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 RETIRED FEDERAL JUDGES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici are four retired federal district judges with years of combined experience on the federal bench.[1] *Amici* have a longstanding and ongoing interest in ensuring that federal judges have the tools to manage their significant caseloads "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. *Amici* respectfully submit that the views expressed herein, drawn from their combined experience, will assist this Court in its consideration of this case.

SUMMARY OF ARGUMENT

This Court should retain the longstanding presumption of adequacy that attaches to a party's representation of its interests in federal court—a presumption that is at its height, as it should be, when that party is a state entity duty-bound to represent those interests under state law.

In the ordinary case, the presumption of adequacy is a bulwark against procedural inefficiency and restrains courts from straying beyond the Judiciary's appropriate role. Petitioners propose to replace it with a "minimal" burden that can apparently be satisfied, as Petitioners seek to do, by asserting various disagreements with the existing parties' ordinary litigation decisions. But virtually any proposed

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[1] Counsel for all parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person aside from *amici* and their counsel made any monetary contribution toward the preparation or submission of this brief. A complete list of *amici* is included as an appendix to this brief.

intervenor could invent a strategic disagreement that would satisfy Petitioners' proposed standard; after all, even excellent lawyers frequently disagree about litigation decisions large and small. Litigation strategy is a field where important questions rarely have only one right answer. Furthermore, our adversarial system leaves litigation strategy to the litigants. Petitioners would have the courts second-guess a party's litigation tactics each time a proposed intervenor argues that the existing party inadequately represents its own interests. That inquiry would stretch courts beyond the institutional competencies of the Judicial Branch and beyond its proper role.

Just as important—if not more so—is the heightened presumption of adequacy that applies where, as here, a governmental party already represents the proposed intervenor's interest. In such cases, the presumption also avoids intrusive, disrespectful inquiries into state officials' performance of their legal and ethical duties, consistent with the judiciary's longstanding practice of affording a presumption of regularity to the acts of public officials. Were this Court to weaken or eliminate the presumption of adequacy in such cases, federal courts would soon find themselves entangled in a thicket of politics, litigation strategy, and state law. The presumption of adequacy wisely avoids such scenarios.

Finally, this is an area ripe for congressional action. *Amici* recognize the challenges posed by a diverse array of state governmental structures for a uniform federal procedural code. But Congress is far better situated to take account of the federalism and

state separation-of-powers concerns involved in this case. Indeed, Congress has already afforded state and private entities a statutory right of intervention in numerous cases, including a provision requiring intervention as of right when *no* state entity is a party to federal litigation. In cases like this one, current federal law takes for granted that one state entity is enough, and that a state's attorney general should be first in line to ensure a state is adequately represented in federal court. If those policy choices no longer meet the needs of our diverse state governments, it would be far more preferable for Congress to revisit them than for this Court to attempt a solution that would force the judiciary into such policy- and politics-laden inquiries.

ARGUMENT

I. THIS COURT SHOULD RETAIN THE PRESUMPTION OF ADEQUACY WHERE AN EXISTING PARTY ALREADY REPRESENTS THE SAME INTEREST AS A PROPOSED INTERVENOR.

A. The Presumption of Adequacy Protects the Ability of District Judges to Manage District Court Proceedings in Accordance with Their Appropriate Judicial Role.

This Court should retain the longstanding presumption of adequacy where, as here, an existing party already represents the interest that a proposed intervenor seeks to vindicate. In such cases, the presumption of adequacy protects district judges' discretion to manage the cases before them towards a "just, speedy, and inexpensive determination." Fed. R. Civ. P. 1. Every federal circuit applies such a

presumption. *See* State Resp. Br. 24–25 (collecting cases); NAACP Resp. Br. 20 n.6 (same).

