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IN THE SUPREME COURT OF THE UNITED STATES

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PHILIP E. BERGER, ET AL., )

Petitioners, )

v. ) No. 21-248

NORTH CAROLINA STATE CONFERENCE )

OF THE NAACP, ET AL., )

Respondents. )

- - - - -

Washington, D.C.

Monday, March 21, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:26 a.m.

1 APPEARANCES:  
2  
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4 behalf of the Petitioners.  
5 ELISABETH S. THEODORE, ESQUIRE, Washington, D.C.; on  
6 behalf of the NAACP Respondents.  
7 SARAH BOYCE, Deputy Solicitor General, Raleigh, North  
8 Carolina; on behalf of the State Respondents.  
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P R O C E E D I N G S

(11:26 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 21-248, Berger against North Carolina State Conference of the NAACP.

Mr. Thompson.

ORAL ARGUMENT OF DAVID H. THOMPSON

ON BEHALF OF THE PETITIONERS

MR. THOMPSON: Mr. Chief Justice, and may it please the Court:

North Carolina law designates the state as necessary parties -- the state -- the Petitioners as agents of the state and as necessary parties in all actions challenging state statutes. When such actions are filed in state court, the Petitioners are defendants and necessary parties. This lawsuit, however, was filed in federal court, and when the Petitioners sought to intervene, they were denied and a strong presumption was applied against their intervention.

This outcome should be reversed for two reasons.

First, under Trbovich, we are entitled to intervene. The State Respondents have

1 candidly and forthrightly acknowledged that they  
2 have a primary objective in receiving clear  
3 guidance on what law, if any, will need to be  
4 enforced, and because that administrative  
5 responsibility and interest may not always  
6 dictate precisely the same approach to  
7 litigation as our interest in defending the law  
8 every step of the way, we are entitled to  
9 intervene under *Trbovich*.

10           Second, this case presents  
11 foundational issues of federalism. This Court  
12 recently, in *Cameron*, held there are deep  
13 constitutional considerations implicated when a  
14 federal court is called to pass upon the  
15 constitutionality of a state law, and, thus, a  
16 federal court must account for a state  
17 designating multiple officials to defend its  
18 sovereign interests.

19           There is no basis in this case for a  
20 federal court to -- to second-guess a state's  
21 decision that it needs a representative  
22 exclusively focused on vindicating state law.

23           I welcome the Court's questions.

24           CHIEF JUSTICE ROBERTS: You say  
25 there's no basis in this case. Is there a

1 situation where you would think it was  
2 appropriate for the federal district court to  
3 deny intervention where the state law provided  
4 specifically that particular state officers be  
5 afforded that right?

6 MR. THOMPSON: Well, Your Honor, we'd  
7 have to go through the -- the multi-step factors  
8 of, number one, Donaldson. We'd need to make  
9 sure it's a significantly protectable interest  
10 that was identified.

11 Number two, we'd need to look at  
12 Hollingsworth to make sure there was a correct  
13 assignment of that agent and creation of that  
14 agency relationship.

15 And then, under Trbovich, there would  
16 need to be an assessment as to whether there was  
17 someone else already in the case that had that  
18 identical interest and didn't have another  
19 interest that was competing at, tugging at the  
20 interest that they were advocating.

21 CHIEF JUSTICE ROBERTS: Well, we often  
22 see in these cases a, as here, sort of political  
23 disagreement between the two purported  
24 representatives of the state. And is there a  
25 situation where that is the claim for -- the

1 necessity for intervention? Do you see a  
2 situation where that would be second-guessed by  
3 the federal court?

4 MR. THOMPSON: While -- while I can  
5 see, Your Honor, where that could be relevant,  
6 here, we don't need to point to Governor  
7 Cooper's involvement in the case to win the  
8 intervention motion, but we would point out that  
9 Governor Cooper has been an implacable foe of  
10 this law.

11 And that's not to criticize him.  
12 Reasonable people can disagree about contentious  
13 issues of public policy, but he has said, at JA  
14 844, to the Fourth Circuit Court of Appeals in  
15 this very case, "This unconstitutional law  
16 should never go into effect." And he has also  
17 claimed for himself the authority to fire each  
18 and every member of the Board of State  
19 Elections. So he would not be an adequate  
20 representative.

21 Now they say -- my -- my friends on  
22 the other side say, well, we have for-cause  
23 removal protection, we can't be fired by  
24 Governor Cooper. And we don't think they're  
25 right about that, but even if there were -- they



1 were, that would just mean that there are  
2 unaccountable, unelected officials in charge of  
3 this paramount interest.

4 JUSTICE SOTOMAYOR: Counsel, two  
5 things. One is what do you do with Wallace v.  
6 Bone, a North Carolina supreme court case that  
7 says the state legislature cannot represent the  
8 state? And I thought that that was the basis of  
9 the governor's claim that the law was  
10 unconstitutional -- that this representative law  
11 was unconstitutional.

12 And, two, I still don't understand  
13 what the conflict here is. The Attorney General  
14 has said -- and it's not the Governor -- that  
15 the Attorney General is representing the state  
16 board. Both the state board and the Governor  
17 and the Attorney General have taken the position  
18 that this law is, A, constitutional, the same  
19 position you're taking. So where is the  
20 conflict? Other than litigation strategy  
21 issues, where is the -- identify it for me.

22 MR. THOMPSON: Okay. I'll take those  
23 in order if I may.

24 First, with respect to Wallace versus  
25 Bone, that plays upon my friend's separation of

1 powers argument. There were only two judges on  
2 the Fourth Circuit Court of Appeals who  
3 addressed that, Judge Quattlebaum and Judge  
4 Richardson, and at Pet. App. 102, we can see  
5 them give it short shrift, and with good reason,  
6 because Wallace versus Bone was a case in which  
7 there was a clear executive power being -- tried  
8 to be kept by the legislature, issuing permits,  
9 denying permits. The other cases they cite to,  
10 the legislature is trying to spend -- excuse me  
11 -- money. And in Martin versus Thornburg, the  
12 North Carolina supreme court clearly said there  
13 is a distinction between defending a law and  
14 executing a law.

15 In addition, their separation of  
16 powers argument proves too much because, if it  
17 were right, then even if the Attorney General  
18 weren't defending the law, we still wouldn't be  
19 allowed in.

20 So that's what I would say about that.

21 JUSTICE SOTOMAYOR: That -- that's not  
22 -- no, that's not what their point is. I think,  
23 if the Attorney General wasn't defending the  
24 law, there'd be another case. That's what the  
25 court below said. It would be a different case

1 if the Attorney General refused to defend the  
2 law.

3 MR. THOMPSON: Well, but the logic,  
4 Your Honor, of their position is that this is an  
5 inherent executive power.

6 JUSTICE SOTOMAYOR: But the problem  
7 with your decision -- your position is that if  
8 North Carolina's law said every member of the  
9 legislature has a right and must be made a party  
10 to defend the state or to defend the interests  
11 of the state, then a federal court would be  
12 bound by 50, 100 legislators coming in and  
13 participating in the -- in the litigation.  
14 Isn't that your point?

15 MR. THOMPSON: No, Your Honor, that's  
16 not our point. Our point is that the first  
17 legislator to show up -- if North Carolina law  
18 said any of the 170 members of the General  
19 Assembly can come in and be an adequate  
20 representative and focus exclusively on  
21 defending state law, then the first person to  
22 show up would be -- in our view, would then --  
23 going back to the text of Rule 24, would be the  
24 adequate representative of that interest.

25 JUSTICE SOTOMAYOR: But tell me of

1 what interest. The interest is upholding the  
2 law.

3 MR. THOMPSON: Yeah.

4 JUSTICE SOTOMAYOR: And the finding  
5 here was that the Attorney General has the  
6 similar interest. It's taking the same  
7 position.

8 MR. THOMPSON: Well --

9 JUSTICE SOTOMAYOR: So why is the  
10 Attorney General inadequate to represent the  
11 same interest the legislators have in protecting  
12 the constitutionality of the law?

13 MR. THOMPSON: Well, Rule 24 focuses  
14 on parties, not on lawyers. So the Attorney  
15 General's role here is not critical. What's  
16 critical is that the parties are the members of  
17 the state Board of Elections, and they have  
18 announced, at Joint Appendix page 203, that they  
19 have a primary objective of receiving clear  
20 guidance on what law, if any, will need to be  
21 enforced.

22 And that's an administrative  
23 responsibility. And the Court asked me where is  
24 there the conflict, and we can see the conflict  
25 quite clearly at JA 366, Footnote 8.

1           There, in the run-up to the March 2020  
2 primary, there was a flagrant violation of the  
3 Purcell principle. The middle district of North  
4 Carolina, to hear their rendering, while voting  
5 was going on, changed the rules. And that's not  
6 right. There was a small window of time before  
7 voting started.

8           But the bottom line is there was a  
9 flagrant violation of the Purcell principle with  
10 the rules being changed, and they have admitted  
11 that they did not seek a stay because of their  
12 administrative responsibilities, their concern  
13 about administrative convenience and ensuring  
14 that the election went smoothly.

15           And so that's an instance in which  
16 these two interests --

17           JUSTICE SOTOMAYOR: Didn't the state  
18 -- in the state court litigation, the same thing  
19 happen, and you're present there and you didn't  
20 make a motion either, did you?

21           MR. THOMPSON: For two reasons, Your  
22 Honor, a factual reason and a legal reason.

23           Factually, we did not because the  
24 preliminary injunction had been issued by the  
25 federal district court on December 31, 2019.

