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IN THE SUPREME COURT OF THE UNITED STATES

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PHILIP E. BERGER, ET AL.,)

Petitioners,)

v.) No. 21-248

NORTH CAROLINA STATE CONFERENCE)

OF THE NAACP, ET AL.,)

Respondents.)

- - - - -

Washington, D.C.

Monday, March 21, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:26 a.m.

1 APPEARANCES:
2
3 DAVID H. THOMPSON, ESQUIRE, Washington, D.C.; on
4 behalf of the Petitioners.
5 ELISABETH S. THEODORE, ESQUIRE, Washington, D.C.; on
6 behalf of the NAACP Respondents.
7 SARAH BOYCE, Deputy Solicitor General, Raleigh, North
8 Carolina; on behalf of the State Respondents.
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P R O C E E D I N G S

(11:26 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 21-248, Berger against North Carolina State Conference of the NAACP.

Mr. Thompson.

ORAL ARGUMENT OF DAVID H. THOMPSON

ON BEHALF OF THE PETITIONERS

MR. THOMPSON: Mr. Chief Justice, and may it please the Court:

North Carolina law designates the state as necessary parties -- the state -- the Petitioners as agents of the state and as necessary parties in all actions challenging state statutes. When such actions are filed in state court, the Petitioners are defendants and necessary parties. This lawsuit, however, was filed in federal court, and when the Petitioners sought to intervene, they were denied and a strong presumption was applied against their intervention.

This outcome should be reversed for two reasons.

First, under Trbovich, we are entitled to intervene. The State Respondents have

1 candidly and forthrightly acknowledged that they
2 have a primary objective in receiving clear
3 guidance on what law, if any, will need to be
4 enforced, and because that administrative
5 responsibility and interest may not always
6 dictate precisely the same approach to
7 litigation as our interest in defending the law
8 every step of the way, we are entitled to
9 intervene under *Trbovich*.

10 Second, this case presents
11 foundational issues off federalism. This Court
12 recently, in *Cameron*, held there are deep
13 constitutional considerations implicated when a
14 federal court is called to pass upon the
15 constitutionality of a state law, and, thus, a
16 federal court must account for a state
17 designating multiple officials to defend its
18 sovereign interests.

19 There is no basis in this case for a
20 federal court to -- to second-guess a state's
21 decision that it needs a representative
22 exclusively focused on vindicating state law.

23 I welcome the Court's questions.

24 CHIEF JUSTICE ROBERTS: You said
25 there's no basis in this case. Is there a

1 situation where you would think it was
2 appropriate for the federal district court to
3 deny intervention where the state law provided
4 specifically that particular state officers be
5 afforded that right?

6 MR. THOMPSON: Well, Your Honor, we'd
7 have to go through the -- the multi-step factors
8 of, number one, Donaldson. We'd need to make
9 sure it's a significantly protectable interest
10 that was identified.

11 Number two, we'd need to look at
12 Hollingsworth to make sure there was a correct
13 assignment of that agent and creation of that
14 agency relationship.

15 And then, under Trbovich, there would
16 need to be an assessment as to whether there was
17 someone else already in the case that had that
18 identical interest and didn't have another
19 interest that was competing at tugging at the
20 interest that they were advocating.

21 CHIEF JUSTICE ROBERTS: Well, we often
22 see in these cases a, as here, sort of political
23 disagreement between the two purported
24 representatives of the state. And is there a
25 situation where that is the claim for -- the

1 necessity for intervention? Do you see a
2 situation where that would be second-guessed by
3 the federal court?

4 MR. THOMPSON: While -- while I can
5 see, Your Honor, where that could be relevant,
6 here, we don't need to point to Governor
7 Cooper's involvement in the case to win the
8 intervention motion, but we would point out that
9 Governor Cooper has been an implacable foe of
10 this law.

11 And that's not to criticize him.
12 Reasonable people can disagree about contentious
13 issues of public policy, but he has said, at JA
14 844, to the Fourth Circuit Court of Appeals in
15 this very case, "This unconstitutional law
16 should never go into effect." And he has also
17 claimed for himself the authority to fire each
18 and every member of the board of state
19 elections. So he would not be an adequate
20 representative.

21 Now they say -- my -- my friends on
22 the other side say, well, we have for-cause
23 removal protection. We can't be fired by
24 Governor Cooper. And we don't think they're
25 right about that, but even if there were -- they

1 were, that would just mean that there are
2 unaccountable, unelected officials in charge of
3 this paramount interest.

4 JUSTICE SOTOMAYOR: Counsel, two
5 things. One is what do you do with Wallace v.
6 Bone, a North Carolina supreme court case that
7 says the state legislature cannot represent the
8 state? And I thought that that was the basis of
9 the governor's claim that the law was
10 unconstitutional -- that this representative law
11 was unconstitutional.

12 And, two, I still don't understand
13 what the conflict here is. The Attorney General
14 has said -- and it's not the governor -- that
15 the Attorney General is representing the state
16 board. Both the state board and the governor
17 and the Attorney General have taken the position
18 that this law is, A, constitutional, the same
19 position you're taking.

20 So where is the conflict? Other than
21 litigation strategy issues, where is the --
22 identify it for me.

23 MR. THOMPSON: Okay. I'll take those
24 in order if I may.

25 First, with respect to Wallace versus

1 Bone, that plays upon my friend's separation of
2 powers argument. There were only two judges on
3 the Fourth Circuit Court of Appeals who
4 addressed that, Judge Quattlebaum and Judge
5 Richardson, and at Pet. App. 102, we can see
6 them give it short shrift, and with good reason,
7 because Wallace versus Bone was a case in which
8 there was a clear executive power being -- tried
9 to be kept by the legislature, issuing permits,
10 denying permits. The other cases they cite to,
11 the legislature is trying to spend -- excuse me
12 -- money. And in Martin versus Thornburg, the
13 North Carolina supreme court clearly said there
14 is a distinction between defending a law and
15 executing a law.

16 In addition, their separation of
17 powers argument proves too much because, if it
18 were right, then even if the Attorney General
19 weren't defending the law, we still wouldn't be
20 allowed in.

21 So that's what I would say about that.

22 JUSTICE SOTOMAYOR: That -- that's not
23 -- no, that's not what their point is. I think,
24 if the Attorney General wasn't defending the
25 law, there'd be another case. That's what the

1 court below said. It would be a different case
2 if the Attorney General refused to defend the
3 law.

4 MR. THOMPSON: Well, but the logic,
5 Your Honor, of their position is that this is an
6 inherent executive power.

7 JUSTICE SOTOMAYOR: But the problem
8 with your decision, your position, is that if
9 North Carolina's law said every member of the
10 legislature has a right and must be made a party
11 to defend the state or to defend the interests
12 of the state, then a federal court would be
13 bound by 50, 100 legislators coming in and
14 participating in the -- in the litigation.
15 Isn't that your point?

16 MR. THOMPSON: No, Your Honor, that's
17 not our point. Our point is that the first
18 legislator to show up -- if North Carolina law
19 said any of the 170 members of the General
20 Assembly can come in and be an adequate
21 representative and focus exclusively on
22 defending state law, then the first person to
23 show up would be -- in our view, would then --
24 going back to the text of Rule 24, would be the
25 adequate representative of that interest.

1 JUSTICE SOTOMAYOR: But tell me of
2 what interest. The interest is upholding the
3 law.

4 MR. THOMPSON: Yeah.

5 JUSTICE SOTOMAYOR: And the finding
6 here was that the Attorney General has the
7 similar interest. It's taking the same
8 position.

