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 Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICUS CURIAE* REPUBLICAN STATE LEADERSHIP COMMITTEE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Republican State Leadership Committee (RSLC) is the largest caucus of Republican state leaders in the nation and only national committee whose mission is to recruit, train, and elect Republicans to multiple down-ballot, state-level offices. Within the RSLC is the Republican Legislative Campaign Committee (RLCC), which is the only national organization dedicated exclusively to electing Republicans to state legislatures. These electoral efforts have been successful in electing Republican legislative majorities in 62 of 99 state legislative chambers. The RSLC also helps to deliver electoral wins for Republican lieutenant governors, secretaries of state, and agriculture officials across the country. The organization is tax exempt pursuant to Section 527 of the Internal Revenue Code.

RSLC's larger goal is to elect the state leaders who will advance the enactment of conservative public policies at the state level that ultimately allow every American to achieve her and his American dream. Rooted in federalism, and building on the concept of states as laboratories of democracy, the RSLC and its members believe that states that adopt conservative solutions to address economic and social issues will

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, other than *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All of the parties have consented to the filing of this brief.

best facilitate economic and educational opportunity and individual freedom and responsibility, and will promote the traditional societal values that sustain ordered liberty. There is evidence in the most recent census data that citizens and businesses are migrating to the states with conservative public policies.

RSLC believes that winning elections with the right candidates with aligned ideology is the best way to ensure these goals are achievable. Elections are meant to yield policy consequences in a responsive democracy. However, public policy can be voided in federal courts with the blithest of concern for the democratic process that forged those policies. Elections become effectively meaningless if the public policies won at the ballot box are unnecessarily, or inaccurately, voided by federal courts that are not fully informed of all defenses, justifications, and stakeholder viewpoints. Worse, federal courts should not be misused by philosophical alliances in friendly litigations to countermand democratic results. Because the RSLC devotes significant resources to electing advocates of conservative public policy at the ballot box nationwide, the RSLC supports state efforts to ensure accurate and comprehensive consideration of all defenses of enacted public policies in federal courts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

States are institutionally and politically complex, and the complexity varies from state to state based upon unique arrangements of authority and responsibility. That complexity often defies the neat and tidy classifications of "interests" and "adequate representation" in litigation where state laws are challenged by philosophical litigants. These complexities are further compounded by issues concomitant to the defense of state laws, and the representational role of attorney general.

In *Virginia House of Delegates v. Bethune-Hill*, the Supreme Court acknowledged that a state may authorize its legislature, or a single house of its legislature, to litigate on the state's behalf. 139 S. Ct. 1945, 1952 (2019). Indeed, the Court declared that "the choice belongs to [the State]," and federal courts must respect those choices. *Id*.

North Carolina followed the Court's guidance in *Bethune-Hill* and exercised its choice—indeed, its sovereignty—to define "the State" to include the Legislature as an interested defendant when laws passed by the Legislature are challenged. North Carolina effectively limited the authority of its executive branch officials, sued under *Ex parte Young*, 209 U.S. 123 (1908), and its Attorney General to exclusively represent the complex interests of North Carolina, and specifically the Legislature. Nevertheless, the Fourth Circuit applied the "interest" standard of Rule 24 in a manner

that countermands the respect for state choice announced in *Bethune-Hill*. Not only did the Fourth Circuit eschew North Carolina's own definition of "the State" for purposes of defending state laws, but it did so in part because the Legislature would choose counsel other than its Attorney General, effectively denying certain state-government litigants their own choice of legal counsel. This was in error and an affront to federalism.

Federal courts should apply Rule 24 in a manner that respects and accommodates state enactments, like North Carolina's, defining "the State" to encompass the legislative branch as part of the state with an important and cognizable interest in defending state laws.