1 The adverse state court ruling was a couple of  
2 months later in February of 2020.

3 And so, if we had run into state court  
4 and tried to seek a stay of -- of that second  
5 injunction, it would have been totally futile  
6 and -- and pyrrhic a victory because we were  
7 still enjoined by the middle district of North  
8 Carolina --

9 JUSTICE SOTOMAYOR: It was your --

10 JUSTICE KAGAN: Mr. --

11 JUSTICE SOTOMAYOR: -- it was your  
12 trial strategy.

13 MR. THOMPSON: No, it -- it would have  
14 been pyrrhic. There would have been no purpose  
15 to doing it because they had already decided to  
16 allow the preliminary injunction to stay in  
17 place. In addition, there's a legal difference  
18 too, which is there's a dispute as to whether  
19 the Purcell principle applies to state court  
20 judges and there's no dispute that it applies to  
21 federal court judges.

22 JUSTICE KAGAN: Mr. Thompson, could --  
23 could I take you back to something that you said  
24 to Justice Sotomayor? She said, well, what if  
25 state law gave every legislator a -- a right to

1       intervene or status as a necessary party, what  
2       have you? And you said, no, that would go too  
3       far. It just has to be one.

4                     Is that -- is that correct?

5                     MR. THOMPSON: Yes, Your Honor.

6                     JUSTICE KAGAN: And why is that? I  
7       mean, suppose there is some -- something in  
8       between. Suppose that there was a law passed in  
9       North Carolina that says, well, you know, the  
10      Senate might flip parties every day, so we need  
11      both the head of the Senate and the head of the  
12      House.

13                    And then suppose there's somebody  
14      writing the statute and says: Actually, we also  
15      need the relevant heads of the committees there,  
16      you know, we need the head of the relevant House  
17      committee and the head of the relevant Senate  
18      committee.

19                    I mean, you get the idea. It's like,  
20      why is it just one? Why -- if -- if -- if we're  
21      deferring to state understandings of their own  
22      interests and the state says, actually, we need  
23      five people here, you know, why would we not say  
24      on your theory, well, then we have to have five  
25      people here?

1 MR. THOMPSON: I think it's important  
2 to understand the role of state law and federal  
3 law in all of this. And, here, we're dealing  
4 with interests that are grounded in federal law.

5 They flow from constitutional  
6 considerations identified in Cameron and they  
7 are reflected in the Federal Rules of Civil  
8 Procedure. Federal Rule 5.1 reflects the  
9 paramount interest in defending a state law.  
10 Federal Rule of Civil Procedure 24(b)(2)  
11 reflects the interest in administering a law.

12 Those are the two interests we have  
13 here. They're not created by the state -- by  
14 state law. And so any hypothetical about, well,  
15 if the state tries to create other interests is  
16 not implicated by this case, because these are  
17 federal law interests in the same way in  
18 *Trbovich* it was a federal law interest, in  
19 *Kaufman*, it was a --

20 JUSTICE KAGAN: So the only rule  
21 you're advocating for is a rule that says one  
22 legislator has to be at the table in the suit?

23 MR. THOMPSON: One adequate  
24 representative. And if it's an interest that is  
25 -- is significantly protectable under *Donaldson*



1 and certainly an interest that's recognized in  
2 the Federal Rules of Civil Procedure we would --  
3 we would submit is -- is significantly  
4 protectable, then we should be entitled.

5 JUSTICE KAGAN: And is there --

6 JUSTICE BARRETT: And --

7 JUSTICE KAGAN: -- a difficulty --

8 JUSTICE BARRETT: No, go ahead.

9 JUSTICE KAGAN: Is there a difficulty  
10 for you? I mean, if you had come in the second  
11 time and said the same thing as the first time,  
12 basically say, you know, we -- we -- it -- it --  
13 it has to be that there's a legislator here in  
14 the suit to represent the specifically  
15 legislative interests in the defense of the law  
16 because these executive branch people, they have  
17 to worry about execution of the law. We just  
18 want a person who all they're worried about is  
19 the defense of the -- the law.

20 I mean, it would seem to me that the  
21 way you would do that is to say we have a  
22 special interest as a legislator, not as the  
23 state writ large, right?

24 But you're not making -- I mean, in  
25 your second motion, you didn't do that. You

1 didn't say we have a special interest as a  
2 legislator. You said our interest is the  
3 interest of the state writ large.

4 But how could that be? Doesn't --  
5 doesn't the executive branch represent the state  
6 writ large?

7 MR. THOMPSON: Not under North  
8 Carolina law, Your Honor. The way these  
9 statutes work, 120-32.6(b) says that we are  
10 deemed to be the state to the same extent as  
11 1-72.2, and that statute says that we are the  
12 legislature.

13 And so we've been designated quite  
14 clearly as agents of the state, and we've been  
15 designated as --

16 JUSTICE KAGAN: But not in replacement  
17 of the Attorney General. I mean, it would be  
18 different if you said, no, you know, we're --  
19 we're tired of the Attorney General, the  
20 legislators now represent the state. But you  
21 kept the Attorney General going.

22 And in your first intervention motion,  
23 you said basically we have a separate interest.  
24 It's the interest of the legislature. And, you  
25 know, that makes a fair amount of sense. It's

1 like, okay, well, that's a different interest.

2 But now you're not saying that.

3 You're -- you're claiming the same interest that  
4 the Attorney General has under North Carolina  
5 law.

6 MR. THOMPSON: Well, under -- well,  
7 no, it's not the same interest. They have an  
8 administrative interest that they've made clear  
9 at Joint Appendix 203 as their primary  
10 objective. We have a separate interest, and as  
11 I've explained, they tug at one another, and  
12 we've seen that in this very litigation.

13 In addition, Bethune-Hill came down  
14 between our first and our second motion to  
15 intervene, and that said that a state must be  
16 able to designate its own agents. And that's  
17 what 120-32.6(b) does.

18 JUSTICE BARRETT: Can I ask you about  
19 Justice Kagan's questions about how many  
20 legislators would have to be present? I just  
21 want to be sure I understand where in Rule 24  
22 you're grounding this language.

23 So I take your point that you have a  
24 different interest than the Board of Elections  
25 because they're interested in executing the

1 election. You're interested in defending the  
2 constitutionality of the law. There's a tug.

3           Would it be fair to say that your  
4 position is that when the interests are  
5 different, as they are here, maybe the Trbovich,  
6 you know, case casts some light on this  
7 question, that it would be rare to find that the  
8 existing party is an adequate representative  
9 because someone with different interests that  
10 are in tension can never adequately represent  
11 the intervenor's interests?

12           MR. THOMPSON: Well, the -- the test  
13 is, under Trbovich, are those interests such  
14 that they may not always dictate precisely the  
15 same approach to litigation. In other words,  
16 Trbovich teaches that it's a minimal burden.

17           And, here, we've amply satisfied that.

18           JUSTICE BARRETT: I -- I -- I  
19 understand that. But I guess what I'm saying  
20 is, if -- I -- I -- I'm -- I'm granting you, I'm  
21 saying assuming that you're right that these  
22 interests are not perfectly aligned between --

23           MR. THOMPSON: Yeah.

24           JUSTICE BARRETT: -- the Board of  
25 Elections and you, that it would be very rare to

1 find that your interests could be adequately  
2 represented? It's -- it's not even really much  
3 of a question because, when the interests are  
4 different, the question of adequate  
5 representation, it's -- it's just how could you  
6 represent that interest in the rule of 24(a) if  
7 the interest is a little bit different,  
8 potentially in tension with? Is that a fair  
9 statement?

10 MR. THOMPSON: Yes. Yes, Your Honor,  
11 that's exactly right. That's the teaching of  
12 Trbovich, because nobody was suggesting in  
13 Trbovich that the Secretary of Labor was not  
14 doing a good job or that he had -- that he --  
15 his interest wasn't at least partly aligned.

16 He was the Petitioners' interest --  
17 lawyer, and he had the exclusive responsibility,  
18 the Secretary of Labor did, for challenging the  
19 elections.

20 JUSTICE BARRETT: Okay. So then let  
21 me take you to Justice Kagan's question about  
22 the, you know, succession of legislators that  
23 might come in and try to intervene and maybe  
24 state law might even give them that right.

25 Then would your position be that,

1 well, all of those interests are the same, all  
2 of those interests are aligned, but, when you  
3 have would-be intervenors who have interests  
4 perfectly aligned, they all have the interests  
5 that you have here, say, in defending the  
6 constitutionality of the law, that then there is  
7 adequate representation?

8 MR. THOMPSON: If the -- well, if the  
9 interests are entirely aligned, we can't invoke  
10 *Trbovich* as a basis to intervene.

11 JUSTICE BARRETT: Right.

12 MR. THOMPSON: We could point to the  
13 fact that, in fact, the representation has not  
14 been adequate, and we can point to the fact that  
15 we do -- we have a different perspective. We're  
16 a separate co-equal branch of the government.

17 So, in one --

18 JUSTICE BARRETT: But, in Justice  
19 Kagan's hypothetical, it was all legislators,  
20 say, all from the same branch of the government.

21 MR. THOMPSON: Yes.

22 JUSTICE BARRETT: And I'm just trying  
23 to ground your answer to Justice Kagan when you  
24 said, well, number 1 can get in and numbers 2  
25 through 10 cannot.

1 MR. THOMPSON: Yes.

2 JUSTICE BARRETT: I'm asking you would  
3 that be because adequate representation would be  
4 satisfied, assuming that there weren't these  
5 other factors like they're doing a bad job or  
6 malfeasance or something?

7 MR. THOMPSON: Yes, Your Honor, that's  
8 right. So the first step under the analysis  
9 under Donaldson is to identify the interest.  
10 Then the second step is to identify whether the  
11 entity has been assigned as an agent of the  
12 state. And then the third step is if there are  
13 different interests but only if there are  
14 different interests do you get to the Trbovich  
15 type of analysis.

