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 FOR STATE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether state officials must overcome a presumption of adequate representation to intervene as of right when they share the same ultimate objective as existing state defendants and those defendants are already adequately defending the challenged law.

2. Whether 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.

3. Whether Petitioners are entitled to intervene as of right in the particular circumstances of this case.

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INTRODUCTION

Over the course of this litigation, State Respondents have steadfastly defended Senate Bill 824, the state law challenged in this lawsuit. Represented by career professionals at the North Carolina Department of Justice under the supervision of the Attorney General, State Respondents robustly opposed a preliminary injunction and succeeded in reversing that injunction on appeal. They are poised to defend the law at trial and, if necessary, again on appeal. In these ways, this case is no different than the hundreds of pending cases where the Attorney General is vigorously defending state laws against constitutional challenge.

Petitioners are two state legislators who seek to intervene so they can defend S.B. 824 alongside State Respondents. State Respondents and the Attorney General take no position on the ultimate question of intervention. North Carolina executive officials and Petitioners cooperatively defend state statutes on a regular basis—oftentimes both represented by the Attorney General and his career staff.

But State Respondents do object to intervention on certain terms: Specifically, Petitioners may not intervene to represent the State's interest in defending state law—the very same interest that State Respondents are already representing. These overlapping interests trigger a presumption of adequate representation, which Petitioners cannot overcome. The record shows that State Respondents have robustly—and thus far successfully—defended S.B. 824. And State Respondents are confident that,

no matter what happens in this appeal, they will ultimately prevail in proving that S.B. 824 is fully consistent with federal law.

Petitioners' claim to represent the State itself also poses a state-law problem: it violates the North Carolina Constitution. For nearly 250 years, since even before the United States was formed, North Carolina's foundational charter has strictly mandated that the State's branches of government be "forever separate and distinct from each other." N.C. Const. art. I, § 6. Allowing two legislators to represent the entire State's interests in litigation outside of the legislative process would breach that constitutional line.

Petitioners may yet be entitled to mandatory or permissive intervention on behalf of the State's legislative branch. As to these paths, State Respondents take no position. With or without Petitioners, State Respondents stand ready to mount a vigorous defense of the challenged law.

STATEMENT OF THE CASE

A. North Carolina Enacts a Photo-ID Law.

In 2018, North Carolina voters approved an amendment to the North Carolina Constitution to require the presentation of a photo ID to vote. *See* N.C. Const. art. VI, § 2(4). Soon after, the North Carolina General Assembly passed S.B. 824 to implement that amendment. J.A. 814.

S.B. 824 allows voters to present broad categories of photo identification to vote. Qualifying IDs include North Carolina driver's licenses, passports, approved

student IDs, tribal IDs, approved state and local government employee IDs, military IDs, and veterans IDs. N.C. Gen. Stat. § 163-166.16(a). In addition, during this litigation, the legislature amended S.B. 824 to include federal and state public-assistance IDs. *See id.* § 163-166.16(a)(2).

S.B. 824 also facilitates the provision of free IDs to qualified voters. It does so in two ways. First, the law requires counties to issue "without charge voter photo identification cards upon request to registered voters." *Id.* § 163-82.8A(a). Second, it provides that all North Carolina residents may receive free non-operator ID cards from the Division of Motor Vehicles. *Id.* § 20-37.7(d). The law also requires the State to provide registered voters—free of charge—any documents needed to obtain an ID from the DMV. *Id.* § 161-10(a)(8).

S.B. 824 further allows eligible voters to cast provisional ballots without presenting a photo ID. Provisional voting is allowed in three situations: if voters have (1) recently been victims of a natural disaster, (2) a religious objection to the photo-ID requirement, or (3) a reasonable impediment that prevents them from presenting a photo ID. *Id.* § 163-166.16(d). A qualifying "reasonable impediment" is defined broadly. It includes the inability to obtain an ID because of disability, illness, work schedule, family responsibilities, or lack of transportation or necessary documents. *Id.* § 163-166.16(e)(1). It also includes when one's photo ID has been lost or stolen, or if a voter has applied for a photo ID but has not yet received it. *Id.* § 163-166.16(e)(2)-(3). The law also

includes a catch-all provision that allows voters to list any other reasonable impediment that prevents them from presenting a qualifying photo ID. *Id.* § 163-166.16(e)(4).

A provisional ballot cast under one of these exceptions *must* be counted "unless the county board [of elections] has grounds to believe" that the voter's stated reason is false. *Id.* § 163-166.16(f).

Separately, the law allows registered voters without an ID to cast provisional ballots that will be counted if they present a qualifying ID to the county board of elections no later than nine days after the election. *Id.* § 163-166.16(c); *see id.* § 163-182.5(b).

The law works similarly for voters who choose to vote by mail. Voters may include a copy of a qualifying photo ID in their return envelope, or they can claim one of the exceptions described above. *Id.* § 163-229(b)(8); *see id.* § 163-230.1(g).

Because of these features, the National Conference of State Legislatures has categorized S.B. 824 as a "non-strict" ID law—one that is *less* restrictive than similar laws in nineteen other States. J.A. 278. Many similar or more restrictive laws have been upheld as valid by courts, including this Court.[1] J.A. 837.

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[1] *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (plurality op); *Greater Birmingham Ministries v. Sec'y of State*, 992 F.3d 1299, 1304, 1308-10 (11th Cir. 2021); *Veasey v. Abbott*, 888 F.3d 792, 802-03 (5th Cir. 2018); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 594 (4th Cir. 2016); *Frank v. Walker*, 768 F.3d 744, 746, 752-53 (7th Cir. 2014); *South Carolina v. United States*, 898 F. Supp. 2d 30, 38-43 (D.D.C. 2012).

Significantly, S.B. 824 is also vastly different from a previous North Carolina law that was held unconstitutional in 2016. That prior law included a photo-ID requirement as only one of numerous provisions that regulated voting practices. The earlier law reduced the early-voting period, eliminated same-day registration, eliminated out-of-precinct voting, and ended pre-registration of sixteen and seventeen-year-olds. J.A. 813.

The earlier law's provisions relating to photo IDs were also far more restrictive than S.B. 824's. That law allowed for fewer kinds of qualifying IDs. J.A. 813. And unlike S.B. 824, the past law did not facilitate free IDs from county boards of elections. J.A. 280. The prior law's reasonable impediment exception was also significantly narrower. J.A. 280-81.

Given these and other features, the Fourth Circuit found in 2016 that the prior voting law was invalid. *See* J.A. 813. In this case, however, that *same* court held that the current law, S.B. 824, is likely constitutional. J.A. 838.

B. The Attorney General Defends the Law, and Petitioners Seek to Intervene.

The day after S.B. 824 was enacted, the North Carolina State Conference of the NAACP ("NAACP Respondents") sued the State Board of Elections and its members ("State Respondents"), as well as the

Governor of North Carolina, seeking to stop them from enforcing the law.[2] Pet. App. 5-6.

As they do in the thousands of cases filed against State agencies and officials every year—including at least 420 currently pending constitutional challenges to state laws and actions[3]—career staff at the North Carolina Department of Justice appeared as counsel to defend the law. These professionals included some of the Department's most experienced attorneys, who have successfully defended numerous controversial and politically sensitive state laws.

The Attorney General himself also publicly declared that he intended to defend S.B. 824 in court.[4] In so doing, the Attorney General made clear that he intended to observe his duty to "appear for the State . . . in any cause or matter . . . in which the State may be a party or interested." N.C. Gen. Stat. § 114-2(1); *see Martin v. Thornburg*, 359 S.E.2d 472, 479 (N.C. 1987). He thus confirmed that his defense of S.B. 824 would be no different than his usual response to legal challenges to state laws, regardless of his personal views.

Despite the Attorney General's public commitment, the President Pro Tempore of the North Carolina Senate and the Speaker of the North

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[2] The Governor was dismissed as an improper party. No party has challenged that ruling on appeal. Pet. App. 12.

[3] N.C. Dep't. of Justice, *2021 Annual Report* 21 (2022), https://bit.ly/34tcs6L.

[4] *E.g.*, SpectrumNews1, *NC Attorney General On Online Privacy,* at 0:29-0:55 (Jan. 24, 2019), https://bit.ly/3GDV5gC.

Carolina House of Representatives ("Petitioners") moved to intervene to defend the law alongside the Attorney General. J.A. 2. Initially, Petitioners sought to intervene "*on behalf of the General Assembly* in defense of North Carolina statutes." J.A. 55 (emphasis added); *see* N.C. Gen. Stat. §§ 1-72.2, 120-32.6(b). They did not purport to represent the interests of the State itself. *See* J.A. 54-72.

State Respondents did not oppose Petitioners' intervention. J.A. 87. However, they made clear that, regardless of the intervention ruling, they remained fully "capable of defending this lawsuit." J.A. 86.

The district court denied Petitioners' motion. Pet. App. 156-57. On intervention by right, the district court first found that Petitioners lacked a cognizable interest in this case, because, it said, a legislative interest arises only when executive officials decline to defend a law. Pet. App. 163-64, 168. Here, the court observed, the Attorney General was actively defending S.B. 824 and had given no indication that he would not continue to do so. Pet. App. 164.

