NO. 21-248

In the Supreme Court of the United States

PHILIP E. BERGER, ET AL.,

Petitioners,

v.

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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Four years ago, North Carolina Governor Roy Cooper and Attorney General Josh Stein successfully sought to ensure that this Court *would not* review the Fourth Circuit's decision invalidating the State's prior voter ID law. *See North Carolina v. N.C. State Conf. of NAACP*, 137 S. Ct. 1399 (2017) (statement of Roberts, C.J., respecting denial of certiorari). By opposing review here, Governor Cooper (who controls State Respondents) and Attorney General Stein (who represents them) are seeking to ensure they have the same authority should a cert petition ever need to be filed to defend the State's current voter ID law. Since the Governor's and Attorney General's 2017 gambit, however, North Carolina law has been amended to make clear that Petitioners, "as agents of the State," "shall be necessary parties" in constitutional challenges to state statutes. *See* Pet. App. 203–04 (N.C. GEN. STAT. § 120-32.6).

Yet, in contravention of the text of Rule 24 of the Federal Rules of Civil Procedure, this Court's decision in *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), and the State of North Carolina's sovereign determination that the Executive Branch alone *is not* an adequate representative of its interest in defending state statutes, the courts below applied a presumption that State Respondents adequately represented the State's interest and denied intervention.

In contrast to the lower courts' decisions, North Carolina's designation of Petitioners as necessary agents to represent its interests in court should be entitled to comity and respect from the federal courts.

State Respondents' arguments in opposition to certiorari are unavailing. While State Respondents try to minimize the division of authority in the lower courts, it cannot be denied that there is a three-way split on the nature of any presumption of adequate representation that should apply and a 7–5 split on the standard of review. And while State Respondents try to downplay the importance of the interests at stake, the State of North Carolina's sovereign designation of Petitioners as necessary agents in defense of the State's laws hangs in the balance—in this case, and potentially in all future cases involving challenges to State statutes in which Petitioners seek to intervene. Finally, the purported vehicle issues State Respondents raise are insubstantial. This Court should grant review to resolve the conflicts in the lower courts on these important issues.

I. This Court Should Grant Review to Determine Whether a State-Designated Agent Must Overcome a Presumption of Adequate Representation When Seeking to Intervene Alongside Another State Official and Whether Petitioners Are Entitled to Intervene as of Right in This Case.

A. The Circuits Are Split Over Whether a Presumption of Adequate Representation Applies.

State Respondents deny that the circuits are split on the question of a presumption of adequate representation, arguing that "the courts of appeals *all* apply a presumption of adequate representation when, as here, an existing party and a proposed

intervenor share the same ultimate objective." Br. in Opp'n by State Respondents at 1 (Oct. 13, 2021) ("Opp'n"). State Respondents, however, examine this question at too high a level of generality. The circuits have split specifically on whether a presumption of adequate representation applies when *a state-designated agent* seeks to intervene alongside *another state official* that is already a party to the case. *See* Pet. 21–24. In *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999 (6th Cir. 2006), the Sixth Circuit rejected applying any such presumption when the Ohio Attorney General moved to intervene on behalf of the State of Ohio and the General Assembly in a case where the Ohio Secretary of State was already a party and defending the challenged law. By contrast, the Fourth Circuit adopted a robust presumption of adequate representation in this case, Pet. App. 35–38, and in *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019), the Seventh Circuit applied an even stricter presumption of adequate representation when Wisconsin's legislature moved to intervene alongside that State's Attorney General.

All of the cases on which State Respondents rely to contest this split are distinguishable because the proposed intervenors were not state-designated agents or the existing parties were not state officials.[1]

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[1] *T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33 (1st Cir. 2020) (local residents); *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171 (2d Cir. 2001) (law firm); *In re Cmty. Bank of N. Va.*, 418 F.3d 277 (3d Cir. 2005) (class objectors); *Commonwealth of Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214 (4th Cir. 1976) (Virginia sought to intervene in suit involving two private electric companies); *Bush v. Viterna*, 740 F.2d 350 (5th Cir. 1984) (501(c)(4) organization); *United States v.*

Consequently, State Respondents fail to demonstrate that the circuits uniformly apply a presumption of adequate representation when a state-designated agent seeks to intervene alongside another state official.

