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* THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The American Legislative Exchange Council ("ALEC") is America's largest non-partisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets, and federalism. ALEC's interest in this proceeding is the protection of state legislatures' ability to intervene in cases where the constitutionality of a statute is challenged and the state has designated the legislature as the final party for determining which entity represents the state in court. ALEC has participated as an *amicus curiae* in several cases involving state legislative standing or intervention including *Va. House of Delegates* v. *Bethune-Hill*, ___ U.S. ___, 139 S. Ct. 1945 (2019) and *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399 (2006). As such, ALEC has an interest in fostering respect for the role of state legislatures within our constitutional order and in promoting state legislatures' access to the federal judiciary when necessary to vindicate their lawful powers and prerogatives.

ALEC members – state legislators – have long maintained an interest in protecting and promoting their authority. At the encouraging of its members, ALEC has adopted several model public policies that

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to its filing.

could be considered by state legislatures, some speaking to the roles of state legislatures either with respect to the federal government or with respect to their vested constitutional authority. These policies include the Resolution Reaffirming Tenth Amendment Rights[2] and the Resolution Reaffirming the Right of State Legislatures to Determine Electoral Districts.[3]

Because the Fourth Circuit, sitting en banc, adopted an erroneous interpretation of Rule 24(a)'s intervention-of-right standard that would dramatically curtail the ability of state legislatures to defend duly enacted state laws, this case implicates ALEC's core organizational interests and concerns. Accordingly, ALEC offers the following brief to explain how the Constitution's federal structure and the Constitution's Elections Clause both require that the Rule 24(a) intervention-of-right analysis recognize state legislatures' unique and deep-rooted interests in defending the constitutionality of state election laws.

SUMMARY OF THE ARGUMENT

The Constitution's Elections Clause delegates to state legislatures—as distinguished from all other

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[2] Am. Legis. Exchange Council, Resolution Reaffirming Tenth Amendment Rights (amended Jan. 16, 2016), https://alec.org/model-policy/resolution-reaffirming-tenth-amendment-rights/.

[3] Am. Legis. Exchange Council, Resolution Reaffirming the Right of State Legislatures to Determine Electoral Districts (Sept. 18, 2018), https://alec.org/model-policy/draft-resolution-reaffirming-the-right-of-state-legislatures-to-determine-electoral-districts/.

state governmental actors—the power to prescribe the "Times, Places, and Manner" of holding elections. U.S. Const., art. I, § 4. Accordingly, the Constitution confers upon state legislatures a unique and important role in crafting the rules that govern federal elections.

Yet divided government at the state level has made it an increasingly treacherous proposition for state legislatures to address electoral fraud and abuse. When state legislatures seek to exercise their special constitutional authority to implement electoral reforms, they must now expect to encounter insidious and politically motivated efforts to undermine their constitutional prerogative—from none other than their state's own Attorney General.

Indeed, state Attorneys General now routinely betray their oath of office and expressly decline to defend provisions of state law that they perceive as incompatible with their own political objectives.[4] Just as often, however, they seek to modify or to set aside controversial measures of which they disapprove—but that they were not able to shape through the democratic process—by masquerading as disinterested government lawyers. When legal challenges to such measures are filed, they register an appearance on behalf of their sovereign client, but then proceed to provide a half-hearted and lackadaisical defense.

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[4] *See* Devins & Prakash, Fifty States, Fifty Attorneys General. And Fifty Approaches to the Duty to Defend, 124 Yale L. J. 2100, 2102-03 (2015) (noting that "state attorneys general are declining to defend state laws on the grounds that those laws transgress the federal and state constitutions").

Such refusal by state Attorneys General to fulfill their basic professional obligations is a relatively new development, arising only in the past decade. Indeed, only three refusals by Attorneys General to defend state law occurred "before 1980 and twelve from 1980 to 2007[,]" for a total of fifteen before 2007.[5]

However, in an ominous turn of events, state Attorneys General play politics and decline to provide a thorough and vigorous defense of duly enacted state election laws—measures approved by the people's representatives in accordance with the process established by each state's constitution—and in so doing, diminish the special constitutional authority of state legislatures and upend the separation and balance of powers codified within each state's constitution.