The court also found that Petitioners could not show that the Attorney General's defense was inadequate. It observed that, under Fourth Circuit precedent, "[w]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented." Pet. App. 170. The presumption applied here, the court found, because the parties shared the same objective of defending S.B. 824. Pet. App. 171.

The court emphasized that "[t]here is nothing in the record to suggest that" the Attorney General would not uphold his duty to defend the law. Pet. App. 173. As the court noted, state law charges the Attorney General with representing the State in defense of its laws, including S.B. 824. Pet. App. 173 (citing N.C. Gen. Stat. § 114-2(1)). Consistent with that obligation, the court said, the Attorney General had repeatedly reaffirmed his commitment to defending S.B. 824—and had, in fact, already moved to dismiss the complaint on behalf of State Respondents. Pet. App. 173-77.

The court also denied Petitioners' request for permissive intervention, concluding that it would "unnecessarily complicate the various stages of this case." Pet. App. 180.

Finally, the court made clear that its denial of intervention was without prejudice. It invited Petitioners to file a renewed motion, "should it become apparent during the litigation that State [Respondents] no longer intend to defend this lawsuit." Pet. App. 182.

C. Petitioners Move to Intervene Again.

Six weeks after Petitioners first moved to intervene, they did so again. To justify their renewed motion, Petitioners cited the Attorney General's representation of the Board in a parallel challenge in state court, where Petitioners and the Board were jointly defending S.B. 824 against state-law claims. J.A. 152-53 (citing *Holmes v. Moore*, 18-CVS-15292 (Wake Cnty. Super. Ct.)).

In *Holmes*, career Department attorneys representing the Board had moved to dismiss five of six claims in the complaint. J.A. 213-14. Although the Board did not immediately move to dismiss the last of the six claims, it did not concede liability on that claim. Instead, the Board made clear that the evidence would eventually refute plaintiffs' factual allegations. J.A. 171-87, 258. This approach was consistent with North Carolina's liberal pleading rules, under which a Rule 12(b)(6) motion must be denied unless the complaint reveals that "plaintiffs could prove *no set of facts* which would entitle them to relief under some legal theory." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 695 S.E.2d 437, 440 (N.C. 2010) (emphasis added). Meanwhile, the Board categorically opposed entry of a preliminary injunction, including based on concerns that an injunction would harm the Board's ongoing efforts to implement the law. J.A. 188-205.

As the Fourth Circuit later observed, these strategic litigation decisions were ultimately vindicated: The state trial court declined to enter a preliminary injunction, dismissed the five claims that the Board had sought to dismiss, and allowed the remaining, fact-sensitive claim, which only Petitioners moved to dismiss, to proceed. Pet. App. 44.

State Respondents recounted this history to the district court in response to Petitioners' renewed motion to intervene in this case. J.A. 215. They reiterated that they "remain ready to defend the constitutionality of [S.B. 824]" and that they had been doing so diligently. J.A. 207.

In their renewed motion, Petitioners also argued for the first time that state law lets them represent not only the legislature's interests, but also the interests of the entire State. Pet. App. 188 n.3. In response, State Respondents explained that the state statutes relied on by Petitioners did not allow two legislators to represent the entire State's interests in court. J.A. 213 n.2. Nevertheless, State Respondents again did not oppose Petitioners' request to intervene. J.A. 207, 211.

When the district court did not rule immediately on their second motion to intervene, Petitioners appealed and sought mandamus relief in the Fourth Circuit, asking it to compel the district court to grant intervention. Pet. App. 186-87. The court of appeals denied the mandamus petition and dismissed the appeal. Pet. App. 187.

Soon thereafter, the district court denied Petitioners' renewed motion. The court concluded that state law was not clear on whether Petitioners could represent the interests of the State in litigation. Pet. App. 188. The court also noted that the state statute that Petitioners relied on disclaimed any authority to dictate federal intervention decisions, instead merely "request[ing]" that federal courts allow Petitioners to participate in certain cases. Pet. App. 188 (quoting N.C. Gen. Stat. § 1-72.2(a)).

In any event, the court found that intervention was unwarranted because "it is abundantly clear that the State Board is actively and adequately defending this lawsuit." Pet. App. 189. The court emphasized that the Attorney General "has consistently denied all

substantive allegations of unconstitutionality," had moved to dismiss, and had just filed an "expansive" brief opposing a preliminary injunction on the merits. Pet. App. 189.

The court went on to reject Petitioners' assertion that the record in *Holmes* supported a different result. At the outset, it cast doubt on whether a party's conduct in one lawsuit could invite intervention in another. Pet. App. 190 (noting that Petitioners were unable to "point to a single case" supporting this theory). The court also found that Petitioners had failed to identify anything other than "mere strategic disagreements" with State Respondents' conduct in *Holmes*. Pet. App. 191. And it observed that State Respondents' litigation strategy in *Holmes* had thus far proved successful, confirming the sincerity and strength of their defense. Pet. App. 191.

D. The Fourth Circuit Affirms.

Petitioners appealed. State Respondents again took no position on whether Petitioners should be allowed to intervene. Ct.App.Dkt. 41 at 1. They explained, however, that the Attorney General was adequately defending S.B. 824. *Id.* at 13-15. They also stressed that Petitioners did not have authority under North Carolina law to represent the interests of the State in litigation. *Id.* at 16. However, they urged the court not to reach this sensitive issue of state constitutional law. *Id.* at 19.

A divided panel of the Fourth Circuit vacated the district court's intervention decision. Pet. App. 88-89. The panel majority construed two state statutes to

allow Petitioners to represent the State in defense of state laws, including the executive branch's interest in the "enforceability" of state law. Pet. App. 99 (citing N.C. Gen. Stat. §§ 1-72.2, 120-32.6). Based on this state-law holding, the panel remanded for the district court to reconsider whether Petitioners could intervene in this case. Pet. App. 108.

Judge Harris dissented. Among other things, she observed that the text of the state statutes appears to allow Petitioners to act only for the state legislature. Pet. App. 145-46. But Judge Harris would not have reached that sensitive state-law issue. Instead, she stated that intervention was unwarranted because State Respondents were already adequately defending S.B. 824. Pet. App. 136-37.

Because the panel unnecessarily and incorrectly decided an important issue of state law, State Respondents petitioned for rehearing en banc. Ct.App.Dkt. 86. They stressed that intervention in federal court "is governed by Rule 24 and not by state law." *Id.* at 14 (quoting 7C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1905 (3d ed. 2020)).

On en banc review, the Fourth Circuit affirmed the district court. The en banc court declined to reach the sensitive state-law issues that the panel had decided. Instead, it held that, even assuming that state law granted Petitioners an interest, Petitioners were not entitled to mandatory intervention. Pet. App. 24-25.

Like the panel, the en banc court agreed that Petitioners were required to overcome a presumption

of adequate representation. The court observed that, like its sister circuits, it had long presumed that an intervenor's interests will be adequately represented when it shares the same objective as an existing party. Here, the parties shared the same interest and objective—defending S.B. 824—so the presumption applied. Pet. App. 30-40.

The court went on to hold that, no matter the strength of this presumption, the district court had not erred in finding that the State's interests were adequately represented by the Attorney General. While Petitioners might be able to raise "garden-variety disagreements" with "the *way* in which the Attorney General has chosen to defend S.B. 824," the district court rightly found that kind of tactical nitpicking "insufficient." Pet. App. 41-42. Likewise, there was no evidence that the policy preferences of the Attorney General or Governor had affected the defense of S.B. 824. The court did note, however, that if State Respondents were to someday abandon their defense of S.B. 824, Petitioners would be free to seek intervention at that time. Pet. App. 48-49.

E. State Respondents Successfully Defend S.B. 824 in Federal Court.

While Petitioners' motion to intervene was on appeal, State Respondents continued to defend S.B. 824 in both state and federal court.

In federal district court, NAACP Respondents filed a motion for a preliminary injunction, which State Respondents vigorously opposed. They filed a robust brief explaining why plaintiffs were unlikely to

prevail on any of their claims—including because "Plaintiffs have failed to show that they are likely to succeed in proving that SB824 was enacted with discriminatory intent, or in a manner that disproportionately burdens minority voters." J.A. 273. Specifically, State Respondents explained that:

- States have a legitimate interest in "safeguarding voter confidence" by requiring photo IDs to vote. J.A. 273 (quoting *Crawford*, 553 U.S. at 191).
- North Carolina's voters expressed this interest by ratifying a constitutional amendment supporting a photo-ID requirement, and S.B. 824 was enacted in compliance with that amendment. J.A. 273-74.
- The law was structured to minimize any burden on voting. It allows for a wide array of qualifying IDs, provides multiple ways for all voters to receive a free ID, and allows anyone with a reasonable impediment to obtaining or presenting an ID to vote provisionally. J.A. 275-76.
- In these and other ways, S.B. 824 is materially *less* restrictive than many photo-ID laws that courts, including this Court, have upheld. J.A. 300-03.
- S.B. 824 is also vastly less restrictive than a previous law that the Fourth Circuit had invalidated. That law limited an array of *other* voting methods, and its photo-ID provisions were also far more restrictive. J.A. 304.
- S.B. 824 arose from an open and relatively bipartisan legislative process, with the final bill

reflecting several amendments from the minority party in the legislature. J.A. 295-96.