16 If the interests are identical, then  
17 there's adequacy of representation on that  
18 metric. There are different --

19 JUSTICE KAGAN: But are we to defer to  
20 the state's understanding of what the interest  
21 is? I mean, suppose the state says, you know,  
22 we think that the -- that members of the Senate  
23 have a different interest than members of the  
24 House because they might be led by different  
25 parties. Or suppose that they said, well,

1 members of a particular committee have a  
2 different interest than other members. I mean,  
3 there are a variety of things that states could  
4 do to define their own interests that are not  
5 just there's a legislative interest.

6 And would we defer to the states on  
7 that definition -- those more particular  
8 definitions of interests so that we could come  
9 up with five interests or 10 interests, all of  
10 which might be expressed by various kinds of  
11 legislators?

12 MR. THOMPSON: States can create  
13 interests. We can see that in the text of Rule  
14 24 because it talks about property, it talks  
15 about transactions, which would include  
16 contracts. Both of those are the traditional  
17 province of state law.

18 But anytime an interest is created or  
19 purported to be created, then a federal court  
20 has to assess whether, under Donaldson, it's  
21 significantly protectable. But none of that is  
22 relevant here because these are federal  
23 interests. These are interests that are created  
24 by federal law and that are recognized by --

25 JUSTICE KAVANAUGH: What about --



1 MR. THOMPSON: -- the state.

2 JUSTICE KAVANAUGH: -- what about the  
3 answer to her question, though, to Justice  
4 Kagan? You're not answering Justice Kagan's  
5 question, I don't think. What about the  
6 committees hypothetical?

7 MR. THOMPSON: Well, it would be up to  
8 the court -- a federal court to -- to decide  
9 whether, under Donaldson, that's a significantly  
10 protectable interest. And it would be a totally  
11 different case than this one because there's  
12 nothing in the Federal Rules of Civil Procedure  
13 that recognizes a state's interest in having a  
14 member of a committee. What we're just saying  
15 is that there are two interests that are --

16 JUSTICE KAVANAUGH: But do you defer  
17 to the state law -- to the state on that or  
18 defer some to the state, give some weight to the  
19 state on that? Or what -- what do you do?

20 MR. THOMPSON: Well, state -- states  
21 can create the interest, and when we're dealing  
22 with a paramount interest that's recognized in  
23 the Federal Rules of Civil Procedure, then that  
24 should be dispositive.

25 And what states think about it in this

1 case is not relevant because -- and the Court  
2 need not address that separate consideration  
3 because these are grounded in federal law and  
4 recognized by the Federal Rules of Civil  
5 Procedure. And Gasperini and Walker teach that,  
6 you know, the -- the federal courts should try  
7 to interpret the Federal Rules of Civil  
8 Procedure to be consistent with --

9 JUSTICE BREYER: The Rules of Federal  
10 Procedure -- note where it is. It's under (b),  
11 permissive intervention, not what we're talking  
12 about, which is intervention of right.

13 All right. Focusing on that for a  
14 second, what is it you want this Court to hold?  
15 We are talking about a particular phrase,  
16 "unless existing parties adequately represent  
17 that interest." And, as you know, most of the  
18 federal courts have interpreted that as starting  
19 with a presumption that if somebody's there with  
20 the same objective, it is adequate. Now that  
21 can be defeated.

22 Now that's what happened here, and  
23 that's -- you lost on that. Very well. You  
24 want us to say when we interpret -- Court, when  
25 you interpret those words, "unless existing

1 parties adequately represent," do you want us to  
2 say the presumption, weak though it is, of every  
3 circuit doesn't apply? Or do you want us to say  
4 it doesn't apply just to the states? Or do you  
5 want us to say no, you see, every private party  
6 often has problems and like to have a lot of  
7 people in the case too?

8                   And so how do we say just the states?  
9 Or do you want us to say the rules are the same,  
10 but they didn't apply that presumption thing  
11 correctly in this case because we have a bigger  
12 interest in intervening than they thought?

13                   Now I --

14                   MR. THOMPSON: The --

15                   JUSTICE BREYER: -- I mention all  
16 those difficulties because I have yet another  
17 one.

18                   MR. THOMPSON: Okay.

19                   JUSTICE BREYER: And the last one is,  
20 since what you talked about is in (b),  
21 permissive intervention, why isn't this a case  
22 for permissive intervention?

23                   MR. THOMPSON: Let me --

24                   JUSTICE BREYER: Suppose we copied  
25 your words, how important it is to get the

1 legislature in here, how desperately the state  
2 wants it. Just copy your words and say that  
3 isn't enough to change the interpretation of  
4 (a), intervention of right, but we think the  
5 Court could reconsider (b), permissive  
6 intervention, noticing what is there in (b)(2)  
7 and dah-dah-dah. We quote you again.

8           Now I've given you a whole lot of  
9 problems that I see in this case if we take your  
10 path. And I also have suggested another path,  
11 but it's only a suggestion, and I'm interested  
12 in your reaction.

13           MR. THOMPSON: Thank you, Your Honor.

14           So we -- the interest that we are  
15 trying to vindicate is not referenced in  
16 24(b)(2). The interest that we are trying to  
17 vindicate is the paramount interest identified  
18 in Cameron in vindicating state law, and that is  
19 recognized in 5.1 of the Federal Rules of Civil  
20 Procedure that says that notice has to be given  
21 to a state whenever -- so it's not -- this isn't  
22 an interest that's under permissive  
23 intervention.

24           The court also referenced the fact  
25 that we have the same ultimate objective, but

1 that can't be enough every time an intervenor  
2 comes in under Rule 24. You have to pick one  
3 side of the "v" or the other. And -- and  
4 there's nothing in the text to suggest that a  
5 presumption should apply in that instance. In  
6 *Trbovich*, the -- there was no presumption of --

7 JUSTICE BREYER: So your point is  
8 treat states differently --

9 MR. THOMPSON: Well, *Trbovich* --

10 JUSTICE BREYER: -- from private  
11 people where the same situation arises?

12 MR. THOMPSON: The -- the Court could  
13 say treat states differently, but, in *Trbovich*,  
14 it was a private party. There was no  
15 presumption that was applied. And it's simply  
16 not true that all the circuits apply a  
17 presumption. The Ohio Northeast Coalition --

18 JUSTICE BREYER: Okay. So is that  
19 your point, you want us to say there is no  
20 presumption?

21 MR. THOMPSON: The Court doesn't have  
22 to reach that. The Court --

23 JUSTICE BREYER: I know that, but I'm  
24 trying to get at what you think would be the  
25 best way because, unfortunately, unlike you, I

1 might have the job of approving or writing even  
2 the case. So I'm trying to make my job easier.  
3 So I want to know what you --

4 MR. THOMPSON: The rule -- the  
5 narrowest grounds to rule in our favor would be  
6 to say that this is a paramount interest of a  
7 state and it's entitled under basic principles  
8 of federalism to have that federal interest  
9 vindicated by a representative who is  
10 exclusively focused on that.

11 And they are not required, just  
12 because they've been sued under Ex Parte Young,  
13 to forgo having what they have in state court,  
14 which is a champion focused exclusively on  
15 winning the suit.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Breyer, anything further?

18 JUSTICE BREYER: You don't see much in  
19 the idea of permissive intervention?

20 MR. THOMPSON: No, Your Honor.

21 CHIEF JUSTICE ROBERTS: Justice Alito?

22 JUSTICE SOTOMAYOR: Am I assuming by  
23 your argument that the existence of the law --  
24 North Carolina law here is irrelevant? You're  
25 basically saying, whether there's a law or not,

1 we have to mandatorily let every legislative  
2 member come in.

3 I don't know what to do with that  
4 claim given how we have ruled in a variety of  
5 different cases that a legislature can't defend  
6 the constitutionality of a law because that's up  
7 to the attorney general of each state or the law  
8 who designates who's going to defend.

9 MR. THOMPSON: State law is not  
10 irrelevant, Your Honor, because it's a  
11 three-part test. One is to test under Donaldson  
12 whether there's a significantly protectable  
13 interest. Here, we have federal --

14 JUSTICE SOTOMAYOR: But that's every  
15 legislature, has a legally protective interest.  
16 So go -- go ahead.

17 MR. THOMPSON: Yes. Step two, this is  
18 where state law kicks in, is at step two --

19 JUSTICE SOTOMAYOR: Right.

20 MR. THOMPSON: -- which is on the  
21 assignment. The -- that is exclusively a  
22 function of state law as to whether the state  
23 has assigned responsibility to the putative  
24 intervenor to be an agent.

25 JUSTICE SOTOMAYOR: So what you're

1 basically saying, every state law that does  
2 that, everybody they designate, every cabinet  
3 member, et cetera, as a matter of law under  
4 24(a), they have to be permitted to come in, and  
5 you're saying no, no, no, no, it's only if  
6 they're adequate to protect that particular  
7 interest, correct?

8 MR. THOMPSON: I'm saying, under step  
9 three, the first one gets to come in --

10 JUSTICE SOTOMAYOR: All right.

11 MR. THOMPSON: -- not the second one.

12 JUSTICE SOTOMAYOR: Now what happens  
13 in a case like this when the two representatives  
14 have overlapping interests? Meaning the  
15 Attorney General is not saying they won't defend  
16 the constitutionality of this law. The state  
17 board hasn't said they won't. They have the  
18 same interest or an overlapping interest to  
19 yours. Where do we go with that?

20 MR. THOMPSON: That's Trbovich, Your  
21 Honor.

22 JUSTICE SOTOMAYOR: No, Trbovich was  
23 the -- saying that the union member and the  
24 department -- the union and the Department of  
25 Labor had conflicting interests.