9 MR. THOMPSON: Well --

10 JUSTICE SOTOMAYOR: So why is the
11 Attorney General inadequate to represent the
12 same interest the legislators have in protecting
13 the constitutionality of the law?

14 MR. THOMPSON: Well, Rule 24 focuses
15 on parties, not on lawyers. So the Attorney
16 General's role here is not critical. What's
17 critical is that the parties are the members of
18 the state board of elections, and they have
19 announced, at Joint Appendix page 203, that they
20 have a primary objective of receiving clear
21 guidance on what law, if any, will need to be
22 enforced.

23 And that's an administrative
24 responsibility. And the Court asked me where is
25 there the conflict, and we can see the conflict

1 quite clearly at JA 366, Footnote 8.

2 There, in the run-up to the March 2020
3 primary, there was a flagrant violation of the
4 Purcell principle. The middle district of North
5 Carolina, to hear their rendering, while voting
6 was going on, changed the rules. And that's not
7 right. There was a small window of time before
8 voting started.

9 But the bottom line is there was a
10 flagrant violation of the Purcell principle with
11 the rules being changed, and they have admitted
12 that they did not seek a stay because of their
13 administrative responsibilities, their concern
14 about administrative convenience and ensuring
15 that the election went smoothly.

16 And so that's an instance in which
17 these two interests --

18 JUSTICE SOTOMAYOR: Didn't the state
19 -- in the state court litigation, the same thing
20 happen and you're present there and you didn't
21 make a motion either, did you?

22 MR. THOMPSON: For two reasons, Your
23 Honor: a factual reason and a legal reason.

24 Factually, we did not because the
25 preliminary injunction had been issued by the

1 federal district court on December 31, 2019.
2 The adverse state court ruling was a couple of
3 months later in February of 2020.

4 And so, if we had run into state court
5 and tried to seek a stay of -- of that second
6 injunction, it would have been totally futile
7 and -- and pyrrhic a victory because we were
8 still enjoined by the middle district of North
9 Carolina --

10 JUSTICE SOTOMAYOR: It was your --

11 JUSTICE KAGAN: Mr. --

12 JUSTICE SOTOMAYOR: -- it was your
13 trial strategy.

14 MR. THOMPSON: No, it -- it would have
15 been pyrrhic. There would have been no purpose
16 to doing it because they had already decided to
17 allow the preliminary injunction to stay in
18 place. In addition, there's a legal difference
19 too, which is there's a dispute as to whether
20 the Purcell principle applies to state court
21 judges and there's no dispute that it applies to
22 federal court judges.

23 JUSTICE KAGAN: Mr. Thompson, could --
24 could I take you back to something that you said
25 to Justice Sotomayor? She said, well, what if

1 state law gave every legislator a -- a right to
2 intervene or status as a necessary party, what
3 have you? And you said, no, that would go too
4 far. It just has to be one.

5 Is that -- is that correct?

6 MR. THOMPSON: Yes, Your Honor.

7 JUSTICE KAGAN: And why is that? I
8 mean, suppose there is some -- something in
9 between. Suppose that there was a law passed in
10 North Carolina that says, well, you know, the
11 Senate might flip parties every day, so we need
12 both the head of the Senate and the head of the
13 House.

14 And then suppose there's somebody
15 writing the statute and says: Actually, we also
16 need the relevant heads of the committees there,
17 you know, we need the head of the relevant House
18 committee and the head of the relevant Senate
19 committee.

20 I mean, you get the idea. It's like
21 why is it just one? Why -- if -- if -- if we're
22 deferring to state understandings of their own
23 interests and the state says, actually, we need
24 five people here, you know, why would we not say
25 on your theory, well, then we have to have five

1 people here?

2 MR. THOMPSON: I think it's important
3 to understand the role of state law and federal
4 law in all of this. And, here, we're dealing
5 with interests that are grounded in federal law.

6 They flow from constitutional
7 considerations identified in Cameron and they
8 are reflected in the Federal Rules of Civil
9 Procedure. Federal Rule 5.1 reflects the
10 paramount interest in defending a state law.
11 Federal Rule of Civil Procedure 24(b)(2)
12 reflects the interest in administering a law.

13 Those are the two interests we have
14 here. They're not created by the state -- by
15 state law. And so any hypothetical about, well,
16 if the state tries to create other interests is
17 not implicated by this case, because these are
18 federal law interests, in the same way in
19 *Trbovich*, it was a federal law interest, in
20 *Kaufman*, it was a --

21 JUSTICE KAGAN: So the only rule
22 you're advocating for is a rule that says one
23 legislator has to be at the table in this suit?

24 MR. THOMPSON: One adequate
25 representative. And if it's an interest that is

1 -- is significantly protectable under Donaldson
2 and certainly an interest that's recognized in
3 the Federal Rules of Civil Procedure we would --
4 we would submit is -- is significantly
5 protectable, then we should be entitled.

6 JUSTICE KAGAN: And is there --

7 JUSTICE BARRETT: And --

8 JUSTICE KAGAN: -- a difficulty --

9 JUSTICE BARRETT: No, go ahead.

10 JUSTICE KAGAN: Is there a difficulty
11 for you? I mean, if you had come in the second
12 time and said the same thing as the first time,
13 basically say, you know, we -- we -- it -- it --
14 it has to be that there's a legislator here in
15 the suit to represent the specifically
16 legislative interest in the defense of the law
17 because these executive branch people, they have
18 to worry about execution of the law. We just
19 want a person who all they're worried about is
20 the defense of the -- the law.

21 I mean, it would seem to me that the
22 way you would do that is to say we have a
23 special interest as a legislator, not as the
24 state writ large, right?

25 But you're not making -- I mean, in

1 your second motion, you didn't do that. You
2 didn't say we have a special interest as a
3 legislator. You said our interest is the
4 interest of the state writ large.

5 But how could that be? Doesn't --
6 doesn't the executive branch represent the state
7 writ large?

8 MR. THOMPSON: Not under North
9 Carolina law, Your Honor. The way these
10 statutes work, 120-32.6(b) says that we are
11 deemed to be the state to the same extent as
12 1-72.2. And that statute says that we are the
13 legislature.

14 And so we've been designated quite
15 clearly as agents of the state, and we've been
16 designated as --

17 JUSTICE KAGAN: But not in replacement
18 of the Attorney General. I mean, it would be
19 different if you said, no, you know, we're --
20 we're tired of the Attorney General, the
21 legislators now represent the state. But you
22 kept the Attorney General going.

23 And in your first intervention motion,
24 you said basically we have a separate interest.
25 It's the interest of the legislature. And, you

1 know, that makes a fair amount of sense. It's
2 like, okay, well, that's a different interest.

3 But now you're not saying that.
4 You're -- you're claiming the same interest that
5 the Attorney General has under North Carolina
6 law.

7 MR. THOMPSON: Well, under -- well,
8 no, it's not the same interest. They have an
9 administrative interest that they've made clear
10 at Joint Appendix 203 as their primary
11 objective. We have a separate interest.

12 And as I've explained, they tug at one
13 another. And we've seen that in this very
14 litigation. In addition, Bethune-Hill came down
15 between our first and our second motion to
16 intervene, and that said that a state must be
17 able to designate its own agents. And that's
18 what 120-32.6(b) does.

