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 FORMER NORTH CAROLINA SUPREME COURT JUSTICE ROBERT F. ORR AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Petitioners read the state statutes at issue to authorize two of North Carolina's 170 legislators to act on behalf of the State of North Carolina in lawsuits, including this one, that seek to enjoin state executive branch officials from enforcing state law.

Would Petitioners' reading of the statutes violate the North Carolina Constitution, including its express separation-of-powers provision?

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INTEREST OF AMICUS CURIAE[1]

Robert F. Orr is a former justice of the North Carolina Supreme Court, where he served from 1994 to 2004. He is also a former judge of the North Carolina Court of Appeals, where he served from 1986 to 1994. At the time he was elected to the Court of Appeals, he was the first Republican judge to win a statewide election in North Carolina since 1896.

During his 18 years as an appellate judge, Justice Orr authored several hundred opinions, a number of which involved significant issues under the North Carolina Constitution. These opinions include:

- *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004) (state constitutional right to education);
- *Dept. of Transp. v. Rowe*, 549 S.E.2d 203 (N.C. 2001) (state constitutional challenge to eminent domain statutes);
- *Bailey v. State*, 540 S.E.2d 313 (N.C. 2000) (authority of the North Carolina Attorney General, discussed *infra* at 20–23);

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[1] The parties were notified of Justice Orr's intent to file this brief and have consented to its filing.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Justice Orr or his counsel made a monetary contribution to its preparation or submission.

- *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002) (concurring in part and dissenting in part on state constitutional grounds in redistricting challenge); and
- *Maready v. City of Winston-Salem*, 467 S.E.2d 615 (N.C. 1996) (dissenting on state constitutional restraints on taxing power).

Apart from his service as an appellate judge, Justice Orr has spent decades as a practicing attorney, professor, and advocate of the North Carolina Constitution. He taught the first course on the North Carolina Constitution offered by the University of North Carolina School of Law—a course he taught for more than two decades. Following his judicial service, he served from 2004 to 2011 as the founding Executive Director of the North Carolina Institute for Constitutional Law (www.ncicl.org), where he exclusively litigated cases involving the North Carolina Constitution. Since 2011, he has been engaged in private practice, where he has continued to focus on state constitutional litigation.

Justice Orr submits this brief in the hope that it will help the Court avoid a conflict with the North Carolina Constitution.

SUMMARY OF ARGUMENT

Whether the Court allows Petitioners to intervene in this case or not, it should only allow them to represent the General Assembly's interest, not act on behalf of the entire State. A contrary result would violate the North Carolina Constitution.

Unlike its federal counterpart, the North Carolina Constitution contains an express separation-of-powers provision. *See* N.C. Const. art. I, § 6. The North Carolina Constitution also requires that when legislators seek to make policy for the State, they must legislate as a 170-member body through the process of bicameralism and presentment. *See* N.C. Const. art. II, §§ 1, 22.

The North Carolina Supreme Court has strictly construed these state constitutional mandates in ways that foreclose Petitioners' approach. The court has held, for example, that a statute allowing four legislators to litigate on behalf of the State was a "crystal clear" violation of the North Carolina Constitution. *State ex rel. Wallace v. Bone*, 286 S.E.2d 79, 88 (N.C. 1982). That executive function, as the court recognized, is reserved for the executive branch.

The executive official who has long carried out that function in North Carolina is the Attorney General, a constitutional officer who serves as the State's lawyer. *See* N.C. Const. art. III, §§ 7(1), 7(7). This constitutional role cannot be legislated away to two legislators, and the two decisions Petitioners and

their amici have relied on for that view—one of which was authored by Justice Orr—do not support it.

These are among the reasons that a North Carolina court recently concluded that Petitioners' approach would violate the North Carolina Constitution. And if the North Carolina Supreme Court takes up these issues again, it will likely do the same.

The Court should reject Petitioners' reading of the state statutes and avoid a conflict with the North Carolina Constitution.