1 MR. THOMPSON: It was --

2 JUSTICE SOTOMAYOR: They didn't have  
3 identical interests.

4 MR. THOMPSON: If we think about it as  
5 a Venn diagram, in Trbovich, the interests of  
6 the petitioner was a subset totally included  
7 within the interests of the Secretary of Labor.  
8 The Secretary of Labor had two interests.  
9 Number one, he was the petitioner's lawyer. So  
10 that was perfect identity of interest on that  
11 interest. But he had a second interest. He had  
12 an interest in the public interest. And it was  
13 the fact that he had those two, one that was  
14 identical, plus an extra one --

15 JUSTICE SOTOMAYOR: No, no, no, but  
16 the public interest could overcome the  
17 individual interest there.

18 MR. THOMPSON: Well, they said because  
19 he had both he wasn't an adequate  
20 representative. And that's our point here. And  
21 -- and -- and --

22 JUSTICE SOTOMAYOR: All right.

23 MR. THOMPSON: -- it's a little bit  
24 stronger here because, even as to the interest  
25 in defending the law, it's not perfectly the

1 same because there's a temporal difference.  
2 They're fighting for ultimate vindication.  
3 We're fighting for the law to be in place every  
4 step of the way, including in the March 2020  
5 primary.

6 JUSTICE SOTOMAYOR: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?

8 JUSTICE KAGAN: Mr. Thompson, I'd just  
9 like to clarify a few points, and this goes back  
10 to Justice Barrett's set of questions.

11 If I understood your responses to her,  
12 you agreed with her that basically your case  
13 here depends on -- on the argument that you've  
14 made that legislators do have different  
15 interests from the executive branch, that there  
16 is a kind of tug, in her words, between your  
17 purely legislative interest and their interest,  
18 which also has to take into account issues of  
19 execution. Is that correct?

20 MR. THOMPSON: We might be saying  
21 different things, so if I may clarify what --  
22 what -- what I'm saying is that there are two  
23 separate interests: defending a law, which  
24 could be done by a legislator or somebody else.  
25 North Carolina has said the General Assembly is

1 the champion of that interest, but there are two  
2 separate interests. One of them is defending  
3 the law. It's not inherently legislative. And  
4 the other is administering the law. Now that is  
5 executive in nature.

6 JUSTICE KAGAN: Yeah. But you're  
7 saying that the reason you should be able to  
8 intervene is because you have the defending the  
9 law interest pure, whereas they don't. They  
10 have --

11 MR. THOMPSON: Yes.

12 JUSTICE KAGAN: -- it in with a mix of  
13 other things.

14 MR. THOMPSON: Yes, Your Honor, that's  
15 correct.

16 JUSTICE KAGAN: Okay. And -- but  
17 you're saying that that legislative interest,  
18 defending the law pure, that we should only --  
19 we should defer to you for one legislative seat  
20 at the table, if you will, but no more, is that  
21 correct?

22 MR. THOMPSON: It's not a legislative  
23 interest. It's an interest in defending the  
24 law. But, yes, the first person --

25 JUSTICE KAGAN: Yeah, I -- I got it.

1 Sorry I'm not precise.

2 MR. THOMPSON: I -- I -- I just don't  
3 want to -- so -- but, yes, the point is that  
4 once there's an interest that's valid,  
5 significantly protectable, the state is entitled  
6 to a champion as to that interest.

7 JUSTICE KAGAN: A champion, one  
8 champion?

9 MR. THOMPSON: Yes.

10 JUSTICE KAGAN: And -- and you're  
11 saying that it really doesn't matter that the  
12 state law in question does not define the  
13 interest in that way? In other words, the state  
14 law in question simply makes the legislature --  
15 legislative members necessary parties but  
16 doesn't make this distinction about the  
17 particular interest in defending the law versus  
18 other state interests. It just says there's a  
19 -- legislators have to be necessary parties?

20 MR. THOMPSON: Well, I -- I think it  
21 does, actually, because the trigger, we only  
22 come into a case when there's a challenge to the  
23 constitutionality or the validity of the law.  
24 So that's what tethers our assignment as the  
25 agent to those -- to that interest, is the

1 trigger.

2 If there's a challenge to the  
3 administration of a law, we're not necessary  
4 parties then.

5 JUSTICE KAGAN: And when you say  
6 necessary parties, do you have to be in those  
7 cases, or does it -- does it require an  
8 intervention motion on your part?

9 MR. THOMPSON: Well, in state law, we  
10 are supposed to be named, but, if we're not,  
11 it's automatic intervention if -- when we move.

12 JUSTICE KAGAN: Thank you.

13 MR. THOMPSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Gorsuch?

16 Justice Barrett?

17 JUSTICE BARRETT: Just to pick up on  
18 the very end of your colloquy with Justice  
19 Kagan, was it wrong that you weren't joined  
20 under Rule 19 as a necessary party in this suit  
21 given what you're saying about this is  
22 practically impairing or impeding your interest?

23 MR. THOMPSON: That -- that would be  
24 our position, Your Honor, that we have an  
25 interest and it's being impaired and that we

1 should have been named.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 MR. THOMPSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Ms. Theodore.

6 ORAL ARGUMENT OF ELISABETH S. THEODORE

7 ON BEHALF OF THE NAACP RESPONDENTS

8 MS. THEODORE: Thank you, Mr. Chief  
9 Justice, and may it please the Court:

10 From Rule 24's inception through  
11 today, a single principle has guided  
12 interpretation of the adequacy prong. When a  
13 proposed intervenor's interest is identical to  
14 one that's already represented in the case, we  
15 presume that the existing representative is  
16 adequate, and that common-sense presumption  
17 holds particular force when the existing  
18 representative is a state official charged  
19 ethically and legally with defending state  
20 interests.

21 The presumption is further supported  
22 by the strong federal interest in requiring  
23 states to speak with a single voice at a time in  
24 federal litigation. From the vantage point of  
25 federal law, there's one state. The state as a

1 unified entity is what matters for federalism  
2 purposes, and it's the state that has the  
3 sovereign interest in defending state law.

4           Where one state representative decides  
5 to no longer represent that interest, like in  
6 the Cameron situation, then a properly appointed  
7 state representative can come in to vindicate  
8 the interest that's no longer being represented.

9           That's the same way federal law  
10 requires the United States to notify Congress to  
11 enable intervention when it stops defending a  
12 statute.

13           But where an authorized state  
14 representative is actively defending the law,  
15 Rule 24's goals of ensuring coherent  
16 presentation and simplified litigation should  
17 prevail.

18           And this case is the poster child for  
19 why federal law puts a thumb on the scale  
20 against intervention when a state agent is  
21 already there defending.

22           Unlike in Cameron, there's just no  
23 need for intervention here. Petitioners  
24 explicitly seek to assert the state's sovereign  
25 interest in enforceability and defense of state

1 law, the exact interest the Attorney General is  
2 charged by statute with representing and is  
3 telling this Court he is representing. And he's  
4 not only representing that interest, but  
5 unfortunately for my clients, he's winning.

6 And then, on the other side of the  
7 ledger, allowing the state to speak with  
8 multiple voices at once would complicate  
9 litigation and draw federal courts into state  
10 law disputes, such as the substantial ones here  
11 about what state statutes in the state  
12 constitution mean. So there's substantial cost  
13 without corresponding benefit to accepting what  
14 Petitioners propose.

15 I welcome the Court's questions.

16 CHIEF JUSTICE ROBERTS: Counsel, you  
17 said right at the outset that there's a federal  
18 interest that people on each side of the case  
19 speak with a single voice, right?

20 Where did -- where did that come from?  
21 I mean, just about every case we hear, we have  
22 two parties representing one side of the case,  
23 often with slightly different interests. In  
24 significant litigation in the federal courts,  
25 you have the same thing.



1           If the sovereign state that is a party  
2     in the case has a law that says these people  
3     have to represent us, I don't know of any  
4     federal interest that outweighs that.

5           MS. THEODORE: I think the federal  
6     interest is having the -- is in having the state  
7     tell a federal court what its position really  
8     is.

9           So Petitioners' whole argument here is  
10    that, you know, enforcing state law A, you know,  
11    enforcing the voter ID law or defending the  
12    voter ID law might conflict with an interest in  
13    election administration. We don't think that's  
14    a different interest.

15          But, if you think it is and if you  
16    think there are different state perspectives  
17    here, there's a really strong federal interest  
18    in not allowing the state to say, you know, we  
19    want our agents to duke it out in federal court.

20          So, you know, put differently, the  
21    possibility that different state agents  
22    defending state law might have different  
23    perspectives and balance state interests  
24    differently is a -- it's a vice, not a virtue of  
25    their proposal, because it requires federal

1 courts to referee instead of just telling the  
2 state, look, pick someone to tell us how the  
3 state law balance comes out. You can get rid of  
4 the Attorney General if you want to in all cases  
5 or all election cases or, you know, our case,  
6 but you should pick.

7 And that's not a problem in other  
8 cases where this Court has had, you know, two  
9 state representatives like Brnovich where, you  
10 know, they disagree about a question ultimately  
11 of whether the state statute violates federal  
12 law. You know, that's a question that's in the  
13 federal court's wheelhouse.

14 But, here, how to balance a state  
15 interest if it conflicts is something that the  
16 state should really just be coming into federal  
17 court and telling --

18 CHIEF JUSTICE ROBERTS: Why --

19 MS. THEODORE: -- the federal court  
20 what the position is.

21 CHIEF JUSTICE ROBERTS: That's a  
22 pretty unusual -- well, a pretty difficult  
23 eyebrow-raising thing for a federal court to do  
24 when you have a political controversy with two  
25 different entities, each one having a right to

1 intervene under state law as far as the state's  
2 concerned.