Through their grandstanding and dithering, such state Attorneys General aim to supplant the nuances of the legislative process with their own political agenda. Elected legislators hear extensive testimony, balance competing considerations, and ultimately settle upon the measures that they believe constitute the best available compromise between principle and circumstance. The results of this multi-faceted process are frequently anathema to the many state Attorneys General whose aim is to generate headlines and to advance their political ambitions. *See* Pet.App.51 ("Every attorney general who looks in the mirror sees a governor.") (Wilkinson, J., dissenting).

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[5] *Id.* at 2137.

State legislatures are not entirely without a remedy for such malfeasance, however. When state laws are challenged in court, state legislatures may retain their own counsel and move to intervene in the litigation. They can even go further and codify in state law their authority to seek such intervention and represent the state's interests in litigation alongside, and on par with, the state's Attorney General.

North Carolina's Legislature took both such measures in the instant case. Remarkably, the Fourth Circuit, sitting en banc, nevertheless prohibited North Carolina's Legislature from intervening in the litigation. For this reason, an important North Carolina law regarding electoral fraud was left to be defended by the state's conflicted Attorney General, who had previously opposed and criticized the challenged measure and who had up until that point pursued an unjustifiably passive litigation strategy.

The Fourth Circuit's decision was wrong, to be sure, because it ignored the clear import of North Carolina's law designating the state legislature as one of the state's agents for purposes of litigation. But the Fourth Circuit's decision is not merely inconsistent with *North Carolina's* law. As this brief will demonstrate, the Fourth Circuit's decision is also offensive to two fundamental principles of *federal constitutional* law.

First, federalism requires that the Rule 24(a) intervention-of-right analysis incorporate state legislatures' interests in defending the

constitutionality of duly enacted state election laws. To conclude otherwise and entrust the defense of a state's election laws entirely to a state's Attorney General, regardless of his or her past conduct, violates the separation and balance of powers *within each state*. Such reasoning contravenes a central expectation of our Constitution's federal structure, namely, that federal courts will respect a state's decisions regarding its own governmental structure. Moreover, considerations of federalism also mandate that federal courts, in applying their own procedural rules, accord deference to another sovereign's express preference as to who may serve as its agent for litigation purposes.

Second, as Judge Wilkinson highlighted in his dissenting opinion in this case, the Constitution's Elections Clause confers upon state legislatures a unique and deep-rooted interest in any litigation that may affect state election laws. The Elections Clause delegates to state legislatures in particular—and *not* to state governments generally—the power to prescribe the "Times, Places, and Manner" of holding elections. U.S. Const., art. I, § 4. Accordingly, the federal Constitution provides a vehement endorsement of state legislatures' unique interests in litigation challenging the constitutionality of state election laws and confirms that legislatures must be permitted to intervene in such cases because their interests cannot be adequately represented by state Attorneys General.

ARGUMENT

I. Constitutional Principles of Federalism and Dual Sovereignty Require That State Legislatures Be Permitted to Intervene in Federal Litigation to Defend the Constitutionality of State Election Laws.

The Constitution's federal structure requires that the federal judiciary respect a state's decisions regarding its own governmental structure. The Fourth Circuit's erroneous approach to intervention-of-right under Rule 24(a) is inconsistent with this requirement. As explained below, the Fourth Circuit's refusal to permit North Carolina's Legislature to intervene in this case as a matter of right denigrates the role of the Legislature within the state's constitutional order by "obstructing the legislative branch from performing its role in defending . . . duly enacted legislation." Pet.App.102.

A. Federalism Mandates That the Rule 24(a) Intervention-of-Right Analysis Account for the Legislature's Role Within a State's Constitutional Structure, Including the Legislature's Authority to Defend Duly Enacted State Election Laws.

The right to intervene in a pending federal suit is governed by Federal Rule of Civil Procedure 24. Rule 24(a)(2) provides for intervention as a matter of right when a proposed intervenor can demonstrate "(1) an

interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's interest is not adequately represented by existing parties to the litigation." Pet.App.23-24. With respect to adequacy of representation, the "requirement of the Rule is satisfied if the applicant shows that representation of his interest may be inadequate; and the burden of making that showing should be treated as minimal." *Trbovich* v. *UMW*, 404 U.S. 528, 540 n.10 (1972) (cleaned up).