19 JUSTICE BARRETT: Can I ask you about
20 Justice Kagan's questions about how many
21 legislators would have to be present? I just
22 want to be sure I understand where in Rule 24
23 you're grounding this language.

24 So I take your point that you have a
25 different interest than the Board of Elections

1 because they're interested in executing an
2 election. You're interested in defending the
3 constitutionality of the law. There's a tug.

4 Would it be fair to say that your
5 position is that when the interests are
6 different, as they are here, maybe the *Trbovich*,
7 you know, case casts some light on this
8 question, that it would be rare to find that the
9 existing party is an adequate representative
10 because someone with different interests that
11 are in tension can never adequately represent
12 the intervenor's interests?

13 MR. THOMPSON: Well, the -- the test
14 is, under *Trbovich*, are those interests such
15 that they may not always dictate precisely the
16 same approach to litigation. In other words,
17 *Trbovich* teaches that it's a minimal burden.

18 And, here, we've amply satisfied that.

19 JUSTICE BARRETT: I -- I -- I
20 understand that. But I guess what I'm saying
21 is, if -- I -- I -- I'm -- I'm granting you, I'm
22 saying assuming that you're right that these
23 interests are not perfectly aligned between --

24 MR. THOMPSON: Yeah.

25 JUSTICE BARRETT: -- the Board of

1 Elections and you, that it would be very rare to
2 find that your interests could be adequately
3 represented? It's -- it's not even really much
4 of a question because, when the interests are
5 different, the question of adequate
6 representation, it's -- it's just how could you
7 represent that interest in the rule of 24(a) if
8 the interest is a little bit different,
9 potentially in tension with? Is that a fair
10 statement?

11 MR. THOMPSON: Yes. Yes, Your Honor,
12 that's exactly right. That's the teaching of
13 Trbovich, because nobody was suggesting in
14 Trbovich that the Secretary of Labor was not
15 doing a good job or that he had -- that he --
16 his interest wasn't at least partly aligned.

17 He was the Petitioners' interest --
18 lawyer, and he had the exclusive responsibility,
19 the Secretary of Labor did, for challenging the
20 elections.

21 JUSTICE BARRETT: Okay. So then let
22 me take you to Justice Kagan's question about
23 the, you know, succession of legislators that
24 might come in and try to intervene and maybe
25 state law might even give them that right.

1 Then would your position be that,
2 well, all of those interests are the same. All
3 of those interests are aligned. But, when you
4 have would-be intervenors who have interests
5 perfectly aligned, they all have the interests
6 that you have here, say, in defending the
7 constitutionality of the law, that then there is
8 adequate representation?

9 MR. THOMPSON: If the -- well, if the
10 interests are entirely aligned, we can't invoke
11 Trbovich as a basis to intervene.

12 JUSTICE BARRETT: Right.

13 MR. THOMPSON: We could point to the
14 fact that, in fact, the representation has not
15 been adequate, and we can point to the fact that
16 we do -- we have a different perspective. We're
17 a separate co-equal branch of the government.

18 So --

19 JUSTICE BARRETT: But, in Justice
20 Kagan's hypothetical, it was all legislators,
21 say, all from the same branch of the government.

22 MR. THOMPSON: Yes.

23 JUSTICE BARRETT: And I'm just trying
24 to ground your answer to Justice Kagan when you
25 said, well, number 1 can get in and numbers 2

1 through 10 cannot.

2 MR. THOMPSON: Yes.

3 JUSTICE BARRETT: I'm asking you would
4 that be because adequate representation would be
5 satisfied, assuming that there weren't these
6 other factors like they're doing a bad job or
7 malfeasance or something?

8 MR. THOMPSON: Yes, Your Honor, that's
9 right. So the first step under the analysis
10 under Donaldson is to identify the interest.
11 Then the second step is to identify whether the
12 entity has been assigned as an agent of the
13 state. And then the third step is if there are
14 different interests but only if there are
15 different interests do you get to the Trbovich
16 type of analysis.

17 If the interests are identical, then
18 there's adequacy of representation on that
19 metric. There are different --

20 JUSTICE KAGAN: But are we to defer to
21 the state's understanding of what the interest
22 is? I mean, suppose the state says, you know,
23 we think that the -- that members of the Senate
24 have a different interest than members of the
25 House because they might be led by different

1 parties. Or suppose that they said, well,
2 members of a particular committee have a
3 different interest than other members. I mean,
4 there are a variety of things that states could
5 do to define their own interests that are not
6 just there's a legislative interest.

7 And would we defer to the states on
8 that definition -- those more particular
9 definitions of interests so that we could come
10 up with five interests or 10 interests, all of
11 which might be expressed by various kinds of
12 legislators?

13 MR. THOMPSON: States can create
14 interests. We can see that in the text of Rule
15 24 because it talks about property, it talks
16 about transactions, which would include
17 contracts. Both of those are the traditional
18 province of state law.

19 But anytime an interest is created or
20 purported to be created, then a federal court
21 has to assess whether, under Donaldson, it's
22 significantly protectable. But none of that is
23 relevant here because these are federal
24 interests. These are interests that are created
25 by federal law and that are recognized by --

1 JUSTICE KAVANAUGH: What about --

2 MR. THOMPSON: -- the state.

3 JUSTICE KAVANAUGH: -- what about the
4 answer to her question, though, to Justice
5 Kagan? You're not answering Justice Kagan's
6 question, I don't think. What about the
7 committees hypothetical?

8 MR. THOMPSON: Well, it would be up to
9 the court -- a federal court to -- to decide
10 whether, under Donaldson, that's a significantly
11 protectable interest. And it would be a totally
12 different case than this one because there's
13 nothing in the Federal Rules of Civil Procedure
14 that recognizes a state's interest in having a
15 member of a committee. What we're just saying
16 is that there are two interests that are --

17 JUSTICE KAVANAUGH: But do you defer
18 to the state law -- to the state on that or
19 defer some to the state, give some weight to the
20 state on that? Or what -- what do you do?

21 MR. THOMPSON: Well, state -- states
22 can create the interest, and when we're dealing
23 with a paramount interest that's recognized in
24 the Federal Rules of Civil Procedure, then that
25 should be dispositive.

1 And what states think about it in this
2 case is not relevant because -- and the Court
3 need not address that separate consideration
4 because these are grounded in federal law and
5 recognized by the Federal Rules of Civil
6 Procedure. And Gasperini and Walker teach that,
7 you know, the -- the federal courts should try
8 to interpret the Federal Rules of Civil
9 Procedure to be consistent with --

10 JUSTICE BREYER: The Rules of Federal
11 Procedure -- note where it is. It's under (b),
12 permissive intervention, not what we're talking
13 about, which is intervention of right.

14 All right. Focusing on that for a
15 second, what is it you want this Court to hold?
16 We are talking about a particular phrase,
17 "unless existing parties adequately represent
18 that interest." And, as you know, most of the
19 federal courts have interpreted that as starting
20 with a presumption that if somebody's there with
21 the same objective, it is adequate. Now that
22 can be defeated.

23 Now that's what happened here, and
24 that's -- you lost on that. Very well. You
25 want us to say when we interpret -- Court, when

1 you interpret those words, "unless existing
2 parties adequately represent," do you want us to
3 say the presumption, weak though it is, of every
4 circuit doesn't apply? Or do you want us to say
5 it doesn't apply just to the states? Or do you
6 want us to say no, you see, every private party
7 often has problems and like to have a lot of
8 people in the case too?