ARGUMENT

1. States are complex entities deserving special legal interest analysis.

Contrary to the insinuations in the Fourth Circuit majority opinion, *see, e.g.*, Pet.App. 4, simply because an attorney general is representing other state officials in an action does not mean that "the State" is adequately represented. Rather, states are institutionally and politically diverse, and it is an erroneous assumption that the state's attorney general can, will, or must always provide the most zealous representation for all involved state interests. In applying Rule 24's "interest" analysis to state government litigants, federal

courts should account for the unique and inherent complexity of state governments.

a. States are institutionally and politically diverse.

Unlike a private corporation or individual, states are democratic institutions consisting of sometimes harmonious, and sometimes competing, officials, agencies, and branches. These constituent parts of state governments often represent diverse populations, constituencies, philosophical preferences, and public interests. *Cf. generally* Anthony Saul Alperin, *The Attorney-Client Privilege and the White House Counsel*, 29 W. St. U. L. Rev. 199, 206 (2002) (observing that "identifying a government lawyer's client is not always as clear as it is in the private sector. Identifying the client involves an examination of the particular governmental structure involved and the relationship of its various agencies").

This inherent complexity is particularly pronounced when a "state" is sued in federal court. States generally cannot be sued in federal court without their consent. *See Sossamon v. Texas*, 563 U.S. 277, 284 (2011). The federal judiciary adapted to that limit on its power in *Ex parte Young*, 209 U.S. at 159-160, pursuant to which a litigant may bring certain suits in federal court seeking prospective declaratory and injunctive relief against state officials for an ongoing violation of federal law. *Virginia Off. for Prot. and Advoc. v. Stewart*, 563 U.S. 247, 255 (2011). A plaintiff who chooses to

challenge a state law in a federal forum thus assumes certain burdens which include the requirement to join all necessary state officials under the *Ex parte Young* doctrine and Rule 19. Certainly, the importance of a plaintiff naming the correct state official or officials is paramount. *See, e.g.*, *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (holding that the *Ex parte Young* exception did not apply to claims for injunctive relief asserted against a state-court judge, state-court clerk, or Texas attorney general, whereas *Ex parte Young* applied to the four executive licensing officials named as defendants); *Deida v. City of Milwaukee*, 192 F. Supp. 2d 899, 915, 918 (E.D. Wis. 2002) (stating that "plaintiffs wishing to file suit under *Ex parte Young* must make sure that they name the right defendant, meaning the official that state law empowers to enforce the challenged statute," and permitting the plaintiff to sue the District Attorney and Superintendent). The practical upshot is that challenges to state laws already often entail multiple state officials as defendants as an adaptation to the complexity of state executive branch arrangements.

An overly-simplistic treatment of states under federal rules of procedure, based on analogies to private sector entities, can do a great disservice to the public served by state governments as well as to the courts. A state, knowledgeable about its own institutional and political complexities (and internal conflicts), should have a sovereign say in designating the appropriate state officials to defend its laws, or at least ensuring

that a court has access to the state's most zealous defenses, evidence, and advocacy.

b. States vary in the authority they vest in their attorneys general.

The myriad complexities of state interests are further compounded by issues concomitant to the defense of states' respective laws. States have approached the defense of their respective laws in different manners, often by entrusting defense exclusively to their attorneys general. Although many state constitutions establish the offices of attorney general, state laws vary widely in the scope of authority vested in their attorneys general. The authority of some state attorneys general is set by state constitution, in some by residual common-law authority, and in some by statute—or some combination of the three sources. *See generally*, Emily Myers, *State Attorneys General Powers and Responsibilities* (4th ed.) (National Association of Attorneys General 2018) at 6-12.

Beyond these variations in the source and scope of authority, the role of a state attorney general itself is unique, and attorney generals' specific objectives and duties vary from state to state. It has been observed that the office of attorney general "occupies the middle of a well-traveled intersection of law, politics, and public policy, delicately, sometimes even perilously, poised between the tensions of scholarship and activism; professional responsibility and public duty; political conflict and the search for legal certainty." Dave

Frohnmayer, Foreword, *State Attorneys General Powers and Responsibilities* at vii (Lynne M. Ross ed. 1990) (National Association of Attorneys General).