ARGUMENT

I. Petitioners' reading of the state statutes would violate the North Carolina Constitution.

Petitioners are two of North Carolina's 170 legislators. They claim statutory power to act on behalf of the entire State of North Carolina in lawsuits, including this one, where state executive branch officials are sued for enforcing state statutes.[2] This raises a threshold question of state law: Would Petitioners' reading of the statutes violate the North Carolina Constitution, including its separation-of-powers provision?

A North Carolina court recently concluded that it would. *See N.C. All. of Retired Ams. v. N.C. State Bd. of Elections*, No. 20 CVS 8881 (N.C. Super. Ct. 2020) [hereinafter *Alliance*]. Petitioners asked both the North Carolina Court of Appeals and the North Carolina Supreme Court to stay that decision. After receiving extensive briefing, both courts declined. *See*

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[2] As an initial matter, Petitioners' reading of the North Carolina statutes at issue is mistaken. Those statutes only contemplate Petitioners' intervention "on behalf of *the General Assembly*"—not the entire State of North Carolina. N.C. Gen. Stat. § 1-72.2(b) (emphasis added); *see also id.* § 1-72.2(a) (public policy favors allowing Petitioners' participation in litigation as "the legislative branch of the State of North Carolina"); *id.* § 120-32.6(c) (Petitioners may employ private counsel "for the General Assembly"). Notably, the only North Carolina court to consider Petitioners' reading of these statutes rejected it. *See N.C. All. of Retired Ams. v. N.C. State Bd. of Elections*, No. 20 CVS 8881 (N.C. Super. Ct. 2020) (discussed *infra* at 13–14).

Order, Case No. P20-513 (N.C. Ct. App. Oct. 19, 2020); Order, Case No. 440P20 (N.C. Oct. 26, 2020).

This result was predictable. As described below, the North Carolina Supreme Court has repeatedly interpreted the North Carolina Constitution in ways that foreclose Petitioners' approach.

A. Petitioners' approach is foreclosed by North Carolina Supreme Court precedent.

Unlike its federal counterpart, the North Carolina Constitution contains an express separation-of-powers provision. *See* N.C. Const. art. I, § 6. That provision states, "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." *Id.* With only minor variations, this provision has existed since North Carolina adopted its first constitution in 1776.[3]

In the nearly 250 years since, the North Carolina Supreme Court has remained "firmly and explicitly committed to" this separation-of-powers mandate. *Advisory Opinion in re Separation of Powers*, 295

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[3] *See* N.C. Const. of 1776, Declaration of Rights, § 4 ("That the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other."); N.C. Const. of 1868, art. I, § 8 ("The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other."); N.C. Const. of 1971, art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.").

S.E.2d 589, 592 (N.C. 1982); *see also Wallace*, 286 S.E.2d at 84 (1982) ("[F]rom the earliest period in our history [North Carolinians] have endeavored with sedulous care to guard this great principle of the separation of the powers.").

The North Carolina judiciary's commitment to this mandate has ensured that legislators stay within their constitutionally defined role: When they seek to set policy for the State, they must legislate as a 170-member body. The North Carolina Constitution provides that "[t]he legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives." N.C. Const. art. II, § 1. Accordingly, North Carolina's legislators can only make policy for the State by legislating through the process of bicameralism and presentment. *Id.* § 22.

Thus, under the North Carolina Constitution, "those who make the laws determine their expediency and wisdom, but they do not administer them." *Wallace*, 286 S.E.2d at 84. Instead, the 170-member General Assembly enacts laws through the constitutionally mandated process of bicameralism and presentment, "but after that is done." *Separation of Powers*, 295 S.E.2d at 596. Once the General Assembly enacts a law, enforcing or administering it on behalf of the State is an executive function. *See* N.C. Const. art. III, §§ 1, 5(4). And any attempt to blur those lines violates the North Carolina Constitution, including its express separation-of-powers provision. N.C. Const. art. I, § 6.

The North Carolina Supreme Court strictly enforces these constitutional guardrails, including in cases that foreclose Petitioners' suggested approach.

Wallace, 286 S.E.2d 79, by itself, forecloses that approach. The legislation in *Wallace* sought to add four members of the General Assembly to an environmental commission previously comprised of executive-branch appointees. *Id.* Among other executive functions, the commission was authorized to "institute actions in superior court"; it was also authorized to "agree upon or enter into settlements" in litigation. *Id.* at 88.