9 And so how do we say just the states?
10 Or do you want us to say the rules are the same,
11 but they didn't apply that presumption thing
12 correctly in this case because we have a bigger
13 interest in intervening than they thought?

14 Now I --

15 MR. THOMPSON: The --

16 JUSTICE BREYER: -- I mention all
17 those difficulties because I have yet another
18 one.

19 MR. THOMPSON: Okay.

20 JUSTICE BREYER: And the last one is,
21 since what you talked about is in (b),
22 permissive intervention, why isn't this a case
23 for permissive intervention?

24 MR. THOMPSON: Let me --

25 JUSTICE BREYER: Suppose we copied

1 your words, how important it is to get the
2 legislature in here, how desperately the state
3 wants it. Just copy your words and say that
4 isn't enough to change the interpretation of
5 (a), intervention of right, but we think the
6 Court could reconsider (b), permissive
7 intervention, noticing what is there in (b)(2)
8 and dah-dah-dah. We quote you again.

9 Now I've given you a whole lot of
10 problems that I see in this case if we take your
11 path. And I also have suggested another path,
12 but it's only a suggestion, and I'm interested
13 in your reaction.

14 MR. THOMPSON: Thank you, Your Honor.

15 So we -- the interest that we are
16 trying to vindicate is not referenced in
17 24(b)(2). The interest that we are trying to
18 vindicate is the paramount interest identified
19 in Cameron in vindicating state law, and that is
20 recognized in 5.1 of the Federal Rules of Civil
21 Procedure that says that notice has to be given
22 to a state whenever -- so it's not -- this isn't
23 an interest that's under permissive
24 intervention.

25 The court also referenced the fact

1 that we have the same ultimate objective, but
2 that can't be enough every time an intervenor
3 comes in under Rule 24. You have to pick one
4 side of the "v" or the other. And -- and
5 there's nothing in the text to suggest that a
6 presumption should apply in that instance. In
7 Trbovich, the -- there was no presumption of --

8 JUSTICE BREYER: So your point is
9 treat states differently --

10 MR. THOMPSON: Well, Trbovich --

11 JUSTICE BREYER: -- from private
12 people where the same situation arises?

13 MR. THOMPSON: The -- the Court could
14 say treat states differently, but, in Trbovich,
15 it was a private party. There was no
16 presumption that was applied. And it's simply
17 not true that all the circuits apply a
18 presumption. The Ohio Northeast Coalition --

19 JUSTICE BREYER: Okay. So is that
20 your point, you want us to say there is no
21 presumption?

22 MR. THOMPSON: The Court doesn't have
23 to reach that. The Court --

24 JUSTICE BREYER: I know that, but I'm
25 trying to get at what you think would be the

1 best way because, unfortunately, unlike you, I
2 might have the job of approving or writing even
3 the case. So I'm trying to make my job easier.
4 So I want to know what you --

5 MR. THOMPSON: The rule -- the
6 narrowest grounds to rule in our favor would be
7 to say that this is a paramount interest of a
8 state and it's entitled under basic principles
9 of federalism to have that federal interest
10 vindicated by a representative who is
11 exclusively focused on that.

12 And they are not required, just
13 because they've been sued under Ex Parte Young,
14 to forgo having what they have in state court,
15 which is a champion focused exclusively on
16 winning the suit.

17 CHIEF JUSTICE ROBERTS: Justice
18 Breyer, anything further?

19 JUSTICE BREYER: You don't see much in
20 the idea of permissive intervention?

21 MR. THOMPSON: No, Your Honor.

22 CHIEF JUSTICE ROBERTS: Justice Alito?

23 JUSTICE SOTOMAYOR: Am I assuming by
24 your argument that the existence of the law --
25 North Carolina law here is irrelevant? You're

1 basically saying, whether there's a law or not,
2 we have to mandatorily let every legislative
3 member come in.

4 I don't know what to do with that
5 claim given how we have ruled in a variety of
6 different cases that a legislature can't defend
7 the constitutionality of a law because that's up
8 to the attorney general of each state or the law
9 who designates who's going to defend.

10 MR. THOMPSON: State law is not
11 irrelevant, Your Honor, because it's a
12 three-part test. One is to test under Donaldson
13 whether there's a significantly protectable
14 interest. Here, we have federal --

15 JUSTICE SOTOMAYOR: But that's every
16 legislature, has a legally protective interest.
17 So go -- go ahead.

18 MR. THOMPSON: Yes. Step two, this is
19 where state law kicks in, is at step two --

20 JUSTICE SOTOMAYOR: Right.

21 MR. THOMPSON: -- which is on the
22 assignment. The -- that is exclusively a
23 function of state law as to whether the state
24 has assigned responsibility to the putative
25 intervenor to be an agent.

1 JUSTICE SOTOMAYOR: So what you're
2 basically saying, every state law that does
3 that, everybody they designate, every cabinet
4 member, et cetera, as a matter of law under
5 24(a), they have to be permitted to come in, and
6 you're saying no, no, no, no, it's only if
7 they're adequate to protect that particular
8 interest, correct?

9 MR. THOMPSON: I'm saying, under step
10 three, the first one gets to come in --

11 JUSTICE SOTOMAYOR: All right.

12 MR. THOMPSON: -- not the second one.

13 JUSTICE SOTOMAYOR: Now what happens
14 in a case like this when the two representatives
15 have overlapping interests? Meaning the
16 Attorney General is not saying they won't defend
17 the constitutionality of this law. The state
18 board hasn't said they won't. They have the
19 same interest or an overlapping interest to
20 yours. Where do we go with that?

21 MR. THOMPSON: That's Trbovich, Your
22 Honor.

23 JUSTICE SOTOMAYOR: No, Trbovich was
24 the -- saying that the union member and the
25 department -- the union and the Department of

1 Labor had conflicting interests.

2 MR. THOMPSON: It was --

3 JUSTICE SOTOMAYOR: They didn't have
4 identical interests.

5 MR. THOMPSON: If we think about it as
6 a Venn diagram, in Trbovich, the interest of the
7 petitioner was a subset totally included within
8 the interests of the Secretary of Labor. The
9 Secretary of Labor had two interests. Number
10 one, he was the petitioner's lawyer. So that
11 was perfect identity of interest on that
12 interest. But he had a second interest. He had
13 an interest in the public interest. And it was
14 the fact that he had those two, one that was
15 identical, plus an extra one --

16 JUSTICE SOTOMAYOR: No, no, no, but
17 the public interest could overcome the
18 individual interest there.

19 MR. THOMPSON: Well, they said because
20 he had both he wasn't an adequate
21 representative. And that's our point here. And
22 -- and -- and --

23 JUSTICE SOTOMAYOR: All right.

24 MR. THOMPSON: -- it's a little bit
25 stronger here because, even as to the interest

1 in defending the law, it's not perfectly the
2 same because there's a temporal difference.
3 They're fighting for ultimate vindication.
4 We're fighting for the law to be in place every
5 step of the way, including in the March 2020
6 primary.

7 JUSTICE SOTOMAYOR: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: Mr. Thompson, I'd just
10 like to clarify a few points, and this goes back
11 to Justice Barrett's set of questions.

12 If I understood your responses to her,
13 you agreed with her that basically your case
14 here depends on -- on the argument that you've
15 made that legislators do have different
16 interests from the executive branch, that there
17 is a kind of tug, in her words, between your
18 purely legislative interest and their interest,
19 which also has to take into account issues of
20 execution. Is that correct?