B. *Northeast Ohio Coalition* Did Not Apply a Presumption of Adequate Representation.

State Respondents charge that Petitioners are "mistaken" that the Sixth Circuit does not apply a presumption of adequate representation where a proposed intervenor is a state-designated agent and a state official is an existing party to the case. Opp'n 15. State Respondents misinterpret *Northeast Ohio Coalition* and once again construe the relevant question at too high a level of generality.

First, State Respondents are incorrect that in *Northeast Ohio Coalition*, the Sixth Circuit "simply engaged in a factbound, case-specific application of" the presumption of adequate representation. Opp'n

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Michigan, 424 F.3d 438 (6th Cir. 2005) (environmental groups and concerned citizens); *FTC v. Johnson*, 800 F.3d 448 (8th Cir. 2015) (two consumers); *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003) (group of native Hawaiians); *Tri-State Generation & Transmission Ass'n, Inc. v. N.M. Pub. Regul. Comm'n*, 787 F.3d 1068 (10th Cir. 2015) (electric distribution cooperative); *Clark v. Putnam County*, 168 F.3d 458 (11th Cir. 1999) (voters and civil rights organization); *Env't Def. Fund, Inc. v. Higginson*, 631 F.2d 738 (D.C. Cir. 1979) (local water districts that no party argued were state-designated agents); *Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fishermen's Ass'ns*, 695 F.3d 1310 (Fed. Cir. 2012) (association of fisherman and environmental organization). The one exception, of course, is *Kaul*, but Petitioners agree that *Kaul* applied a strict presumption of adequate representation in an analogous situation to this case.

16. Instead, the court referred to the presumption only as an argument that the parties opposing intervention made and rejected that argument. The Sixth Circuit thus did not apply any presumption at all to the state-designated agent.

Second, State Respondents' contention that the Sixth Circuit has continued to apply the presumption in other cases not involving state-designated agents as proposed intervenors in cases where other state officials are existing defendants is irrelevant. Opp'n 15–17. Whether the Sixth Circuit applies a presumption of adequate representation where a private party attempts to intervene has no bearing upon whether the court applies such a presumption where a state-designated agent seeks to intervene in a case where another state entity is already a defendant.

C. The Fourth Circuit's Decision Was Incorrect.

State Respondents further maintain that this Court's review is not warranted "because the Fourth Circuit's decision was correct." Opp'n 18–21. State Respondents are wrong.

First, a presumption of adequate representation is inconsistent with Rule 24, this Court's decision in *Trbovich*, and proper respect for a State's sovereign authority. *See* Pet. 24–27. Rule 24, by mandating that an interested party "must [be] permit[ted]" to intervene "*unless*" its interests are adequately represented, suggests that courts should exclude proposed intervenors on adequacy of representation grounds only where it is clear that intervention is unnecessary to protect the proposed intervenor's

interests. Additionally, in *Trbovich*, this Court explained that to intervene as of right, a proposed intervenor need only satisfy a "minimal" burden that representation by the existing parties "may be inadequate," *Trbovich*, 404 U.S. at 538 n.10 (cleaned up), which is incompatible with the Fourth Circuit's presumption.[2] And the Fourth Circuit's decision is insufficiently respectful of a State's sovereign determination regarding which agents are necessary to defend its interests in court.

Second, State Respondents' and Petitioners' interests do not align. State Respondents do not (because they cannot) deny that their defense of this litigation has been influenced by their responsibility to administer state election law. Indeed, they have expressly stated in parallel litigation that they have a "*primary* objective . . . to expediently obtain clear guidance on what law, if any, will need to be enforced." Pet. 32. That is a distinct interest not shared by Petitioners, whose objective is to defend North Carolina law.