The North Carolina Supreme Court found it "crystal clear" that "the duties of [the commission]"—including litigating and settling cases on behalf of the State—were "administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws." *Id.* For that reason, the legislation violated the North Carolina Constitution's express separation-of-powers provision. *See id.* at 88–89.

Significantly, the *Wallace* court cited favorably to the Colorado Supreme Court's decision in *Stockman v. Leddy*, which struck down legislation "creating a joint committee of [legislators]" authorized to "act in . . . defending certain [civil] actions for the benefit of the state." *Wallace*, 286 S.E.2d at 86 (citing *Stockman v. Leddy*, 129 P. 220, 221 (Colo. 1912)). As the *Leddy* court explained, and as the court in *Wallace* quoted, authorizing a group of legislators to defend litigation on behalf of the State constitutes "a clear and

conspicuous instance of an attempt by the [legislature] to confer executive power upon a collection of its own members." *Id.* (quoting *Leddy*, 129 P. at 223).

In the same year *Wallace* was decided, the North Carolina Supreme Court issued another decision reaffirming these principles. *See Separation of Powers*, 295 S.E.2d 589. That case involved budget legislation that would have delegated the General Assembly's legislative power to a group of legislators, allowing them to make policy for the State outside of the constitutionally required process of bicameralism and presentment. *See id.*

The legislation had two primary features. First, it gave a 13-member commission of legislators "power to control major budget transfers proposed to be made by the Governor in his constitutional role as administrator of the budget." *Id.* at 594. Second, it gave the commission power to decide "whether the State or its agencies will accept [certain federal block] grants [ ], and, if accepted, the authority to determine how the funds will be spent." *Id.* at 595. The court held that both of these delegations violated the North Carolina Constitution. *Id.*

As to the budget-transfer feature, the court held that "the power that [the statute] purports to vest in certain members of the legislative branch of our government exceeds that given to the legislative branch by Article II of the Constitution"—in other words, that it was an unconstitutional delegation of legislative authority. *Id.* at 594. In addition, the

court held that "[t]he statute also constitutes an encroachment upon the duty and responsibility imposed upon the Governor by Article III," and "thereby violates the principle of separation of governmental powers." *Id.*

As to the block-grants feature, the court held that it "would be an unlawful delegation of legislative power," because "the committee would be exercising legislative functions[.]" *Id.* at 596. The court further explained that "the committee would be exercising authority that is executive or administrative in character," which "would be a violation of the separation of powers provisions of the Constitution and an encroachment upon the constitutional power of the Governor." *Id.*

In recent years, the North Carolina Supreme Court has only reinforced the principles in *Wallace* and *Separation of Powers*.

In 2016, the Governor and two former Governors challenged legislation that would have allowed the General Assembly to appoint the majority of voting members on certain administrative commissions, while also limiting the Governor's ability to remove those appointees. *See McCrory v. Berger*, 781 S.E.2d 248, 257 (N.C. 2016). The North Carolina Supreme Court struck down the legislation, because it unconstitutionally diminished the Governor's "control over the views and priorities of the officers" on the administrative commissions and hindered the Governor's duty to deliver "the final say on how to execute the laws."

Id.; *see also id.* at 250 ("In short, the legislative branch has exerted too much control over commissions that have final executive authority.").

In 2018, the North Carolina Supreme Court again considered legislation that ran afoul of the North Carolina Constitution's express separation-of-powers provision. In *Cooper v. Berger*, the Governor challenged the General Assembly's attempt to reorganize the state and local elections boards so that they would no longer be administered by the executive branch, as they had been for more than a century. 809 S.E.2d 98, 100 (N.C. 2018).

The legislation accomplished this in three steps. First, it prevented the Governor from replacing the state elections board's executive director, who had been appointed by the previous administration. Second, it effectively gave the opposing political party's appointees the power to veto any matter under the boards' consideration. Third, it required local election boards to be chaired by the opposing political party in every presidential and gubernatorial election year. *See id.*

Once again, the North Carolina Supreme Court concluded this legislation "impermissibly interfere[d] with the Governor's ability to faithfully execute the laws" and, therefore, violated the North Carolina Constitution's separation-of-powers provision. *Id.* at 116.

