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 PETITIONERS

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QUESTIONS PRESENTED

1. Whether a state agent authorized by state law to defend the State's interest in litigation must overcome a presumption of adequate representation to intervene as of right in a case in which a state official is a defendant.

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 this litigation.

PARTIES TO THE PROCEEDING

Petitioners Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, were the proposed intervenors in the District Court and the proposed intervenors–appellants in the Court of Appeals.

Respondents North Carolina State Conference of the NAACP, Chapel Hill-Carrboro NAACP, Greensboro NAACP, High Point NAACP, Moore County NAACP, Stokes County Branch of the NAACP, and Winston Salem-Forsyth County NAACP were the plaintiffs in the District Court and the plaintiffs-appellees in the Court of Appeals.

Respondents Damon Circosta, in his official capacity as Chair of the North Carolina State Board of Elections, Stella Anderson, in her official capacity as Secretary of the North Carolina State Board of Elections, Jefferson Carmon III, in his official capacity as a member of the North Carolina State Board of Elections, Stacy Eggers IV, in his official capacity as a member of the North Carolina State Board of Elections, and Wyatt T. Tucker, Sr., in his official capacity as a member of the North Carolina State Board of Elections were defendants-appellees in the Court of Appeals. Ken Raymond and David C. Black also initially were defendants-appellees below in their former capacity as members of the North Carolina State Board of Elections; they were succeeded in office by Respondents Eggers and Tucker. *See* FED. R. APP. P. 43(c)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONS AND STATUTES

RULES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the en banc Court of Appeals is reported at 999 F.3d 915 and is reproduced at Pet.App.1. The opinion of the three-judge panel of the Court of Appeals is reported at 970 F.3d 489 and is reproduced at Pet.App.86. The District Court's opinion is not published in the Federal Supplement but can be found at 2019 WL 5840845 and is reproduced at Pet.App.155.

JURISDICTION

The en banc Court of Appeals issued its judgment on June 7, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Pertinent statutory provisions and rules are reproduced at Pet.App.195.

INTRODUCTION

It is "[t]hrough the structure of its government, and the character of those who exercise government authority," that "a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). An important exercise of state sovereign authority is the defense of state law from constitutional attack. The people of North Carolina, through their elected representatives, have determined that Petitioners—the President Pro Tempore of the North Carolina Senate and Speaker of the North Carolina House of Representatives—as agents of the State, are necessary to the exercise of this sovereign authority. *See* N.C. GEN. STAT. § 120-32.6. Yet, in the decision

below, the Fourth Circuit, in a sharply divided en banc decision, refused to heed the State's determination and instead affirmed a holding that the State's interest in the validity of its laws was adequately represented by executive branch officials who already were defendants in the case. Pet.App.40.

The Fourth Circuit reached this conclusion by requiring Petitioners to overcome a presumption of adequate representation and reviewing the district court's determination of adequate representation for abuse of discretion. But Federal Rule of Civil Procedure 24's text, structure, and history, this Court's precedent and historical practice, and proper respect for a State's determination of which agents are necessary to the defense of its laws do not countenance such an analysis.

Moreover, this method of analysis entails negative practical consequences, including the risk that a State may be deprived of the most effective defense of its laws in federal court, a risk that is particularly pronounced in divided government states, like North Carolina, where the executive branch may not be enthusiastic about defending the legislature's handiwork. *See* Pet.App.54 (Wilkinson, J., dissenting). Indeed, the executive branch defendants in this case serve at the pleasure of Governor Roy Cooper—who sought to ensure this Court would not review a Fourth Circuit decision invalidating the State's prior voter ID law, vetoed the current voter ID law, and filed an amicus brief in the Fourth Circuit supporting Plaintiffs.

Under the proper standards, Petitioners are entitled to intervene as of right in this case.

STATEMENT

I. Governor Cooper Fails to Defend North Carolina's Former Voter ID Law.

In 2013, the North Carolina General Assembly passed and then-Governor Pat McCrory signed into law an election bill that created a photo ID requirement and made several other changes to the State's voting system. *See* 2013 N.C. Sess. Laws 381. In 2016, a divided panel of the Fourth Circuit held that the challenged provisions of the law, including the voter ID provisions, were invalid because, in the court's view, they were enacted with racially discriminatory intent. *See N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016). In so holding, the Fourth Circuit reversed the district court, determining that, despite the district court's extensive factual findings, the court had clearly erred in not finding racially discriminatory intent. The State moved this Court to stay the Fourth Circuit's mandate pending a petition for a writ of certiorari, and four of the eight Justices then on the Court indicated that they would have granted the motion. *North Carolina v. N.C. State Conf. of NAACP*, 137 S. Ct. 27 (2016).

As Attorney General of North Carolina at the time that the prior voter ID law was enacted, Governor Cooper staunchly opposed that law. He posted a petition online for those opposed to the bill to lobby Governor McCrory to veto it. Doc. 8-7 at 3. And Cooper sent a letter to Governor McCrory urging him to veto the bill, criticizing the law as "regressive," "unnecessary, expensive and burdensome." Doc. 8-8 at 2.

The State was forced to defend its previous voter ID law without Cooper's help, who declined to participate in the petition for certiorari seeking review of *McCrory*. *See* Pet. for a Writ of Cert., *North Carolina*, No. 16-833, 2016 WL 7634839 (U.S. Dec. 27, 2016); Doc. 8-10 at 2–3. And when campaigning for Governor, Cooper's opposition to the previous voter ID law was central to his platform. *See* Doc. 8-10 at 2–3.

After taking office, Governor Cooper, represented by Attorney General Stein, moved to dismiss the State's petition over the objection of Petitioners, which resulted in a "blizzard of filings," *North Carolina v. N.C. State Conf. of NAACP*, 137 S. Ct. 1399, 1400 (2017) (Roberts, C.J., statement respecting the denial of certiorari), that raised questions about this Court's ability to grant certiorari. When this Court denied certiorari, Governor Cooper issued a press release celebrating as "good news" the denial that he had orchestrated. JA.79.

II. The General Assembly Enacts a Law Establishing that Petitioners as Agents of the State Are Necessary Parties in Actions Challenging State Laws.

Following the denial of certiorari in *McCrory*, the General Assembly amended N.C. GEN. STAT. § 120-32.6(b) over the Governor's veto to provide that "**[w]henever** the validity or constitutionality of an act of the General Assembly . . . is the subject of an action in . . . federal court, the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, **shall be necessary** parties." 2017 N.C. Sess. Laws 57 § 6.7(*l*) (emphases added).

This amendment built upon existing North Carolina law, which provided (and continues to provide) that "[t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State . . . shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute." N.C. GEN. STAT. § 1-72.2(b).

III. The General Assembly Enacts A New Voter ID Law.

In November 2018, the people of North Carolina amended the State's constitution to provide that "[v]oters offering to vote in person shall present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions." N.C. CONST. art. VI, § 2(4).

Pursuant to that mandate, the General Assembly passed S.B. 824 with bipartisan support. 2018 N.C. Sess. Laws 144. One of the three primary sponsors of the bill was Joel Ford, an African American Democrat, and several other Democrats also voted for the bill. S.B. 824 concerns only voter ID, and it is classified as "non-strict" because it allows voters lacking ID at the polls to cast a ballot that will count without requiring them to present ID or take additional actions after casting their ballot. *See Voter Identification Requirements*, NAT'L CONF. OF STATE LEGISLATURES (archived Aug. 25, 2020), https://bit.ly/3s1mAem. The law therefore ensures that "[a]ll registered voters will be allowed to vote

with or without a photo ID card." 2018 N.C. Sess. Laws 144 § 1.5(a)(10).

Two of S.B. 824's provisions are particularly aimed at ensuring that all lawfully registered voters will be able to cast a ballot. First, free, no-documentation-required photo ID is available at county election offices in all of the State's 100 counties. N.C. GEN. STAT. § 163-82.8A. These free IDs are available at all times except between the end of early voting and election day, and they can be obtained and used to vote in a single trip during the State's multiple-week early voting period. Second, voters who appear at the polls without ID may complete a reasonable impediment form to indicate the reason why they could not present ID and vote a provisional ballot. *Id.* § 163-166.16.

In these respects, North Carolina's law compares favorably with other voter ID laws that have been upheld by the courts. Indeed, many voter ID laws have withstood constitutional attack despite missing one or both of these features. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008); *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299 (11th Cir. 2021). And South Carolina's voter ID law, which does have both of these features, satisfied the stringent preclearance requirements of Section 5 of the Voting Rights Act, because "the sweeping reasonable impediment provision . . . eliminates any disproportionate effect or material burden that South Carolina's voter ID law otherwise might have caused." *South Carolina v. United States*, 898 F. Supp. 2d 30, 40 (D.D.C. 2012) (Kavanaugh, J.).