3 And you're saying the federal court --  
4 before you even get into this dispute, which,  
5 obviously, under those scenarios, is  
6 intentionally political, you pick -- I don't  
7 want to say you pick the winner, but you pick  
8 who is the real representative of the state.

9 I don't see federal courts doing that  
10 as a general matter or if they -- if we do ask  
11 them to do that, that's putting them in an  
12 intensely political position when they are used  
13 to in lots and lots of cases having people --  
14 more than one interest represented on -- on one  
15 side of the -- of the "v."

16 MS. THEODORE: Well, we're not telling  
17 the federal court to pick. We're saying when  
18 there is, you know, a duly authorized  
19 representative who's already there, who's  
20 already active -- actively defending the state,  
21 you know, we'll stick with that person unless  
22 there's a really good reason to think that  
23 they're not -- they're not doing the job.

24 And, again, the state can always kick  
25 them out. But this is consistent with federal

1 statutory law on intervention. So Section  
2 2403(b) says, you know, we'll allow intervention  
3 of the state if there's not already someone in  
4 there defending state law.

5 CHIEF JUSTICE ROBERTS: Well, but the  
6 federal side is very different. We have a  
7 unitary executive. The person -- the -- the --  
8 the -- one person should speak for the United  
9 States. States don't have to have that same  
10 perspective.

11 MS. THEODORE: Well, Section 2403(b)  
12 is specifically about intervention by states,  
13 and what it says is a state can intervene as of  
14 right if there's not already a state agency or  
15 state officer who's a defendant. So I think  
16 federal law really strongly supports our view  
17 that there should be a presumption of adequacy  
18 when you already have one state officer in there  
19 as a defendant defending state law.

20 And so -- so I don't think we're  
21 asking the federal court to pick. We're saying  
22 you stick with the one who's there, and, by the  
23 way, the -- the defendant who's there is going  
24 to be the one who's, you know, the only  
25 permissible defendant under federal law.

1 CHIEF JUSTICE ROBERTS: So, if the  
2 legislature had entered an appearance first,  
3 they would be the one there?

4 MS. THEODORE: Well, the legislature  
5 wasn't a defendant. I mean, we -- we sued the  
6 only defendants that we could sue under Ex Parte  
7 Young, which would not, of course, include the  
8 legislator -- legislatures.

9 So -- so I don't think -- as I say, I  
10 don't think the federal court is picking. And,  
11 again, the State of North Carolina can kick the  
12 Attorney General out at any time, anytime it  
13 wants, if it really thinks he's not adequate to  
14 defend the state's interests in -- in the voter  
15 ID law. And it hasn't done that here.

16 And, as I say, I think there's a  
17 really strong federal interest in just telling  
18 the state you choose who represents you, but we  
19 want to know what your position is in federal  
20 court.

21 JUSTICE BARRETT: But isn't their  
22 position that even if it wasn't the Attorney  
23 General defending the Board of Elections, that  
24 it would still -- they would still be entitled  
25 to intervention?

1                   Let's say that they hired private  
2                   counsel. I understand their position to be the  
3                   same, I think, that it doesn't depend on the  
4                   fact that the Attorney General is representing  
5                   them but the fact that the interests aren't  
6                   aligned.

7                   MS. THEODORE: I -- well, I think  
8                   North Carolina law clearly says that the  
9                   Attorney General is the authorized  
10                  representative of the state Board of Elections.  
11                  And North Carolina law says that the Attorney  
12                  General represents the state in any case in  
13                  which the state's a party or interested or its  
14                  agencies are a party. So --

15                 JUSTICE BARRETT: Didn't he get  
16                 dismissed from the suit?

17                 MS. THEODORE: The governor got  
18                 dismissed from the suit.

19                 JUSTICE BARRETT: Okay. Sorry.

20                 MS. THEODORE: Yeah. So --

21                 JUSTICE BARRETT: Okay.

22                 MS. THEODORE: -- so North Carolina  
23                 law clearly authorizes the Attorney General to  
24                 be here. That hasn't been repealed.

25                 JUSTICE BARRETT: Well, what if a

1 private firm was representing the state Board of  
2 Elections? They just decided no Attorney  
3 General. And so you said the state can kick the  
4 Attorney General out at any time. So let's say  
5 that's what happens.

6 What then? Does anything change?

7 MS. THEODORE: Well, I -- I think I  
8 would assume in your hypothetical that there's a  
9 state law that says the private lawyers  
10 represent the state board to defend the  
11 constitutionality of state law.

12 JUSTICE BARRETT: Yeah. Well, you  
13 said that they could kick the Attorney General  
14 out anytime. And I'm not saying, like, as a  
15 matter of general principle that the Attorney  
16 General is not the one who typically represent  
17 the state in court. But, obviously, there's  
18 been a lot of back and forth, and the  
19 legislature has passed laws related to this  
20 specific litigation.

21 So I'm just saying, would that matter  
22 at all? Let's say they say we think the  
23 Attorney General is doing a bad job, so we want  
24 private counsel.

25 MS. THEODORE: They could do that,

1 absolutely. North Carolina law could do that.  
2 And then, in that case, again, I don't think the  
3 legislature could come in and say we want a  
4 second counsel representing the state. They --  
5 they'd just pick one, the one that state law  
6 says represents the -- the state.

7 JUSTICE BARRETT: But it wouldn't  
8 change your view about whether the legislature  
9 could come into the suit, whether Berger could  
10 come in? It wouldn't change?

11 MS. THEODORE: It wouldn't. But, if  
12 state law says that, you know, the -- the state  
13 legislators decide who the counsel is for the  
14 state Board of Elections in any particular case,  
15 that would be fine from the perspective of  
16 federal law. They could -- they could certainly  
17 do that. And so, again, you know, the state is  
18 in -- is in total control here.

19 JUSTICE BREYER: But, before you do --  
20 what do you do about this Trbovich? I mean, on  
21 page 539, I take it what the Court said, this is  
22 a union member, he goes to the Secretary of  
23 Labor, says, hey, they had an unfair election in  
24 the Mine Workers. The Secretary brings the  
25 lawsuit, as he's supposed to. The union member



1 wants to intervene.

2           The interests of the union member and  
3 the Secretary, says the Court, are identical,  
4 but even if the Secretary is performing his  
5 duties as well as can be expected, the union  
6 member may have a valid complaint about the  
7 performance of his lawyer. Such a complaint  
8 filed by the member who initiated the entire  
9 enforcement proceeding should be regarded as  
10 sufficient to warrant relief in the form of  
11 intervention under 24(a)(2).

12           No mention of any presumption against  
13 intervening. Sounds like the easiest thing in  
14 the world to intervene. This man, the union  
15 member, just wanted to present some more  
16 evidence. That was it.

17           MS. THEODORE: Yes.

18           JUSTICE BREYER: So -- so is -- have  
19 all the lower courts just not followed that, or  
20 -- or what's -- what's the situation? And what  
21 do you think?

22           MS. THEODORE: Trbovich -- Trbovich is  
23 a totally different situation. It just holds  
24 that, you know, a government official can't  
25 adequately represent at the same time both the

1 public interest and a private union member's  
2 individual interest.

3 And it makes total sense that showing  
4 inadequacy is a minimal burden where you have,  
5 you know, a government defendant and then you  
6 have a private person who wants to come in. We  
7 completely agree with that.

8 But, here -- here, the issue is that  
9 you have a government defendant on one side  
10 representing the state's interests in defending  
11 state law, and Petitioners want to come in and  
12 say that they represent exactly that same  
13 interest.

14 And with respect to their claim that  
15 they aren't focused on election administration,  
16 that's really hard to square with their view and  
17 the way they've presented this case where, in  
18 their cert petition, they intentionally  
19 disclaimed any institutional interest.

20 JUSTICE BREYER: Well, that's the  
21 interest. But, I -- I mean, if a private person  
22 can very easily go in and help the federal  
23 government win a lawsuit, why couldn't the state  
24 say we want this person to come in? That would  
25 seem stronger, not weaker, because the private

1 person is one of 400,000 union members. But the  
2 state legislature in an election case has a  
3 pretty strong interest.

4 MS. THEODORE: Well, the state  
5 legislature -- the Petitioners here have said in  
6 their cert petition they don't represent the  
7 legislature, they only represent the state,  
8 which I think makes it really difficult for them  
9 to say they have a different perspective and  
10 they don't care about election administration  
11 when they have said we want to come in on behalf  
12 of the state as a whole.

13 JUSTICE KAGAN: So, Ms. Theodore, I  
14 take that point, and -- but, I mean, I guess I  
15 think that there's a kind of formalness about  
16 it. I mean, they are saying that they have a  
17 different interest because they have this  
18 interest, pure, in defending the law, unleavened  
19 by any other consideration.

20 Now I take -- I take your point that  
21 that's in some tension with their consistent  
22 representations that they want not to represent  
23 the legislature but, instead, to represent the  
24 whole state, which you might think is a kind of  
25 interest that's, even taking their own view, you

1 know, leavened by these executive interests as  
2 well. So they want to kind of have it both  
3 ways.

4 But why shouldn't we think that the  
5 more important of the two statements that  
6 they're making to us is that they have this pure  
7 interest in defending the law which nobody else  
8 in the courtroom has and that, you know, whether  
9 we call it representing the state or call it  
10 representing the legislature is less important  
11 than that sort of substantive difference in the  
12 interests that they have?

13 MS. THEODORE: Well, you have the  
14 Attorney General saying that his primary  
15 interest is also in defending the law. So you'd  
16 have to be deciding between two state actors who  
17 have a dispute about state law and what -- what  
18 each one is doing. And you'd have to be saying  
19 that the Attorney General is inadequate to  
20 defend state law, and I think that's something  
21 the Court should hesitate to do.