In this case, the Fourth Circuit, sitting en banc, applied a heightened standard with respect to adequacy of representation, however, concluding that there is a "long-standing presumption of adequate representation," Pet.Ap.30, that arises when "the party seeking intervention has the same ultimate objective as a party to the suit." *Virginia* v. *Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976). Such presumption may be overcome only if the proposed intervenor can "'demonstrate adversity of interest, collusion, or nonfeasance.'" Pet.App.31. Moreover, the Fourth Circuit also held that an "especially 'strong showing of inadequacy' [is required] to rebut the . . . presumption [of adequate representation]" if the proposed intervenor's objective is shared with a governmental defendant rather than a private litigant. *Id.* Ultimately, the Fourth Circuit declined to permit the North Carolina Legislature to intervene in this suit, finding that any interest of the legislature was adequately represented by the Attorney General.

The Fourth Circuit's skewed application of the Rule 24(a) intervention-of-right standard to the North Carolina Legislature is crucially flawed because it fails to incorporate considerations of federalism and dual sovereignty into its analysis. In evaluating whether a state legislature's interest is adequately represented, a federal court must respect a state's internal constitutional framework, including the legislature's assigned role in defending duly enacted state election laws.

Each state has adopted a constitutional structure that "prioritize[s] balance of power in government." *See* J. Sutton, Who Decides?: States as Laboratories of Constitutional Experimentation 8 (2022). Because each state's constitution allocates and limits the powers of governmental actors in distinct ways, state constitutions both participate in, and affirm, the American tradition that holds that structural constitutional safeguards promote liberty and good government. *See id.* at 1–11. Accordingly, North Carolina's Constitution calls for the "legislative, executive, and supreme judicial powers of the State government [to] be forever separate and distinct from each other." N.C. Const., Art. 1, § 6.

The federal Constitution commands, in turn, that each state's decision to separate its governmental functions be respected. *See, e.g.*, *Georgia Muslim Voter Project* v. *Kemp*, 918 F.3d 1262, 1288 (11th Cir. 2019) (Tjoflat, J., dissenting). "Our Constitution, which enshrines federalism" ultimately requires that federal courts decline to interfere with each state's choices regarding "its own governmental structure." *Id.* "Even the narrowest

notion of federalism requires us to recognize a state's interest in preserving the separation of powers within its own government as a compelling interest." *Id.* (quoting *Republican Party of Minn.* v. *White*, 416 F.3d 738, 773 (8th Cir. 2005)); *see also id.* at 1294 n.34 ("[S]eparation of powers within a state implements federalism's purpose in our constitutional structure.").

Preventing a state legislature from participating in the defense of duly enacted state laws violates separation-of-powers principles. *See* Pet.App.102-03 (citing *United States* v. *Windsor*, 570 U.S. 744, 762 (2013)). The defense of legislation from judicial review may be understood as a component of legislative power. In many instances, a constitutional challenge follows immediately upon the legislature's enactment of an authoritative statutory text. The task of defending the newly enacted statute is one closely related to the original exercise of legislative power and is best performed by the governmental actor most familiar with the statutory text and the reasons for its enactment. Accordingly, wresting this task from the legislature and assigning it exclusively to the Attorney General, regardless of his or her willingness to undertake it properly, constitutes unwarranted interference with the state's internal separation and balance of powers in violation of federalism.

By contrast, the Fourth Circuit reasoned here that the interest of North Carolina's Legislature in upholding the constitutionality of state election laws is merely identical to the State of North Carolina's interest in the litigation, and that such interest is

presumptively adequately represented by the Attorney General—except, perhaps, in the extreme case in which the Attorney General explicitly declines to defend the challenged statute. Pet.App.68. The Fourth Circuit's logic blithely ignores the separation-of-powers violation that results from conflating the Attorney General's role with the legislature's role. Accordingly, the Fourth Circuit's decision is also inconsistent with a federal court's obligation under the federal system to respect North Carolina's internal separation of governmental functions.

B. Federalism Requires That Each State Have Discretion to Select the Agents That Will Best Represent Its Interests in Litigation.