D. Petitioners Are Entitled to Intervene in This Case.

In a footnote, State Respondents argue that this Court deciding, under the proper standards, whether Petitioners are entitled to intervene as of right in this case would be a "factbound question . . . not . . . worthy of this Court's review." Opp'n 25 n.5. But the factors

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[2] While the Fourth Circuit reasoned that the district court would not have abused its discretion even under a normal presumption of adequacy, Pet. App. 40, *any* presumption of adequacy in this situation is inconsistent with *Trbovich* and conflicts with the Sixth Circuit's approach.

that a court must examine to determine whether a proposed intervenor is entitled to intervene as of right require legal determinations, not discretionary judgments. *See* 7C WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1902 (3d ed. 2021 update). Indeed, the proper inquiry for the adequacy of representation factor is whether Petitioners have shown that "representation of [their] interest *may be* inadequate," *Trbovich*, 404 U.S. at 538 n.10 (emphasis added), a standard that is met as a matter of law in this case. At any rate, at a minimum the Court should resolve the split over *whether Trbovich* applies in cases like this one. *See, e.g.*, Pet. App. 32–34 (refusing to apply *Trbovich*); *Ne. Ohio Coal.*, 467 F.3d at 1007–08 (applying *Trbovich*).

II. The Court Should Grant Review to Determine What Standard of Review Applies to a Decision on a Motion to Intervene As of Right.

A. Petitioners Have Not Forfeited This Question.

State Respondents next contend that Petitioners have forfeited the question whether "the Fourth Circuit erroneously reviewed the denial of their intervention motion for abuse of discretion" because they allegedly "neither presented nor preserved" it below. Opp'n 21. This Court has explained, however, that "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (brackets omitted). Petitioners have consistently claimed throughout this

case that the district court erred in denying intervention. In support of that claim, Petitioners argue here that the Fourth Circuit should have reviewed the district court's determination of adequate representation de novo instead of for abuse of discretion. Pet. 29–30. This contention is "not a new claim within the meaning of th[e] rule" set forth in *Lebron*, "but a new argument to support what has been [Petitioners'] consistent claim." *Lebron*, 513 U.S. at 379. Accordingly, Petitioners have not forfeited their second question presented.

B. The Circuits Are Split on What Standard of Review Applies.

On the merits, State Respondents assert that there is no circuit split because all the circuits would review de novo the question of whether to apply a presumption of adequate representation, that the Fourth Circuit did so here, and that abuse of discretion "is the better approach for reviewing intervention decisions by trial courts." Opp'n 2, 24. This Court should reject these arguments.

First, State Respondents misconstrue Petitioners' second question presented. Petitioners ask this Court to decide "[w]hether a district court's *determination of adequate representation* in ruling on a motion to intervene as of right is reviewed de novo or for abuse of discretion." Pet. i (emphasis added). Petitioners argue that *this* question should have been reviewed de novo, not for abuse of discretion as the Fourth Circuit did. In reviewing the district court's decision, the Fourth Circuit explicitly specified that "[i]t is not for us to decide whether, in our best view, [Petitioners] have demonstrated that the State Board and Attorney

General are inadequate representatives of the State's interest" because "[t]hat inquiry is firmly committed to the discretion of the district court." Pet. App. 40.

Second, the courts of appeals are split on this issue. *Compare, e.g.*, Pet. App. 40 (explaining that whether existing party is inadequate representative of proposed intervenor's interests is an inquiry "firmly committed to the discretion of the district court"), *with Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 569 (5th Cir. 2016) (applying de novo review to whether proposed intervenor "has met its minimal burden to demonstrate inadequate representation").

Third, de novo review is the better approach. Intervention *as of right* is not subject to a district court's discretion, and the factors that a court must examine to determine whether a proposed intervenor is entitled to intervene as of right require legal determinations, thus necessitating de novo review.