Petitioners filed an amicus brief supporting State Respondents. Petitioners' amicus brief made these same arguments, with only minor differences in organization and emphasis. *See* D.Ct.Dkt. 96.

State Respondents also presented extensive factual evidence to show why entry of a preliminary injunction was improper. J.A. 274-300. It included:

- An independent study showing that many States have adopted photo-ID laws, and that S.B. 824 is relatively "non-strict." J.A. 278.
- Nearly two dozen exhibits showing that S.B. 824 was enacted through normal procedures, and with bipartisan support. J.A. 289-97.
- An affidavit from the Board's Chief Information Officer refuting NAACP Respondents' assertion of a racial disparity in the possession of photo IDs, including because their analysis omitted eight categories of qualifying IDs. J.A. 298-99.

Petitioners also sought to submit their own evidence to oppose an injunction, but that evidence again overlapped almost entirely with the Board's. Specifically, Petitioners submitted five expert reports. These reports opined that:

- voter fraud is a legitimate concern,
- S.B. 824 is a relatively lenient photo-ID law and was enacted through ordinary procedures,

- S.B. 824 is similar to a South Carolina law that survived legal challenge,
- plaintiffs exaggerated the racial disparity in possession of qualifying IDs, and
- photo ID laws have broad public support.

D.Ct.Dkt. 96 at 31-33.

Despite State Respondents' robust opposition, the district court granted a preliminary injunction. State Respondents appealed.

On appeal, they again explained the many reasons why plaintiffs could not show that S.B. 824 was unconstitutional. J.A. 351-393. A unanimous panel of the Fourth Circuit—the same panel that had divided on Petitioners' intervention—embraced these arguments in their entirety. J.A. 839-40. It therefore reversed the district court and vacated the preliminary injunction. Although Petitioners were allowed to intervene on appeal, the en banc Fourth Circuit later noted that the panel's "reversal was based on the record the Attorney General created in the district court." Pet. App. 43. The victory therefore "confirmed that the Attorney General's litigation approach was well within the range of acceptable strategy." Pet. App. 43-44.

NAACP Respondents petitioned for rehearing en banc. The petition was summarily denied.

Back in the district court, State Respondents moved for summary judgment. J.A. 316. In support, they explained that the Fourth Circuit's opinion, along with this Court's recent decision in *Brnovich v.*

Democratic National Committee, 141 S. Ct. 2321 (2021), had foreclosed plaintiffs' claims as a matter of law. J.A. 327, 338-42. Petitioners again filed an amicus brief that largely overlapped with State Respondents' brief. D.Ct.Dkt. 183. The motion remains pending.

Trial was originally scheduled for January 2021, but was postponed to January 2022, "pending the resolution of this separate appeal regarding intervention." Pet. App. 15-16. After this Court granted certiorari, State Respondents asked the district court to stay the trial, or alternatively to allow Petitioners to participate at trial as permissive intervenors. D.Ct.Dkt. 192. State Respondents did so to promote judicial economy, and out of respect for Petitioners' repeated insistence that they "must be permitted to intervene before trial" or their rights "will be lost forever." Ct.App.Dkt. 50 at 24; *see* Ct.App.Dkt. 31 at 35 (same). Petitioners took no position on a stay, and chose to *oppose* their own intervention on jurisdictional grounds. D.Ct.Dkt. 192 at 5. The trial court stayed the trial for a second time, pending this Court's decision on intervention, and held that the request to allow Petitioners to intervene was moot. D.Ct.Dkt. 194.

Finally, State Respondents and Petitioners have continued to jointly defend S.B. 824 in state court in *Holmes*. For example, both on appeal of the trial court's denial of a preliminary injunction and at trial, the Board strongly opposed plaintiffs' claim that S.B. 824 was discriminatory in intent or effect. Although the trial court ultimately entered judgment

in favor of the *Holmes* plaintiffs, the Board and Petitioners have both appealed that decision to the North Carolina Court of Appeals. *See Holmes v. Moore,* No. COA22-16 (N.C. Ct. App.).

SUMMARY OF ARGUMENT

Throughout this litigation, State Respondents have taken no position on Petitioners' request for intervention. They maintain that posture here. But the intervention analysis advanced by Petitioners is flawed in several respects.

First, the courts of appeals have universally applied a presumption of adequacy when a putative intervenor shares the same interests as an existing party. Petitioners offer no good reason to discard that uniform practice, which lower courts have applied in innumerable cases over the past half century. And while state law can create a qualifying *interest* under Rule 24(a)(2), it cannot predetermine whether an existing party will adequately represent that interest.

Second, the adequacy determination should be reviewed for abuse of discretion. This Court has previously applied abuse-of-discretion review to adequacy under Rule 24(a)(2), and for good reason. Adequacy is a fact-sensitive determination that turns on the record before the trial court. It is exactly the kind of discretionary judgment on which trial courts are owed deference.

Third, the presumption of adequacy applies here, because State Respondents are already representing the interest that Petitioners seek to vindicate: the State's interest in defending its laws. And, by any

measure, State Respondents are defending S.B. 824 adequately. Finally, if Petitioners are allowed to intervene, they may do so only on behalf of the state legislature—not the entire State. Any other result would violate the North Carolina Constitution.

ARGUMENT

I. A Proposed Intervenor Must Overcome a Presumption of Adequacy When It Shares an Interest with an Existing Party and State Law Cannot Relieve That Burden.

Rule 24 provides two paths to intervention: intervention as of right under Rule 24(a) and permissive intervention under Rule 24(b). Petitioners moved to intervene under both theories, but this appeal principally concerns intervention by right.

Under Rule 24(a)(2), a party must be allowed to intervene if it files a timely motion and shows that (1) it has an interest in the proceedings, (2) the interest may be impaired by the action, and (3) the interest is not being adequately represented by the current parties.

In applying this test, courts have coalesced around four principles that are relevant to this appeal. First, state law can create a qualifying interest. Second, the proposed intervenor bears the burden of showing the rule's factors are met. Third, when a proposed intervenor shares the same interest as an existing party, courts presume adequate representation. Fourth, adequacy is a fact-sensitive determination that state law cannot predetermine. These principles are discussed further below.

A. An Intervenor Must Have a Significantly Protectable Interest, Which May Be Defined by State Statute.

The Rule 24(a)(2) analysis begins with defining the proposed intervenor's interest, as the test's other prongs—impairment and adequacy—depend on that definition.

Courts have read Rule 24(a)(2)'s interest requirement relatively broadly. *See Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 135-36 (1967). At the same time, an interest must be "significantly protectable"—a phrase that many lower courts have understood to mean "direct," "substantial," and "legally protectable." *Donaldson v. United States*, 400 U.S. 517, 531 (1971); *e.g.*, *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 464 (5th Cir. 1984) (en banc).

Courts have held that state law can establish significantly protectable interests. *See, e.g.*, *City of Emeryville v. Robinson*, 621 F.3d 1251, 1259-60 (9th Cir. 2010); *Olden v. Hagerstown Cash Reg., Inc.*, 619 F.2d 271, 273-74 (3d Cir. 1980). But state law cannot supersede the requirements of Rule 24 altogether and dictate an intervention outcome. Wright & Miller, *supra*, § 1905; *see infra* pp. 28-30.

B. An Intervenor Bears the Burden of Establishing That Representation of Its Interests May Be Inadequate.

After a court identifies the proposed intervenor's interest, Rule 24(a)(2) requires the court to determine

whether the "existing parties adequately represent that interest."

As Petitioners themselves seem to concede, "adequate" representation is not an especially high bar. It requires only that representation be "suitable." Br. 18 (quoting Bryan A. Garner, Modern American Usage 17 (2003)); *see also Adequate*, Webster's Seventh New Collegiate Dictionary, 11 (1963) ("1: sufficient for a specific requirement; *specif*: barely sufficient"); *Adequate*, Webster's Third New Int'l Dictionary, 25 (1961) ("2 : … *often*: narrowly or barely sufficient: no more than satisfactory"); *Adequate*, Webster's Collegiate Dictionary, 13 (3d ed. 1929) ("Equal to or sufficient for some (specific) requirement").

Courts have likewise understood the term "adequate" to mean meeting relatively minimal standards. *E.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 & n.20 (1997) (explaining that "[t]he adequacy inquiry under Rule 23(a)(4)" should focus on competency and conflicts of interest); *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (equating "ineffective assistance" with a "fail[ure] to render 'adequate legal assistance'"—that is, assistance so deficient that it "undermined the proper functioning of the adversarial process"); *United States v. Smith*, 893 F.2d 1573, 1580 & n.2 (9th Cir. 1990) (interpreting 18 U.S.C. § 3006A(e), which promises "adequate representation," to require any services that "reasonably competent retained counsel would require"); *cf. Harbison v. Bell*, 556 U.S. 180, 189 (2009) (suggesting that the mere appointment of "state-

furnished representation" necessarily equates to "adequate representation" under 18 U.S.C. § 3599, without any further inquiry into the competency of that representation). These courts certainly do not define "adequate" as exceptional or maximal.