21 MR. THOMPSON: We might be saying
22 different things, so if I may clarify what --
23 what -- what I'm saying is that there are two
24 separate interests: defending a law, which
25 could be done by a legislator or somebody else.

1 North Carolina has said the General Assembly is
2 the champion of that interest, but there are two
3 separate interests.

4 One of them is defending the law.
5 It's not inherently legislative. And the other
6 is administering the law. Now that is executive
7 in nature.

8 JUSTICE KAGAN: Yeah. But you're
9 saying that the reason you should be able to
10 intervene is because you have the defending the
11 law interest pure, whereas they don't. They
12 have --

13 MR. THOMPSON: Yes.

14 JUSTICE KAGAN: -- it in with a mix of
15 other things.

16 MR. THOMPSON: Yes, Your Honor, that's
17 correct.

18 JUSTICE KAGAN: Okay. And -- but
19 you're saying that that legislative interest,
20 defending the law pure, that we should only --
21 we should defer to you for one legislative seat
22 at the table, if you will, but no more, is that
23 correct?

24 MR. THOMPSON: It's not a legislative
25 interest. It's an interest in defending the

1 law. But, yes, the first person --

2 JUSTICE KAGAN: Yeah, I -- I got it.

3 Sorry I'm not precise.

4 MR. THOMPSON: I -- I -- I just don't
5 want to -- so -- but, yes, the point is that
6 once there's an interest that's valid,
7 significantly protectable, the state is entitled
8 to a champion as to that interest.

9 JUSTICE KAGAN: A champion, one
10 champion?

11 MR. THOMPSON: Yes.

12 JUSTICE KAGAN: And -- and you're
13 saying that it really doesn't matter that the
14 state law in question does not define the
15 interest in that way? In other words, the state
16 law in question simply makes the legislature --
17 legislative members necessary parties, but
18 doesn't make this distinction about the
19 particular interest in defending the law versus
20 other state interests. It just says there's a
21 -- legislators have to be necessary parties?

22 MR. THOMPSON: Well, I -- I think it
23 does, actually, because the trigger, we only
24 come into a case when there's a challenge to the
25 constitutionality or the validity of the law.

1 So that's what tethers our assignment as the
2 agent to those -- to that interest, is the
3 trigger.

4 If there's a challenge to the
5 administration of a law, we're not necessary
6 parties then.

7 JUSTICE KAGAN: And when you say
8 necessary parties, do you have to be in those
9 cases, or does it -- does it require an
10 intervention motion on your part?

11 MR. THOMPSON: Well, in state law, we
12 are supposed to be named, but, if we're not,
13 it's automatic intervention if -- when we move.

14 JUSTICE KAGAN: Thank you.

15 MR. THOMPSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch?

18 Justice Barrett?

19 JUSTICE BARRETT: Just to pick up on
20 the very end of your colloquy with Justice
21 Kagan, was it wrong that you weren't joined
22 under Rule 19 as a necessary party in this suit
23 given what you're saying about this is
24 practically impairing or impeding your interest?

25 MR. THOMPSON: That -- that would be

1 our position, Your Honor, that we have an
2 interest and it's being impaired and that we
3 should have been named.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 MR. THOMPSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Ms. Theodore.

8 ORAL ARGUMENT OF ELISABETH S. THEODORE
9 ON BEHALF OF THE NAACP RESPONDENTS

10 MS. THEODORE: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 From Rule 24's inception through
13 today, a single principle has guided
14 interpretation of the adequacy prong. When a
15 proposed intervenor's interest is identical to
16 one that's already represented in the case, we
17 presume that the existing representative is
18 adequate, and that common-sense presumption
19 holds particular force when the existing
20 representative is a state official charged
21 ethically and legally with defending state
22 interests.

23 The presumption is further supported
24 by the strong federal interest in requiring
25 states to speak with a single voice at a time in

1 federal litigation. From the vantage point of
2 federal law, there's one state. The state as a
3 unified entity is what matters for federalism
4 purposes, and it's the state that has the
5 sovereign interest in defending state law.

6 Where one state representative decides
7 to no longer represent that interest, like in
8 the Cameron situation, then a properly appointed
9 state representative can come in to vindicate
10 the interest that's no longer being represented.

11 That's the same way federal law
12 requires the United States to notify Congress to
13 enable intervention when it stops defending a
14 statute.

15 But where an authorized state
16 representative is actively defending the law,
17 Rule 24's goals of ensuring coherent
18 presentation and simplified litigation should
19 prevail.

20 And this case is the poster child for
21 why federal law puts a thumb on the scale
22 against intervention when a state agent is
23 already there defending.

24 Unlike in Cameron, there's just no
25 need for intervention here. Petitioners

1 explicitly seek to assert the state's sovereign
2 interest in enforceability and defense of state
3 law, the exact interest the Attorney General is
4 charged by statute with representing and is
5 telling this Court he is representing. And he's
6 not only representing that interest, but
7 unfortunately for my clients, he's winning.

8 And then, on the other side of the
9 ledger, allowing the state to speak with
10 multiple voices at once would complicate
11 litigation and draw federal courts into state
12 law disputes, such as the substantial ones here
13 about what state statutes in the state
14 constitution mean. So there's substantial cost
15 without corresponding benefit to accepting what
16 Petitioners propose.

17 I welcome the Court's questions.

18 CHIEF JUSTICE ROBERTS: Counsel, you
19 said right at the outset that there's a federal
20 interest that the people on each side of the
21 case speak with a single voice, right?

22 Where did -- where did that come from?
23 I mean, just about every case we hear, we have
24 two parties representing one side of the case,
25 often with slightly different interests. In

1 significant litigation in the federal courts,
2 you have the same thing.

3 If the sovereign state that is a party
4 in the case has a law that says these people
5 have to represent us, I don't know of any
6 federal interest that outweighs that.

7 MS. THEODORE: I think the federal
8 interest is having the -- is in having the state
9 tell a federal court what it's position really
10 is.

11 So Petitioners' whole argument here is
12 that, you know, enforcing state law A, you know,
13 enforcing the voter ID law or defending the
14 voter ID law might conflict with an interest in
15 election administration. We don't think that's
16 a different interest.

17 But, if you think it is and if you
18 think there are different state perspectives
19 here, there's a really strong federal interest
20 in not allowing the state to say, you know, we
21 want our agents to duke it out in federal court.

22 So, you know, put differently, the
23 possibility that different state agents
24 defending state law might have different
25 perspectives and balance state interests

1 differently is a -- it's a vice, not a virtue of
2 their proposal, because it requires federal
3 courts to referee instead of just telling the
4 state, look, pick someone to tell us how the
5 state law balance comes out. You can get rid of
6 the Attorney General if you want to in all cases
7 or all election cases or, you know, our case,
8 but you should pick.

9 And that's not a problem in other
10 cases where this Court has had, you know, two
11 state representatives like Brnovich where, you
12 know, they disagree about a question ultimately
13 of whether the state statute violates federal
14 law. You know, that's a question that's in the
15 federal court's wheelhouse.

16 But, here, how to balance a state
17 interest if it conflicts is something that the
18 state should really just be coming into federal
19 court and telling --

20 CHIEF JUSTICE ROBERTS: Why --

21 MS. THEODORE: -- the federal court
22 what the position is.

23 CHIEF JUSTICE ROBERTS: That's a
24 pretty unusual -- well, a pretty difficult
25 eyebrow-raising thing for a federal court to do

1 when you have a political controversy with two
2 different entities, each one having a right to
3 intervene under state law as far as the state's
4 concerned.