As these decisions reflect, when the North Carolina General Assembly oversteps its boundaries,

it faces a constitutional rebuke from the North Carolina Supreme Court.

And should the North Carolina Supreme Court again take up the questions that Petitioners' approach raises here, it will likely view the Petitioners' approach with great skepticism. After all, the North Carolina Supreme Court has already:

- held that legislation allowing four members of the General Assembly to litigate and settle litigation on behalf of the State was a "crystal clear" violation of the North Carolina Constitution. *Wallace*, 286 S.E.2d at 88;
- cited favorably to a decision holding that legislation "creating a joint committee of [legislators]" who would "act in . . . defending certain [civil] actions for the benefit of the state" was "a clear and conspicuous instance of an attempt by the [legislature] to confer executive power upon a collection of its own members." *Id.* at 86 (quoting *Leddy*, 129 P. at 223); and
- held that legislation authorizing "certain members of the legislative branch" to perform executive functions "exceeds [the power] given to the legislative branch by Article II of the Constitution" and "constitutes an encroachment upon" the executive branch, "thereby violat[ing] the principle of separation of governmental powers." *Separation of Powers*, 295 S.E.2d at 594.

This North Carolina precedent, along with the more recent decisions above, leaves no room for Petitioners' statutory interpretation.

That is why it comes as no surprise that the only North Carolina court to consider Petitioners' interpretation rejected it as unconstitutional.

Alliance involved a challenge to absentee voting legislation. No. 20 CVS 8881 (N.C. Super. Ct. 2020). The parties ultimately compromised and submitted a consent judgment to the state trial court. *Id.* at *4–5. But Petitioners, having intervened, objected. Claiming "final decision-making authority" on behalf of "the State" under the same statutes at issue here, Petitioners demanded that the trial court reject the settlement.

The trial court refused. The court first observed that while the statutes allow Petitioners "to appear and be heard, or in some cases to request to do so, in certain lawsuits on behalf of the legislative branch alone[,]" that "limited authority does not allow these legislators to represent the interests of the executive branch or of the State, including any interest of the State in the execution and enforcement of its laws." *Id.* at *8.

The court next explained that nothing in the statutes authorized Petitioners "to control executive officials' decisions about execution and enforcement of state law, or to prevent executive officials from entering into settlements that affect how statutes are

executed or enforced after their enactment." *Id.* at *8–9.

Finally, the court concluded that to accept Petitioners' broad reading of the statutes "would violate the North Carolina Constitution's separation of powers clause." *Id.* at *9 (citing *Cooper*, 809 S.E.2d at 111–12 and N.C. Const. art. I, § 6).

Here, as in *Alliance*, Petitioners claim "final decision-making authority" over how the State defends its laws. Petitioners' Br. at 45. They even claim to have "*primacy* in defense of state law" over the Attorney General. *Id.* (emphasis added). And in another recent case, they claimed that they could act on behalf of the State in lawsuits in an "enforcement role." Legislative Defs.' Br., 4th Cir. Dkt. No. 39-1 at 35, *Common Cause v. Lewis*, 956 F.3d 246 (4th Cir. 2020).

The executive nature of Petitioners' desired "enforcement role" becomes even more apparent when the implications of their approach are considered. If Petitioners' view were to be adopted, two of the 170 members of the General Assembly could exercise any number of inherently executive functions, all without joining their 168 other colleagues in enacting legislation through the constitutionally required process of bicameralism and presentment. As a few examples, Petitioners' approach would allow two members of the General Assembly to:

- create State policy by dictating litigation settlements on behalf of the State, even though it encroaches on the inherently

executive function of determining how laws should be enforced, *see Tice v. Dept. of Transp.*, 312 S.E.2d 241, 245 (N.C. Ct. App. 1984) (equating the authority to settle litigation over a law with the authority to enforce that law); *Wallace*, 286 S.E.2d at 88 (settling lawsuits against the State is an executive function); *Alliance*, *supra*, at *9 (rejecting Petitioners' attempt to override an executive branch agency's settlement authority on behalf of the State);