22 I think also the -- the -- the answer  
23 to the hypotheticals about, you know, the two  
24 legislators coming in are really devastating to  
25 their position. A state could easily just say,

1 you know, we think the head of the Budget  
2 Committee has a different perspective on  
3 defending state law than the head of the  
4 Election Committee and, you know, the -- the  
5 head of the budget -- the head of the Election  
6 Committee might not prioritize budget issues,  
7 and so, therefore, those -- those folks should  
8 come in too. And I think -- I think that, as --  
9 as the intuition of Mr. Thompson suggests, Rule  
10 24 would have a real problem with that.

11 And I do also want to identify some of  
12 the real specific practical problems with their  
13 -- with their position that you can have two  
14 officers representing the state. You know, how  
15 do you get a binding admission when two agents  
16 purport to represent the state? What if agent  
17 number one admits something and agent number two  
18 says, you know, we lack knowledge and so,  
19 therefore, it's denied? Is it admitted?

20 Or let's suppose you have a damages  
21 suit against the state as a named party like in  
22 a Title VII suit where they say a law violates  
23 -- a state law violates Title VII. You know,  
24 Congress has validly abrogated sovereign  
25 immunity. You know, let's suppose agent number

1 one wants to put on a different 30(b)(6)  
2 representative on behalf of the state than agent  
3 number two. Which one binds the state? Or  
4 let's say agent one says we want a jury trial  
5 and agent two says we don't. There are real  
6 significant problems with their position here.

7 JUSTICE ALITO: What happens if  
8 intervention is denied on the ground that the  
9 Attorney General will provide adequate  
10 representation and then the trial goes forward,  
11 the legislature has its attorneys sitting there  
12 in the courtroom, and they -- they say look what  
13 -- look what the Attorney General has done. The  
14 Attorney General has assigned one very junior  
15 attorney to try this case, and the Attorney  
16 General is declining to spend money on experts  
17 and engage in other activities which we think  
18 are essential to the defense of this statute.

19 Can they move for intervention at that  
20 time? Is it untimely?

21 MS. THEODORE: I -- I think that if --  
22 no, I don't think it would be untimely if they  
23 could say there are, you know, significant new  
24 developments that would allow us to overcome the  
25 presumption. It wouldn't be untimely. And I

1 think the district court made very clear in its  
2 ruling that if there were new developments that  
3 suggested that the Attorney General was somehow  
4 abdicating his responsibility to defend state  
5 law, they could try again.

6 JUSTICE ALITO: Well, not in  
7 abdicating the responsibility, but, you know,  
8 doing the -- the minimum required by the  
9 Attorney General's duty under the law, but not  
10 treating this as the most important thing that  
11 merits the expenditure of whatever is necessary  
12 to provide the maximum defense of the law.

13 The legislature can appropriate as  
14 much money as it wants to the defense of the law  
15 and make that their number one priority.

16 But what if at some point the Attorney  
17 General says, look, this is costing too much, we  
18 -- we should settle. Or suppose there's an  
19 adverse decision and the Attorney General says:  
20 We -- you know, we did our best, but we are not  
21 going to take an appeal.

22 Would intervention be allowed at that  
23 point?

24 MS. THEODORE: As for the appeal, you  
25 know, I think the Court's decision in Cameron

1 makes pretty clear that it would be an abuse of  
2 discretion not to allow an appeal.

3 JUSTICE ALITO: Well, what sense does  
4 it make to allow the appeal -- to allow  
5 intervention at the appellate level after the  
6 Attorney General has made what the legislature  
7 regards as an inadequate defense of the statute  
8 or an inadequate record? Doesn't that just make  
9 things more complicated?

10 MS. THEODORE: No, I don't think so.  
11 I think the purpose of the adequacy prong in  
12 Rule 24 is to simplify litigation. That's why  
13 courts have to decide adequacy.

14 But, again, the state here -- if -- if  
15 the state thinks that the Attorney General isn't  
16 doing a good enough job, it has a very simple  
17 way to deal with that. All it has to do is  
18 replace him. And nothing about our position  
19 prevents that. Our position simply prevents  
20 them from having two people at the same time.

21 JUSTICE ALITO: What's the mechanism  
22 for replacing him?

23 MS. THEODORE: The -- well, I mean, I  
24 -- I think Petitioners would probably say that  
25 state law already allows them to do it and they



1 just haven't done it.

2 But, you know, state law could simply  
3 say that if -- at -- at the discretion of the  
4 General Assembly's leaders, they can replace the  
5 Attorney General with private counsel on behalf  
6 of the board.

7 And, you know, there might be a state  
8 law problem with that, but there wouldn't be a  
9 federal law problem with that. And that's -- I  
10 think that's -- that's the answer to -- to any  
11 concern about --

12 JUSTICE ALITO: Do they have that  
13 power under state law now?

14 MS. THEODORE: I think there's a real  
15 dispute about whether they do, and they haven't  
16 invoked it in this Court, but --

17 JUSTICE KAGAN: But the position is  
18 that they have that power and they wouldn't even  
19 need the governor's signature on a new piece of  
20 legislation?

21 MS. THEODORE: I -- I think that might  
22 be their position. But, certainly, as far as  
23 federal law is concerned, a state could give  
24 them that power.

25 CHIEF JUSTICE ROBERTS: Thank you --

1 JUSTICE ALITO: I mean, there's an air  
2 of unreality about the arguments here. So you  
3 say that the Attorney General representing the  
4 Board of Elections is going to provide perfectly  
5 adequate representation. The legislature  
6 obviously doesn't think that.

7 They say, well, you're wrong. You  
8 know, you're wrong, the Attorney General is  
9 going to provide perfectly adequate  
10 representation in defending the law. They --  
11 they don't understand what's in their own best  
12 interests, right?

13 MS. THEODORE: Well, the Petitioners  
14 don't think that, but the state does think that.  
15 That's why the state has a law that designates  
16 the Attorney General as -- as their -- as the --  
17 the person who defends state law.

18 And I think it's important to  
19 distinguish between what Petitioners say and  
20 what the state says. And state law clearly  
21 authorizes the Attorney General to defend state  
22 interests --

23 CHIEF JUSTICE ROBERTS: Thank you.

24 JUSTICE SOTOMAYOR: Counsel --

25 MS. THEODORE: -- in state law

1 litigation.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Thank you, Ms. Theodore. I just have a couple  
4 really quick questions.

5 It -- it -- this may be along the same  
6 lines as Justice Alito's, but it does seem a  
7 little unfair to me that you're -- you're asking  
8 us to let -- to pick your opponents. I'd rather  
9 -- in -- in court, I'd rather have only one  
10 person arguing against me rather than two.

11 But I think that's a little bit of a  
12 -- a conflict there. I mean, what's -- what are  
13 you afraid of? I mean, you should -- you know,  
14 I'm sure you could handle two of them as -- as  
15 easily as -- as -- as one.

16 MS. THEODORE: Well, I'll say again  
17 that we haven't picked our opponents. We sued  
18 the people who federal law, Ex Parte Young, in  
19 Article III allowed us to sue. So we didn't  
20 make a decision there.

21 But, you know, I think what Rule 24 is  
22 about is simplifying litigation, and it -- it  
23 says we don't add another defendant, we don't  
24 add another plaintiff unless there's a really  
25 good reason, and, here, there isn't one.

1 CHIEF JUSTICE ROBERTS: Well, you keep  
2 saying we, we. I mean, the -- the point is that  
3 it -- it's -- it's a court interest and it --  
4 the question is whether the court should be --  
5 should be letting the state have the two  
6 representatives that under state law they say  
7 they should have.

8 And, I mean, I -- I don't -- I don't  
9 mean this the way it might sound, but I don't  
10 know why we're terribly interested in what your  
11 views are on that in the first place, because  
12 you're the one who's going to benefit if we  
13 throw one of your opponents out.

14 MS. THEODORE: Well, I think Rule 24  
15 is there to protect plaintiffs and defendants.  
16 It's there to simplify litigation. It's there  
17 to reduce cost and burden. And that's an  
18 interest that protects the litigants, including  
19 us.

20 I think, you know, we have an interest  
21 and, you know, I think the Court probably should  
22 have an interest in sort of not announcing rules  
23 that make it easier for governments to just say  
24 we're going to make it harder for people to  
25 challenge the government.

1                   So I think we do as plaintiffs have an  
2 interest.

3                   CHIEF JUSTICE ROBERTS: Thank you.

4                   Justice Breyer, anything?

5                   JUSTICE BREYER: Well, I'll go back to  
6 this once more because I did notice the  
7 footnote, which fortunately or unfortunately  
8 count, and the footnote says the requirement of  
9 the rule -- they're talking about the same  
10 phrase -- is satisfied if the applicant shows  
11 that representation of his interests "may be"  
12 inadequate, and the burden of making that  
13 showing should be treated as minimal.

14                   Now that says maybe there is a  
15 presumption. Moore says there's a presumption.  
16 Not Moore himself, but the treatise. And -- but  
17 minimal is the key word.

18                   So what -- what do you say? I mean, I  
19 think we have to follow that, don't we?

20                   MS. THEODORE: So all of the federal  
21 courts of appeals have understood that Trbovich  
22 rule to apply only in cases where there wasn't  
23 the same interest, where there was a different  
24 interest, like in Trbovich, where the Secretary  
25 of Labor was charged with both being a private

1 person's lawyer and --

2 JUSTICE BREYER: Okay, I got it.

3 MS. THEODORE: -- and representing the  
4 government.

5 JUSTICE BREYER: I see your point, I  
6 see your point.

7 MS. THEODORE: So that's how we  
8 understand it.

9 JUSTICE BREYER: Thank you.

10 MS. THEODORE: We -- we agree with  
11 Trbovich.

12 JUSTICE BREYER: Okay.

13 CHIEF JUSTICE ROBERTS: Justice Alito,  
14 anything further?

15 JUSTICE SOTOMAYOR: Trbovich was a  
16 situation in which the private individual  
17 doesn't have a right to pick his lawyer,  
18 correct?