5 And you're saying the federal court --
6 before you even get into this dispute, which,
7 obviously, under those scenarios, is
8 intentionally political, you pick -- I don't
9 want to say you pick the winner, but you pick
10 who is the real representative of the state.

11 I don't see federal courts doing that
12 as a general matter or if they -- if we do ask
13 them to do that, that's putting them in an
14 intensely political position when they are used
15 to in lots and lots of cases having people --
16 more than one interest represented on -- on one
17 side of the -- of the "v."

18 MS. THEODORE: Well, we're not telling
19 the federal court to pick. We're saying when
20 there is, you know, a duly authorized
21 representative who's already there, who's
22 already active -- actively defending the state,
23 you know, we'll stick with that person unless
24 there's a really good reason to think that
25 they're not -- they're not doing the job.

1 And, again, the state can always kick
2 them out. But this is consistent with federal
3 statutory law on intervention. So
4 Section 2403(b) says, you know, we'll allow
5 intervention of the state if there's not already
6 someone in there defending state law.

7 CHIEF JUSTICE ROBERTS: Well, but the
8 federal side is very different. We have a
9 unitary executive. The person -- the -- the --
10 the -- one person should speak for the United
11 States. States don't have to have that same
12 perspective.

13 MS. THEODORE: Well, Section 2403(b)
14 is specifically about intervention by states,
15 and what it says is a state can intervene as of
16 right if there's not already a state agency or
17 state officer who's a defendant. So I think
18 federal law really strongly supports our view
19 that there should be a presumption of adequacy
20 when you already have one state officer in there
21 as a defendant defending state law.

22 And so -- so I don't think we're
23 asking the federal court to pick. We're saying
24 you stick with the one who's there, and, by the
25 way, the -- the defendant who's there is going

1 to be the one who's, you know, the only
2 permissible defendant under federal law.

3 CHIEF JUSTICE ROBERTS: So, if the
4 legislature had entered an appearance first,
5 they would be the one there?

6 MS. THEODORE: Well, the legislature
7 wasn't a defendant. I mean, we -- we sued the
8 only defendants that we could sue under Ex Parte
9 Young, which would not, of course, include the
10 legislator -- legislatures.

11 So -- so I don't think -- as I say, I
12 don't think the federal court is picking. And,
13 again, the State of North Carolina can kick the
14 Attorney General out at any time, anytime it
15 wants, if it really thinks he's not adequate to
16 defend the state's interests in -- in the voter
17 ID law. And it hasn't done that here.

18 And, as I say, I think there's a
19 really strong federal interest in just telling
20 the state you choose who represents you, but we
21 want to know what your position is in federal
22 court.

23 JUSTICE BARRETT: But isn't their
24 position that even if it wasn't the Attorney
25 General defending the Board of Elections, that

1 it would still -- they would still be entitled
2 to intervention?

3 Let's say that they hired private
4 counsel. I understand their position to be the
5 same, I think, that it doesn't depend on the
6 fact that the Attorney General is representing
7 them but the fact that the interests aren't
8 aligned.

9 MS. THEODORE: I -- well, I think
10 North Carolina law clearly says that the
11 Attorney General is the authorized
12 representative of the state Board of Elections.
13 And North Carolina law says that the Attorney
14 General represents the state in any case in
15 which the state's a party or interested or its
16 agencies are a party. So --

17 JUSTICE BARRETT: Didn't he get
18 dismissed from the suit?

19 MS. THEODORE: The governor got
20 dismissed from the suit.

21 JUSTICE BARRETT: Okay. Sorry.

22 MS. THEODORE: Yeah. So --

23 JUSTICE BARRETT: Okay.

24 MS. THEODORE: -- so North Carolina
25 law clearly authorizes the Attorney General to

1 be here. That hasn't been repealed.

2 JUSTICE BARRETT: Well, what if a
3 private firm was representing the state Board of
4 Elections? They just decided no Attorney
5 General. And so you said the state can the kick
6 the Attorney General out at any time. So let's
7 say that's what happens. What then? Does
8 anything change?

9 MS. THEODORE: Well, I -- I think I
10 would assume in your hypothetical that there's a
11 state law that says the private lawyers
12 represent the state board to defend the
13 constitutionality of state law.

14 JUSTICE BARRETT: Yeah. Well, you
15 said that they could kick the Attorney General
16 out anytime. And I'm not saying, like, as a
17 matter of general principle that the Attorney
18 General is not the one who typically represent
19 the state in court. But, obviously, there's
20 been a lot of back and forth, and the
21 legislature has passed laws related to this
22 specific litigation.

23 So I'm just saying, would that matter
24 at all? Let's say they say we think the
25 Attorney General is doing a bad job, so we want

1 private counsel.

2 MS. THEODORE: They could do that,
3 absolutely. North Carolina law could do that.
4 And then, in that case, again, I don't think the
5 legislature could come in and say we want a
6 second counsel representing the state. They --
7 they'd just pick one, the one that state law
8 says represents the -- the state.

9 JUSTICE BARRETT: But it wouldn't
10 change your view about whether the legislature
11 could come into the suit, whether Berger could
12 come in? It wouldn't change?

13 MS. THEODORE: It wouldn't. But, if
14 state law says that, you know, the -- the state
15 legislators decide who the counsel is for the
16 state Board of Elections in any particular case,
17 that would be fine from the perspective of
18 federal law. They could -- they could certainly
19 do that. And so, again, you know, the state is
20 in -- is in total control here.

21 JUSTICE BREYER: But, before you do --
22 what do you do about this Trbovich? I mean, on
23 page 539, I take it what the Court said, this is
24 a union member, he goes to the Secretary of
25 Labor, says, hey, they had an unfair election in

1 the Mine Workers. The Secretary brings the
2 lawsuit, as he's supposed to. The union member
3 wants to intervene.

4 The interests of a union member and
5 the Secretary, says the Court, are identical,
6 but even if the Secretary is performing his
7 duties as well as can be expected, the union
8 member may have a valid complaint about the
9 performance of his lawyer. Such a complaint
10 filed by the member who initiated the entire
11 enforcement proceeding should be regarded as
12 sufficient to warrant relief in the form of
13 intervention under 24(a)(2).

14 No mention of any presumption against
15 intervening. Sounds like the easiest thing in
16 the world to intervene. This man, the union
17 member, just wanted to present some more
18 evidence. That was it.

19 MS. THEODORE: Yes.

20 JUSTICE BREYER: So -- so is -- have
21 all the lower courts just not followed that, or
22 -- or what's -- what's the situation? And what
23 do you think?

24 MS. THEODORE: Trbovich -- Trbovich is
25 a totally different situation. It just holds

1 that, you know, a government official can't
2 adequately represent at the same time both the
3 public interest and a private union member's
4 individual interest.

5 And it makes total sense that showing
6 inadequacy as a minimal burden where you have,
7 you know, a government defendant and then you
8 have a private person who wants to come in. We
9 completely agree with that.

10 But, here -- here, the issue is that
11 you have a government defendant on one side
12 representing the state's interests in defending
13 state law, and Petitioners want to come in and
14 say that they represent exactly that same
15 interest.

16 And with respect to their claim that
17 they aren't focused on election administration,
18 that's really hard to square with their view and
19 the way they've presented this case where, in
20 their cert petition, they intentionally
21 disclaimed any institutional interest.