This consensus is no accident. Requiring mandatory intervention as of right where, as here, an existing party already represents the exact interests that a proposed intervenor seeks to represent would threaten procedural chaos. The presumption of adequacy wisely raises the bar for litigants whose participation would come at such a cost to the existing parties and the courts. As Judge St. Eve—an experienced former district judge herself—explained for the Seventh Circuit, "[a]n intervenor must meet this high standard before it can subject the district court to the intractable procedural mess that would result from the extraordinary step of allowing a single entity, even a state, to have two independent parties simultaneously representing it." *Planned Parenthood of Wisc., Inc. v. Kaul*, 942 F.3d 793, 801 (7th Cir. 2019). Were it otherwise, Rule 24(a)(2) would force district courts into a situation where two parties "could take inconsistent positions on any number of issues" on behalf of the same interest, from "the decision whether to move to dismiss, [to] briefing schedules, to discovery issues, to the ultimate merits of the case." *Id.*; *see* Pet. App. 52 (Wilkinson, J., dissenting) ("Open-ended intervention greatly complicates the trial court's duty to have the trains run on time."). To be sure, in certain rare circumstances those costs are worth bearing. But they should be the exception, not the rule.

Requiring intervention as of right on the type of showing that Petitioners have offered here would open federal courtroom doors to "intractable procedural mess[es]." *Kaul*, 942 F.3d at 801. Petitioners' primary

complaint is that the State Respondents have not litigated this case (and a parallel state court action) as Petitioners would have preferred. *See* Pet. Br. 49–51. The presumption of adequacy reflects the accumulated judgment of American jurists that, at a minimum, "disagreement over how to approach the conduct of the litigation" should not be enough to trigger intervention as of right. *Stuart v. Huff*, 706 F.3d 345, 353 (4th Cir. 2013); *see id.* at 353–54 (collecting cases). "Nor could it be any other way." *Id.* at 354. As Judge Wilkinson has observed for the Fourth Circuit:

> There will often be differences of opinion among lawyers over the best way to approach a case. It is not unusual for those who agree in principle to dispute the particulars. To have such unremarkable divergences of view sow the seeds for intervention as of right risks generating endless squabbles at every juncture over how best to proceed.

Id.; *see also* Pet. App. 33–34.

Just as, "[a]fter an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better," *Harrington v. Richter*, 562 U.S. 86, 109 (2011), a party seeking to intervene as of right will not struggle to propose alternative litigation strategies. *Cf. Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."). This is precisely what Petitioners have done here. If such a showing is enough to trigger

mandatory intervention as of right, no showing will ever fall short.

The wisdom of our adversarial system, accumulated over centuries, has coalesced around a uniform practice that keeps those floodgates closed. As neutral arbiters in that system, federal judges avoid second-guessing parties' litigation decisions. Instead, "our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (internal quotation marks omitted). That premise entails significant deference to the strategic choices that parties are entitled to make for themselves—which inevitably will include strategic bets that don't pay off. *Cf. Strickland*, 466 U.S. at 681 ("Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected . . . if they are based on professional judgment.").

Furthermore, adequacy disputes of this type present questions that federal judges are ill suited to answer. "Courts are essentially passive instruments of government," *Sineneng-Smith*, 140 S. Ct. at 1579 (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in the denial of rehearing *en banc*)); they "rely on the parties to frame the issues for decision," and keep to the "role of neutral arbiter of matters the parties present," *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). Generally speaking, these limitations restrain federal courts from straying beyond their institutional

competencies. "Counsel almost always know a great deal more about their cases than [judges] do," and courts therefore generally presume that litigation decisions are made after "careful consideration," and are "supported by some facts or reasoning not readily apparent to judges who view the case, so to speak, from the outside." *Samuels*, 808 F.2d at 1301 (Arnold, J., concurring in the denial of rehearing *en banc*). By putting questions of litigation strategy on the table for judicial review, Petitioners' proposed adequacy analysis would distort the limited, neutral role of a federal district judge: Petitioners would, in effect, have the umpires decide when it's time to make a pitching change.