Governor Cooper vetoed S.B. 824, alleging that it had "sinister and cynical origins" and "was designed to suppress the rights of minority, poor and elderly voters." JA.74. The General Assembly overrode the veto, thus enacting S.B. 824. *See* 2018 N.C. Sess. Laws 144.

IV. Plaintiffs File Suit, and the District Court Denies Without Prejudice Petitioners' Initial Motion to Intervene.

On December 20, 2018—the day after S.B. 824 became law—Plaintiffs filed this suit against Governor Cooper and the members of the North Carolina State Board of Elections. Plaintiffs' suit alleges that S.B. 824 disproportionately impacts African American and Latino voters in violation of Section 2 of the Voting Rights Act, intentionally discriminates against African American and Latino voters, in violation of Section 2 and the Fourteenth and Fifteenth Amendments, and unduly burdens the right to vote, in violation of the Fourteenth Amendment. *See* Doc. 1 ¶¶ 105–146.

On January 14, 2019, Petitioners filed their first motion to intervene. Doc. 7. In this initial motion, Petitioners invoked the interest of "state legislatures . . . in seeing that their enactments are not 'nullified.' " JA.61 (quoting *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 803 (2015)).

On June 3, the district court denied Petitioners' motion to intervene without prejudice. Pet.App.155. The court held that legislators have an interest in defending the constitutionality of a state law only

"when the executive declines to do so" and found that Defendants had not yet "expressed an intention to so decline." Pet.App.163–64. In addition, the court applied a "presumption" that Petitioners' interests would be adequately represented by Defendants. Pet.App.170–72. The court concluded that Petitioners had not rebutted the presumption, and it denied intervention under Rule 24(a)(2). But the district court held "should it become apparent during the litigation that State Defendants no longer intend to defend this lawsuit, the Court will entertain a renewed Motion to Intervene by [Petitioners]." Pet.App.182. The court also permitted Petitioners to "participate in th[e] action by filing *amicus curiae* briefs." *Id.*

V. The State Board of Elections Prioritizes Its Interest in Election Administration.

A. Following the district court's denial of Petitioners' motion to intervene, the State Board of Elections' actions in parallel state court litigation, *Holmes v. Moore*, No. 18 CVS 15292 (N.C. Super. Ct. Wake Cnty.), demonstrated that election administration concerns were paramount to its approach to the litigation over S.B. 824. The claims asserted in *Holmes* include the state-law equivalent of the federal intentional discrimination claim being pressed in federal court in this case.

As required under North Carolina law, Petitioners are defendants in *Holmes*. *See* N.C. GEN. STAT. § 1A-1, Rule 19(d). The North Carolina State Board of Elections also is a defendant, and, as in this case, is represented by the North Carolina Attorney General's office.

In response to the *Holmes* plaintiffs' preliminary injunction motion, the State Board did not contest likelihood of success on the intentional racial discrimination claim. Instead, the State Board indicated that it had "*a primary objective . . . to expediently obtain clear guidance on what law, if any, will need to be enforced*." JA.203 (emphasis added). "With that in mind," the State Board explained, "if the Court is inclined to issue an injunction at this stage, the State Board requests that it be granted some flexibility in making technical preparations that will allow it to implement the law in the event the injunction were later vacated." *Id*. The State Board's response and subsequent supplemental brief therefore were focused on how the court could craft injunctive relief that would permit "some flexibility to account for the possibility of enforcing the law in the future." *Id*.; *see also* Doc. 61-15. In support of this response, the State Board offered a sole affiant: Executive Director Karen Brinson Bell, who spoke to the implementation of S.B. 824 that had begun and potential issues going forward. *See* Doc. 61-16; *see also* Doc. 61-8 at 4–5. The State Board did not offer any affiants defending S.B. 824's constitutionality.

Petitioners, by contrast, vigorously contested the *Holmes* plaintiffs' intentional discrimination claim on the merits. Petitioners also offered multiple supporting affidavits—including those from three experts, former Senator Ford, and several local election officials. Doc. 61-8 at 5.

On July 19, 2019, the state trial court declined to enjoin S.B. 824 because the *Holmes* plaintiffs had "failed to demonstrate a likelihood of success on the

merits of their" intentional-discrimination claim—an issue the State Board had not addressed. Doc. 67-3 at 6.

B. Meanwhile, in federal court, the State Board's administrative concerns also came to the fore. The defendants filed motions to dismiss, but those motions did not engage the merits of Plaintiffs' claims. Governor Cooper argued that his connection with the enforcement of S.B. 824 was insufficient under *Ex parte Young*. Doc. 45 at 6–17. The State Board moved to dismiss or stay on abstention grounds, citing the parallel state court litigation. Doc. 43 at 13. It argued that the litigation was "occur[ring] at a critical time when the State Board and its personnel are currently overseeing two special congressional elections and municipal elections this year, and are otherwise preparing for the 2020 general elections for which candidate filing begins this December." JA.142.

On July 2, 2019, the district court dismissed Governor Cooper but denied the State Board's motion, Doc. 57, allowing the case to move forward in parallel with *Holmes* with the State Board members as the only defendants.

VI. The District Court Denies Petitioners' Renewed Motion to Intervene.

On July 19, 2019, Petitioners filed a renewed motion to intervene. Petitioners highlighted the State Board's confirmation in the *Holmes* litigation that it had a primary objective of obtaining guidance on what law it would need to apply. JA.166. And relying on *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), Petitioners made clear that they were

seeking to intervene to defend "the interest of *the State* in defending the constitutionality of S.B. 824." JA.159.

On September 17, 2019, while the renewed motion to intervene was pending, Plaintiffs filed a preliminary injunction motion. *See* Doc. 72. While the State Board did engage with the merits in briefing, it continued to emphasize administrative concerns, arguing that the equities weighed against an injunction because it was "approaching a critical time for a photo ID requirement to be smoothly administered in advance of the 2020 elections cycle." JA.312. Despite Plaintiffs having waited over nine months to move for a preliminary injunction—until fewer than six months before the March 2020 primaries—the State Board did not argue that the motion should be rejected because of this delay. Whereas Plaintiffs relied on five expert reports in support of their motion, Doc. 73, the State Board did not rely on any expert reports, *see* JA.271–314; Doc. 97-1.

Petitioners filed an amicus brief opposing Plaintiffs' preliminary injunction motion. Doc. 96. Petitioners supported their amicus brief with five expert reports, along with other support, including a declaration from former state Senator Ford. *Id.* Plaintiffs moved to strike Petitioners' amicus brief for "attaching . . . evidence," Doc. 99 at 1, which the district court granted, striking the amicus brief for "includ[ing] [and] referenc[ing] submissions of evidence not already introduced into the record by the named parties." Doc. 116 at 3. Petitioners accordingly

submitted a new brief that did not include or reference such submissions. Doc. 117.

The district court denied intervention on November 7, 2019. The district court concluded that the State Board was defending the lawsuit and that the litigation choices the State Board made in *Holmes* were irrelevant, stating that there is "no merit in [Petitioners'] argument that it should draw inferences about how the State Board will act when, as here, the parties, claims, and forums in the two cases are all distinct." Pet.App.190. The district court also discounted the significance of this Court's decision in *Bethune-Hill*, stating that despite that decision, "[s]o long as the State Board and Attorney General are defending this suit," Petitioners were not entitled to intervene. Pet.App.188 n.3. The district court therefore again denied intervention, but this time, with prejudice. Pet.App.194.

VII. Administrative Concerns Continue to Pervade the State Board's Litigation Strategy.

On December 31, 2019, the district court granted Plaintiffs' preliminary injunction motion. *N.C. State Conf. of NAACP v. Cooper*, 430 F. Supp. 3d 15 (M.D.N.C. 2019). That date was the "very latest" the State Board had indicated it could learn of an injunction and give it effect for the March 2020 primary. Doc. 97-9 at 13–14. The State Board appealed but did not seek a stay, thereby acquiescing in the injunction of the voter ID law for the March 2020 primary. As the State Board later informed the Fourth Circuit, it did not seek a stay "due to the disruptive effect such relief would have had on the

primary election." JA.366 n.8. Indeed, the State Board opposed Petitioners' unsuccessful stay motion, largely based on concerns with administering the primary. *See* Doc. 127 at 3–7.