22 JUSTICE BREYER: Well, that's the
23 interest. But I'm -- I mean, if a private
24 person can very easily go in and help the
25 federal government win a lawsuit, why couldn't

1 the state say we want this person to come in?
2 That would seem stronger, not weaker, because
3 the private person is one of 400,000 union
4 members. But the state legislature in an
5 election case has a pretty strong interest.

6 MS. THEODORE: Well, the state
7 legislature -- the Petitioners here have said in
8 their cert petition they don't represent the
9 legislature, they only represent the state,
10 which I think makes it really difficult for them
11 to say they have a different perspective and
12 they don't care about election administration
13 when they have said we want to come in on behalf
14 of the state as a whole.

15 JUSTICE KAGAN: So, Ms. Theodore, I
16 take that point, and -- but, I mean, I guess I
17 think that there's a kind of formalness about
18 it. I mean, they are saying that they have a
19 different interest because they have this
20 interest, pure, in defending the law, unleavened
21 by any other consideration.

22 Now I take -- I take your point that
23 that's in some tension with their consistent
24 representations that they want not to represent
25 the legislature but, instead, to represent the

1 whole state, which you might think is a kind of
2 interest that's, even taking their own view, you
3 know, leavened by these executive interests as
4 well. So they want to kind of have it both
5 ways.

6 But why shouldn't we think that the
7 more important of the two statements that
8 they're making to us is that they have this pure
9 interest in defending the law which nobody else
10 in the courtroom has and that, you know, whether
11 we call it representing the state or call it
12 representing the legislature is less important
13 than that sort of substantive difference in the
14 interest that they have?

15 MS. THEODORE: Well, you have the
16 Attorney General saying that his primary
17 interest is also in defending the law. So you'd
18 have to be deciding between two state actors who
19 have a dispute about state law and what -- what
20 each one is doing. And you'd have to be saying
21 that the Attorney General is inadequate to
22 defend state law, and I think that's something
23 the Court should hesitate to do.

24 I think also the -- the -- the answer
25 to the hypotheticals about, you know, the two

1 legislators coming in are really devastating to
2 their position. A state could easily just say,
3 you know, we think the head of the Budget
4 Committee has a different perspective on
5 defending state law than the head of the
6 Election Committee and, you know, the -- the
7 head of the budget -- the head of the Election
8 Committee might not prioritize budget issues.
9 And so, therefore, those -- those folks should
10 come in too. And I think -- I think that, as --
11 as the intuition of Mr. Thompson suggests, Rule
12 24 would have a real problem with that.

13 And I do also want to identify some of
14 the real specific practical problems with their
15 -- with their position that you can have two
16 officers representing the state. You know, how
17 do you get a binding admission when two agents
18 purport to represent the state? What if agent
19 number one admits something and agent number two
20 says, you know, we lack knowledge and so,
21 therefore, it's denied? Is it admitted?

22 Or let's suppose you have a damages
23 suit against the state as a named party like in
24 a Title VII suit where they say a law violates
25 -- a state law violates Title VII. You know,

1 Congress has validly abrogated sovereign
2 immunity. You know, let's suppose agent number
3 one wants to put on a different 30(b)(6)
4 representative on behalf of the state than agent
5 number two. Which one binds the state? Or
6 let's say agent one says we want a jury trial
7 and agent two says we don't. There are real
8 significant problems with their position here.

9 JUSTICE ALITO: What happens if
10 intervention is denied on the ground that the
11 Attorney General will provide adequate
12 representation and then the trial goes forward,
13 the legislature has its attorneys sitting there
14 in the courtroom, and they -- they say look what
15 -- look what the Attorney General has done. The
16 Attorney General has assigned one very junior
17 attorney to try this case, and the Attorney
18 General is declining to spend money on experts
19 and engage in other activities which we think
20 are essential to the defense of this statute.

21 Can they move for intervention at that
22 time? Is it untimely?

23 MS. THEODORE: I -- I think that if --
24 no, I don't think it would be untimely if they
25 could say there are, you know, significant new

1 developments that would allow us to overcome the
2 presumption. It wouldn't be untimely. And I
3 think the district court made very clear in its
4 ruling that if there were new developments that
5 suggested that the Attorney General was somehow
6 abdicating his responsibility to defend state
7 law, they could try again.

8 JUSTICE ALITO: Well, not in
9 abdicating the responsibility, but, you know,
10 doing the -- the minimum required by the
11 Attorney General's duty under the law, but not
12 treating this as the most important thing that
13 merits the expenditure of whatever is necessary
14 to provide the maximum defense of the law.

15 The legislature can appropriate as
16 much money as it wants to the defense of the law
17 and make that their number one priority.

18 But what if at some point the Attorney
19 General says, look, this is costing too much, we
20 -- we should settle. Or suppose there's an
21 adverse decision and the Attorney General says:
22 We -- you know, we did our best, but we are not
23 going to take an appeal.

24 Would intervention be allowed at that
25 point?

1 MS. THEODORE: As for the appeal, you
2 know, I think the Court's decision in Cameron
3 makes pretty clear that it would be an abuse of
4 discretion not to allow an appeal.

5 JUSTICE ALITO: Well, what sense does
6 it make to allow the appeal -- to allow
7 intervention at the appellate level after the
8 Attorney General has made what the legislature
9 regards as an inadequate defense of the statute
10 or an inadequate record? Doesn't that just make
11 things more complicated?

12 MS. THEODORE: No, I don't think so.
13 I think the purpose of the adequacy prong in
14 Rule 24 is to simplify litigation. That's why
15 courts have to decide adequacy.

16 But, again, the state here -- if -- if
17 the state thinks that the Attorney General isn't
18 doing a good enough job, it has a very simple
19 way to deal with that. All it has to do is
20 replace him. And nothing about our position
21 prevents that. Our position simply prevents
22 them from having two people at the same time.

23 JUSTICE ALITO: What's the mechanism
24 for replacing him?

25 MS. THEODORE: The -- well, I mean, I

1 -- I think Petitioners would probably say that
2 state law already allows them to do it and they
3 just haven't done it.

4 But, you know, state law could simply
5 say that if -- at -- at the discretion of the
6 General Assembly's leaders, they can replace the
7 Attorney General with private counsel on behalf
8 of the board.

9 And, you know, there might be a state
10 law problem with that, but there wouldn't be a
11 federal law problem with that. And that's -- I
12 think that's -- that's the answer to -- to any
13 concern about --

14 JUSTICE ALITO: Do they have that
15 power under state law now?

16 MS. THEODORE: I think there's a real
17 dispute about whether they do, and they haven't
18 invoked it in this Court, but --

19 JUSTICE KAGAN: But the position is
20 that they have that power and they wouldn't even
21 need the governor's signature on a new piece of
22 legislation?

23 MS. THEODORE: I -- I think that might
24 be their position. But, certainly, as far as
25 federal law is concerned, a state could give

1 them that power.

2 CHIEF JUSTICE ROBERTS: Thank you --

3 JUSTICE ALITO: I mean, there's an air
4 of unreality about the arguments here. So you
5 say that the Attorney General representing the
6 Board of Elections is going to provide perfectly
7 adequate representation. The legislature
8 obviously doesn't think that.

9 They say, well, you're wrong. You
10 know, you're wrong, the Attorney General is
11 going to provide perfectly adequate
12 representation in defending the law. They --
13 they don't understand what's in their own best
14 interests, right?