- offer interpretations of North Carolina law *in* court that limit the executive branch's discretionary authority *outside* of court to determine how laws will be enforced, *see Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.5 (1982) (observing that courts will "consider any limiting construction that a[n] . . . enforcement agency has proffered"); *compare Cooper*, 809 S.E.2d at 113 n.11 (recognizing that these enforcement decisions are the exclusive province of the executive branch), *with* Legislative Defs.' Br., 4th Cir. Dkt. No. 39-1 at 35, *Lewis*, 956 F.3d 246 (contending that Petitioners have an "enforcement role"); or

- waive the State's Eleventh Amendment immunity by removing a lawsuit to federal court, rather than by enacting a statute consenting to suit in federal court, *see Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535

U.S. 613, 623 (2002) (holding that "state-authorized litigating decision[s]" can waive Eleventh Amendment immunity through removal); *Port Auth. v. Feeney*, 495 U.S. 299, 308 (1990) (discussing waiver through a "statutory consent to suit provision").

As these examples show, Petitioners' approach has no limiting principle—at least not one that the North Carolina Constitution would countenance. Under North Carolina Supreme Court precedent—and, in particular, the decisions in *Wallace* and *Separation of Powers*—Petitioners' reading of the statutes would violate the North Carolina Constitution.

B. Petitioners' suggestion that the Attorney General's role is statutory and can be performed by two legislators is mistaken.

1. The Attorney General's constitutional role cannot be performed by two of the General Assembly's 170 members.

Petitioners argued below that the North Carolina Attorney General's role is purely statutory, so two legislators could perform this role if it were statutorily given to them. Should Petitioners take the same position before this Court, that position would be mistaken for at least two reasons.

First, the Attorney General's authority is not purely statutory. The North Carolina Constitution creates the Attorney General as a constitutional officer

of the executive branch. *See* N.C. Const. art. III, § 7(1). It also expressly requires that the Attorney General be authorized to practice law—a requirement that applies to no other constitutional officer in the executive branch. *See* N.C. Const. art. III, § 7(7). Thus, the North Carolina Constitution recognizes that the Attorney General will be the State's lawyer.

Consistent with this constitutional role as the State's lawyer, the North Carolina Attorney General has always "represent[ed] the agencies and departments of the State, a role which historically has served the State well." *Tice*, 312 S.E.2d at 245–46; *see also Martin v. Thornburg*, 359 S.E.2d 472, 479 (N.C. 1987) (recognizing "the common law duty of the Attorney General to prosecute actions . . . [and] defend actions instituted against the interest of the sovereign power"). As Judge David Sentelle observed in a case involving the Attorney General's authority to defend state law:

> The attorney general of North Carolina is a constitutional officer. N.C. Const. art. III, § 7(1). He is required to take an oath which among other things binds him to "support, maintain and defend the constitution of [North Carolina] not inconsistent with the constitution of the United States." N.C. Gen. Stat. § 11-7. It is but a small step from the language of his oath to the proposition asserted by the attorney general in this case that his duty includes the defense of

> statutes of his state against charges of unconstitutionality.

Hendon v. State Bd. of Elections, 633 F. Supp. 454, 459 (W.D.N.C. 1986).[4]

Although the North Carolina Constitution also contemplates that the Attorney General's duties will be further "prescribed by law," N.C. Const. art. III, § 7(2), that does not mean the Attorney General has no power other than what the General Assembly might provide by statute. Instead, as a recent decision of the North Carolina Supreme Court makes clear, executive branch officers like the Attorney General whose offices are created by Article III of the North Carolina Constitution still have "inherent powers" by virtue of their constitutionally created role, even if their more specific duties are "prescribed by law." *N.C. State Bd. of Educ. v. State*, 814 S.E.2d 67, 78 n.1 (N.C. 2018) (referring to the "inherent powers" of the Superintendent of Public Instruction, another constitutional officer whose office is created by Article III, Section 7);[5] *Atkinson v. State*, No. 09 CVS 006655, 2009 WL 8597173 (N.C. Super. Ct. Jul. 17, 2009) (same).[6] These inherent powers of constitutional officers whose "offices [are] created and provided for by the Constitution" can only be altered or eliminated by

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[4] Justice Orr represented the plaintiffs in *Hendon v. State Board of Elections*.