Petitioners sought and were granted leave to intervene in the preliminary injunction appeal. Order, *N.C. State Conf. of NAACP v. Raymond*, No. 20-1092 (4th Cir. Mar. 27, 2020), Doc. 43. Governor Cooper filed an amicus brief in the Fourth Circuit supporting Plaintiffs and arguing that the preliminary injunction "should be made permanent, and that **this unconstitutional law should never go into effect**." JA.844 (emphasis added).

On December 2, 2020, the Fourth Circuit reversed. North Carolina's voter ID law "is more protective of the right to vote than other states' voter-ID laws that courts have approved," the court reasoned, and it is "hard to say that [the law] does not sufficiently go out of its way to make its impact as burden-free as possible." *N.C. State Conf. of NAACP v. Raymond*, 981 F.3d 295, 310 (4th Cir. 2020) (quotation marks omitted). Back in the district court, the State Board moved for summary judgment on October 2, 2021. On December 30, 2021, the district court stayed the case pending the resolution of the grant of certiorari by this Court or until further order of the district court. Doc. 194.

In the *Holmes* litigation, a panel of the North Carolina Court of Appeals reversed the state trial court's denial of a preliminary injunction on February 18, 2020. *See Holmes v. Moore*, 840 S.E.2d 244 (N.C. Ct. App. 2020). The General Assembly subsequently passed a bill, which Governor Cooper signed into law,

adding public assistance IDs to the list of qualifying voter ID, 2020 N.C. Sess. Laws 17—the lack of which was a key foundation of the Court of Appeals' decision. *See, e.g.*, *Holmes*, 840 S.E.2d at 262. Petitioners accordingly asked the trial court to lift the injunction. The State Board **opposed**, arguing that "the complexities of implementing the photo ID requirement at this time counsel against issuing this relief." Opp'n to Mot. to Dissolve Inj. at 1, *Holmes*, No. 18 CVS 15292 (N.C. Super. Ct. Wake Cnty. July 24, 2020). The court ultimately denied the motion.

After a trial on the merits, the three-judge state trial court issued a divided opinion permanently enjoining S.B. 824 on September 17, 2021. The court held that S.B. 824 violates the North Carolina Constitution's Equal Protection Clause. Doc. 174-1. Both Petitioners and State Respondents have appealed that decision.

VIII. The En Banc Fourth Circuit Affirms the Denial of Intervention.

Meanwhile, Petitioners appealed the denial of their renewed intervention motion, and a divided panel of the Fourth Circuit reversed and remanded. Pet.App.86. Plaintiffs and Defendants each petitioned for rehearing en banc, which the Fourth Circuit granted. *N.C. State Conf. of NAACP v. Berger*, 825 F. App'x 122 (4th Cir. 2020).

On June 7, 2021, a divided en banc court affirmed by a vote of 9–6. The majority concluded that the district court did not abuse its discretion in finding "that the Attorney General, consistent with his

statutory duties, continued to provide an adequate defense of S.B. 824," and affirmed. Pet.App.40–41.

Judge Quattlebaum dissented, joined by Judges Niemeyer, Agee, Richardson, and Rushing. In his view, the district court erred by "ignor[ing] North Carolina's law requesting two agents in cases challenging the constitutionality of its duly-enacted statutes," and it then "compounded the error by setting the bar for the Intervenors to clear too high." Pet.App.64 (Quattlebaum, J., dissenting).

Judge Niemeyer wrote a separate dissent, explaining his view that denying Petitioners' motion to intervene when "the State of North Carolina, as sovereign, . . . designate[d] the General Assembly to represent its interests" simply "because the Attorney General is doing a good job is substantively flawed." Pet.App.57 (Niemeyer, J., dissenting).

Judge Wilkinson also dissented, explaining that he "would recognize a right of intervention" given a "confluence of factors," including that "State law envisions a role for the General Assembly when a state statute is under challenge," *id.*, and that "in 'divided government' states like North Carolina, the danger that the executive or judicial branches may seek to override the constitutionally prescribed legislative role is more than theoretical." *Id.* Pet.App.53–54 (Wilkinson, J., dissenting)

SUMMARY OF ARGUMENT

I. Petitioners need not overcome a presumption of adequate representation to intervene under Rule 24(a). A presumption of adequate representation fails to give appropriate weight to the State's vital interest

in defending the constitutionality of North Carolina's election laws. It also brings Rule 24 into unnecessary conflict with North Carolina policy on who is entitled to speak on the State's behalf. North Carolina has designated legislative officials as necessary agents to defend State laws in certain categories of cases, *see* N.C. GEN. STAT. §§ 1-72.2, 120-32.6, and this Court should interpret Rule 24 in a way that accommodates the State's choice of who may act on its behalf. Moreover, courts routinely hear cases that involve multiple separately represented state officials, and whatever inconvenience might be entailed in allowing Petitioners to participate is greatly outweighed by the importance of ensuring that all of North Carolina's interests in this litigation are fully represented.

A presumption also is inconsistent with Rule 24's text and precedent. Nothing in Rule 24's text suggests that the "adequacy" of an existing party's representation should form a significant barrier to intervention. This Court's precedents, including *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), also strongly support treating the adequacy element as requiring only a "minimal" showing.

II. A district court's determination of adequacy of representation in considering a motion to intervene as of right is an issue of law that should be reviewed de novo. Rule 24's text and structure support this conclusion. The Rule distinguishes between "intervention of right," Rule 24(a), and "permissive intervention," Rule 24(b), mandating that when the substantive requirements of the former are met, a court "must" permit intervention, whereas when the

substantive requirements of the latter are met, the court "may" permit intervention. Consequently, only permissive intervention is subject to the discretion of the district court, and reviewing a district court's determination on intervention of right for abuse of discretion would blur the distinction between the distinct types of intervention.

This Court's historical practice regarding Rule 24 also supports application of de novo review. This Court has always effectively reviewed the substantive intervention of right standards de novo without any indication of deference to the district court or, if reaching the issue in the first instance, that the Court itself was exercising discretion. *See, e.g.*, *Trbovich*, 404 U.S. at 538.

At any rate, regardless of the standard that applies generally, de novo review should apply here because the district court abused any discretion it had by applying a presumption of adequate representation.

III. Under the proper standards, Petitioners are entitled to intervene. First, it is uncontested that Petitioners' motion to intervene was timely. Second, North Carolina has a significantly protectable interest in the enforcement of its laws, and Petitioners are authorized to assert that interest as agents of the State. N.C. GEN. STAT. §§ 1-72.2(b), 120-32.6(b); *Bethune-Hill*, 139 U.S. at 1951.

Third, the disposition of this case may impair Petitioners' significantly protectable interest, as agents of the State, in defending the constitutionality

of S.B. 824. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers).

Fourth, State Board Respondents may not adequately protect Petitioners' interest. By declaring Petitioners necessary parties, state law makes clear that State Board Respondents' representation is inadequate. State Board Respondents' responsibility to administer state election law means that their incentives may not necessarily be aligned with Petitioners'. *See Trbovich*, 404 U.S. at 538 n.10. And State Board Respondents adequacy is further undermined by their service at the pleasure of Governor Cooper, who supports Plaintiffs in this lawsuit.

ARGUMENT

I. Petitioners Need Not Overcome a Presumption of Adequate Representation.

A. The Court Should Apply Rule 24 in a Manner That Reflects the State's Weighty Interests in This Case and That Respects Its Designation of Agents.

1. Rule 24(a)(2) directs courts to assess whether the existing parties "adequately represent" a would-be intervenor's interests. To be "adequate," representation must be "[e]qual to or sufficient for some (specific) requirement," *see Adequate*, WEBSTER'S NEW INTERNATIONAL DICTIONARY 31 (2d ed. 1944); "adequate" representation is "suitable to the occasion or circumstances" that the intervention motion presents, *Adequate*, BRYAN A. GARNER, MODERN AMERICAN USAGE 17 (2003). Thus, adequacy

of representation under Rule 24 cannot be assessed in a vacuum or by simply asking in the abstract whether the existing parties' lawyers are doing a good job. Instead, adequacy must be weighed with reference to the nature and gravity of the specific interests that the proposed intervenor seeks to advance.

Rather than undertaking the highly contextual and interest-specific analysis that is necessary to assess "adequacy" of representation under the Rule's plain text, the Fourth Circuit adopted a one-size-fits-all presumption that creates a nearly insurmountable barrier to a state legislature intervening in a case in which state executive branch officials are already participating. But in deploying its presumption, the Fourth Circuit completely ignored the importance of the state interest that Petitioners seek to defend. Representation that is adequate in a small matter may be utterly inadequate in a large one, and it makes no sense to adopt an analytical framework for assessing adequacy that is incapable of distinguishing a routine slip and fall case from constitutional litigation over the most sensitive state policies.