B. The Presumption Is Properly at its Height Where a Governmental Party Already Represents the Proposed Intervenor's Interest.

The presumption of adequacy is properly at its height where, as here, a governmental party already represents the same interest that a proposed intervenor seeks to vindicate. This Court should retain that sensible approach.

Federal district courts are overwhelmingly, and appropriately, reluctant to conclude that an appearing state entity, charged with authority to represent the interests of the state, is falling short of its legally assigned task. The longstanding practice of our courts is to presume the opposite: that, absent strong indications to the contrary, federal and state officials conduct themselves in accordance with their legal and ethical duties. A "presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that

they have properly discharged their official duties." *United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926). As it applies to federal officials, that presumption of regularity "reflects respect for a coordinate branch of government whose officers not only take an oath to support the Constitution, . . . but also are charged with faithfully executing [federal] laws." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2579–80 (2019) (internal quotation marks omitted) (Thomas, J., concurring in part and dissenting in part). The presumption applies equally to state officials, who take similar oaths and are similarly charged with legal duties under state law. *See, e.g.*, N.C. CONST. art. VI, § 7 (requiring state officeholders to take an oath to support the Constitution and laws of the United States and of North Carolina); N.C. Gen. Stat. Ann. § 114-2 (requiring the North Carolina Attorney General "[t]o represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State," and expressly providing that he must follow his ethical duties to his client when he does so). A federal court should not lightly conclude that a state official has neglected such duties. *E.g. Withrow v. Larkin*, 421 U.S. 35, 55 (1975) ("Without a showing to the contrary, state administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'") (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)).

One need only look to Petitioners' own arguments to see the problem with the inquiry they propose. Petitioners would have this Court deem the State Respondents' representation inadequate because:

(1) the State Respondents have employed litigation tactics different from those that Petitioners would prefer; (2) the State Respondents serve at the pleasure of the Governor of North Carolina, who opposes voter ID laws; and (3) the Attorney General, who represents the State Respondents in court, opposed a prior voter ID bill when he served in the North Carolina Senate. Pet. Br. 49–51.

Petitioners are inviting the federal courts into a thicket. Government officials routinely enforce laws, and take legal positions, with which they have personal or political disagreements. Our nation's many governments—in which lawyers routinely answer to elected or appointed officials, or are elected or appointed themselves—depend on our public servants' ability to set aside their personal political views and uphold the law. Their ability to do so should be celebrated, not picked apart with suspicion or dismissed with cynicism. This Court should not invite or require federal judges to look behind government officials' public acts for evidence of hidden political motives.

Of course, partisan politics are a fact of life in the political branches of state governments as well as the federal government. *See* Pet. App. 51–52 (Wilkinson, J., dissenting). But while political considerations may, in the aggregate, increase the frequency of interbranch disputes over who should speak with a state's voice in federal court, that tendency should lead federal courts to avoid such disputes, not to join the fray. This Court has never "attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States." *Gaffney v. Cummings*, 412 U.S. 735, 754

(1973). Instead, when it encounters an intractably political question, this Court's practice is to leave it where it lies. *See, e.g.*, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

That practice stems both from an appropriately modest understanding of judicial competencies and a measured understanding of the judicial role. "If federal courts are to inject themselves into the most heated partisan issues . . . , they must be armed with a standard that can reliably differentiate" permissible from impermissible conduct. *Rucho*, 139 S. Ct. at 2499 (citations and internal quotation marks and citations). Otherwise, "[w]ith uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring).

Petitioners offer little guidance as to how a court should analyze a claim that an existing governmental party is too affected by political considerations to represent the interests of a state adequately. Seemingly, it is possible to satisfy Petitioners' proposed "minimal" burden by leveling innuendos about the conduct of government officials who possess both legal duties and legitimate political views. *See* Pet. Br. 51 (arguing that because it is "far from certain" that Governor Cooper will "allow[]" the State Board to defend S.B. 824, "the State Board's representation of Petitioners' interests 'may be' inadequate"); *id.* at 52 (arguing that because Attorney General Stein opposed a prior voter ID bill as a state senator, there is "no reason to expect [him] to resist" an order from the Governor directing the State Board

to cease its defense of S.B. 824). For the reasons discussed above, federal courts should not reach such disrespectful conclusions so lightly.