III. No Vehicle Issues Prevent This Court From Granting Review.

First, State Respondents assert that this appeal could become moot before this Court could decide it should the underlying federal case or the North Carolina state court case examining the same voter ID law finish all appeals. Opp'n 25–27. But even if that possibility were more than remote, this case is not currently moot and is highly unlikely to become moot before June 2022. In the state court case, *Holmes v. Moore*, a three-judge trial court issued a divided opinion permanently enjoining S.B. 824 on September 17, 2021. Both Petitioners and State Respondents have appealed that decision, but no briefing schedule

has been set and it is likely that whoever loses in the Court of Appeals will seek review in the North Carolina Supreme Court. In this case, State Respondents have filed a motion for summary judgment, but even if the district court promptly grants that motion, it will undoubtedly be appealed, delaying the January 2022 trial start date and any appellate proceedings resulting from that trial. And should the court deny the motion and issue a final judgment in State Respondents' favor after trial but before this Court rules, as State Respondents suggest could happen, Opp'n 26, again, that judgment will undoubtedly be appealed and Petitioners could participate in the appeal if the denial of intervention is reversed. In sum, there is a high likelihood that this Court could grant certiorari in this case and issue a decision this Term before either the state court proceedings or underlying federal proceedings exhaust all appellate review.

Moreover, regardless of what happens below this case would nevertheless qualify for the "capable of repetition, yet evading review" exception to mootness. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016). If Petitioners' motion to intervene cannot be fully litigated before the case is resolved, it is a near certainty that Petitioners will seek to intervene alongside the Executive Branch in the future, especially if North Carolina's government remains divided.[3]

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[3] Petitioners (in their official capacity) have sought intervention in numerous cases recently, and it is likely that they will continue to do so. *See, e.g.*, *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457, 2020 WL 6589360 (M.D.N.C. June 15, 2020); *Crowell v. North Carolina*, No. 17-cv-515, Doc. 20

Second, State Respondents charge that Petitioners' position rests on contested issues of state law, namely, whether Petitioners are authorized by state law to intervene to represent the State's interests in litigation. Opp'n 27–30. Petitioners have already explained why state law grants them authority to intervene in this manner. Pet. 8, 31. And in any event, this Court has often granted certiorari in cases where state laws may be contested. *See, e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1887 n.21 (2021) (Alito, J., concurring in the judgment); *McKesson v. Doe*, 141 S. Ct. 48, 51 (2020). Even if the North Carolina Supreme Court were to interpret the relevant statutes differently than this Court—and that possibility is highly unlikely—this Court's determination of whether a presumption of adequate representation is appropriate where a state-designated agent seeks to intervene in a case where a state official already is a party will be generally applicable across the country.

Third, State Respondents assert that "the questions presented are likely to have limited, if any, practical significance" because they are unlikely to recur and because the Fourth Circuit's decision may be nonbinding dicta. Opp'n 30–33. But, as just explained, these questions are extremely likely to recur in federal court in North Carolina. What is more, there is a recent example of the same circumstances at issue in this case occurring in another state. *See EMW Women's Surgical Ctr., P.S.C.*

(M.D.N.C. Sept. 18, 2017); *Ansley v. Warren*, No. 16-cv-54, 2016 WL 3647979 (W.D.N.C. July 7, 2016); *United States v. North Carolina*, No. 16-cv-425, 2016 WL 3626386 (M.D.N.C. June 29, 2016); *Carcaño v. McCrory*, 315 F.R.D. 176 (M.D.N.C. 2016); *Fisher-Borne v. Smith*, 14 F. Supp. 3d 699 (M.D.N.C. 2014).

v. Friedlander, 978 F.3d 418, 452 (6th Cir. 2020) (Kentucky Attorney General intervening on behalf of Kentucky where state officials were already parties). And North Carolina is not the only state to adopt laws designating certain entities as state agents to represent the state's interests in court in certain situations. *See, e.g.*, *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1952 (2019) (citing IND. CODE § 2-3-8-1 (2011)); NEV. REV. STAT. 218F.720(2)–(3); *Kaul*, 942 F.3d at 796 (citing WIS. STAT. § 803.09(2m)). Furthermore, while one of the *dissents* below suggests that the relevant part of the majority's analysis was dicta, the en banc *majority* expressly rejected that charge. *See* Pet. App. 25 n.2.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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