Once the state interest that provides the basis for Petitioners' intervention motion is considered, it becomes clear that the Fourth Circuit set the threshold for establishing inadequacy of representation much too high. As agents of the State, Petitioners seek to demonstrate the constitutionality of one of the State's duly enacted laws—a "grave matter" for North Carolina in which it "clearly has a legitimate interest." *Maine v. Taylor*, 477 U.S. 131, 135, 137 (1986). "Any time a State is enjoined by a court from effectuating statutes enacted by

representatives of its people, it suffers a form of irreparable injury." *Maryland*, 567 U.S. at 1303 (Roberts, C.J., in chambers) (cleaned up). That is particularly so where state laws governing election procedures are concerned. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 & n.17 (2018). Indeed, the States' interest in the enforcement of their duly enacted laws is so significant that the Federal Rules prohibit courts from permanently enjoining such laws without first giving state officials an opportunity to be heard. *See* Fed. R. Civ. P. 5.1(c). And North Carolina law requires that such notice be forwarded to Petitioners. *See* N.C. GEN. STAT. § 114-2(9). Given the importance of this interest and Petitioners' status as agents of the State, only a minimal showing of inadequacy should be required for Petitioners to intervene.

2. The Fourth Circuit's presumption of adequate representation additionally brings Rule 24 into unnecessary conflict with North Carolina policy on who is entitled to speak on the State's behalf. A State "must be able to designate agents to represent it in federal court," *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013); *see Bethune-Hill*, 139 S. Ct. at 1951–53, and in an important category of cases North Carolina has designated legislative branch officials as necessary agents to defend the State's interests, *see* N.C. GEN. STAT. §§ 1-72.2, 120-32.6. Rather than inventing presumptions that frustrate North Carolina's policy, the Court should interpret Rule 24 to accommodate the State's choice of who may act as its agents in litigation.

This Court has often emphasized the need to interpret and apply the Federal Rules with

"sensitivity to important state interests." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7, 437 n.22 (1996). While the Federal Rules preempt contrary state law, conflicts should be avoided when the Rules can be "fairly construed" in a manner that is consistent with state policy. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4–5 (1987); *see also, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–51 (1980). This well-established interpretive principle respects the dignity of sovereign States in our federal system while minimizing the degree of divergence in outcomes between the federal and state court systems.

Interpreting the Federal Rules to accommodate state policy is critical here because the state policy at issue is especially weighty. North Carolina's choice about who should speak for it reflects one of its essential attributes as a State: "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory*, 501 U.S. at 460. This Court has in the past taken care to avoid "displac[ing] a State's allocation of governmental power and responsibility," *Alden v. Maine*, 527 U.S. 706, 752 (1999), and respect for North Carolina's choice of agents provides a compelling reason to reject the Fourth Circuit's judicially created presumption.

There is also a practical reason why the Court should refuse to interpret Rule 24(a)(2) to make it very difficult for Petitioners to intervene on the State's behalf in federal court: doing so effectively empowers plaintiffs who sue the State to decide which state agents will control the defense. Under the Fourth

Circuit's application of Rule 24, when the NAACP Respondents opted to sue in federal court, they were able to vest control of the defense in the exclusive hands of the State Board Respondents. If the NAACP Respondents had instead brought their claims in North Carolina court, the situation would have been entirely different. In state court, Petitioners must be joined as defendants in any civil action challenging the constitutionality of a North Carolina statute and have an absolute right to intervene as necessary parties in such cases if they are not joined. *See* N.C. GEN. STAT. § 1A-1, Rules 19(d), 24(c).

While the NAACP Respondents cannot be faulted for preferring that control of the defense remain in the hands of state officials who are sympathetic to their cause, allowing plaintiffs to make this selection by opting for federal rather than state court is extraordinarily prejudicial to the State. Whenever possible, this Court interprets the Federal Rules to avoid "substantial variations [in outcomes] between state and federal litigation." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001) (cleaned up); *see also Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 37–38 (1988) (Scalia, J., dissenting). In contravention of that principle, the Fourth Circuit's presumption creates significant disuniformity between federal and state court proceedings over the constitutionality of North Carolina statutes.

In *Virginia House of Delegates v. Bethune-Hill*, this Court rejected an attempt by the Virginia House of Delegates to litigate on behalf of Virginia because that State had "chosen to speak as a sovereign entity with a single voice" through its attorney general. 139

S. Ct. at 1952. But the Court also made clear that the choice was Virginia's to make and that the State could have "designated the House to represent its interests." *Id.* at 1951. North Carolina has made just such a designation here, and the Court should honor the State's selection of agents rather than applying Rule 24 in a way that needlessly frustrates an important state policy.

3. The Court should also reject the Fourth Circuit's presumption because it fails to appropriately account for the complex and multifaceted interests of States like North Carolina that do not centralize control over the State's litigating positions in a single state official. Like many States, North Carolina divides decision-making responsibility—including authority to litigate on behalf of the State—among multiple independently selected officials who do not answer to each other. Separating power in this way is admittedly inefficient; it leads to "conflicts, confusion, and discordance." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). But no less than the national government, North Carolina has opted to allocate authority among a variety of officials to better "secure liberty." *Id.* at 721 (internal quotation marks omitted).

Thanks to the separation of powers, a small but important class of lawsuits inevitably arises in which the branches of state government have different perspectives on the State's interests. At the federal level, such disagreements are frequently resolved within the Solicitor General's office, and on occasion that office has concluded that the best way to fully represent the entire federal government's interests is by allowing more than one governmental perspective

to be aired in court. Solicitor General Bork filed briefs on both sides in *Buckley v. Valeo*, Nos. 75-436 & 75-437, 424 U.S. 1 (1976)—one that defended the constitutionality of the campaign finance law that Congress passed and another that reflected the Administration's view that the law was unconstitutional. Acting Solicitor General Roberts similarly permitted the FCC to file a brief defending the constitutionality of a statute that the United States argued against in *Metro Broadcasting, Inc. v. FCC*, Nos. 89-453 & 89-700, 497 U.S. 547 (1990). As those examples and innumerable others show, the interests of a government of divided powers cannot always be reduced to a single litigating position presented in one brief. *See* Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1075 (2001). In recognition of this reality, and out of a desire to ensure that even state laws that may be unpopular in certain quarters receive a robust defense, North Carolina has designated Petitioners to serve as additional agents who may speak on the State's behalf in lawsuits like this one.

North Carolina's designation of multiple state agents also reflects the fact that the State sometimes has more than one interest that may be affected in a lawsuit, as this case demonstrates. The State has two fundamental interests at stake in the voter ID litigation: an interest in administering elections and an interest in defending the State's duly enacted statutes. The State Board Respondents are executive branch officials who have said that a primary concern of theirs in the litigation is administrative. *See* JA.142, 203. Petitioners, in contrast, are members of

the legislature—a vantage point that makes them exclusively focused on defending the law on its merits. North Carolina has *multiple* interests at stake in this case, and the State's decision to have those interests represented by multiple agents is a choice that the federal courts should not second guess. *Cf. Mayor of City of Phila. v. Educ. Equal. League*, 415 U.S. 605, 615 n.13 (1974) (observing that a State may "pattern its government after the scheme set forth in the Federal Constitution or in any other way it sees fit").

The Fourth Circuit worried that honoring North Carolina's choice of agents "would risk turning over to state legislatures, rather than district courts, control over litigation involving the states." Pet.App.30 n.3. But who speaks for North Carolina ought to be up to North Carolinians, not federal district courts. Rather than embracing a presumption that relegates North Carolina to relying exclusively on agents who, in the State's view, are not positioned to fully represent *all* the State's interests in this case, the Court should interpret and apply Rule 24 in a way that accommodates North Carolina's choice of representatives.

B. Requiring Petitioners to Overcome a Presumption of Adequate Representation Is Inconsistent with Rule 24's Text and Precedent.

Wholly apart from federalism considerations, the Fourth Circuit's presumption is inconsistent with Rule 24's text, this Court's precedents, and the Advisory Committee's guidance on how courts should weigh adequacy of representation when deciding whether a movant is entitled to intervene as of right.