Of course, a presumption is only a presumption, and even strong presumptions are sometimes rebuttable. But Petitioners' proposed test threatens to make what should be extraordinary—and regrettable—routine. A strong presumption of adequacy, at its strongest where a governmental entity already represents the proposed intervenor's interest, properly reserves these extraordinary determinations for the extreme cases in which they are compelled by the evidence.

Urging a revision of this longstanding practice, Petitioners argue that the perceived "legitimacy of judicial proceedings" is undermined by a presumption that a state's chief legal officer will discharge his legal and ethical duties regardless of personal or partisan political preferences. Pet. Br. 32. The truth is just the opposite. State governmental attorneys are human beings—like all lawyers and judges—and our system depends on the correct assumption that they are able to set aside personal political preference in service of their legal and ethical responsibilities. In times of political controversy, federal courts should encourage understanding and respect for the ability of our Nation's governmental lawyers to serve the public in that way—even, and especially, when they report to elected officials or political appointees.

Petitioners' other counterarguments fail to diminish these concerns. While Petitioners are correct to point out that federal courts have often allowed permissive intervention to state legislators where a state executive-branch official is already in the case,

Pet. Br. 32, it is notable that in each case Petitioners cite, the district court made no finding or suggestion that the executive-branch official was in any way inadequate or derelict in his representation. *See Middleton v. Andino*, 481 F. Supp. 3d 563, 571 (D.S.C. 2020); *Carcano v. McCrory*, 315 F.R.D. 176, 177–179 (M.D.N.C. 2016); *Feldman v. Arizona Sec'y of State's Off.*, No. CV-16-01065-PHX-DLR, 2016 WL 4973569, at *2 (D. Ariz. June 28, 2016).

Further, Petitioners' argument that a federal court may avoid impugning the state Attorney General's conduct because Rule 24(a)(2) "directs courts to consider whether the 'existing *parties*'—*i.e.*, the State Board Respondents—adequately represent Petitioners' interests" is a red herring. Pet. Br. 33. Here, for example, the State Respondents explain that the NAACP Respondents' suit against the State Board implicated an interest of the state itself that the North Carolina Attorney General has the legal duty and authority to represent. State Resp. Br. 36–37. Similarly, and even in states with different arrangements, in the mine run of cases plaintiffs will inevitably name as defendants those state officials charged with enforcing the state enactment under challenge, rather than the state itself. But that is ordinarily because, under this Court's precedents, those are the defendants against whom effective relief may run. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021) (describing the *Ex parte Young* exception to state sovereign immunity as a "narrow exception grounded in traditional equity practice—one that allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to

federal law"). As this Court has "often observed," however, the "*Ex parte Young* doctrine rests on [an] obvious fiction, that such a suit is not really against the State, but rather against an individual who has been stripped of his official or representative character because of his unlawful conduct." *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 267 (2011) (Scalia, J., dissenting) (internal quotation marks omitted). This Court has accordingly remained attentive to the "real interests" of its sovereign immunity jurisprudence and exceptions, lest they be "sacrificed to elementary mechanics of captions and pleading." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997).

Pointing out, as Petitioners do, that a finding of party "inadequacy" signals no disrespect to the Attorney General's conduct in defending the state's interest in circumstances like this one elevates those formalities over substance. Indeed, in this very case, the fact that the district court dismissed Governor Cooper as a defendant because he was not a proper party under *Ex parte Young* has not prevented Petitioners from casting aspersions on the Governor and Attorney General's abilities to keep their legal and ethical obligations separate from their political opinions. *See* JA 391–413. Plaintiffs who avail themselves of the *Ex parte Young* "fiction" cannot invoke Rule 24(a)(2) to obscure the reality that their suit implicates the state itself, which—in states like North Carolina—the Attorney General is charged by law to represent. *See* State Resp. Br. 36–37.