Moreover, considerations of federalism require that the Rule 24(a) intervention-of-right analysis properly account for North Carolina's decision to divide the authority to defend state election laws from constitutional challenge among both the Legislature and the Attorney General. Such distribution is reasonable under the circumstances and this Court's precedents require that North Carolina's choice—if not determinative—be accorded deference within the Rule 24(a) inquiry.

i. North Carolina Law Expressly Provides That the Legislature Shall Serve as One of the State's Proper Legal Agents.

Since a state is an incorporeal entity, it cannot speak for itself and must speak through a designated agent in federal court. *See, e.g.*, *Hollingsworth* v. *Perry*, 570 U.S. 693, 710 (2013). The state's agent is frequently the state's Attorney General, but such arrangement is not foreordained and may be adjusted by constitution or statute.

North Carolina, among other states, has affirmatively tasked its Legislature by statute with representation of the state's interests in litigation. North Carolina's Legislature determined that the State of North Carolina is the proper party in interest when the validity of a statute or constitutional provision is challenged. *See* N.C. Gen. Stat. § 1-72.3.[6] By statute, it remains up to the North Carolina Legislature to determine, on a case-by-case basis, who possesses the state's agency. *See* N.C. Gen. Stat. § 120-32.6(b).[7] Moreover, the North

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[6] "The State shall be a party whenever the validity or constitutionality of a local act of the General Assembly is the subject of an action in any court and, except as provided in G.S. 147-17, shall be represented by the Attorney General. *This section shall not affect any authority… [NC Gen. Stat. § 120-32.6].*" (emphasis added).

[7] Whenever the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action in any state or federal court, the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, shall be necessary parties and shall be deemed to be a client of the Attorney General for purposes of that action as a matter of law and pursuant to Section 7(2) of Article III of the North Carolina Constitution. In such cases, the *General Assembly shall be deemed to be the State of North Carolina to the extent provided i*n [NC Gen. Stat. § 1-72.2(a) *unless waived pursuant to this subsection*. Additionally, in such

Carolina Legislature, in a separate statute, further clarified the responsibility of the Attorney General to hew closely to the Legislature's interests and instructions when charged with representation of the state in litigation in which a state law has been challenged. In N.C. Gen. Stat. § 114-2(10), the Legislature requires the Attorney General "to represent upon request and *otherwise abide by and defer to the final decision-making authority exercised by the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly . . . .*" (emphasis added.)

North Carolina's designation of its Legislature as the state's agent for litigation purposes can only be described as prescient considering the circumstances of the instant case. Here, North Carolina's "Voter ID" statute, the measure under review, was enacted by the Legislature over the Governor's veto and despite criticism from the Attorney General. Accordingly, North Carolina's designation of the Legislature as the State's agent is an eminently reasonable choice given the political conflicts over the legislation in a time of divided government. North Carolina is clearly entitled to choose the Legislature as its agent, particularly under such circumstances.

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cases, the *General Assembly through the Speaker of the House of Representatives and President Pro Tempore of the Senate jointly shall possess final decision-making authority with respect to the defense of the challenged act* of the General Assembly or provision of the North Carolina Constitution." (Emphasis added).

ii. This Court's Decision in *Virginia House of Delegates* Confirms that a State May Designate the Legislature as One of Its Legal Agents—And That Federal Courts *Must* Heed Such Designation.

In *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, this Court made clear that a state may select the legislature as its agent for purposes of representing the state's interest in litigation. Put simply, a state has the right, both as a sovereign and as an incorporeal entity, to determine who best represents its interests when the constitutionality of a state statute is challenged. *Id*.[8] Unlike Virginia, which, as *Va. House of Delegates* concluded, never attempted by statute to designate its legislature as the state's agent for litigation purposes, North Carolina has made precisely such a designation. *Compare* Va. Code Ann. § 2.2-507(A)[9] with N.C. Gen. Stat. §§ 1-72.3, 120-32.6(b).

As North Carolina made a fundamentally different policy choice than Virginia, it is therefore clear that federal courts are *bound* to respect such choice out of respect for federalism and state sovereignty. *See Va. House of Delegates*, 139 S. Ct. at

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[8] A state's authority extends to designating "agents to represent it in federal court." *Va. House of Delegates*, 139 S. Ct. at 1951.