19 MS. THEODORE: That's -- that's right.

20 JUSTICE SOTOMAYOR: And so what  
21 Trbovich was dealing with, which was an innate  
22 conflict, which is the union member who can't  
23 pick his lawyer, is saddled with a lawyer whose  
24 interests can be combined but has a separate  
25 primary interest of the public interest,

1 correct?

2 MS. THEODORE: Yeah. And I think the  
3 private --

4 JUSTICE SOTOMAYOR: All right. That's  
5 not the case here. The case here is there's  
6 overlapping interests, but the question the  
7 district court was looking at was whether the  
8 representation was adequate.

9 MS. THEODORE: Yeah.

10 JUSTICE SOTOMAYOR: The other side,  
11 Justice Alito asked a question of how does the  
12 legislature protect itself in the event that the  
13 Attorney General is not vigorously defending the  
14 law by giving it good counsel or expert  
15 witnesses.

16 Isn't that what the district court  
17 looked at, which was how vigorously was the  
18 state defending this law, and didn't it say that  
19 everything the legislature wanted to do the  
20 state had done but in a different way?

21 MS. THEODORE: Yes.

22 JUSTICE SOTOMAYOR: They proposed  
23 experts, but the legislature gave an expert that  
24 gave exactly the same information, correct?

25 MS. THEODORE: I think the -- yes, I

1 think the district court looked at all of these  
2 things, and its determination is entitled to  
3 deference.

4 JUSTICE SOTOMAYOR: And it said, if  
5 the state stopped doing it, they could come back  
6 and ask to intervene, correct?

7 MS. THEODORE: Absolutely right.

8 JUSTICE SOTOMAYOR: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Kagan,  
10 anything further?

11 Justice Gorsuch?

12 Justice Barrett?

13 Thank you, counsel.

14 MS. THEODORE: Thank you.

15 CHIEF JUSTICE ROBERTS: Ms. Boyce.

16 ORAL ARGUMENT OF SARAH BOYCE

17 ON BEHALF OF THE STATE RESPONDENTS

18 MS. BOYCE: Mr. Chief Justice, and may  
19 it please the Court:

20 Petitioners cannot plausibly argue  
21 that the state board and the Attorney General  
22 are not adequately defending the voter ID law.  
23 Petitioners have identified no daylight between  
24 their legal position and ours. Their evidence  
25 is duplicative of our evidence. And we have



1 prevailed in the litigation thus far and are  
2 confident that we will ultimately prevail  
3 through final judgment.

4           Nevertheless, Petitioners seek to  
5 intervene. As we have consistently said, we  
6 have no problem litigating alongside  
7 Petitioners. But Petitioners cannot satisfy the  
8 requirements of mandatory intervention.

9           They have asserted the same interests  
10 as the Attorney General, who remains in this  
11 case robustly defending the law. In that  
12 situation, a presumption of adequacy applies and  
13 Petitioners cannot overcome it.

14           Moreover, there is a fundamental  
15 principle of state constitutional law at stake.  
16 Petitioners read two state statutes to give them  
17 the right to represent the state's interests in  
18 enforcing the law. That construction would  
19 violate the North Carolina constitution.

20           Thus, whether or not the Petitioners  
21 are permitted to intervene in this case, we urge  
22 the Court not to adopt their erroneous reading  
23 of state law, which would violate our state's  
24 separation of powers.

25           I welcome the Court's questions.

1                   JUSTICE ALITO:  Doesn't the fact --  
2  doesn't that state law -- state constitutional  
3  law issue that you just raised show that your  
4  perspective on this is different from the  
5  legislature's?

6                   MS. BOYCE:  I don't believe so, Your  
7  Honor.  Our state constitutional law issue  
8  arises out of Wallace versus Bone, as Justice  
9  Sotomayor spoke of, and gets to the issue of  
10 whether or not the legislature -- the  
11 Petitioners can represent the state, not to  
12 whether they might have a distinct legislative  
13 interest as they've claimed here.

14                   And just as Justice Sotomayor said,  
15 Wallace v. Bone, much like the Buckley versus  
16 Valeo federal analogue, says that a legislature  
17 cannot represent a government's interest in  
18 enforcement of law or, to -- to -- to say the  
19 flip side of that, in defending the law.

20                   So, to the extent that Petitioners  
21 claim to represent our state and to have the  
22 authority to represent the state's interests in  
23 litigation, Wallace versus Bone says that is a  
24 crystal-clear violation of our state's  
25 constitution.

1 JUSTICE KAGAN: So, if the Petitioners  
2 were here saying we have a distinct interest in  
3 -- in defending the law pure, let's say, which  
4 is a little bit different from what you do in  
5 the executive branch, that's their -- their --  
6 their theory, and so we -- you know, we have a  
7 distinctively legislative interest and -- and --  
8 and we're asking for intervention, would you --  
9 would you be all right with that?

10 Like, as long as they said we're not  
11 representing the state's interests, we're  
12 representing a specifically legislative interest  
13 which is not represented by the Attorney  
14 General, would you be, like, come on in under  
15 intervention of right?

16 MS. BOYCE: I'm not -- I think it  
17 would depend on the particular case, Your Honor.  
18 We do not have an issue with them asserting a  
19 legislative interest insofar as the question is  
20 does that pose a constitutional problem. We  
21 agree that they are entitled to assert a  
22 legislative interest.

23 JUSTICE KAGAN: And would you also  
24 agree that under the intervention rule, that  
25 would be perfectly permissible? They're

1 representing a different interest. They're  
2 asserting a different interest. You can't  
3 adequately represent an interest that's not your  
4 own. So, as long as they were saying we're here  
5 as the legislature representing a distinctively  
6 legislative interest, all your objections would  
7 fall away, is that correct?

8 MS. BOYCE: I think that's partially  
9 correct. So, because defining an interest can  
10 be inherently malleable and, as we've seen from  
11 Petitioners' briefs, you can frame what I would  
12 say is the same interest in many different ways,  
13 the federal courts use different litmus tests to  
14 assert whether or not the interests sufficiently  
15 overlap that they're effectively the same.

16 And that's where these inquiries like  
17 do the parties have the same ultimate objective,  
18 are there any claims that the movant would wish  
19 to assert that the existing party has declined  
20 to assert, things like that are the -- the tests  
21 that the federal courts use to suss out whether  
22 or not the interests sufficiently overlap.

23 JUSTICE KAGAN: And what's the result  
24 under that test?

25 MS. BOYCE: I --

1                   JUSTICE KAGAN:  If -- if -- again, if  
2                   they were saying specifically legislative  
3                   interests, unadulterated, separate from any  
4                   executive interests that you -- you have?

5                   MS. BOYCE:  In this particular case,  
6                   I'm still not sure that they've shown enough to  
7                   prove that we haven't adequately represented  
8                   their interests because, as I said in my opening  
9                   remarks, they haven't actually identified any  
10                  daylight between their position and ours or any  
11                  claims that they wish to assert or any evidence  
12                  that they wish we were putting on that we  
13                  haven't put on.

14                  But we certainly concede that in  
15                  certain cases that might be different.  And  
16                  North Carolina does seem to grant them a  
17                  distinct legislative interest that would allow  
18                  them to move for Rule 24(a)(2) intervention in  
19                  other cases.

20                  JUSTICE SOTOMAYOR:  (a) or (b)?  
21                  Meaning I think of it as permissive  
22                  intervention.

23                  MS. BOYCE:  Your Honor, they're  
24                  certainly permitted to move for intervention --  
25                  for permissive intervention and, of course, have

1 done so in this case. And we would urge the  
2 Court, insofar as it's inclined to let the  
3 Petitioners intervene, to permit them to  
4 intervene through that route.

5 But the state's position is that North  
6 Carolina state law does recognize a legislative  
7 interest as well. And then the question is  
8 just, on a case-by-case basis, whether or not  
9 the Attorney General, who's already in the case,  
10 is, in fact, already adequately representing  
11 that legislative interest, as well as the  
12 broader state interest.

13 JUSTICE SOTOMAYOR: All right. In  
14 that regard --

15 JUSTICE BREYER: Now how --

16 JUSTICE SOTOMAYOR: -- may I ask,  
17 you've succeeded in the Fourth Circuit, haven't  
18 you, in a vacatur of the preliminary injunction?

19 MS. BOYCE: Yes, Your Honor.

20 JUSTICE SOTOMAYOR: On the ground that  
21 you were likely to succeed on the merits that  
22 S.B. 824 was constitutional?

23 MS. BOYCE: Yes, Your Honor. That's  
24 correct.

25 JUSTICE SOTOMAYOR: So it wasn't on an

1 equities argument with respect to administrative  
2 burdens?

3 MS. BOYCE: No, Your Honor.

4 JUSTICE SOTOMAYOR: You're defending  
5 on the merits?

6 MS. BOYCE: Absolutely.

7 JUSTICE SOTOMAYOR: What is the status  
8 of -- it's been placed on hold below waiting for  
9 this case?

10 MS. BOYCE: Yes, that's correct. It  
11 has been stayed. And I would note that, in  
12 fact, we moved, at the point that this Court  
13 granted cert, for permissive intervention on the  
14 legislators' behalf because we have an interest  
15 in actually seeing this case through to  
16 resolution and -- and having the chance to  
17 defend the law and vindicate our ability to  
18 enforce the law.

19 But the district court denied that  
20 motion as moot and stayed the case until this  
21 case is resolved by this Court.