[5] Justice Orr and the undersigned represented the plaintiff in *State Board of Education v. State.*

[6] Justice Orr represented the plaintiff in *Atkinson v. State*.

constitutional amendment.[7] *N.C. State Bd. of Educ.*, 814 S.E.2d at 74–75 (quoting *Mial v. Ellington*, 46 S.E. 961, 971 (N.C. 1903)). Thus, the Attorney General has the constitutional power to serve as the State's lawyer, which cannot be abridged by statute.

Second, even if the Attorney General's role were purely statutory, the General Assembly could not transfer that role to two of its 170 legislators. Again, the General Assembly can only set policy for the State through the constitutionally required process of bicameralism and presentment. *See* N.C. Const. art. II, § 22; *supra* at 6–8. So while the General Assembly, acting as 170-member body, could enact a statute, for instance, that limits the way executive branch officials settle lawsuits (*see*, *e.g.*, N.C. Gen. Stat. § 114-2.4(a)), it could not delegate authority to control litigation to two of its members. *See* N.C. Const. art. II, § 22; *see supra* at 8–16.

In this way, Petitioners' assertion that "*the legislature*—not the Attorney General—has *primacy* in defending the State under North Carolina law" only highlights the state constitutional infirmity with Petitioners' approach. J.A. 160 (emphasis added). Petitioners do not merely seek to intervene on behalf of "the legislature," as their statutes contemplate. Rather, they seek to have two legislators "act in . . . defending certain [civil] actions for the benefit of the

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[7] The concept of state officials having "inherent power" is a familiar one in North Carolina. *See*, *e.g.*, *Ex Parte McCown*, 51 S.E. 957, 961–62 (N.C. 1905) (observing that judicial officials have "inherent powers" under North Carolina law).

state"—a "clear and conspicuous instance of an attempt by the [legislature] to confer executive power upon a collection of its own members." *Wallace*, 286 S.E.2d at 86 (citing *Leddy*, 129 P. at 223); *see also Separation of Powers*, 295 S.E.2d at 594.

2. The North Carolina Supreme Court's decision in *Bailey v. State* does not support Petitioners' approach.

To further justify their position, Petitioners and their amici have previously relied on the North Carolina Supreme Court's decision in *Bailey v. State*, 540 S.E.2d 313 (N.C. 2000), a decision authored by Justice Orr. In their view, *Bailey* supports the notion that the Attorney General's authority is purely statutory and, therefore, can be given to two legislators. Their reliance on *Bailey* is misplaced.

Bailey marked the end of a protracted class-action lawsuit over the constitutionality of a state tax on retirement benefits. *Id.* at 318. The Attorney General defended the State throughout the litigation, as usual. After nearly a decade, the parties reached a settlement. As part of the settlement, the State—again, represented by the Attorney General—waived any right to contest the class counsel's right to attorneys' fees. *Id.* at 318–19.

Despite that waiver, the Attorney General at the time sought to challenge the award of attorneys' fees to class counsel—a highly publicized, controversial award of approximately $64 million, which reduced

each class member's recovery by eight percent. *Id.* at 321. The Attorney General's request presented several problems. First, the State had no interest in the fee award in light of the waiver. Second, the Attorney General did not move to intervene to assert any interest distinct from that of the State. Third, even if the Attorney General had moved to intervene, he had represented *the State* for a decade, and now wished to advocate on behalf of *the plaintiffs* in the same litigation—"a position at odds" with his prior role and "a questionable proposition to be sure." *Id.*

Under these unique circumstances, the North Carolina Supreme Court concluded the Attorney General lacked authority to switch sides and contest the fees—that is, he could not represent the private plaintiffs against whom he had litigated for nearly a decade. *Id.* In so holding, the court examined the Attorney General's authority in a two-step process:

First, the court looked to the Attorney General's constitutionally created office and common law powers. *Id.* at 319–20. The court, however, failed to find any basis for the Attorney General to represent the private plaintiffs "as an entity separate from the State" under those unique circumstances. *Id.* at 320.