This understanding of adequacy is consistent with Rule 24's history. Even before a federal rule on intervention existed, American courts considered adequacy of representation in making intervention decisions. James Wm. Moore & Edward H. Levi, *Federal Intervention I. The Right to Intervene and Reorganization*, 45 Yale L.J. 565, 581 (1936). These courts did not define adequacy strictly: Absent proof of collusion, adversity of interests, or nonfeasance, an intervenor could not intervene. *Id.* at 591-92.

In 1937, the federal rules codified the adequacy requirement. Fed. R. Civ. P. 24(a)(2) (1937) (amended in 1966). And in 1966, the Rules Committee revised Rule 24(a)(2), but made clear that it intended no change "in the meaning of [the adequacy] concept." Wright & Miller, *supra*, § 1909.

Over the ensuing decades, the courts of appeals have further elaborated on the meaning of "adequate representation" under Rule 24(a)(2). Many courts continue to look for evidence of collusion, adversity of interests, or nonfeasance. *Tri-State Generation & Transmission Ass'n v. N.M. Pub. Regul. Comm'n*, 787 F.3d 1068, 1073 (10th Cir. 2015). Others have focused on whether the proposed intervenor "add[s] some necessary element" to the litigation that could not be conveyed by an amicus brief. *Blake v. Pallan*, 554 F.2d 947, 954-55 (9th Cir. 1977); *see Daggett v. Comm'n on*

Govt'l Ethics & Elections Pracs., 172 F.3d 104, 112 (1st Cir. 1999).

No matter the precise standard, in applying Rule 24(a)(2), courts have universally embraced certain principles. Notably, every federal court of appeals has consistently held that "[a] mere difference of opinion concerning the tactics with which the litigation should be handled" is not sufficient to prove inadequacy. Wright & Miller, *supra*, § 1909; *e.g.*, *Daggett*, 172 F.3d at 112 ("Of course, the use of different arguments as a matter of litigation judgment" cannot alone show inadequacy); *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 810 (7th Cir. 2019) (Sykes, J., concurring) ("disagreements about litigation strategy" are "not enough to rebut the presumption of adequate representation"). This principle aligns neatly with the Rule's text: Rule 24(a)(2) requires *adequate* representation, not something more.

In addition, as this Court has twice made clear, the *proposed intervenor* bears the burden of showing inadequacy. *See Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) ("The [inadequacy] requirement of the Rule is satisfied if *the applicant shows* that representation of his interest 'may be' inadequate." (emphasis added)); *NAACP v. New York*, 413 U.S. 345, 368 (1973) (noting that proposed intervenors had failed to substantiate their claim of inadequate representation). Consistent with this guidance, the federal courts of appeals all agree that the burden of showing inadequacy is on the proposed intervenor. *E.g.*, *Am. Nat'l Bank & Trust Co. v. City of Chicago*, 865 F.2d 144, 148 (7th Cir. 1989);

Pennsylvania v. Rizzo, 530 F.2d 501, 505 (3d Cir. 1976).[5]

C. An Intervenor Must Overcome a Presumption of Adequacy When It Shares an Interest with an Existing Party.

"The most important factor in determining adequacy of representation is how the interest of the [proposed intervenor] compares with the interests of the present parties." Wright & Miller, *supra*, § 1909. This principle reflects the understanding that when a proposed intervenor's interests align closely with those of an existing party, the intervenor's interests are likely to be adequately represented by that party. *Id.*; *see* 6 James Wm. Moore, *Moore's Federal Practice* § 24.03(4)(a) (3d ed. 2021).

Consistent with this understanding, for decades, both this Court and every federal appellate court have applied a presumption of adequacy when the proposed intervenor shares the same interest as an existing party. *E.g.*, *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 692 n.4 (1961); *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982); *USPS v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978); *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 315 (3d Cir. 2005); *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976); *Bush v. Viterna*, 740 F.2d 350, 355

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[5] Petitioners rely on a single sentence from *Federal Practice & Procedure* to advocate in favor of handling the burden differently. Br. 26. But Wright and Miller themselves acknowledge that their reading of Rule 24's text is not the one that most courts—including this one—have adopted. Wright & Miller, *supra*, § 1909 & n.5 (citing *Trbovich*, 404 U.S. at 538 n.10).

(5th Cir. 1984); *United States v. Michigan*, 424 F.3d 438, 443-44 (6th Cir. 2005); *Kaul*, 942 F.3d at 799 (7th Cir.); *FTC v. Johnson*, 800 F.3d 448, 452 (8th Cir. 2015); *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003); *Tri-State*, 787 F.3d at 1072-73 (10th Cir.); *United States v. City of Miami*, 278 F.3d 1174, 1178 (11th Cir. 2002); *Env't Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979) (per curiam); *Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fishermen's Ass'ns*, 695 F.3d 1310, 1316 (Fed. Cir. 2012); *see also* Wright & Miller, *supra*, § 1909.

Moreover, in the fifty years that courts of appeals have applied this presumption, no court has ever held that the presumption is *relaxed* when the intervenor is a government actor. In fact, courts have developed government-specific intervention rules that suggest the opposite. Notably, many courts of appeals have held that when the existing party is a governmental entity or official representing a sovereign interest, the presumption of adequate representation is even stronger. *E.g.*, *Kaul*, 942 F.3d at 799; *Stuart v. Huff*, 706 F.3d 345, 352 (4th Cir. 2013); *Arakaki*, 324 F.3d at 1086; *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996); *see also* 28 U.S.C. § 2403(b) (intervention by a State to defend constitutionality of state statute is required when "a State or any agency, officer, or employee thereof is not a party").[6]

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[6] State Respondents take no position on whether a heightened presumption of adequacy for government defendants applies here. Because State Respondents are adequately defending the law under any standard, the precise strength of the presumption does not affect the outcome in this case. *See infra* pp. 39-49.

Petitioners ignore this overwhelming consensus, which spans over half a century and which has been applied in hundreds—if not thousands—of lower-court cases since this Court last interpreted Rule 24(a)(2). As they see things, a presumption of adequate representation should *never* apply, no matter who the existing parties are and no matter how those parties' interests compare to the proposed intervenors' interests. In fact, Petitioners go so far as to *flip* the presumption, contending that *any* party with *any* interest may presumptively intervene. Br. 26-27. Adopting this proposed rule would effect a sea change in federal litigation—allowing any number of intervenors to join lawsuits on demand.

Petitioners cite *Trbovich* to support their new rule. Br. 27-29. But this case does not undermine the well-settled presumption applied by all of the courts of appeals. In *Trbovich*, this Court rejected the Secretary of Labor's argument that the interest of the union member who sought to intervene overlapped fully with the Secretary's interest. *See* 404 U.S. at 538. *Trbovich* is thus not a case where the presumption would ordinarily apply.[7]

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[7] *Cascade* is no more help to Petitioners. There, the Court did not say whether it understood the proposed intervenor's interests to align with the existing party's interests. *See* 386 U.S. at 135-36. Instead, the Court said only that the existing party had "fallen far short of representing [Cascade's] interests." *Id.* at 136. *Cascade* thus does not address whether a court should presume adequate representation or how to overcome a presumption when one does apply. Instead, the Court merely held—on the facts of that case—that the existing party had not represented the intervenor's interests adequately. *Id.*

The courts of appeals have adopted this understanding of *Trbovich*. *E.g.*, *Stuart*, 706 F.3d at 352 (explaining that "the proposed intervenors [in *Trbovich*] did not even share the same ultimate objective as an existing party"). After all, the courts of appeals universally embraced the presumption of adequacy *after* this Court decided *Trbovich*. Moreover, many courts of appeals cite *Trbovich* while simultaneously applying the presumption. *E.g.*, *Brennan*, 579 F.2d at 191.

As Judge Sykes has explained while applying *Trbovich*, it only "makes sense" to presume adequate representation "when the intervenor and the named party share the same goal, and when the named party is a governmental official or body charged by law with protecting the intervenor's interest." *Kaul*, 942 F.3d at 810 (Sykes, J. concurring). In these situations "it is reasonable, fair, and consistent with the practical inquiry required by Rule 24(a)(2) to start from a presumption of adequate representation and put the intervenor to a heightened burden to show a concrete, substantive conflict or an actual divergence of interests to overcome it." *Id.*

This understanding of Rule 24(a)(2) echoes a mountain of precedent from the lower courts. Petitioners' argument thus asks this Court to conclude that every federal court of appeals, for half a century, has misread *Trbovich* and Rule 24(a)(2). This Court should not embrace that remarkable claim.

D. State Law Has No Bearing on the Adequacy Analysis.

Petitioners resist this case law, urge the Court not to apply any presumption, and insist that North Carolina state law establishes the inadequacy of the Attorney General's representation. Petitioners place great weight on two state statutes, which they say let them represent "the State itself." Br. 43 (citing N.C. Gen. Stat. §§ 1-72.2(b), 120-32.6(b)). It is true, of course, that these statutes might bear on whether Petitioners have *an interest* that allows them to intervene. But the statutes do not—and cannot—supplant federal courts' duty to independently analyze Rule 24(a)(2)'s requirements.