1. Nothing in Rule 24's text suggests that the "adequacy" of an existing party's representation should form the significant barrier to intervention that the Fourth Circuit erected. By mandating that an interested party "must [be] permit[ted]" to intervene "*unless*" its interests are adequately represented, the text makes clear that the other elements required for intervention as of right should be the primary focus of the inquiry and that courts should only exclude proposed intervenors on adequacy of representation grounds when it is apparent that intervention is unnecessary to protect the proposed intervenor's interests. In other words, under the plain text of the Rule, the "adequate representation" element of the test only comes into play after a party has demonstrated that it otherwise has an interest at stake and should presumptively be allowed to intervene.

Indeed, by providing that a party is entitled to intervene when the other factors are met "unless" an existing party adequately represents the movant, "it seems entirely clear" that the Rule's text "shift[s] the burden of persuasion" from the putative intervenor to the existing parties on this element. *See* 7C Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1909 (3d ed. 2021 update). Ultimately, however, the Court need not reach the issue in this case of who bears the burden because Petitioners easily satisfy whatever minimal burden the Rule, at most, imposes under this Court's precedents.

Nor does anything in the Rule's text justify singling out for special, disfavored treatment motions in which a state agent seeks to intervene on the same

side as existing governmental litigants. If anything, the presumption should be the opposite: when the Federal Rules specifically address intervention motions filed by state officials, they do so to make it *easier* for state officials to intervene. *See* FED. R. CIV. P. 5.1(c), 24(b)(2).

2. This Court's precedents also strongly support treating Rule 24(a)(2)'s adequacy element as a low threshold without any presumptions that Petitioners must overcome. The Court has addressed Rule 24(a)(2)'s adequacy element in depth on two occasions. In both cases, the Court reversed lower court decisions that denied motions to intervene on the same side as governmental litigants. The Court did not apply a presumption of adequate representation in either instance.

This Court's most significant discussion of Rule 24(a)(2)'s adequacy element came in *Trbovich*. In that case, a union member, Trbovich, filed a complaint with the Secretary of Labor in which he alleged that a union election had been tainted by violations of the Labor Management Reporting and Disclosure Act of 1959. 404 U.S. at 529. When the Secretary of Labor sued the union based on these allegations, Trbovich sought to intervene on the side of the Secretary. *Id*. at 529–30. The Court held that the inadequate representation requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Id*. at 538 n.10.

The decision below dismissed *Trbovich* as supplying a liberal "'default' rule" that must

nevertheless "give way to more specific standards for the adequacy of representation under Rule 24 based on the context of each case." Pet.App.33. But the Fourth Circuit failed to acknowledge that it was deciding a case *exactly* like *Trbovich*—where movants seek to intervene alongside an existing governmental party. Indeed, the argument for presuming adequacy of representation in *Trbovich* was *stronger* than it is here, for the Secretary of Labor brought an enforcement action under a statutory regime that gave him "exclusive" authority to sue. 404 U.S. at 531.

This Court's other significant treatment of Rule 24(a)(2)'s adequacy element was in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), an antitrust lawsuit brought by the Department of Justice. Cascade was a distributor of natural gas supplied by the target of the government's antitrust action, and this Court held that Cascade was entitled to intervene as of right on the government's side after antitrust regulators attempted to settle the case for insufficient consideration. Without applying any presumption that the Department of Justice adequately represented Cascade's interests, the Court said that Cascade could intervene because the existing parties had "fallen far short of representing [Cascade's] interests." *Id.* at 136.

Justice Stewart dissented in *Cascade*, and in doing so he made many of the same arguments that the Fourth Circuit advanced as justification for its presumption. Justice Stewart worried that allowing Cascade to intervene would be "unworkable" and "multiply trial exhibits and testimony, and further confound" complex litigation. *Compare* 386 U.S. at

147–48, 155 (Stewart, J., dissenting), *with* Pet.App.38. He argued that intervention would interfere with the government's "discharge of its duties" by allowing "volunteers" to "press[ ] their own particular interpretations of the 'public interest' against the defendant, the Government, and each other." *Compare* 386 U.S. at 149 (Stewart, J., dissenting), *with* Pet.App.34, 36–37. And he predicted that the Court's ruling would "draw[ ] judges into the adversary arena and force[ ] them into the impossible position of trying to second-guess the parties in the pursuit of their own interests." *Compare* 386 U.S. at 156 (Stewart, J., dissenting), *with* Pet.App.33. None of Justice Stewart's arguments carried the day in *Cascade*, and Rule 24 has not materially changed since.

3. Requiring Petitioners to overcome a strong presumption of adequate representation by the existing parties is also inconsistent with Rule 24's history and the Advisory Committee Notes. As originally written, Rule 24(a)(2) required movants to show that the existing parties' representation "is or *may be* inadequate." FED. R. CIV. P. 24, 308 U.S. 690 (1938) (emphasis added). That generous standard reflected Rule 24's place in a broader system of interlocking rules on the joinder of parties and claims designed to advance "that fundamental tenet of modern procedure that joinder . . . must be greatly liberalized to provide . . . for the effective settlement at one time of all disputes of which parts are already before the court." *Lesnik v. Pub. Industrials Corp.*, 144 F.2d 968, 973 (2d Cir. 1944) (Clark, J.).

Rule 24 was revised in 1966 to make intervention even more freely available, and in overhauling the Rule's adequacy provision the Advisory Committee said that would-be intervenors need only show a "fair probability" of inadequate representation. FED. R. CIV. P. 24, Advisory Committee Notes, 1966 Amendment. Accordingly, a movant who satisfies the Rule's other criteria for intervention as of right "should, as a general rule, be entitled to intervene." *Id.* To further guide judicial application of the Rule's adequacy element, the Advisory Committee of 1966 also favorably cited several cases in which lower courts correctly analyzed adequacy of representation under the prior version of the Rule. One of those cases is particularly relevant here.

In *Atlantic Refining Co. v. Standard Oil Co.*, 304 F.2d 387 (D.C. Cir. 1962), the court held that a group of petroleum refiners was entitled to intervene as of right in support of the Secretary of the Interior's defense of a regulation concerning crude oil import quotas. Although the refiners did not seek "a decree in anywise different from that sought by the Secretary," *id.* at 392, the court held that they were not adequately represented by the Secretary because they wished to defend the regulation on "additional and broader grounds," *id.* at 391. In ruling in favor of intervention, the court *rejected* the argument that "where one seeks to intervene in an action in which the United States is a party and on its side of the controversy, it is necessary to claim bad faith or malfeasance on the part of the Government or its representatives." *Id.* at 392. That reasoning—favorably cited by the Advisory Committee—directly

contradicts the decision below, which held that Petitioners must show "adversity of interest, collusion, or malfeasance" on the part of existing governmental litigants with whom Petitioners share the "same ultimate objective." Pet.App.31–32.

Like this Court's decisions in *Trbovich* and *Cascade*, the D.C. Circuit ruled as it did without any hint that the intervenors were required to overcome a presumption of adequate representation by the governmental litigants who were already in the case.

C. Practical Considerations Do Not Justify Requiring Petitioners to Overcome a Presumption of Adequate Representation.

While the decision below was based in large measure on earlier Fourth Circuit caselaw that cannot be reconciled with Rule 24's text or this Court's precedents, the Fourth Circuit also worried that allowing North Carolina to protect its distinct interests through multiple agents would make litigation involving the State more "protracted, costly, and complicated." Pet.App.38. As a threshold matter, this concern does not fit comfortably into any of Rule 24(a)(2)'s elements. While the standard for *permissive* intervention requires courts to "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights," FED. R. CIV. P. 24(b)(3), no similar language appears in the Rule's standard for intervention as of right.

In any event, the Fourth Circuit's practical concerns are unfounded. It is routine for the federal courts to hear cases in which different state officials

have different perspectives on a State's interests; just last Term, this Court decided a major election law case in which Arizona's Attorney General and Secretary of State were on opposite sides. *See Brnovich v. Democratic Nat'l Comm.*, Nos. 19-1257 & 19-1258, 141 S. Ct. 2321 (2021). Indeed, to obtain complete relief, plaintiffs are frequently required to sue multiple government officials who share responsibility for enforcing a challenged state law, and it is not unusual for such officials to be separately represented. *See, e.g.*, *Republican Party of Pa. v. Degraffenreid*, Nos. 20-542 & 20-574, 141 S. Ct. 732 (2021) (mem.); *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, No. 16-1140, 138 S. Ct. 2361 (2018).