22 But I say --

23 JUSTICE SOTOMAYOR: How about --

24 MS. BOYCE: -- that to --

25 JUSTICE SOTOMAYOR: -- how about the

1 issue of this -- your summary judgment motion on  
2 the merits? You made one on the merits as well,  
3 correct?

4 MS. BOYCE: Yes, Your Honor. That's  
5 correct. And that --

6 JUSTICE SOTOMAYOR: Has that ruled --  
7 been ruled on?

8 MS. BOYCE: No, it has not. It -- it  
9 remains pending.

10 JUSTICE SOTOMAYOR: Can this case  
11 become moot on the -- because of the state court  
12 action?

13 MS. BOYCE: It could, Your Honor, yes.  
14 Currently, the -- the law is enjoined by the  
15 state trial court via a permanent injunction,  
16 and we are currently appealing that decision  
17 alongside the legislators, and -- and that has  
18 gone straight up to our North Carolina Supreme  
19 Court.

20 JUSTICE SOTOMAYOR: If you --

21 MS. BOYCE: So if --

22 JUSTICE SOTOMAYOR: And that is  
23 scheduled for argument when?

24 MS. BOYCE: It's not yet scheduled for  
25 argument, Your Honor, but I assume it will be



1 argued at some point this year.

2 JUSTICE SOTOMAYOR: I read somewhere  
3 that it's likely this summer?

4 MS. BOYCE: I -- I believe that's  
5 correct, Your Honor, but I -- I -- I don't  
6 believe that there's a firm date quite yet.

7 JUSTICE SOTOMAYOR: So, if you lose  
8 there, then this case becomes moot, correct?

9 MS. BOYCE: That's correct, Your  
10 Honor. That's a point that we made in our brief  
11 in opposition. Because of the parallel nature  
12 of this litigation, it is possible that this  
13 case would become mooted.

14 And I would also note that the  
15 parallel litigation is -- is part of what drove  
16 our decision not to move to stay the preliminary  
17 injunction that Petitioners have raised so  
18 frequently.

19 The problem there, of course, was that  
20 the district court enjoined the law at the end  
21 of January 2019, and we had made clear that at  
22 the start of January 2020 we would need to move  
23 immediately to mail ballots for the primaries in  
24 2020. And we knew that there was this parallel  
25 state court litigation that might lead to an

1 injunction, once again causing us to change  
2 course.

3           And so we acknowledged and conceded  
4 candidly in our briefs that because of our  
5 obligations to enforce all of the state's  
6 elections laws, that we recognize they might put  
7 us in -- in an impossible situation were we to  
8 move to stay the federal court case and then  
9 immediately find that the state court had  
10 enjoined the law, which, of course, is precisely  
11 what did end up happening in February 2020.

12           So I -- I just wanted to clarify the  
13 record on that point regarding the motion to --

14           JUSTICE BREYER: Suppose -- suppose  
15 that I thought, hypothetically, one,  
16 intervention, which we're getting into under 24,  
17 is vast, as a subject. All right.

18           Two -- and I don't know that much  
19 about it. I don't want to deny that I know some  
20 things, but, I mean, maybe I've gone too far in  
21 this argument. But -- but, regardless, I'm not  
22 an expert, okay?

23           Two, suppose I think it's terribly  
24 important in an election case that the  
25 legislature have a right to -- to be there in

1 the court or be there in some form. They'll be  
2 -- amicus briefs, permissive intervention. But  
3 I'm worried about saying under general -- but  
4 then there's this other parallel thing, and the  
5 election's coming along. Okay?

6 So what do I do?

7 MS. BOYCE: Well, our position would  
8 be --

9 JUSTICE BREYER: Aside from saying,  
10 well, we win, but, I mean -- go ahead.

11 MS. BOYCE: Yes. I mean, our position  
12 is that, as they have brought this case to the  
13 Court asking only for mandatory intervention on  
14 behalf of the state, which we think gives rise  
15 to a significant constitutional problem, the  
16 only proper outcome for this Court is to deny  
17 mandatory intervention.

18 Again, we are not opposed to the  
19 idea --

20 JUSTICE BREYER: Second choice.

21 MS. BOYCE: -- that if they were to  
22 ask for permissive intervention, that that would  
23 be an acceptable choice. And I think, for many  
24 reasons, which I can list quickly, that would be  
25 preferable to intervention as of right.

1           The first would be that it avoids  
2 these complicated questions of state law about  
3 who gets to represent the state, whether, in  
4 fact, North Carolina has deemed the Attorney  
5 General inadequate, which we vigorously disagree  
6 with.

7           The second reason would be because  
8 Rule 24(a)(1) already recognizes an automatic  
9 right for parties who are granted a mandatory  
10 intervention under federal law. It has no  
11 parallel congruent provision for state law. And  
12 one would think that if Congress or the advisory  
13 committee had intended to grant states the  
14 ability to automatically admit intervenors, that  
15 they would have included it there.

16           And then, finally, when the rules were  
17 revised in 1944 to add the provisions in the --  
18 in 24(b), the permissive intervention section,  
19 that allow certain state officials a thumb on  
20 the scale for permissive intervention, the  
21 committee specifically considered moving state  
22 officials into 24(a)(2) and allowing them the  
23 right the intervene automatically and declined  
24 to do so.

25           For all -- so for all of those

1 reasons, if the Court is concerned about  
2 legislators' ability to protect their  
3 legislative interest, this distinct narrow  
4 legislative interest, the proper course would be  
5 to grant them permissive intervention, not  
6 mandatory intervention as of right.

7 I do quickly, in whatever time I have  
8 left, want to push back aggressively against the  
9 notion that North Carolina would be free to  
10 simply abolish the Attorney General. It may be  
11 true that that would be permissible under  
12 federal law. It would clearly not be  
13 permissible under North Carolina state law.

14 The Attorney General is a  
15 constitutional officer with -- who is identified  
16 as the chief legal officer of the State of North  
17 Carolina. And, of course, statutory law  
18 reinforces his obligations. But the State of  
19 North -- North Carolina could not simply  
20 delegate his responsibilities to someone else.

21 CHIEF JUSTICE ROBERTS: I'm sure your  
22 bosses will be happy to hear that that's what --  
23 that was your position.

24 MS. BOYCE: I believe I would have  
25 been remiss if I did not mention that.

1           I do want to briefly touch on Cameron  
2 as well since that was one of the many  
3 intervention cases that this Court has heard  
4 this term and note that Cameron is wholly  
5 consistent with our position.

6           In Cameron, what the Court was  
7 concerned about was whether a state might find  
8 itself without a fair defense and with no one  
9 there to defend its laws. We, of course,  
10 acknowledge the significance of that interest to  
11 the states,

12           But, here, we have an attorney general  
13 who has committed to robustly defending this law  
14 who has prevailed in overturning a preliminary  
15 injunction on appeal. So there is no situation  
16 where the state is going to be left without  
17 someone to defend it.

18           Cameron says, of course, that a state  
19 is free to designate its own agents, and we  
20 accept that proposition, but that does not mean,  
21 A, that a state can force federal courts to hear  
22 from numerous actors, all of whom purport to  
23 speak on behalf of the state, or that a state  
24 can designate agents in a way that flouts its  
25 state constitution.

1                   And we think that both of those  
2                   counsel against mandatory intervention here.

3                   CHIEF JUSTICE ROBERTS: Justice  
4                   Breyer, anything further?

5                   Justice Alito?

6                   Justice Sotomayor?

7                   Justice Kagan?

8                   Justice Gorsuch?

9                   Justice Barrett, no?

10                  Thank you, counsel.

11                  MS. BOYCE: Thank you.

12                  CHIEF JUSTICE ROBERTS: Rebuttal, Mr.  
13                  Thompson.

14                  REBUTTAL ARGUMENT OF DAVID H. THOMPSON  
15                  ON BEHALF OF THE PETITIONERS

16                  MR. THOMPSON: Yes, Mr. Chief Justice,  
17                  just a few quick points.

18                  They claim they're not trying to pick  
19                  their opponent, but they are because they filed  
20                  in federal court, not in state court. If they  
21                  had filed in state court, we would be there as  
22                  defendants, number one.

23                  Number two, they invoked the prospect  
24                  of intramural fights, but there are frequently  
25                  instances, it happens all the time in 1983

1 litigation, that a plaintiff will name a  
2 variety, a multiplicity of state defendants, and  
3 they haven't been able to point to a single  
4 example of when the multiplicity of state  
5 defendants in a 1983 suit somehow has created  
6 problems in terms of administration of justice.

7 And that's because of the presumption  
8 of good faith. And they acknowledge at page 55  
9 of their brief, candidly and forthrightly, that  
10 they have no doubt that if we come into this  
11 case we will work cooperatively with them, as we  
12 have done on many occasions before.

13 They invoke the role of the attorney  
14 general. But Rule 24 talks about parties, not  
15 lawyers. And the party here is the State Board  
16 of Election, which has the responsibility for  
17 administering the election.

18 They say that they prevailed in the  
19 Fourth Circuit. The March 2020 primary was held  
20 without this law in effect, and the reason it  
21 wasn't in effect is because they prioritized  
22 their administrative responsibilities over the  
23 merits and the Purcell violation.

24 And then, finally, there was a  
25 discussion about, well, maybe this case will be



1 rendered moot by the state court. There's been  
2 no -- the briefing hasn't been completed.  
3 There's no argument. We don't know how the  
4 North Carolina Supreme Court will rule.

5 And it could be capable of repetition  
6 yet evading review even if that proceeding  
7 ultimately one day did moot things out.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel. The case is submitted.

11 (Whereupon, at 12:37 p.m., the case  
12 was submitted.)

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