Until their brief to this Court, Petitioners agreed with this point. Below, they repeatedly and expressly disavowed the theory that North Carolina law could be dispositive on the question of adequacy. As they told the Fourth Circuit: "[T]his case says nothing about whether Proposed Intervenors will be entitled to intervene in future federal cases because *every* Rule 24(a) applicant must satisfy the inadequacy prong in *every* case. The inadequacy prong will foreclose intervention as of right in cases in which another party adequately represents the General Assembly's protectable interests." Ct.App.Dkt. 50 at 21; Ct.App.Dkt. 31 at 32 (same). The court of appeals relied on this concession, noting that Petitioners "assure us that state laws designating legislative agents as additional representatives will *not* lead necessarily to intervention as of right—precisely

because the adequacy prong will remain an independent check." Pet. App. 30.

Petitioners now, for the first time, maintain the opposite. Br. 47-49. In effect, they argue that North Carolina law deems the Attorney General's representation inadequate as a matter of law.

Petitioners have waived this argument, given their past concessions. But even if they had not, their prior position was plainly the correct one. It is black-letter law that federal law governs procedural matters in federal court, including intervention. Fed. R. Civ. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts."). Hence, "[i]t is wholly clear that the right to intervene" in a federal case "is governed by Rule 24 and not by state law." Wright & Miller, *supra*, § 1905. For precisely this reason, North Carolina law only "request[s]" that federal courts allow Petitioners to intervene. N.C. Gen. Stat. § 1-72.2(a).

Nor is there any reason to think that Rule 24(a)(2) was intended to allow States to dictate the entire intervention analysis, including the adequacy requirement. A comparison with subpart (a)(1) is instructive: That subpart makes intervention mandatory if the proposed intervenor "is given an unconditional right to intervene by a *federal* statute." (emphasis added). If the drafters of Rule 24 had intended for States to have equivalent authority to create a right to mandatory intervention, they would have said so expressly. *See Harris v. Reeves*, 946 F.2d 214, 222 n.10 (3d Cir. 1991) (declining to apply a

Pennsylvania statute that purported to give district attorneys the automatic right to intervene).

Nor would it be workable to allow all fifty States to predetermine intervention in the federal courts. Could a State pass a law granting the State's environmental agency the right to intervene in any federal case implicating the State's environmental interests? What about a law granting the State's civil-rights enforcement agency a right to intervene in any Title VII lawsuit? Petitioners' new position would allow States to supplant Rule 24 in these and innumerable other ways.

At bottom, Petitioners' approach cannot be squared with the basic principle that the federal rules of civil procedure, not state law, govern procedural matters in federal court. Wright & Miller, *supra*, § 1905. A state statute can create a significantly protectable interest, but it cannot predetermine whether an existing party adequately represents that interest.

II. The Proper Standard of Review for a District Court's Adequacy Determination Is Abuse of Discretion.

For two reasons, this Court should review the district court's decision on adequacy for abuse of discretion. First, Petitioners waived any argument for a different standard. Second, this Court's precedent makes clear that abuse of discretion is the correct standard of review.

A. Petitioners Waived Any Argument That Adequacy Is Reviewed De Novo.

Petitioners told the court below that "[d]enial of a motion to intervene as of right is reviewed for abuse of discretion," drawing no distinction among the separate prongs of Rule 24(a)(2). Ct.App.Dkt. 31 at 23. Although circuit precedent established this standard, Petitioners were still required to preserve issues they wish to raise in this Court—particularly where, as here, the district court's decision was reviewed by the court of appeals sitting en banc. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007). Because Petitioners never argued that adequacy should be reviewed for abuse of discretion until their petition to this Court, they have waived their new position here. *See Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 72-73 (2013) (finding that respondent had waived an argument by conceding the opposite in the court below).

B. Adequacy Is Appropriately Reviewed for Abuse of Discretion.

Precedent also forecloses Petitioners' argument. This Court has previously reviewed a district court's adequacy determination for abuse of discretion. *Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003). In *Georgia*, this Court held that the "[d]istrict [c]ourt did not abuse its discretion" when it found that the existing party did not adequately represent the proposed intervenor's interest under Rule 24(a)(2). *Id.*

Petitioners cite a handful of other cases, Br. 39-40, but none addresses the standard for reviewing a

district court's determination of *adequacy*—the question that this Court granted certiorari to decide. Indeed, as Petitioners concede, none of those cases even identifies the standard of review for the overall intervention decision. *See* Br. at 39. The *only* decision that addresses the standard for reviewing adequacy is *Georgia*.

Even if this Court were inclined to revisit that precedent, Petitioners cannot show any basis for doing so. The appropriate standard of review depends on which "judicial actor is better positioned" to decide an issue. *U.S. Bank Nat'l Ass'n v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 966-67 (2018). Appellate courts review questions that "immerse courts in case-specific factual issues" for abuse of discretion, whereas questions that involve significant "legal work" are reviewed de novo. *Id.* at 967-68.

Adequacy of representation is predominantly factual. To determine adequacy, courts must make fact-intensive and case-specific judgments about a party's ability and willingness to represent a proposed intervenor's interests. Petitioners concede the point: They argue that adequacy is "highly contextual" and "cannot be assessed in a vacuum." Br. 18-19. They then cite case-specific disagreements with State Respondents' litigation choices. Br. 49-50. These kinds of context-dependent disputes are exactly the kinds of factual questions that are reviewed deferentially. *U.S. Bank*, 138 S. Ct. at 966; Fed. R. Civ. P. 52(a)(6) (factual findings reviewed for clear error).

Deference is especially warranted here, moreover, because the adequacy inquiry implicates district

courts' inherent authority to manage their dockets. District courts have "superior familiarity" with the parties litigating before them. *United States v. Clarke*, 573 U.S. 248, 256 (2014); *see* Pet. App. 52 (Wilkinson, J., dissenting) ("The district court is best situated to assess the 'adequacy' of an existing party's representation of a proposed intervenor's interest"; "[t]he parties are right there in front of it."). Because of this "institutional advantage[]," "it is especially common for issues involving supervision of litigation to be reviewed for abuse of discretion." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991). This deference extends to control over the addition of new parties. *E.g.*, *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 553 (2010) (district courts have discretion when "deciding whether to grant a motion to amend a pleading to add a party"); *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170-72 (1989) (same, notice to additional class members).

To counter this straightforward analysis, Petitioners claim that measuring adequacy of representation is a question of law. Br. 35. But that assertion misunderstands the nature of the adequacy inquiry.

Of course, State Respondents agree that any legal questions embedded within the adequacy analysis—such as whether to apply a presumption of adequacy—are reviewed de novo. But once the legal standards are established, *application* of those standards is reviewed for abuse of discretion. This duality fits neatly within the abuse-of-discretion framework. After all, "the abuse-of-discretion standard is not a

monolith: within it, abstract legal rulings are scrutinized de novo, factual findings are assayed for clear error, and the degree of deference afforded to issues of law application waxes or wanes depending on the particular circumstances." *T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 38 (1st Cir. 2020); *see Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003) (intervention decisions implicate "different kinds" of determinations, with "pure issues of law … reviewed de novo" and "findings of fact … for clear error").

Petitioners argue that because the *overall* intervention determination is reviewed de novo, any *subsidiary* factual questions must be as well. Br. 37. Petitioners' premise is questionable: Many courts of appeals have long reviewed intervention decisions for abuse of discretion. *E.g.*, *Int'l Paper Co. v. Inhabitants of Town of Jay*, 887 F.2d 338, 344 (1st Cir. 1989) (joining approach of Second, Third, and Fourth Circuits). But even taking Petitioners' premise as true, their conclusion does not follow. Subsidiary factual questions are reviewed deferentially, even when they are "nearly dispositive" of the "ultimate legal question." *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 333 (2015). Petitioners recognize as much elsewhere: They agree that courts should review Rule 24(a)(2)'s timeliness requirement for abuse of discretion. Br. at 38-39.

Petitioners' remaining arguments are also meritless. For example, Petitioners argue that de novo review is required because Rule 24(a)(2) uses mandatory language. Br. 35. But the standard of

review depends on whether the underlying questions are legal or factual, not on whether a rule is mandatory. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990).

Petitioners also argue that the standards of review for subparts (a)(1) and (a)(2) of Rule 24 should be the same. But the text of the two rules differs markedly. Rule 24(a)(1) requires intervention when a federal statute "give[s] an unconditional right to intervene." Interpreting the scope of federal statutes is quintessential "legal work." *U.S. Bank*, 138 S. Ct. at 968. Evaluating "adequacy" of representation is not.

III. State Respondents Take No Position on Intervention but Are Adequately Defending the State's Interests.

Consistent with their posture throughout this case, State Respondents do not oppose Petitioners' request for intervention. *See, e.g.*, J.A. 5; J.A. 206-07. Indeed, the Attorney General frequently works cooperatively with Petitioners to mount a robust defense of state law. For example, the Attorney General often represents Petitioners when they are named as defendants alongside executive branch officials. And when Petitioners are not named as defendants, the Attorney General has even moved for permissive intervention on their behalf.

Although State Respondents take no position on the ultimate question of intervention, they highlight certain principles that should guide the intervention analysis.

First, insofar as Petitioners seek to intervene to vindicate the State's interest in defending state law, the presumption of adequacy applies. This is so because State Respondents are already vindicating that very same interest.