District courts also frequently allow state legislative officials to permissively intervene even though state executive branch officials are already named parties. *See, e.g.*, *Middleton v. Andino*, No. 3:20-cv-01730, 2020 WL 4915566 (D.S.C. Aug. 21, 2020); *Carcaño v. McCrory*, 315 F.R.D. 176, 179 (M.D.N.C. 2016); *Feldman v. Ariz. Sec'y of State's Office*, No. CV-16-01065, 2016 WL 4973569, at *2 (D. Ariz. June 28, 2016). And in numerous statutes, Congress has given certain parties an unqualified right to intervene without regard to whether their perspectives overlap with those of one of the existing parties. *See, e.g.*, 18 U.S.C. § 3626(a)(3)(F) (granting individual state legislators with appropriations authority an unconditional right to intervene in certain cases involving prison conditions); *see also* 6 MOORE'S FEDERAL PRACTICE § 24.02 (3d ed. 2021) (collecting additional examples). The federal courts' experience in these contexts lends no support to the

Fourth Circuit's fear that requiring Petitioners to make anything less than an "extraordinary" showing of inadequacy of representation would unduly complicate litigation involving the State. *See* Pet.App.4.

But the Court need not look beyond the litigation over North Carolina's voter ID law to see that the Fourth Circuit's practical concerns were misplaced. While Petitioners have so far been prohibited from being heard as parties in this federal case, they have been active participants in parallel litigation in North Carolina court. Far from derailing the state court litigation, Petitioners' participation has facilitated it. The state court case went to trial last year—far ahead of the schedule on which the federal case has been litigated in Petitioners' absence. And at trial in state court, Petitioners took the lead in defending the challenged law on the merits. In short, Petitioners have been permitted to intervene in a case closely parallel to this one, and none of the practical problems that the Fourth Circuit worried about have materialized.

The Fourth Circuit also reasoned that federal courts should be reluctant to conclude that North Carolina's Attorney General is inadequately representing the State's interests "in dereliction of his statutory duties." Pet.App.4. But Rule 24(a)(2) directs courts to consider whether the "existing *parties*"—*i.e.*, the State Board Respondents—adequately represent Petitioners' interests. The Attorney General represents the State Board Respondents but is not a party to this case, and the Court need not impugn the integrity of any state official to recognize that

Petitioners and the State Board Respondents have different responsibilities under state law and varying perspectives on the State's interests. While the Fourth Circuit adopted its presumption so that courts would not need to "arbitrate, de novo, the inevitable differences over strategy" among state officials, Pet.App.33, the Fourth Circuit's presumption requires state agents who seek to intervene to accuse the existing state parties of "malfeasance," Pet.App.32. In this way, the Fourth Circuit's presumption increases rather than diminishes the intensity and extent of intra-state disagreements that the courts must adjudicate when ruling on motions to intervene as of right.

Finally, whatever practical difficulties the federal courts might encounter in permitting the State to designate an additional agent to speak for North Carolina in court, those difficulties pale in comparison to the importance of ensuring that the State receives a fair hearing before its laws are enjoined on constitutional grounds. Advocates of North Carolina's voter ID law could hardly be faulted for questioning the legitimacy of judicial proceedings in which the courts refuse to hear from the branch of state government that actually supports the law and the defense is left to state officials controlled by a Governor who vetoed the law at issue and put in an amicus in this very case casting the law as unconstitutional. The Federal Rules should be administered in a manner that is not only "speedy" and "inexpensive," but also "just." FED. R. CIV. P. 1. Justice in this case requires that Petitioners be heard as additional agents of the State.

II. Adequacy of Representation Is an Issue of Law That Should Be Reviewed De Novo.

Because the District Court committed legal error by applying a presumption of adequate representation, the district court necessarily abused any discretion it may have had in denying intervention. *See McLane Co. v. EEOC*, 137 S. Ct. 1159, 1168 n.3 (2017). But even apart from this legal error, a district court's determination of whether a proposed intervenor's interest is adequately represented is a question of law that should be reviewed de novo on appeal.

A. Rule 24's Text and Structure Demonstrate That De Novo Review Applies.

Rule 24 distinguishes between "intervention of right," Rule 24(a), and "permissive intervention," Rule 24(b). When the substantive requirements of the former are met, a court "must" permit intervention; when the substantive requirements of the latter are met, the court "may" permit intervention. The contrast between intervention of right and permissive intervention demonstrates that only the latter is subject to the discretion of the district court. Indeed, reviewing intervention of right for abuse of discretion would risk blurring the distinction between the two types of intervention that have been present in the Rule since its initial promulgation.

Some commentators have criticized Rule 24 for this division and advocated for all intervention decisions to be discretionary. *See, e.g.*, Gene R. Shreve, *Questioning Intervention of Right—Toward a New*

Methodology of Decisionmaking, 74 NW. U. L. REV. 894, 924–25 (1980); David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 758 (1968). But this reinforces that the Rule as currently structured *does* maintain this division, and that division must be given effect.

Rule 24(b)(3) further supports that appellate review of intervention of right determinations should be de novo. That provision states that "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(3). This language reinforces that only with respect to *permissive* intervention is discretion involved and that only with respect to permissive intervention do practical matters of litigation administration come into the intervention decision.

Moreover, Rule 24(a)(2) is grouped with Rule 24(a)(1), and courts to have considered the question of what standard of review applies to intervention determinations under Rule 24(a)(1) consistently have held that they are subject to de novo review. *See, e.g.*, *In re Fin. Oversight & Mgmt. Bd. for P.R. ex rel. P.R.*, 872 F.3d 57, 61 (1st Cir. 2017); *EEOC v. PJ Utah, LLC*, 822 F.3d 536 (10th Cir. 2016); *EEOC v. STME, LLC*, 938 F.3d 1305 (11th Cir. 2019).

In light of these textual and structural features of Rule 24, a leading treatise concludes that while "an application for permissive intervention is addressed to the discretion of the court," "an application for intervention of right seems to pose only a question of law." 7C Wright & Miller, FEDERAL PRACTICE &

PROCEDURE § 1902 (3d ed. 2021 update). Therefore, when a timely motion is filed and the substantive standards are met, "[t]here is no discretion when intervention is under Rule 24(a)." *Id.* § 1913.

Because intervention of right is a legal question that should be reviewed de novo, the same should be true of the subsidiary, substantive factors that determine whether intervention of right must be granted. Indeed, it would not make much sense to say that intervention of right is a legal question to be reviewed de novo if the substantive standards that inform that decision are reviewed for abuse of discretion. Such a system would effectively transform the right to intervene into a privilege subject to the discretion of the district court. This Court in other contexts has rejected bifurcated standards of review for unitary standards. *See, e.g.*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399–405 (1990); *see generally First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 948 (1995) ("[I]t is undesirable to make the law more complicated by proliferating review standards without good reasons."). And while the circuits are sharply split on whether to apply de novo or abuse of discretion review in this context, nearly all circuits agree that the *same* standard applies across the board to the substantive factors—whether the proposed intervenor has an interest in the subject matter of the action, whether the protection of the interest would be impaired because of the action, and

whether the applicant's interest is not adequately represented by existing parties to the litigation.[1]

The text of the adequacy of representation factor itself reinforces that it is a legal question not entrusted to the discretion of the district court. When the other factors are met, intervention must be allowed "*unless* existing parties adequately represent [the movant's] interest." FED. R. CIV. P. 24(a)(2). Contrast this language with the language in the attorney fee provision for which this Court adopted abuse of discretion review in *Pierce v. Underwood*, 487 U.S. 552, 559 (1988): attorney fees were to be awarded "unless *the court finds* that the position of the United States was substantially justified." "This formulation, as opposed to simply 'unless the position of the United States was substantially justified'"—*i.e.*, the formulation reflected in Rule 24—"emphasizes the fact that the determination is for the district court to make, and thus suggests some deference to the district court upon appeal." *Id.* The same reasoning entails that adequacy of representation in the intervention context is not a finding for the district court to make, and thus suggests no deference is due to the district court on appeal.

The fact that timeliness of a motion to intervene is reviewed for abuse of discretion does not counsel a contrary result. *See NAACP v. New York*, 413 U.S. 345, 365–66 (1973). Textually, timeliness is separated from the substantive criteria for intervention. And

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[1] *See, e.g.*, Pet.App.25–26, 40–41; *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011). The D.C. Circuit is an exception. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003).

structurally, it is parallel to the timeliness provision in Rule 24(b), suggesting that unlike with the substantive criteria for each type of intervention, it should be assessed with similar standards.

B. Historical Practice Supports De Novo Review.

This Court's historical practice supports application of de novo review. *See Pierce*, 487 U.S. at 558; *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 435 (2001). Although this Court has never expressly held what standard of review applies, it has always effectively reviewed the substantive intervention of right standards, including adequacy of representation, de novo without any indication of deference to the district court or, if reaching the issue in the first instance, that the Court itself was exercising discretion. Additionally, this Court has often *distinguished* review of intervention of right from review of permissive intervention by emphasizing that the latter is reviewed for abuse of discretion, implying that the same is not true for the former.