Indeed, some state attorneys general owe their principal duty to the public, rather than to the state, its agencies and officials, or even to the defense of its laws. *See generally, e.g.*, *Feeney v. Com.*, 366 N.E.2d 1262, 1267 (Mass. 1977) ("Where, in his judgment, an appeal would further the interests of the Commonwealth and the public he represents, the Attorney General may prosecute an appeal to the Supreme Court of the United States from a judgment of the District Court even over the expressed objections of the State officers he represents."). At a minimum, an attorney general typically has a dual role of simultaneously representing both the state *and* the public interest. *See Appointing State Attorneys General: Evaluating the Unbundled State Executive*, 127 Harv. L. Rev. 973, 981 (2014) (observing that "[u]nsurprisingly, the independence of the state attorney general and his dual responsibilities of representing both state officials and the public raise complex issues about who is the attorney general's client," and that "[w]hile some contend that the attorney general should act strictly as a faithful representative of the state agency or actor he represents, courts have generally not favored this interpretation. Rather than adhering steadfastly to an attorney-client model, attorneys general typically consider the wishes of the state actor alongside the public interest.").

Thus, it would be inaccurate to assume that each state attorney general appearing before a federal court is a zealous advocate in defense of a state agency or law. In fact, in recent years, there has been a marked uptick in the use of the offices of attorney general in several states to pursue what some perceive as philosophical or political objectives to inform litigation choices. *See, e.g.*, Neal Devins, Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 Yale L.J. 2100, 2147, 2151 (2015) (observing that "[t]he recent high-profile refusals to defend (along with the noisy choices to defend) are yet another example of attorneys general exploiting the advantages of their offices to advance their electoral fortunes," and that "when attorneys general are from a different party than the dominant legislative party or the governor, there is greater risk of conflict. Attorneys general are much more likely to espouse views that resonate with their coherent ideological base and are much more likely to seek political advantage by refusing to defend laws unpopular with that base."); Colin Provost, *The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-State Lawsuits*, 59 POL. RES. Q. 609, 616 (2006) (concluding, based on an empirical study of consumer litigation, that litigation choices of state attorneys general were heavily influenced by citizen ideology and in-state interest groups).

c. North Carolina has limited the scope of its attorney general's representations.

Recognizing the competing objectives and claims on the loyalties of state attorneys general, many states have begun to enact statutory limits on the powers of their attorneys general. North Carolina is such a state.

The role and authority of North Carolina's attorney general is controlled by statute. The North Carolina Constitution establishes the office of attorney general and provides that the attorney general's "duties shall be prescribed by law." N.C. Const. art. III, § 7(1), (2). The North Carolina Supreme Court has construed "prescribed by law" to mean that the attorney general's "duties are left to the discretion of the General Assembly" and are set forth in statute. *Bailey v. State of North Carolina*, 540 S.E.2d 313, 320 (N.C. 2000); *Martin v. Thornburg*, 359 S.E.2d 472, 479 (N.C. 1987).

The North Carolina General Assembly has provided in statute that the attorney general is to appear for the state in any court in which the state may be a party and to represent all state departments, agencies, and commissions, N.C. GEN. STAT. § 114-2, and moreover to exercise "those powers of the Attorney General that existed at the common law," but only so long as the exercise of those powers do not conflict with, or are not limited by, statute. N.C. GEN. STAT. § 114-1; *Martin*, 359 S.E.2d at 479. Thus, the General Assembly's enactments define and limit the state attorney general's authority.

The General Assembly has limited its attorney general's exclusive role in representing state agencies and officials by authorizing the Governor to appoint, and pay for, lawyers other than the attorney general. *Id*. at 480 (concluding that North Carolina's statutes provided the Governor the "unrestricted right" to employ special counsel as he may deem proper or necessary). And significantly, as will be discussed below, North Carolina has limited its attorney general's representational authority further by authorizing the General Assembly to defend state laws, perhaps in unison with the attorney general, perhaps alongside the attorney general, or perhaps in conflict with the attorney general. *See* N.C. GEN. STAT. § 1-72.2; N.C. GEN. STAT. § 120-32.6.