Second, regardless of any presumption, State Respondents, through the Attorney General, are adequately defending S.B. 824 in this case. They have already successfully overturned on appeal a preliminary injunction blocking S.B. 824, and they stand ready to defend the law on the merits at trial and, if necessary, again on appeal. By any measure, this robust defense cannot be deemed inadequate.

Third, if Petitioners can intervene, they may do so only on behalf of *the legislature*—not the entire State. The state statutes cited by Petitioners allow them to represent only the General Assembly's interests in court. And reading those statutes to allow Petitioners to act for the State would violate the North Carolina Constitution. Even if this Court were inclined to allow intervention, there would be no need for it to issue a ruling that would clash with state law.

A. The Presumption of Adequacy Applies.

State Respondents' thus-far successful defense of S.B. 824 is owed the presumption of adequacy. Petitioners seek to intervene to vindicate the State's interest in "defending the validity of its laws." Br. 43. But there is no dispute that State Respondents are already doing so.

Under North Carolina law, the Attorney General has constitutional, statutory, and common law

authority "to appear for the State . . . in any cause or matter . . . in which the State may be a party or interested." N.C. Gen. Stat. § 114-2(1); *see Martin*, 359 S.E.2d at 479. Indeed, Petitioners do not dispute that the Attorney General has authority to represent the State's interests. *See* Ct.App.Dkt. 50 at 19. Here, the Attorney General is fulfilling that responsibility by directing State Respondents' defense of S.B. 824. Because the Attorney General is already defending the State's interest in the validity of its laws, the presumption of adequacy should apply.

Notwithstanding the Attorney General's vigorous defense of S.B. 824 for the State, Petitioners claim that only the interests of the Board of Elections are being represented, not those of the State itself. They are mistaken.

Petitioners first argue that the Attorney General's duty to defend the State is irrelevant because he is not a party to this case. Br. 33. But as the North Carolina Supreme Court has recognized, when the State is not named as a party, the Attorney General "defend[s] the State" when he represents state officials. *Martin*, 359 S.E.2d at 475, 479. That makes sense because a lawsuit filed against state officials in their official capacities is "no different from a suit against the State itself." *Printz v. United States*, 521 U.S. 898, 930-31 (1997) (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989)); *see White v. Trew*, 736 S.E.2d 166, 168 (N.C. 2013) (same). Thus, as a matter of North Carolina law, the Attorney General represents the State's interests in this case.

Nor are the State's interests inadequately represented merely because the defendant Board members also administer state election law. Under North Carolina law, when the Attorney General is directing a state official's defense of state law, his principal aim is to defend the State's interest in the validity of its laws. *Martin*, 359 S.E.2d at 479. It is established, for example, that the Board cannot compel the Attorney General to take any action that he believes would impair the defense of S.B. 824. *See Hendon v. N.C. State Bd. of Elections*, 633 F. Supp. 454, 457-59 (W.D.N.C. 1986) (Sentelle, J.) (holding that a state agency cannot order the Attorney General to abandon defense of a statute). And here, the Board has never involved itself with decisions about how this lawsuit should be conducted. The Board, for instance, has never taken any vote on the defense of S.B. 824.

In sum, because the State's interest in defending the validity of S.B. 824 is already represented in this lawsuit, the presumption of adequacy applies.[8] And as explained below, Petitioners cannot overcome that presumption because State Respondents' defense of this lawsuit has been more than adequate.

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[8] If this Court were to hold that no presumption applies, it would be appropriate to remand for the district court to assess adequacy under the proper standard. Although State Respondents believe that the record shows they have adequately defended S.B. 824 under any standard, they recognize that this Court is not the typical forum for conducting the highly fact-specific adequacy analysis under a new standard for the first time. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view"). A remand to the district court to assess adequacy in the first instance would be consistent with the result urged by the en banc dissent below. Pet. App. 60.

B. State Respondents Are Adequately Defending S.B. 824 in This Case.

There is no dispute that State Respondents, through the Attorney General, are actively defending S.B. 824. *See* Pet. App. 27, 41. And this defense has thus far proven successful: State Respondents have overturned a preliminary injunction on appeal; have moved for summary judgment; and are poised to defend the law at trial and, if necessary, again on appeal. Thus, regardless of any presumption, State Respondents' defense of S.B. 824 has clearly been adequate.

In fact, were it not for this side dispute on intervention—which has twice required the district court to postpone trial—State Respondents would already have prevailed in this lawsuit. As State Respondents explained in their summary judgment brief to the district court, the Fourth Circuit has "already analyzed the merits of Plaintiffs' case on the same record and found [Plaintiffs] unlikely to succeed." J.A. 327 (emphasizing that "[b]ecause Plaintiffs failed to conduct discovery, there is no additional evidence in the record" that could dislodge the Fourth Circuit's preliminary merits ruling). Thus, *it is this very intervention dispute* that has blocked State Respondents from securing conclusive dismissal of plaintiffs' claims.

But even if the presumption does not apply here, Petitioners cannot show that the Attorney General's defense of the State's interests in this case has been inadequate. Petitioners quibble with how the Attorney General has defended S.B. 824, but these

tactical disagreements fall far short of showing inadequacy. They complain, for example, that State Respondents did not raise a makeweight timeliness objection to plaintiffs' preliminary-injunction motion. Br. 49. But it strains credulity to think that this argument—to which Petitioners allocated less than a page at the end of their amicus brief, D.Ct.Dkt. 96 at 30-31—would have moved the district court. And of course, this timeliness argument ended up being unnecessary for State Respondents to prevail on appeal.

Petitioners similarly complain that State Respondents did not submit expert reports in opposition to the preliminary-injunction motion. Br. 49-50. But they neglect to mention that State Respondents did submit extensive *factual* evidence at that stage. Critically, this factual evidence overlapped materially with the information that Petitioners themselves sought to introduce through experts. *See supra* pp. 9, 18. For example, Petitioners sought to introduce expert evidence showing that only small numbers of registered voters lack a qualifying photo ID. D.Ct.Dkt 96 at 33. But State Respondents submitted this *exact same* information through the Board's Chief Information Officer. Moreover, the Board's witness had extensive personal knowledge that directly rebutted plaintiffs' flawed assertions—knowledge that Petitioners' expert lacked. *See* J.A. 378. Likewise, Petitioners sought to introduce expert evidence that the legislature passed S.B. 824 using ordinary procedures. D.Ct.Dkt. 96 at 33-34. But again, State Respondents submitted fact evidence

based on personal knowledge that made the exact same point, including an affidavit from the General Assembly's own Director of Legislative Drafting. J.A. 383-86.

All of Petitioners' other "expert" evidence merely described the law or made commonsense points that have never been in dispute. For example, one expert opined that photo ID laws are popular. Another compared S.B. 824's provisions to South Carolina's similar law. Whether these topics are properly the subject of expert evidence is doubtful. *See* Charles Gibbons, *Federal Trial Objections* § E70 (7th ed. 2020) ("[F]ederal courts typically prohibit … experts from interpreting the law for the court or from advising the court about how the law should apply to the facts of a particular case"). Regardless, all of Petitioners' "expert" evidence merely echoed State Respondents' own arguments and evidence. *See supra* pp. 15-16. It cannot be inadequate under Rule 24 for a party to submit the *same evidence and arguments* in different form. And as the Fourth Circuit recognized when it vacated the injunction, none of Petitioners' duplicative evidence proved necessary to defeat plaintiffs' claims.

Finally, Petitioners note that State Respondents did not seek an emergency stay of the district court's preliminary injunction. State Respondents forthrightly explained that they made this decision because a stay would have altered the State's voting rules *while voting was already underway* in the March 2020 primary. *See* J.A. 366 n.8. At the same time, however, the Attorney General announced that he

would appeal the injunction—with the aim of securing reversal before the general election. This thoughtful strategy can hardly be deemed inadequate. Petitioners even seem to agree; they have *twice* chosen not to seek such extraordinary relief in the parallel *Holmes* litigation in state court. State Respondents cannot be faulted for making the same clear-eyed calculation that Petitioners have twice made.

More broadly, Petitioners' nitpicking of State Respondents' litigation choices exposes the broader flaw in their position. "Adequate" representation does not require scorched-earth litigation tactics in which every possible argument or filing is made, no matter how unlikely it is to succeed, and without regard to possible drawbacks. Such undisciplined litigation tactics often backfire. And Petitioners themselves would easily fail that impossible standard.

In sum, because Petitioners have only a "mere difference of opinion concerning the tactics with which [this] litigation [has been] handled," they cannot show that State Respondents inadequately represent the State's interests in this case. Wright & Miller, *supra*, § 1909; *see Kaul*, 942 F.3d at 810 (Sykes, J. concurring) (concluding that "disagreements about litigation strategy" and "political and policy differences with the Attorney General" did not suffice to show that representation was inadequate).

Beyond these minor disputes, Petitioners can only speculate that State Respondents "may" at some point stop defending S.B. 824. Br. 47. In support, Petitioners point to the Board's defense in the parallel *Holmes* litigation in state court. But this argument

overlooks that in *Holmes*, State Respondents have always defended S.B. 824 *alongside* Petitioners, dividing up the work and points of emphasis and coordinating strategy to avoid generating contradictions in the defense's case. Government co-defendants do this all the time.