This practice is particularly apparent in cases reversing denials of intervention of right, none of which evince any degree of deference to the district court. *See Trbovich*, 404 U.S. at 538; *Cascade*, 386 U.S. at 135–36; *Kaufman v. Societe Internationale Pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156 (1952); *Bhd. of R.R. Trainmen v. Balt. & O.R. Co.*, 331 U.S. 519 (1947) (Rule 24(a)(1)). Indeed, even the dissent in *Cascade*, which would have affirmed the denial of intervention, implicitly adhered to this practice by addressing the

intervention of right question at length and apparently de novo and, forced to address permissive intervention, in a brief footnote said that the district court did not "abuse its discretion." 386 U.S. at 159 n.27 (Stewart, J., dissenting).

The practice is also present in cases affirming denials of intervention, *see, e.g.*, *Donaldson v. United States*, 400 U.S. 517, 530–31 (1971); *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683 (1961); *Sutphen Estates v. United States*, 342 U.S. 19 (1951); *United States v. Paramount Pictures*, 334 U.S. 131, 177–78 (1948); *Allen Calculators, Inc. v. Nat'l Cash Reg.*, 322 U.S. 137 (1944), and in cases affirming permissive intervention, *see SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 458 (1940).[2]

Finally, this Court's past statements about when rulings on intervention motions are appealable support the same distinction between intervention of right and permissive intervention. *See, e.g.*, *Bhd. of R.R. Trainmen*, 331 U.S. at 534–35.

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[2] This Court's statement that it was affirming the grant of intervention in *Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003), because the district court did not "abuse its discretion" is consistent with this practice. In *Georgia*, the "district court did not explain whether it granted intervention as of right under Rule 24(a)(2) or permissive intervention under Rule 24(b)(2)," and the intervenors defended the district court's decision under the standards of both. *See* Br. of Appellee Intervenors, *Georgia v. Ashcroft*, 2003 WL 1792241, at *43–48, *44 n.38 (Apr. 2, 2003). To hold that intervention was improper under both Rule 24(a) *and* Rule 24(b) this Court would have had to have found an abuse of discretion.

C. The Federal Rules of Civil Procedure Advisory Committee Notes Support Application of De Novo Review.

Rule 24 was amended in 1966 to combine elements of what had been Rule 24(a)(2) and 24(a)(3) into a single standard for intervention of right. FED. R. CIV. P. 24(a), 383 U.S. 1051 (1966). The Advisory Committee cited cases that support application of de novo review. Like this Court's historical practice, none of these cases gave the district court's determination regarding intervention as of right deference and seemed to implicitly differentiate between de novo review for intervention of right and abuse of discretion review for permissive intervention. *See Int'l Mortg. & Inv. Corp. v. Von Clemm*, 301 F.2d 857, 860–64 (2d. Cir. 1962); *Formulabs, Inc. v. Hartley Pen Co.*, 275 F.2d 52 (9th Cir. 1960); *Atl. Refin. Co.*, 304 F.2d at 393–94; *Ford Motor Co. v. Bisanz Bros.*, 249 F.2d 22, 26–28 (8th Cir. 1957); *Wolpe v. Poretsky*, 144 F.2d 505, 507–08 (D.C. Cir. 1944). Furthermore, that the Advisory Committee cited *appellate* cases as examples for how adequacy of representation should be analyzed implies that de novo review is appropriate. If abuse of discretion were the standard, citations to leading *district court* opinions would have been more appropriate.

D. As a Matter of Sound Administration, Review Should Be De Novo.

The text of Rule 24 and this Court's historical practice establish that de novo review should apply. But even if these factors were not determinative, administrative considerations would offer further support for de novo review. *See McLane Co.*, 137 S. Ct.

at 1166–67. "Requiring the application of law, rather than a decisionmaker's caprice . . . helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself." *Cooper Indus.*, 532 U.S. at 436 (internal quotation marks omitted). "Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id.* De novo review also tends to "unify precedent" and supply district courts with a "set of rules" to apply to intervention questions. *Id.*; *see also Ornelas v. United States*, 517 U.S. 690, 697 (1996).

Intervention of right is principally a matter of the rights of the prospective intervenor, not of docket management. Thus, Rule 24 lists trial management-type considerations only under subsection (b), permissive intervention. And the district court will not be meaningfully better situated to judge whether the adequacy factor is satisfied. As shown in Petitioners' briefing in this case and in decisions such as *Trbovich*, the adequacy determination will often turn principally on objective factors such as the interests and incentives created by a party's role and undisputed facts. Furthermore, given the timeliness requirement, motions to intervene will frequently be filed and decided at the outset of litigation before the district court has extensive experience handling a case.

III. Petitioners Are Entitled to Intervene As of Right.

A. Petitioners Timely Filed Their Motion to Intervene.

It is uncontested that Petitioners' motion to intervene was timely. Pet.App.23; Br. in Opp'n by State Respondents at 31 n.6 (Oct. 13, 2021).

B. Petitioners Have a Significantly Protectable Interest in the Subject of This Suit.

Respondents have not disputed that the State itself has an interest in defending the validity of its laws, so the only question is whether Petitioners can assert that interest—which they undoubtedly have the right to do. North Carolina law expressly authorizes Petitioners to defend the constitutionality of legislation as "agents of the State." N.C. GEN. STAT. § 1-72.2(b); *see also id.* § 120-32.6(b).

This Court's longstanding precedent establishes that state legislative officials have the authority to defend state enactments in federal court "on behalf of the State" when state law "authorize[s]" them to do so. *Karcher v. May*, 484 U.S. 72, 81 (1987). In *Karcher*, this Court found that it lacked jurisdiction over a petition for a writ of certiorari in which the petitioners were individual legislators. *Id.* at 77. But the Court found that it did not need to vacate the judgment below because, during the time the case was before the district court and court of appeals, the legislators had been the Speaker and President of the State's two legislative houses and therefore had properly been permitted to intervene to represent the State's

interests. *Id.* at 81. This was so, the Court concluded, because New Jersey law provided that petitioners "[h]ad authority under state law to represent the State's interests in both the District Court and the Court of Appeals." *Id.* at 82. *Karcher* thus stands for the proposition that *if* a State has given defensive litigating authority to state legislative officials, those officials are authorized to assert the State's interest in the validity of its laws in federal court.

Other cases confirm that laws such as North Carolina's allow legislative officials to represent the State's interests in federal court. In *Hollingsworth v. Perry*, this Court explained that

> No one doubts that a State has a cognizable interest in the continued enforceability of its laws that is harmed by a judicial decision declaring a state law unconstitutional. To vindicate that interest or any other, a State must be able to designate agents to represent it in federal court. That agent is typically the State's attorney general. *But state law may provide for other officials to speak for the State in federal court*, as New Jersey law did for the State's presiding legislative officers in *Karcher*.

570 U.S. at 709–10 (cleaned up) (emphasis added). This Court's recent decision in *Bethune-Hill* is of a piece, which explained that "[s]ome States" "have authorized" one or both houses of the legislature "to litigate on the State's behalf." *Bethune-Hill*, 139 U.S. at 1952; *see also id.* (citing an Indiana statute similar to North Carolina's as an example of a statute that

"authorize[s]" a legislative body "to litigate on the State's behalf").

Petitioners' interest in representing the State is not dependent in any way on whether the executive branch is involved in defending the State as well. North Carolina law provides that "*[w]henever* the validity or constitutionality of an act of the General Assembly . . . is the subject of an action in any . . . federal court," Petitioners, "as agents of the State through the General Assembly, *shall be necessary parties*." N.C. GEN. STAT. § 120-32.6(b) (emphasis added). And it indeed gives Petitioners primacy in defense of state law by providing that "it shall be the duty of the Attorney General . . . to . . . abide by and defer to the final decision-making authority exercised by the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, in defending any State or federal action challenging the validity or constitutionality of an act of the General Assembly." N.C. GEN. STAT. § 114-2(10).

In the face of these statutes designating Petitioners as agents of the State to represent its interests in court whenever the validity of state laws is challenged, it is no response to assert that Petitioners have an interest in defending the constitutionality of legislation only when the executive declines to do so. Pet.App.163, 186, 188–89. This consideration goes not to the *existence* of a significantly protectable interest, but rather to whether that interest is being *adequately represented*. It is thus better suited for the adequacy prong of the Rule 24(a)(2) standard. Indeed, even the dissent from

the panel opinion below—written by the author of the en banc majority—indicated that it was "inclined to agree" with the panel majority that Petitioners had a sufficient interest to support intervention and that the district court had erred by conflating the interest and adequacy factors of the analysis. *See* Pet.App.147 & n.9 (Harris, J., dissenting).