2. Rule 24 should be applied to states in a manner that respects state choice of litigants and legal counsel.

a. States are entitled to designate representatives of "the State" when defending state laws, and North Carolina has done so here.

In a series of decisions, made in a variety of contexts, the Court has established the principle, rooted in federalism, that federal courts should respect states' choices of representation in federal court litigation. In *Hollingsworth v. Perry*, noting that "a State has a cognizable interest 'in the continued enforceability' of its laws that is harmed by a judicial decision declaring a state law unconstitutional," the Court stated

that "[t]o vindicate that interest or any other, a State must be able to designate agents to represent it in federal court." 570 U.S. 693, 709-710 (2013). While "[t]hat agent is typically the State's attorney general[, . . .] state law may provide for other officials to speak for the State in federal court. . . ." *Id*. In *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, the Court recognized the constitutional standing of the Arizona House and Senate to challenge a ballot initiative threatening its authority over redistricting. 576 U.S. 787, 800-801 (2015).

The Court also acknowledged this principle more recently, in *Bethune-Hill*, in which the Court addressed whether the Virginia House of Delegates and its Speaker, as intervenors, had constitutional standing to appeal a lower court ruling invalidating Virginia's redistricting plan after the state's attorney general, as the representative of the Commonwealth of Virginia, did not appeal. 139 S. Ct. 1945 (2019). Although the Court concluded that the Virginia House of Delegates did not have constitutional standing to appeal the district court opinion, the Court's reasoning underscored each state's inherent authority to choose for itself which branch or agent of state government may defend the state. The Court reasoned that "'a State must be able to designate agents to represent it in federal court,'" and that "if the State had designated [a legislative branch] to represent its interests . . . the [legislative branch] could stand in for the State." *Id*. at 1951 (quoting *Hollingsworth*, 570 U.S. at 710). Notably, none of these decisions limited this sovereign choice

principle to a situation in which the initial agent was no longer participating in the defense or had declined to pursue an appeal.

Further, although the Court's precedents address the constitutional requisite of standing, or direct harm, under Article III, which is distinguishable from the kind of interest required for intervention under Rule 24, the distinction favors the North Carolina Legislature here. Standing is a constitutional requisite necessary to confer jurisdiction upon the court, whereas Rule 24 interest is a broader, more flexible standard. *Compare generally, e.g.*, *Entergy Gulf States Louisiana, L.L.C. v. U.S. E.P.A.*, 817 F.3d 198, 203 (5th Cir. 2016) ("The inquiry under Rule 24(a)(2) is a flexible one, which focuses on the particular facts and circumstances surrounding each application, and intervention of right must be measured by a practical rather than technical yardstick. The rule is to be liberally construed, with doubts resolved in favor of the proposed intervenor." (Quotations omitted)), *with Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1306 (11th Cir. 2011) ("Standing is a rigid doctrine, and it can lead to an abrupt end to a case that has consumed large amounts of judicial and social resources."). Even applying the strict principles enunciated for standing, North Carolina was clearly well within its sovereign rights to designate the Legislature, through its respective leaders, to represent the state.

Consistent with the Court's precedent, North Carolina has designated state agents to defend "the State"

and its laws in judicial challenges. It has enacted statutes that ask federal courts to allow both the executive and legislative branches of the state government to participate in actions challenging the constitutionality of its laws. Specifically, anticipating that the State will be sued when the validity or constitutionality of an act of the General Assembly is challenged, N.C. GEN. STAT. § 1-72.2(a) provides that the "General Assembly and the Governor constitute the State of North Carolina" in such a suit, and therefore, a federal court should allow the General Assembly and Governor to participate jointly in "any action in any federal court in which the validity or constitutionality of an act of the General Assembly . . . is challenged." And N.C. GEN. STAT. § 1-72.2(b) provides the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as "agents of the State," and "by and through counsel of their choice, including private counsel, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." *See also* N.C. GEN. STAT. § 120-32.6(b). Significantly, these statutes do not limit the role of the General Assembly to instances where the executive branch declines to defend or participate in the action.