[9] "All legal service in civil matters for the Commonwealth, the Governor, and every state department, institution, division, commission, board, bureau, agency, entity, official, court, or judge shall be rendered and performed by the Attorney General." (Ellipses omitted).

1951 ("[I]f the State had designated [a legislative branch] to represent its interests . . . the [legislative branch] *could* stand in for the State." (emphasis added)).

Deference to a state's selection of agent is consistent with, and indeed required by, considerations of federalism. This Court has never indicated that respect for a sovereign state's selection of agent for litigation purposes is dependent on a finding that the Attorney General has declined to undertake the representation or is otherwise unsuited for it. Nor has the Court ever suggested that a state may not select multiple agents for such purpose.

On the contrary, this Court's reasoning in *Va. House of Delegates*, setting forth the conditions under which Virginia's House of Delegates could have stepped into federal court to defend the constitutionality of a Virginia law, makes clear that a state is *always* entitled as a matter of right to designate an agent besides, or in addition to, the Attorney General. *Va. House of Delegates*, 139 S. Ct. at 1951; *Hollingsworth*, 570 U. S., at 710 ("[A] State must be able to designate agents to represent it in federal court.").

The Supreme Court noted in *Va. House of Delegates* that "Virginia, had it so chosen, could have authorized the House to litigate on the State's behalf, either generally or in a defined class of cases." 139 S. Ct. at 1951 (citing *Hollingsworth*, 570 U. S. at 710). In this instance, North Carolina *did* authorize its legislature to defend State law and it was incumbent

upon the Fourth Circuit to respect that sovereign decision.

Va. House of Delegates confirms that the choice here belongs to North Carolina. North Carolina is entitled to choose its agent, be it the Legislature, the Attorney General, or another officer or entity altogether.[10]

Accordingly, the Fourth Circuit committed a serious error by ignoring North Carolina's choice of agent in its Rule 24(a) intervention-of-right analysis. North Carolina, as a separate sovereign, is entitled to select the agent that, in its judgment, will best represent its interests in federal court. The "adequacy" of the Attorney General's representation is ultimately for North Carolina—not a federal court—to determine.

A federal court may not simply ignore a state's choice of agent, nor may it deny the state the right to

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[10] It is worth noting that the Virginia House of Delegates' position was also weakened by circumstances that are not present here. Initially, the House of Delegates had to meet standing requirements in its own right as the only party to appeal the adverse judgment of the district court. Further, the House of Delegates, as one organ of a bicameral legislature, brought an appeal without its sister branch when no court has acknowledged that "a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of the government that participated in the law's passage." *Id.* In sum, the Virginia House of Delegates was in a far different procedural posture than North Carolina's State Legislature is in this case, where it was seeking to intervene at an early stage after the constitutionality of a state statute had been called into question.

select multiple agents. In sum, when a state legislature has been designated as the state's agent for litigation purposes, the Attorney General's representation of the legislature is *per se* inadequate, and the legislature *must* be permitted to intervene under Rule 24.

II. The Fourth Circuit's Decision Diminishes the Authority of State Legislatures to Defend their Constitutional Powers.

The Constitution's Elections clause states: "The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ." U.S. Const. Art. I, Sec. 4, Cl. 1 (the "Elections Clause"). The Framers understood that it would be primarily the province of state *legislatures* to enact election rules with the only check being Congress. The Federalist No. 59 (A. Hamilton) (the Elections Clause "reserve[s] to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety."). As explained below, this federal constitutional provision confirms that state legislatures have a unique and important interest in litigation affecting the constitutionality of state election laws. Because it failed to consider this powerful interest, the Fourth Circuit's Rule 24(a) intervention-of-right analysis was woefully inadequate and must be reversed.

A. The Original Public Meaning of the Constitution's Election Clause Indicates That State *Legislatures*—*Not* State Executive Officers—Establish Standards for the Conduct and Administration of Elections

The Elections Clause of the United States Constitution vests the authority to regulate the times, places, and manner of federal elections directly and exclusively with North Carolina's Legislature, subject only to alteration by Congress. U.S. Const. Art. I, § 4. No other state governmental actor is permitted to modify North Carolina's election laws.