C. The Disposition of This Case May Impair Petitioners' Significantly Protectable Interest.

The outcome of this case may impair Petitioners' interest, as agents of the State, in defending the constitutionality of S.B. 824. An injunction would visit "irreparable injury" on the State. *Maryland*, 567 U.S. at 1303 (Roberts, C.J., in chambers) (internal quotation marks omitted). Furthermore, the General Assembly's continuing authority to enact voting laws on behalf of the State—itself a significant protectable interest—may be burdened. *See* Doc. 1 at 36–37 (requesting supervision under Section 3 of the Voting Rights Act).

That the district court permitted Petitioners to file an amicus brief, Pet.App.157, does not cure the impairment to Petitioners' interests: an amicus limited to briefing cannot engage in discovery, seek dismissal of a claim, or file a notice of appeal. Indeed, these limitations on amicus status have already affected Petitioners in this case. The district court struck Petitioners' expert reports and fact witness declaration and declined to consider them when deciding the preliminary injunction motion, Doc. 116 at 3; and, after the district court entered a preliminary

injunction, Petitioners were unable to appeal that order.

Petitioners' inability to file an appeal or petition for certiorari from later decisions in this case is particularly important here: in the litigation over North Carolina's previous voter ID law, Governor Cooper's successful effort to shield the Fourth Circuit's decision from this Court's review (an effort that was assisted by Attorney General Stein) was facilitated by the fact that Petitioners were not parties to the litigation. *See North Carolina*, 137 S. Ct. 1399.

D. The State Board Respondents May Not Adequately Protect Petitioners' Significantly Protectable Interest.

Petitioners easily clear the "minimal" threshold for establishing that the State Board Respondents' representation of the State's interests "may be" inadequate. *Trbovich*, 404 U.S. at 538 n.10.

As a threshold matter, federalism considerations provide a compelling reason to defer to the State's choice about who should speak for North Carolina in court. Those considerations deserve dispositive weight where, as here, the State designates the proposed intervenors "necessary parties" to exercise "final decisionmaking authority" in litigation that implicates the State's vital interest in defending its duly enacted laws, N.C. GEN. STAT. § 120-32.6(b), and the proposed intervenors have a meaningfully different perspective than the existing state defendants on the merits of the case. Indeed, given the constitutional authority of the General Assembly to prescribe the manner of federal elections in North

Carolina, *see* U.S. CONST. art. I, § IV, Petitioners are uniquely well-suited to defend the State's interest in its election laws in litigation.

The en banc majority's contention that North Carolina's statutes are irrelevant to the adequacy of representation analysis is mistaken. *See* Pet.App.29–30 n.3. The court worried that looking to those statutes would risk "turning over to state legislatures, rather than district courts, control over litigation involving the states." *Id.* But when the inquiry is whether existing parties adequately represent the State's interest in litigation, it is highly relevant what *the State itself* says about the subject. Indeed, given the State's sovereign authority to determine "the character of those who exercise government authority," *Gregory*, 501 U.S. at 460, it is unclear what basis a district court would have to second-guess a State's judgment that a certain agent who is differently situated from the existing defendants is necessary for adequate representation of the State's interests. And there is nothing unusual about state law informing whether elements of a federal legal standard are met. *See, e.g.*, *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998).

The differing perspectives of Petitioners and State Board Respondents are a product of their different relationships to the State. Petitioners hail from the state legislature and thus seek to focus entirely on defending the constitutionality of the law the legislature passed. In contrast, State Board Respondents are responsible for overseeing elections and have made obtaining readily implemented guidance from the courts a primary focus of their

litigation conduct. *See* JA.203. Petitioners and State Board Respondents each seek to advance legitimate but distinct interests of the State, and it follows that the State cannot be adequately represented in Petitioners' absence.

What is more, the important differences between Petitioners and State Board Respondents are apparent from how the litigation has played out so far. The State Board filed a motion to dismiss, but it did not engage with the **merits** of Plaintiffs' claims. Instead, the State Board moved to dismiss or, in the alternative, to stay on abstention grounds, citing the parallel state court litigation. Doc. 43 at 13. The State Board argued that the litigation was "occur[ring] at a critical time when the State Board and its personnel are currently overseeing two special congressional elections and municipal elections this year, and are otherwise preparing for the 2020 general elections for which candidate filing begins this December." JA.142. In response to Plaintiffs' motion for a preliminary injunction, the State Board continued to emphasize administrative concerns, arguing that the equities weighed against an injunction because it was "approaching a critical time for a photo ID requirement to be smoothly administered in advance of the 2020 elections cycle." JA.312. Yet, inexplicably, the State Board failed to argue that Plaintiffs' months-long delay in moving for a preliminary injunction weighed against granting that relief. *See Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989). Unlike Plaintiffs, who relied on five expert reports in support of their motion, Doc. 73, the State Board's briefing did not rely on any

expert reports, *see* JA.271–314; Doc. 97-1. And in its opening brief in the Fourth Circuit, the State Board explained that it declined to seek a stay of the district court's preliminary injunction because of its election administration concerns. JA.366 n.8.[3] Indeed, the State Board opposed Petitioners' unsuccessful stay motion, largely based on concerns with administering the March 2020 primary. *See* Doc. 127 at 3–7.

The State Board's prioritization of its interest in election administration has also affected its conduct in the parallel state court litigation. In response to the state court plaintiffs' preliminary injunction motion, the State Board did not contest the plaintiffs' likelihood of success on their intentional racial discrimination claim. Instead, consistent with its primary objective to obtain guidance on what law would need to be enforced, the State Board's response and subsequent supplemental brief were focused on advising the court on how it could craft injunctive relief in a manner that would permit the State Board "some flexibility to account for the possibility of enforcing the law in the future." JA.204. In support of this response, the State Board offered a sole affiant—the executive director of the State Board—who spoke to the implementation of S.B. 824 that had begun and potential issues going forward, but did not offer any

[3] To be sure, the State Board's decision not to seek a stay occurred after the district court denied intervention. But it is "illustrative of the underlying divergent interests of" Petitioners and the Board of Elections that has existed from the inception of this lawsuit. *See Ne. Ohio Coal. for Homeless v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006).

affiants defending S.B. 824's constitutionality. *See* Doc. 61-16; *see also* Doc. 61-8 at 4–5.

In addition, while no longer a defendant, Governor Cooper has constitutional authority to control the State Board of Elections. *See Cooper v. Berger*, 809 S.E.2d 98, 111–12 (N.C. 2018). He accordingly appoints the State Board's members, who serve at his pleasure. *See* N.C. GEN. STAT. §§ 163-19(b), 163-28; *Cooper*, 809 S.E.2d at 114. Governor Cooper is a staunch opponent of voter ID. This opposition has included Governor Cooper's seeking the dismissal of a petition for certiorari in this Court seeking review of the Fourth Circuit decision enjoining the State's prior voter ID law, vetoing S.B. 824 and deriding it as "designed to suppress the rights of minority, poor and elderly voters," JA.74, and submitting an amicus brief in support of Plaintiffs' preliminary injunction in the Fourth Circuit in this very case, JA.841–894. Governor Cooper has allowed the State Board to defend S.B. 824 to date. But it is far from certain that he will continue to do so; thus, the State Board's representation of Petitioners' interests "may be" inadequate. *Trbovich*, 404 U.S. at 538 n.10.

The State Board's lawyer, Attorney General Stein, is also a staunch opponent of voter ID. As a state senator, he opposed the passage of North Carolina's former voter ID law in the General Assembly and, after it passed, supported the *McCrory* plaintiffs with a declaration. *See N.C. State Conf. of NAACP v. McCrory*, 997 F. Supp. 2d 322, 337–38, 357–58 (M.D.N.C. 2014). And when Governor Cooper sought the dismissal of the petition for certiorari in

this Court in *McCrory*, Attorney General Stein filed the motion on his behalf. Should the Governor direct the State Board to cease defense of S.B. 824, there is no reason to expect Attorney General Stein to resist.

* * *

Accordingly, under the proper analytical framework, Petitioners are entitled to intervene as of right in this case.

CONCLUSION

For the foregoing reasons, the Court should rule that Petitioners need not overcome a presumption of adequate representation, review the denial of Petitioners' intervention motion de novo, and conclude that Petitioners are entitled to intervene as of right.

Respectfully submitted,

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