North Carolina's choice to involve its Legislature in defense of lawsuits, and to effectively limit its attorney general's exclusive role, contrasts sharply with the Virginia statutes considered in *Bethune-Hill*. *Cf. generally, e.g.*, *Karcher v. May*, 484 U.S. 72, 82 (1987),

supporting the notion that the role that active legislators play in defending a lawsuit depends upon a particular state's law. In short, North Carolina properly exercised its sovereign right to designate its General Assembly as a part of "the State" with authority—and certainly a cognizable *interest*—to represent it in defending its laws.

Moreover, like the subject of the lawsuit in *Arizona State Legislature*, the subject of this lawsuit directly implicates the North Carolina Legislature's authority to set the time, place and manner of elections under Article I, Sec. 4 of the United States Constitution. The North Carolina Legislature has a distinct interest in defending its authority from usurpation through litigation.

In sum, the North Carolina Legislature not only has an obvious interest in the subject matter, the substantive defense and course of the litigation, and in the judicial outcome, but it deliberately took all the actions set forth in *Bethune-Hill* to designate itself a representative of the state with specific authority to defend its law. Federal courts should respect and accommodate North Carolina's designation in their Rule 24 interest analysis.

b. States, including individual officials of a state, are entitled to choose their own lawyers.

It matters little that North Carolina's General Assembly might choose a lawyer who is not the Attorney

General. As Judge Niemeyer observed in dissent below, the General Assembly could choose to be represented, along with the five defendant election board officials, by the North Carolina Attorney General. Or it might choose separate legal counsel. Pet.App. 56. But a state's choice of attorney—whether multiple defendant officials choose one attorney or several—should not be precluded by application of Rule 24.

There is a significant distinction between the agents designated to defend a state's law and the attorneys chosen to represent those state agents. There is no requirement under *Ex parte Young* practice that multiple state officials, sued individually but in their official capacities, must be represented by one attorney. Each North Carolina official's respective choice of lawyer should have no bearing on the adequacy of representation of his or her interest. That multiple state officials must be joined individually in the lawsuit is a function of the Eleventh Amendment and the *Ex parte Young* doctrine. A state could appoint separate attorneys for each state official joined as a defendant in a lawsuit, if it so chose, and a federal court would have no authority to mandate each official to surrender her attorney to another official's attorney. It is certainly not unusual for multiple government officials to be separately represented. *See, e.g.*, *Nat'l Inst. of Fam. and Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018).

Likewise, there can be no requirement for an intervenor under Rule 24 to be represented by the same counsel. Yet, the Fourth Circuit's majority opinion confused the distinction between official parties and their

lawyers, emphasizing that the State "was adequately represented already by the State Board of Elections and Attorney General." Pet.App. 24. In conflating official parties designated to defend a law with their attorneys, *cf. generally, e.g.*, *Att'y Gen. v. Michigan Pub. Serv. Comm'n*, 625 N.W.2d 16, 30–34 (Mich. App. 2000) (addressing, in the context of discussing conflicts of interest, distinctions between an attorney general as a representative and an attorney general as an actual party to the litigation), and denying the General Assembly's right to intervene on that basis, the Fourth Circuit's majority opinion effectively denied North Carolina its attorneys of choice. Further, the Fourth Circuit majority opinion's pronounced emphasis on the fact that the state defendants were represented by the North Carolina Attorney General begs the question whether a different result would have been reached if the named state defendants had been represented by counsel other than the Attorney General.

c. The representational authority of North Carolina's attorney general is limited.

As discussed above, the North Carolina Attorney General's authority is both prescribed and limited by statute. *See generally Martin*, 359 S.E.2d 472. Further, North Carolina has limited the scope and authority of its Attorney General to represent all state officials, agencies, and branches by statute, so there is nothing sacrosanct about the Attorney General's sole advocacy in litigation.