The Constitution does not delegate any authority regarding the time, place and manner of elections to state Attorneys General or to other state executive officers.[11] Such principle is plain from the provision's text. The word "legislature" was "not one 'of uncertain meaning when incorporated into the Constitution.'" *Smiley*, 285 U.S. at 365 (quoting *Hawke* v. *Smith*, 253 U.S. 221, 227 (1920)). The term "legislature" necessarily differentiates between that body and the "State" of which it is only a subpart. By empowering one body of the state to prescribe election rules, the Constitution impliedly denies it to others.[12]

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[11] *But see Smiley* v. *Hohn*, 285 U.S. 355 (1932) (acknowledging a peripheral role for the executive branch within the meaning of Art. I, Sec. 4, namely a governor's decision to sign or to veto an election law.)

[12] Moreover, it is worth noting that North Carolina's Constitution similarly confers upon the Legislature the power

Aside from its plain language, the Elections Clause denies unilateral authority to a state's executive officers through several contextual reference points. For example, the power to regulate federal elections is incidental to the Constitution's establishment of a federal government; it is not an inherent state power. *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 806 (1995); *Cook* v. *Gralike*, 531 U.S. 510, 522 (2001). Thus, it "had to be delegated to, rather than reserved by, the states." *Cook*, 531 U.S. at 522 (quotations omitted). Because the delegation necessarily confines the scope of power, the term "legislature" is "a limitation upon the state in respect of any attempt to circumscribe the legislative power" over federal elections. *McPherson* v. *Blacker*, 146 U.S. 1, 25 (1892). For this reason, this Court has explicitly recognized that redistricting (which is itself simply a time, place, and manner regulation) is a "legislative function," and that it must be performed "in accordance with [a] State's prescriptions for lawmaking." *Arizona State Legis.* v. *Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015).

Further, in referencing the "Times, Places and Manner" of elections, the Elections Clause plainly references what English Parliamentary law called "methods of proceeding" as to the "time and place of election" to the House of Commons. *See* 1 W. Blackstone, Commentaries on the Laws of England (1765-1769) *158-59, *170-74. Those "time and place" "methods" were in turn completely within

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to regulate *state* elections. *See, e.g.*, N.C. Const., Art. II. §§ 1, 20.

parliamentary control." G. Petyt, Lex Parliamentaria 9, 36-37, 70, 74-75,80 (1690); 1 W. Blackstone, Commentaries, *146-47. By delegating the procedures of congressional elections to legislative bodies, the Elections Clause carried forward that English law tradition of maintaining legislative control, and excluding all other forms of control, over such matters.

Another contextual reference point for the Elections Clause comes from the framing debates and early commentaries. Though all concerned parties appreciated that state legislatures might abuse their authority over election rules, none of them even proposed that other branches of state government may exercise a check on such abuse. Instead, they viewed Congress as the exclusive check. *See* The Federalist No. 59. That check, expressed directly in the Constitution's text, parallels the judicial-type functions Congress performs in other quintessentially legislative affairs, as described in adjacent constitutional provisions. *See, e.g.*, U.S. Const., Art. I, §§ 2-5.

It was furthermore assumed that even Congress would exercise its prerogative to override state legislatures' regulations only "from an extreme necessity, or a very urgent exigency." J. Story, Commentaries on the Constitution of the United States § 820 (3d ed. 1858). This was because the power "will be so desirable a boon" in the "possession" of "the state legislatures" that "the exercise of power" in Congress would (it was thought) be highly unpopular. *Id.* That state Attorneys General or other state executive officers might

deprive state legislatures of this "desirable . . . boon" in their "possession" was beyond belief. *Id.*

B. The Constitution's Elections Clause Expressly Confers Upon State Legislatures a Unique Interest in Litigation That May Impact the Meaning and Scope of a State's Election Laws.