In *Holmes*, State Respondents have naturally chosen to emphasize issues that are uniquely within the Board's expertise, while Petitioners have focused on arguments unique to the legislative process. Among the areas within Petitioners' relative expertise was responding to plaintiffs' unfounded allegation that Petitioners passed S.B. 824 with discriminatory intent. J.A. 258. As State Respondents repeatedly explained to the trial court, they chose to collaborate with Petitioners on this issue to promote judicial economy.[9] These kinds of good-faith, cooperative strategic choices are hardly evidence of nonfeasance or inadequate representation.

Nor do these good-faith efforts suggest that State Respondents somehow prioritize election administration over defending S.B. 824. Yes, the Board has noted that court-issued injunctions can hugely disrupt the Board's ability to execute its administrative responsibilities. *See* J.A. 203. But it has simultaneously emphasized again and again that S.B. 824 is not discriminatory in either purpose or

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[9] *E.g.*, Opening Statement 30:26-31:32, *Holmes v. Moore*, 18-CVS-15292 (Wake Cnty. Super. Ct. Apr. 12, 2021), https://bit.ly/3svSssh ("As Mr. Thompson has indicated, we have worked out an understanding with the legislative defendants" on the division of evidence and argument at trial.).

effect. For example, on appeal of the preliminary-injunction order, at trial, and again on appeal of the final judgment, the Board in *Holmes* has strenuously defended S.B. 824 in its entirety, including against any claims of racial discrimination. J.A. 371; *see supra* pp. 9, 18. And this defense was directed by the Attorney General, not the Board.

In any event, any question about how State Respondents might have defended S.B. 824 in *Holmes* were Petitioners not involved has a clear answer. That describes *this case*. And again, State Respondents, through the Attorney General, have mounted a robust—and thus far successful—defense of the law here.

Petitioners also claim that the Board might not continue to adequately defend the law because its members are supposedly subject to Governor Cooper's "control." Br. 51. But as Petitioners concede, Governor Cooper is not a party to this case—and indeed, succeeded in having himself dismissed as a party *because he does not enforce North Carolina election law*. D.Ct.Dkt. 57 at 20-23 (citing *Ex parte Young*, 209 U.S. 123, 155-56 (1908)).

Instead, state election law is administered by the Board—which, by law, is an "independent agency" that exercises the authority delegated to it by the General Assembly. N.C. Gen. Stat. § 163-28; *see id.* § 163-22. It is true that the Governor has the authority to *appoint* the Board's members. *Cooper v. Berger*, 822 S.E.2d 286, 290 (N.C. 2018). But even this appointment authority is circumscribed. The Governor must select the Board's five members from

lists submitted by the state's two largest political parties, no more than three of whom may belong to a single party. N.C. Gen. Stat. § 163-19(b). And the Governor may remove Board members only for cause. *Id.* §§ 143B-16, 163-40 (allowing removal for "misfeasance, malfeasance, or nonfeasance"). Importantly, the Governor has no authority to direct the Board's day-to-day activities or to manage the Board's defense of litigation. *See id.* § 163-25.

The parties' position in prior litigation over the previous elections bill reinforces this point. In that case, Governor Cooper was a named party defendant (after his predecessor declined to seek dismissal). It was in that capacity as an independent party that Governor Cooper moved this Court to dismiss a certiorari petition that had been filed by the previous Governor. J.A. 77-78. But the Board itself took no position on the litigation or on whether the petition should be dismissed—and was not directed to do so by the Governor. Reply Brief in Support of Petitioners Motion to Dismiss at 4, *North Carolina v. N.C. State Conf. of the NAACP*, No. 16-833 (filed Mar. 9, 2017) (writ of certiorari denied).

The Governor's filing of an amicus brief against the law in this case further proves the point. Because the Governor has no effective control over the Board's defense of litigation, the only way for him to air his policy preferences in this litigation was through an amicus brief filed by private counsel. And Petitioners themselves have no objection to a chief executive expressing his policy preferences in this way. *See* Br.

23-24 (endorsing the practice of the Solicitor General filing briefs on both sides of cases in this Court).

Thus, Petitioners' speculation that the Governor could someday intercede in this case is wholly without basis. Br. 51. He is not a party to this case, the Board members do not serve at his pleasure, and he lacks the authority under North Carolina law to direct the Board or Attorney General to defend S.B. 824 in accordance with his policy preferences.

As for the Attorney General, he routinely defends laws without regard to his personal views.[10] This includes numerous challenges to laws that the current Governor vetoed;[11] challenges to politically sensitive elections laws where the Board, or its members and executive director, were the sole defendants;[12] and challenges to laws that the Attorney General vocally

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[10] *E.g.*, SpectrumNews1, *Attorney General Explains Decision to Appeal Voter ID Ruling*, at 0:50 (Jan. 30, 2020), https://bit.ly/3uR8rnB ("My job as Attorney General [of North Carolina] is to defend the law and the Constitution of North Carolina.").

[11] *E.g.*, *Rural Empowerment Ass'n for Cmty. Help v. State*, 2021-NCCOA-693, 2021 WL 6014722 (N.C. Ct. App. Dec. 21, 2021) (successful defense of law that, over Governor Cooper's veto, restricted nuisance claims against hog farming operations).

[12] *E.g.*, *Buscemi v. Bell*, 964 F.3d 252 (4th Cir. 2020) (affirming dismissal of challenge to election law Governor Cooper vetoed, where Board's executive director was sole defendant); *N.C. Democratic Party v. Berger*, 717 F. App'x 304 (4th Cir. 2018) (per curiam) (successful appeal of challenge to election law Governor Cooper vetoed, with Attorney General working alongside private counsel for legislature); *Alexander v. N.C. State Bd. of Elections*, No. COA 21-77 (N.C. Ct. App. Feb. 1, 2022) (same).

opposed in his previous role as a state legislator.[13] The Attorney General has even represented Petitioners as they have sought to intervene permissively to defend controversial rules relating to elections.[14]

As this history shows, the Attorney General has faithfully executed his duty to represent the State, its people, and its laws.

Any suggestion to the contrary contradicts nearly two centuries of precedent that courts must "presume that [public officials] have properly discharged their official duties." *United States v. Chem. Found.*, 272 U.S. 1, 15 (1926); *see also Martin v. Mott*, 25 U.S. 19, 33 (1827) ("Every public officer is presumed to act in obedience to his duty, until the contrary is shown."). This Court has applied this presumption of good faith to an Attorney General's exercise of his executive discretion. *See, e.g.*, *Hartman v. Moore*, 547 U.S. 250, 261 (2006); *Reno v. Am.-Arab Anti-Discrimination*

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[13] *E.g.*, *Ansley v. Warren*, 861 F.3d 512 (4th Cir. 2017) (affirming dismissal of challenge to law authorizing magistrates to decline to perform same-sex marriages "based upon any sincerely held religious objection"). Like here, in *Ansley*, Petitioners moved to intervene, claiming that then-Attorney General Cooper "cannot adequately defend [the law] because he personally disagrees with its purpose and effects." 1:16-cv-54, order at 8 (W.D.N.C. Aug. 12, 2016). The district court denied intervention, finding that: "[t]he fact that the Attorney General may dislike S.B.2 has not dissuaded him from vigorously defending this case." *Id.* The district court later granted Attorney General Cooper's motion to dismiss—a victory Attorney General Stein succeeded in preserving on appeal, 861 F.3d at 517, despite his own vocal public opposition to the law as a state senator.

[14] *E.g.*, *N.C. A. Philip Randolph Inst. v. N.C. State Bd. of Elections*, 1:20-cv-00876, Dkt.No. 44 (M.D.N.C.) (constitutional challenge to state restrictions on voting by felons).

Comm., 525 U.S. 471, 489 (1999); *United States v. Armstrong*, 517 U.S. 456 (1996).

Moreover, this Court's precedents could not be clearer that a government official's intent with respect to one law does not transfer onto a separate law. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *contra* Pet. App. 90 (vacated panel opinion) (asserting, without citation or explanation, that the Attorney General "oppos[es] the bill under challenge"). That is, courts may not discard the presumption of good faith by requiring officials to "cleanse" the "taint" of their past actions. J.A. 825 (vacating the preliminary injunction, noting that the district court made this same analytical error). This is especially true where, as here, there are significant intervening events that break the chain of any intent—such as the passage of a new law.

Finally, Petitioners claim that they must intervene now, to ensure that any adverse judgment in this case is appealed. Any such interest, of course, is purely hypothetical. State Respondents have *already* succeeded in obtaining an appellate reversal of a preliminary injunction—and they intend to appeal once again if the trial court wrongly enters a permanent injunction against the law.

But as all the courts below recognized, if that hypothetical interest were somehow to materialize, there is no dispute that Petitioners could seek to intervene at that time. *See* Pet. App. 48-49, 182. And State Respondents agree that, in that situation, such an intervention motion would be timely. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395 & n.16

(1977) (noting that federal courts commonly permit "post-judgment intervention for the purpose of appeal").

In sum, because the existing parties are already vindicating the State's interest in defending state law, the presumption of adequacy applies. But regardless of any presumption, State Respondents, through the Attorney General, are adequately defending S.B. 824.