Second, the court looked to the Attorney General's statutory powers, which were "left to the discretion of the General Assembly." *Id.* The court found no statutory basis there either.

It is this second source of the Attorney General's authority to which Petitioners and their amici now

latch on: *Bailey*'s reference to the Attorney General's statutory duties being "left to the discretion of the General Assembly." *Id.* To them, this phrase means the General Assembly can duplicate the Attorney General's role, or even shift the Attorney General's constitutional role to two legislators.[8]

Bailey does not support—nor was it ever intended to support—such a sweeping proposition. On the contrary, *Bailey* expressly acknowledges the Attorney General's constitutional role—that is, the Attorney General's inherent powers—but simply concluded those powers did not apply to the Attorney General's highly unusual request to represent private plaintiffs against whom he had been litigating. *Id.* at 319–20. That unorthodox request would be at odds with the Attorney General's fundamental role of representing "the State." *Id.*

Thus, nothing in *Bailey* supports the notion that the General Assembly can statutorily give an executive officer's constitutional role to two of its 170 members. That notion, moreover, would run afoul of later North Carolina decisions discussed above, which confirm that executive branch officers named in Article III (including the Attorney General) have "inherent

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[8] *See*, *e.g.*, Petitioners' Reply, 4th Cir. Dkt. No. 50 at 18–19 (filed Feb. 18, 2020) (citing *Bailey* for the proposition that "the General Assembly's decision to allocate to itself responsibility to defend the State's interests in litigation" does not violate the separation-of-powers provision); Brief of Amicus Curiae Republican State Leadership Committee at 10–11 (filed Jan. 17, 2022).

powers" by virtue of their constitutional office. *See N.C. State Bd. of Educ.*, 814 S.E.2d at 78 n.1; *Atkinson*, 2009 WL 8597173; *see also supra* at 16–20.

In short, while *Bailey*'s facts were extraordinary, its holding was straightforward: The Attorney General has a duty to defend the State, not private plaintiffs, and like any lawyer, he cannot "change[] hats" mid-litigation to take an adverse position "at the expense of [his client] the State's interest." *Id.* at 318–20. *Bailey* simply does not support the state constitutional violation that Petitioners seek here.

3. The North Carolina Supreme Court's decision in *Martin v. Thornburg* does not support Petitioners' approach.

Petitioners and their amici have previously suggested that the decision in *Martin v. Thornburg* lends credence to their approach. *See* Petitioners' Reply, 4th Cir. Dkt. No. 50 at 18 (filed Feb. 18, 2020). In their view, the conclusion in *Thornburg* that the Attorney General can represent the State in court without encroaching on the Governor's executive power should mean that Petitioners can do the same without violating the North Carolina Constitution. Not so.

Thornburg involved a dispute within the executive branch over whether the Attorney General and the Governor both had the authority to represent the State in court. The case arose out of a lawsuit against the

State where the Attorney General—apparently with a responsive pleading deadline looming—gave notice of his appearance, then immediately moved for an extension of time "to enable him to advise and consult with the Council of State members, including the Governor" about the lawsuit. 359 S.E.2d at 475. The trial court sustained these time-sensitive filings as a stop-gap measure, holding that "the Attorney General has the authority to appear and defend any civil action filed against the State or department head without first obtaining the permission of the Governor or department head, and in the course thereof, to unilaterally determine the procedural steps necessary to defend the State's interest in the action." *Id.*

The North Carolina Supreme Court "modif[ied] and affirm[ed] the trial court's holding that the Attorney General has the authority to appear and defend actions on behalf of the State." *Id.* at 481. As the court explained, "[t]he independent executive offices of Governor and Attorney General with their differing functions and duties under the constitution create a clear potential for conflict," but "such is not the case here since the duty of the Attorney General to appear for and defend the State or its agencies in actions in which the State may be a party or interested is not in derogation of or inconsistent with the executive power vested by the constitution in the Governor." *Id.* at 480 (citing *Tice*, 312 S.E.2d 241). Thus, the court merely recognized that the Attorney General's performance of his executive duties did not intrude

on the Governor's performance of his own distinct executive duties. *Id.*

As this discussion from *Thornburg* reflects, the case was an internal dispute within the *executive* branch. *Thornburg* did not involve questions of legislative authority, nor did it involve separation-of-powers issues—much less make the sweeping pronouncements on those topics that Petitioners have implied. *See* Petitioners' Reply, 4th Cir. Dkt. No. 50 at 18.