The Constitution's Elections Clause empowers state legislatures alone among state governmental actors to protect the integrity of elections through measures aimed at the "prevention of fraud and corrupt practices," as well as through measures addressing reapportionment, redistricting, and other related matters. *Smiley*, 285 U.S. at 366. Accordingly, state legislatures have a unique and deep-rooted interest in state election laws. Indeed, this Court recently recognized that a "strong and entirely legitimate state interest is the prevention of [electoral] fraud. Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight." *Brnovich* v. *Democratic Nat'l Comm.*, ___ U.S. ___, 141 S. Ct. 2321, 2340 (2021), *see also id.* at 2348 ("[I]t should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders.").

Such interest cannot be adequately represented by a state Attorney General or other state executive officer. State legislatures have unique power and credibility in the regulation of federal elections that

is conferred directly by the Constitution. For this reason, state legislatures must be permitted to intervene under Rule 24(a) in federal litigation that may impact the meaning and scope of state election laws.[13]

i. The Fourth Circuit's Decision Will Allow State Executives to Unilaterally Change the Interpretation, Application, and Meaning of State Election Law *Without* the Input of State Legislatures.

Since the onset of the COVID-19 pandemic, the constitutionally-delegated authority of state legislatures has been under attack, as governors, election commissions, secretaries of state, and even state courts have refused to enforce, unilaterally interpreted, or even nullified significant provisions of state election law. Intervention in federal litigation affecting state election law is one of the last remaining safeguards of a state legislature's unique authority under the federal Constitution.

By minimizing or ignoring the North Carolina Legislature's unique interest in defending duly enacted state election laws, the Fourth Circuit's decision will only accelerate the erosion of state

[13] Moreover, state legislatures have a strong interest in challenges to state election laws because such laws determine how their members are elected. *See League of Women Voters of Mich.* v. *Johnson*, 902 F.3d 572, 579 (6th Cir. 2018), *citing McCormick* v. *United States*, 500 U.S. 257, 272 (1991).

legislatures' legitimate constitutional authority to regulate federal elections. In fact, the Fourth Circuit's decision opens the door for hostile state Attorneys General to hijack state election law by negotiating favorable settlements with politically friendly plaintiffs. Such efforts to circumvent state legislatures' special constitutional authority over federal elections have already occurred.[14] These efforts will only become more frequent if the Fourth Circuit's decision is not reversed.

It is critical that this Court act now to prevent the constitutional grant of power to state legislatures to regulate federal elections from being further sabotaged. This Court must recognize and affirm state legislatures' unique interests in this area and must protect state legislatures' ability to intervene in federal court to protect their legitimate constitutional powers. For these reasons, the Fourth Circuit's decision must be reversed.

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[14] *See, e.g.*, *League of Women Voters of Va.* v. *Virginia State Bd. of Elections*, 481 F. Supp. 3d 580 (W.D. Va. 2020) (memo. op.) (entering a consent decree with the Virginia Attorney General modifying Virginia election law); *Common Cause R.I. v. Gorbea*, No. 1:20-CV-00318-MSM-LDA, 2020 U.S. Dist. LEXIS 135267 (D.R.I. 2020) (consent decree to suspend Rhode Island's absentee ballot witness and notarization requirements for 2020 general election); *Gary v. Virginia Dep't of Elections*, No. 1:20-CV-860, 2020 U.S. Dist. LEXIS 214886 (E.D. Va. 2020) (consent decree requiring Virginia to provide a tool that would allow disabled voters to vote electronically/remotely); *Parnell v. Allegheny Cnty. Bd. of Elections*, No. 2:20-cv-1570, 2020 U.S. Dist. LEXIS 204105 (W.D. Pa. 2020) (consent decree requiring county board to segregate and count separately absentee ballots from voters who were originally mailed incorrect ballots).

CONCLUSION

The Fourth Circuit's decision should be reversed, and this Court should confirm that both the Constitution's federal structure and its Elections Clause mandate that state legislatures be permitted to intervene as a matter of right under Rule 24(a) in litigation impacting state election laws. State legislatures have unique and deep-rooted interests in the regulation of elections that cannot be adequately represented by a state's Attorney General, let alone one that has repeatedly criticized the measure under review and failed to defend it with vigor. Failure to give proper deference to the unique interests of state legislatures in the Rule 24 intervention-of-right analysis will inevitably lead to further encroachment upon constitutional self-government in the all-important area of election administration.

Respectfully submitted,

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