C. Petitioners Cannot Intervene to Represent the Entire State.

Once again, State Respondents do not oppose Petitioners' request for intervention. They frequently defend state law alongside Petitioners, often *both* represented by the Attorney General. But any intervention could only lawfully be grounded in Petitioners' right to represent the General Assembly's interests—not the interests of the entire State, including its executive branch.

1. Petitioners are authorized to act only for the General Assembly.

Petitioners rest their claim to represent the State's interests on two North Carolina statutes. *See* N.C. Gen. Stat. §§ 1-72.2(b); 120-32.6(b). These statutes, to be sure, do describe Petitioners as "agents of the State." In that way, they clarify that Petitioners act in their official capacity as state officials when they seek to intervene in lawsuits. *Cf. Karcher v. May*, 484 U.S. 72, 78 (1987) (dismissing appeal by legislators acting in their personal capacity).

But these statutes allow Petitioners to represent the General Assembly alone. Section 1-72.2(b), for

example, clarifies that Petitioners have "standing to intervene on behalf of *the General Assembly*." (emphasis added). Section 1-72.2(a) further clarifies that when Petitioners seek to participate in litigation, Petitioners may act for "the legislative branch of the State of North Carolina." Similarly, section 120-32.6(b) makes clear that Petitioners act only as "agents of the State *through* the General Assembly." (emphasis added).

On their face, then, these statutes do not purport to authorize Petitioners to represent the interests of the entire State in court.

The only North Carolina court to have considered the issue interpreted these statutes in this way. *See* Ct.App.Dkt. 107 at 1 (citing *N.C. All. of Retired Ams. v. N.C. State Bd. of Elections*, 20-CVS-8881 (Wake Cnty. Super. Ct. 2020)). Specifically, a state trial court held that the statutes authorized Petitioners to represent "the legislative branch alone" and not "any interest of the State in the execution and enforcement of its laws." *Id.* at 10. The court went on to observe that construing the statutes more broadly would "violate the North Carolina Constitution's separation of powers clause." *Id.* at 11. The North Carolina Supreme Court chose not to disturb these rulings. *See id.* at 16-17.

2. Allowing two legislators to act for the entire State would violate the North Carolina Constitution.

Despite the clear statutory limits on their authority, Petitioners claim the power to act for "the

State itself." Br. 43. They therefore claim to possess "final decision-making authority" over the State's defense of "duly enacted laws." Br. 47. They also claim to have "primacy in defense of state law" over the Attorney General, allowing them to overrule litigation decisions made by the Attorney General and his executive-branch clients. Br. 45.

If these statutes were read to grant Petitioners that authority, they would be unconstitutional. Petitioners serve as just two of the 170 members of the state legislature, but claim the authority to set policy for the entire State outside of the legislative process. Based on these statutes, Petitioners have even claimed to have "an enforcement role" regarding challenged state laws, thereby acknowledging that the State's discretionary litigation decisions bear on how its laws are enforced. Brief for Legislative Defendants at 35, *Common Cause v. Lewis*, 956 F.3d 246 (4th Cir. 2020); *see also Tice v. Dep't of Transp.*, 312 S.E.2d 241, 245 (N.C. Ct. App. 1984).

Petitioners, however, cannot legally wield that executive decision-making authority on behalf of the State. The North Carolina Supreme Court has made clear that when individual legislators wish to set policy for the entire State, they must act through the legislative process. *See* N.C. Const. art. I, § 6; *id.* art. II, § 22.

In *Advisory Opinion in re Separation of Powers*, for instance, the North Carolina Supreme Court considered whether the General Assembly could delegate authority to a committee of legislators to make funding decisions for the State. 295 S.E.2d 589,

595 (N.C. 1982). The court held that this arrangement "would be an unlawful delegation of legislative power," because only the full General Assembly can make such decisions. *Id.* at 596. While the legislature could grant policymaking authority to executive officials by "enact[ing]" a statute, it could not grant that power to a subset of legislators. *Id.*

Similarly, in *State ex rel. Wallace v. Bone*, the North Carolina Supreme Court addressed whether the General Assembly could appoint legislators to a commission charged with enforcing state environmental law. 286 S.E.2d 79, 87-89 (N.C. 1982). It again held that the legislature may not create a commission "to implement specific legislation and then retain some control over the process of implementation by appointing legislators" to the commission. *Id.* at 88. Doing so would violate the state constitution's express Separation of Powers Clause, which provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. In recent years, the North Carolina Supreme Court has reaffirmed this principle and invalidated statutes that purported to authorize legislators to control how laws are enforced after their enactment. *E.g.*, *Cooper v. Berger*, 809 S.E.2d 98, 110-16 (N.C. 2018); *McCrory v. Berger*, 781 S.E.2d 248, 255-58 (N.C. 2016).

Here, as Petitioners see it, they are a two-person committee of legislators with authority to defend certain actions on behalf of the State—including by giving discretionary orders to executive officials.

Wallace and *Separation of Powers* squarely foreclose this arrangement. *Wallace* makes that point expressly. To support its holding, the *Wallace* court reviewed authority from other States that, like North Carolina, have shown "strict adherence" to "separation of powers." 286 S.E.2d at 84. The court favorably cited a Colorado Supreme Court decision, *Stockman v. Leddy*. *Id.* (citing 129 P. 220 (Colo. 1912)). *Stockman* considered whether the Colorado legislature could, by statute, give a legislative committee control over "defending certain actions for the benefit of the state." *Id.* at 86. The answer was no: The court "declared [the act] unconstitutional." *Id.* Relying on this holding, the *Wallace* court likewise held that letting legislators serve on the commission at issue there, which had powers similar to *Stockman*'s committee, was also unconstitutional. *Id.* at 88 (citing N.C. Gen. Stat. § 143-215.3(a)(6)). Likewise, the arrangement that Petitioners envisage—whereby two legislators could effectively act as the Attorney General for certain cases—would plainly violate the North Carolina Constitution.[15]

This result should be familiar to this Court. Under the federal Constitution, congressional authority is

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[15] Petitioners have previously argued that the North Carolina Supreme Court's decision in *Martin v. Thornburg* somehow allows two legislators to act for the State in litigation, but that argument is clearly meritless. *Martin* involved a conflict *within* the executive branch over control of the State's litigation. 359 S.E.2d at 479-80 (holding that it did not violate gubernatorial authority for another executive official—the Attorney General—to represent the State in court). Any issues over which executive officials can wield particular executive powers under North Carolina's plural executive are not implicated here.

limited in similar ways. *See Bowsher v. Synar*, 478 U.S. 714, 721-34 (1986); *I.N.S. v. Chadha*, 462 U.S. 919, 944-59 (1983). Thus, under this Court's case law, Congress could not enact a statute that authorized the Speaker of the House and the Senate Majority Leader to represent the United States' interests in court, with "final decision-making authority" and "primacy" over the United States Attorney General. Br. 45, 47; *see Buckley v. Valeo*, 424 U.S. 1, 139 (1976). The same is true under the North Carolina Constitution, which mandates an even stricter and more explicit separation of powers than the federal Constitution. N.C. Const. art. I, § 6; *see Cooper*, 809 S.E.2d at 119 (Martin, C.J., dissenting) (noting that, under the majority's analysis, certain federal agencies "would be unconstitutional under North Carolina law").

A "State is entitled to order the processes of its own governance." *Alden v. Maine*, 527 U.S. 706, 752 (1999). That Petitioners' position so clearly disregards the "allocation of governmental power" established by North Carolina's foundational charter should dissuade this Court from adopting their reading of these statutes. *Id.* After all, any decision of this Court premised on an erroneous interpretation of state law could be overridden by the North Carolina Supreme Court. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 542 n.3 (2021) (Thomas, J., dissenting in part) (warning that this Court's "misinterpretation" of state law could lead state courts to overrule to "correct [this Court's] mistakes").

The Court could easily avoid that risk, however, even if it is inclined to allow Petitioners to intervene.

For starters, Petitioners often are granted permissive intervention in similar cases under Rule 24(b), and State Respondents do not oppose such relief here. That rule allows a federal court to "permit anyone to intervene," if they make a "timely motion" and have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). State Respondents have never disputed that Petitioners satisfy these threshold requirements: Their initial intervention motion was filed within weeks of the lawsuit's commencement, and their defense would undoubtedly present common questions of law and fact. *Id.*

State Respondents also acknowledge that state law gives Petitioners an interest that may allow them to intervene *on behalf of the General Assembly* in certain cases. N.C. Gen. Stat. § 1-72.2(b). Should this Court interpret the relevant statutes in that manner, a remand would be appropriate for the lower courts to address whether State Respondents adequately represent the interest those statutes protect.

State Respondents reiterate that they do not oppose, and have never opposed, allowing Petitioners to intervene in this case. State Respondents have no doubt that they could work cooperatively with Petitioners to defend S.B. 824, just as they are currently doing in many other cases, including a state-court challenge to this same statute. But any intervention analysis must afford proper respect for the separation of powers under the North Carolina Constitution.

CONCLUSION

The Fourth Circuit's decision should be affirmed or, in the alternative, remanded with instructions to apply the standards articulated by this Court.

Respectfully submitted,

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