II. CONGRESS IS BETTER SITUATED THAN THIS COURT TO ADDRESS ANY PROBLEMS WITH THE PRESUMPTION OF ADEQUACY AS IT APPLIES TO STATE GOVERNMENTAL ENTITIES.

Amici acknowledge that this case presents difficult questions about how federal law should account for the diversity of state governmental structures, including the questions that animated the dissenting judges in the court below. *See* Pet. App. 53–54 (Wilkinson, J., dissenting); Pet. App. 56 (faulting the majority for "fail[ing] to take proper account of . . . state law"); Pet. App. 76–77 (Quattlebaum, J., dissenting) (same).

If, however, the presumption of adequacy enjoyed by state governmental entities under Rule 24(a)(2) fails to account for the diversity of state practice, *Amici* submit that Congress is best situated to remedy the problem.

Indeed, Congress has already spoken to the question of state intervention where *no* state entity is present to defend the state's interest in the constitutionality of its own laws. Section 2304(b) of Title 28, United States Code, provides:

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is

> otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C. § 2403(b). The statutory right to intervene granted by Section 2403(b) triggers, in turn, a right to mandatory intervention under Rule 24. *See* Fed. R. Civ. P. 24(a)(1).

Section 2403(b) embodies two congressional policy choices about state representation in federal court: first, that one agent of the state is enough. (After all, it requires no action and triggers no rights of intervention where a "State or any agency, officer, or employee there of" is already a party.) And second, that a state's Attorney General is the party to which federal law looks first to ensure that the appropriate agent appears to represent the state's interest.

Either or both of those policy choices may be flawed, outdated, or simply in need of further consideration in light of developments in state governmental practice. Certainly, this case illustrates why those choices are a matter of interest, even controversy, in states like North Carolina. Ultimately, *Amici* take no position on those questions except to urge this Court to leave them in Congress's capable hands.

Congressional attention to the varied ways in which states interact with the federal government is more than theoretical. As Petitioners point out, in

Section 802 of the Prison Litigation Reform Act of 1995, Congress granted certain state legislators a statutory right to intervene in any federal proceeding relating to a prisoner release order. *See* 18 U.S.C. § 3626(a)(3)(F) ("Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief."). And Congress has, if anything, demonstrated an active imagination when it comes to managing the federal government's relationship with a diverse array of state governmental structures. *See* Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561, 1573–79 (2015). Similarly, Congress has been active in granting statutory rights of intervention to private parties. *See generally* 6 Moore's Federal Practice § 24.02 (3d ed. 2021).

If Petitioners are correct that the longstanding presumption of adequacy "fails to appropriately account for the complex and multifaceted interests of States . . . that do not centralize control over the State's litigating positions in a single state official," Pet. Br. 23, then perhaps Congress should revisit the policy choices embodied in Section 2403(b). But, for the reasons expressed above, *see supra* at 3–13, this Court should not attempt to address any such problem by doing away with the presumption of adequacy,

which would force district judges to confront complex policy and political disputes that longstanding doctrine wisely avoids.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 2022

APPENDIX

APPENDIX

List of Amici

The Hon. Nancy Gertner (ret.) served on the United States District Court for the District of Massachusetts from 1994 to 2011.

The Hon. W. Royal Furgeson, Jr. (ret.) served on the United States District Court for the Western District of Texas from 1994 to 2013.

The Hon. T. John Ward (ret.) served on the United States District Court for the Eastern District of Texas from 1999 to 2011.

The Hon. Kevin H. Sharp (ret.) served on the United States District Court for the Middle District of Tennessee from 2011 to 2017.