Moreover, the holding in *Thornburg* that the *Attorney General* can "appear for the State in any court proceeding in which the State may be a party" without encroaching on the Governor's powers by no means suggests that two *legislators* can do so. *Id.* at 473. Unlike Petitioners, the Attorney General can carry out the executive function of making discretionary decisions for the State in court because he is part of the North Carolina Constitution's plural executive. As the North Carolina Supreme Court recently explained, the Governor is North Carolina's "chief executive" who "bears the ultimate responsibility of ensuring that our laws are properly enforced. . . . But the Governor is not alone in this task," because "[o]ur state constitution establishes nine other offices in the executive branch." *Cooper*, 822 S.E.2d at 289.

As described above, the Attorney General is one of those nine executive branch officers whose role (the State's lawyer) is within the plural executive as set forth in Article III of the North Carolina Constitution

("Executive").[9] *See id.*; *see also Thornburg*, 359 S.E.2d at 479; *supra* at 16–20. Petitioners, by contrast, are not. Their constitutionally created offices are found in Article II of the Constitution ("Legislative"), and thus, they can only direct the State in litigation by enacting statutes that establish policy for executive officials like the Attorney General to carry out in court. *See* N.C. Const. art. II, §§ 14–15.

So while Petitioners may claim to have an "enforcement role" as if they were executive branch officers, Legislative Defs.' Br., 4th Cir. Dkt. No. 39-1 at 35, *Lewis*, 956 F.3d 246, the text of the North Carolina Constitution defeats that claim. Petitioners' role is not to litigate on behalf of executive branch officials in a lawsuit seeking a permanent injunction barring the State's enforcement of a law—a quintessentially executive function.[10]

* * *

No one disputes that Petitioners are free—as the plain language of their legislation contemplates—to act on behalf of themselves and their 168 colleagues in the name of "the General Assembly." *See supra* at 5 n.2. If they were limited to that authority alone, they

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[9] The others are the Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance. N.C. Const. art. III, § 7(1).

[10] More than a century ago, this Court embraced a parallel federal concept: Injunctions against the enforcement of federal law are only available against the officers charged with executing the law. *See Ex Parte Young*, 209 U.S. 123 (1908).

could not use these statutes to claim an "enforcement role" with respect to state law. Legislative Defs.' Br., 4th Cir. Dkt. No. 39-1 at 35, *Lewis*, 956 F.3d 246. Instead, they could simply speak for the General Assembly.

But Petitioners' desire to act on behalf "of the State" in a lawsuit seeking to enjoin executive branch officials from enforcing state law is a bridge too far—one that runs headlong into the North Carolina Constitution. It took little effort for one North Carolina court to reach this conclusion, *see supra* at 13–14, and if the North Carolina Supreme Court takes up these issues again, it will likely do the same.[11]

In the end, whether this Court allows Petitioners to intervene in this case or not, it should only allow them to represent the General Assembly's interest, not act on behalf of the entire State.

[11] Although North Carolina has not seen fit to create formal structures to allow for certification of state-law questions, the North Carolina Supreme Court has accepted requests for advisory opinions in the past. *See*, *e.g.*, *Separation of Powers*, 295 S.E.2d 589. Thus, if this Court decides that resolution of this case requires the federal courts to pass on Petitioners' reading of these statutes, it could consider a remand to the Fourth Circuit with direction to consider certifying the state constitutional question to the North Carolina Supreme Court.

CONCLUSION

The Court should reject Petitioners' reading of the state statutes and avoid a conflict with the North Carolina Constitution.

Respectfully submitted,

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