/ Anita S. Earls*

Anita S. Earls (State Bar # 15597)
Allison J. Riggs (State Bar # 40028)
Clare R. Barnett (State Bar #42678)
Southern Coalition for Social Justice
1415 Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3380 ext. 115
Facsimile: 919-323-3942
E-mail: anita@southerncoalition.org

Laughlin McDonald*
ACLU Voting Rights Project
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303
(404) 500-1235
lmcdonald@aclu.org
* *appearing pursuant to Local Rule 83.1(d)*

Christopher Brook (State Bar #33838) ACLU of North Carolina Legal Foundation
P.O. Box 28004
Raleigh, NC 27611-8004
Telephone: 919-834-3466
Facsimile: 866-511-1344
E-mail: cbrook@acluofnc.org

Dale Ho*
Julie A. Ebenstein*
ACLU Voting Rights Project
125 Broad Street
New York, NY 10004
(212) 549-2693
dale.ho@aclu.org
**appearing pursuant to Local Rule 83.1(d)*

Attorneys for Plaintiffs in League of Women Voters of North Carolina, et al. v. North Carolina, et al.

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2014, I served Plaintiffs' Reply In Support of Motion to Compel Production of Documents with the Clerk of Court using the CM/ECF system in case numbers 1:13-cv-658, 1:13-cv-660, and 1:13-cv-861, which on the same date sent notification of the filing to the following:

Counsel for Plaintiffs

Adam Stein
TIN FULTON WALKER & OWEN, PLLC
312 West Franklin Street
Chapel Hill, NC 27516
Telephone: (919) 240-7089
Facsimile: (919) 240-7822
Email: astein@tinfulton.com

Penda D. Hair
Edward A. Hailes
Denise Lieberman
Donita Judge
Caitlin Swain
ADVANCEMENT PROJECT
Suite 850
1220 L Street, N.W.
Washington, DC 20005
Telephone: (202) 728-9557
Email: phair@advancementproject.com

Daniel T. Donovan
Thomas D. Yannucci
Susan M. Davies
Bridget K. O'Connor
K. Winn Allen
Uzoma Nkwonta
Kimberly D. Rancour
Jodi Wu
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
Telephone: (202) 879-5174
Facsimile: (202) 879-5200
E-mail: daniel.donovan@kirkland.com

Irving Joyner, Esq.
PO Box 374
Cary, NC 27512
Email: ijoyner@nccu.edu

Counsel for Plaintiffs in League of Women Voters of North Carolina, et al. v. North Carolina, et al.

Anita S. Earls (State Bar # 15597)
Allison J. Riggs (State Bar # 40028)
Clare R. Barnett (State Bar #42678)
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 Highway 54, Suite 101
Durham, NC 27707
Telephone: (919) 323-3380 ext. 115
Facsimile: (919) 323-3942
E-mail: anita@southerncoalition.org

Christopher Brook (State Bar #33838)
ACLU of NORTH CAROLINA LEGAL FOUNDATION
P.O. Box 28004
Raleigh, NC 27611-8004
Telephone: (919) 834-3466
Facsimile: (866) 511-1344
E-mail: cbrook@acluofnc.org

Dale Ho*
Julie A. Ebenstein*
ACLU VOTING RIGHTS PROJECT
125 Broad Street
New York, NY 10004
Telephone: (212) 549-2693
E-mail: dale.ho@aclu.org
**appearing pursuant to Local Rule 83.1(d)*

Laughlin McDonald*
ACLU VOTING RIGHTS PROJECT
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303
Telephone: (404) 500-1235
E-mail: lmcdonald@aclu.org
**appearing pursuant to Local Rule 83.1(d)*

Counsel for Plaintiffs in US v. North Carolina, et al.
T. Christian Herren, Jr.
John A. Russ IV
Catherine Meza
David G. Cooper
Spencer R. Fisher
Elizabeth Ryan
Attorneys, Voting Section
Civil Rights Division
U.S. DEPARTMENT OF JUSTICE
Room 7254-NWB
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (800) 253-3931
Facsimile: (202) 307-3961
E-mail: john.russ@usdoj.gov
E-mail: catherine.meza@usdoj.gov

Gill P. Beck (State Bar # 13175)
Special Assistant United States Attorney
OFFICE OF THE UNITED STATES ATTORNEY
United States Courthouse
100 Otis Street
Asheville, NC 28801
Telephone: (828) 259-0645
E-mail: gill.beck@usdoj.gov

Counsel for Defendant Patrick McCrory
Karl S. Bowers, Jr.
BOWERS LAW OFFICE LLC
P.O. Box 50549
Columbia, SC 29250
Telephone: (803) 260-4124
Facsimile: (803) 250-3985
E-mail: butch@butchbowers.com

Robert C. Stephens
General Counsel
OFFICE OF THE GOVERNOR OF NORTH CAROLINA
20301 Mail Service Center
Raleigh, North Carolina 27699
Telephone: (919) 814-2027
Facsimile: (919) 733-2120
E-mail: bob.stephens@nc.gov
Of Counsel

Counsel for Defendants State of North Carolina and Members of the State Board of Elections
Alexander Peters, Esq.
NC DEPARTMENT OF JUSTICE
PO Box 629
Raleigh, NC 27602
Telephone: (919) 716-6913
Facsimile: (919) 716-6763
E-mail: apeters@ncdoj.gov

Thomas A. Farr, Esq.
Phillip J. Strach, Esq.
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C
4208 Six Forks Road
Raleigh, NC 27609
Telephone: (919) 787-9700
Facsimile: (919)783-9412
E-mail: thomas.farr@ogletreedeakins.com
E-mail: phil.strach@ogletreedeakins.com

Respectfully Submitted,

/s/ Daniel T. Donovan
Daniel T. Donovan, Esq.
Kirkland & Ellis LLP
655 Fifteenth St., N.W.
Washington, DC 20005
Telephone: (202) 879-5174
Facsimile: (202) 879-5200
E-mail: daniel.donovan@kirkland.com

/s/ Adam Stein
Adam Stein (N.C. State Bar #4145)
TIN FULTON WALKER & OWEN
312 West Franklin Street
Chapel Hill, NC 27516
Telephone: (919) 240-7089
E-mail: astein@tinfulton.com

/s/ Anita S. Earls
Anita S. Earls (State Bar # 15597)
Allison J. Riggs (State Bar # 40028)
Clare R. Barnett (State Bar #42678)
Southern Coalition for Social Justice
1415 Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3380 ext. 115
Facsimile: 919-323-3942
E-mail: anita@southerncoalition.org