For example, North Carolina has, for decades, limited its Attorney General's exclusive responsibility for representing state agencies and officials by express authority afforded to its Governor to choose a lawyer other than the Attorney General. *See Martin*, 359 S.E.2d at 480. Indeed, had the Governor remained in this case, he could have selected his own attorney to represent his interests and to defend the contested statute (or not). *Id*. The federal district court would have had no authority to instruct the Governor on his choice of an otherwise qualified attorney. Further, N.C. GEN. STAT. § 1-72.2(b) provides that the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State "shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution" "by and through **counsel of their choice, including private counsel**." (Emphasis added). This plainly envisions that the General Assembly may find the Attorney General's counsel inadequate or otherwise undesirable, and it authorizes such a choice.

These limitations, coupled with North Carolina statutes designating the General Assembly as a state agent with authority to defend state statutes alongside the executive branch, reflect a sovereign policy judgment that the Attorney General is not the State's exclusive representative in court when state laws are challenged. Federal courts should respect and accommodate North Carolina's choice to afford its state

agents, including the General Assembly, attorneys of their own choosing, and the choice of attorney should have no bearing on the General Assembly's "interest" under Rule 24.

3. Federal courts will benefit from the participation of legislative branches of state governments.

Finally, the Fourth Circuit's majority opinion focused on supposed burdens that could be visited upon the courts and plaintiffs if two additional state officials were to defend the state's law. Pet.App. 50-51. That concern is histrionic. Federal district courts manage far more complex litigations, involving dozens of parties represented by different attorneys and debating far more diverse issues and positions, every day. It overlooks the fact that, under *Ex parte Young*, plaintiffs already must join under Rule 19 a multitude of state officials—and there is no guarantee they will be represented by the same attorney or speak in a monolithic voice.

The fact is that a plaintiff who chooses a federal forum to challenge a state law assumes the burdens of litigation, of which *Ex parte Young* practice is one, as well as the state's decision to designate its agents to defend its law. If the state designates its Legislature along with executive branch officials—whether it joins the executive branch officials or varies from their position—the burdens are manageable. Of course, encountering a more zealous defense by one state agent over

another is not an *undue* burden of litigation. Plaintiffs should expect to be put to the reasonable burdens of proof and persuasion when they challenge state laws.

More important to the Rule 24 analysis should be federal courts' commitment to hearing all sides and all justifications for a state law and thereby rendering the most accurate and just result. The democratic enactments of state legislatures should not be voided blithely. Relegating a state litigant to input as *amicus* does not ensure adequate representation. *See Miller-Wohl Co. v. Comm'r of Lab. & Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982) ("An amicus curiae is not a party to litigation."). Records must be developed. State justifications must be fully aired. And state executive branch officials often bring a different objective or perspective on laws than their legislative counterparts that adopted the law. Indeed, this case is emblematic of such a concern, as this case implicates at least two distinct interests: the administration of elections and the defense of the State's enacted statutes. Further, only parties may participate in settlement discussions and have standing to object to settlements or consent decrees. *See, e.g.*, *Russell v. Bd. of Plumbing Examiners of Cty. of Westchester*, 74 F. Supp. 2d 349, 351 (S.D.N.Y. 1999), *aff'd*, 1 F. App'x 38 (2d Cir. 2001) ("An intervenor can, but an amicus cannot, block settlements by refusing to sign, take discovery, make independent motions, or appeal.").

The objective of federal courts must be to consider all sides, recognizing that complex political institutions like state governments often house different

perspectives and interests. Providing a forum for airing those perspectives throughout the litigation process will only strengthen the judicial process—not weaken it. It will make for more informed and more accurate judicial outcomes.

CONCLUSION

For the reasons set forth above, the Court should reverse the decisions of the lower courts and direct them to respect and accommodate North Carolina's designation of its General Assembly as a proper intervenor to defend North Carolina laws.

Respectfully submitted,

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