15 MS. THEODORE: Well, the Petitioners
16 don't think that, but the state does think that.
17 That's why the state has a law that designates
18 the Attorney General as -- as their -- as the --
19 the person who defends state law.

20 And I think it's important to
21 distinguish between what Petitioners say and
22 what the state says. And state law clearly
23 authorizes the Attorney General to defend state
24 interests --

25 CHIEF JUSTICE ROBERTS: Thank you.

1 JUSTICE SOTOMAYOR: Counsel --

2 MS. THEODORE: -- in state law
3 litigation.

4 CHIEF JUSTICE ROBERTS: Thank you.
5 Thank you, Ms. Theodore. I just have a couple
6 really quick questions.

7 It -- it -- this may be along the same
8 lines as Justice Alito's, but it does seem a
9 little unfair to me that you're -- you're asking
10 us to let -- to pick your opponents. I'd rather
11 -- in -- in court, I'd rather have only one
12 person arguing against me rather than two.

13 But I think that's a little bit of a
14 -- a conflict there. I mean, what's -- what are
15 you afraid of? I mean, you should -- you know,
16 I'm sure you could handle two of them as -- as
17 easily as -- as -- as one.

18 MS. THEODORE: Well, I'll say again
19 that we haven't picked our opponents. We sued
20 the people who federal law, Ex Parte Young, in
21 Article III allowed us to sue. So we didn't
22 make a decision there.

23 But, you know, I think what Rule 24 is
24 about is simplifying litigation, and it -- it
25 says we don't add another defendant, we don't

1 add another plaintiff unless there's a really
2 good reason, and, here, there isn't one.

3 CHIEF JUSTICE ROBERTS: Well, you keep
4 saying we, we. I mean, the -- the point is that
5 it -- it's -- it's a court interest and it --
6 the question is whether the court should be --
7 should be letting the state have the two
8 representatives that under state law they say
9 they should have.

10 And, I mean, I -- I don't -- I don't
11 mean this the way it might sound, but I don't
12 know why we're terribly interested in what your
13 views are on that in the first place, because
14 you're the one who's going to benefit if we
15 throw one of your opponents out.

16 MS. THEODORE: Well, I think Rule 24
17 is there to protect plaintiffs and defendants.
18 It's there to simplify litigation. It's there
19 to reduce cost and burden. And that's an
20 interest that protects the litigants, including
21 us.

22 I think, you know, we have an interest
23 and, you know, I think the Court probably should
24 have an interest in sort of not announcing
25 rules that make it easier for governments to

1 just say we're going to make it harder for
2 people to challenge the government.

3 So I think we do as plaintiffs have an
4 interest.

5 CHIEF JUSTICE ROBERTS: Thank you.

6 Justice Breyer, anything?

7 JUSTICE BREYER: Well, I'll go back to
8 this once more because I did notice the
9 footnote, which fortunately or unfortunately
10 count, and the footnote says the requirement of
11 the rule -- they're talking about the same
12 phrase -- is satisfied if the applicant shows
13 that representation of his interest "may be"
14 inadequate, and the burden of making that
15 showing should be treated as minimal.

16 Now that says maybe there is a
17 presumption. Moore says there's a presumption.
18 Not Moore himself, but the treatise. And -- but
19 minimal is the key word.

20 So what -- what do you say? I mean, I
21 think we have to follow that, don't we?

22 MS. THEODORE: So all of the federal
23 courts of appeals have understood that Trbovich
24 rule to apply only in cases where there wasn't
25 the same interest, where there was a different

1 interest like in Trbovich, where the Secretary
2 of Labor was charged with both being a private
3 person's lawyer and --

4 JUSTICE BREYER: Okay, I got it.

5 MS. THEODORE: -- and representing the
6 government.

7 JUSTICE BREYER: I see your point, I
8 see your point.

9 MS. THEODORE: So that's how we
10 understand it.

11 JUSTICE BREYER: Thank you.

12 MS. THEODORE: We -- we agree with
13 Trbovich.

14 JUSTICE BREYER: Okay.

15 CHIEF JUSTICE ROBERTS: Justice Alito,
16 anything further?

17 JUSTICE SOTOMAYOR: Trbovich was a
18 situation in which the private individual
19 doesn't have a right to pick his lawyer,
20 correct?

21 MS. THEODORE: That's -- that's right.

22 JUSTICE SOTOMAYOR: And so what
23 Trbovich was dealing with, which was an innate
24 conflict, which is the union member who can't
25 pick his lawyer is saddled with a lawyer whose

1 interests can be combined but has a separate
2 primary interest of the public interest,
3 correct?

4 MS. THEODORE: Yeah. And I think the
5 private --

6 JUSTICE SOTOMAYOR: All right. That's
7 not the case here. The case here is there's
8 overlapping interests, but the question the
9 district court was looking at was whether the
10 representation was adequate.

11 MS. THEODORE: Yeah.

12 JUSTICE SOTOMAYOR: The other side,
13 Justice Alito asked a question of how does the
14 legislature protect itself in the event that the
15 Attorney General is not vigorously defending the
16 law by giving it good counsel or expert
17 witnesses.

18 Isn't that what the district court
19 looked at, which was how vigorously was the
20 state defending this law, and didn't it say that
21 everything the legislature wanted to do the
22 state had done but in a different way?

23 MS. THEODORE: Yes.

24 JUSTICE SOTOMAYOR: They proposed
25 experts, but the legislature gave an expert that

1 gave exactly the same information, correct?

2 MS. THEODORE: I think the -- yes, I
3 think the district court looked at all of these
4 things, and its determination is entitled to
5 deference.

6 JUSTICE SOTOMAYOR: And it said, if
7 the state stopped doing it, they could come back
8 and ask to intervene, correct?

9 MS. THEODORE: Absolutely right.

10 JUSTICE SOTOMAYOR: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice Kagan,
12 anything further?

13 Justice Gorsuch?

14 Justice Barrett?

15 Thank you, counsel.

16 MS. THEODORE: Thank you.

17 CHIEF JUSTICE ROBERTS: Ms. Boyce.

18 ORAL ARGUMENT OF SARAH BOYCE

19 ON BEHALF OF THE STATE RESPONDENTS

20 MS. BOYCE: Mr. Chief Justice, and may
21 it please the Court:

22 Petitioners cannot plausibly argue
23 that the state board and the Attorney General
24 are not adequately defending the voter ID law.
25 Petitioners have identified no daylight between

1 their legal position and ours. Their evidence
2 is duplicative of our evidence. And we have
3 prevailed in the litigation thus far and are
4 confident that we will ultimately prevail
5 through final judgment.

6 Nevertheless, Petitioners seek to
7 intervene. As we have consistently said, we
8 have no problem litigating alongside
9 Petitioners. But Petitioners cannot satisfy the
10 requirements of mandatory intervention.

11 They have asserted the same interests
12 as the Attorney General, who remains in this
13 case robustly defending the law. In that
14 situation, a presumption of adequacy applies and
15 Petitioners cannot overcome it.

16 Moreover, there is a fundamental
17 principle of state constitutional law at stake.
18 Petitioners read two state statutes to give them
19 the right to represent the state's interests in
20 enforcing the law. That construction would
21 violate the North Carolina constitution.

22 Thus, whether or not the Petitioners
23 are permitted to intervene in this case, we urge
24 the Court not to adopt their erroneous reading
25 of state law, which would violate our state's

1 separation of powers.

2 I welcome the Court's questions.

3 JUSTICE ALITO: Doesn't the fact --
4 doesn't that state law -- state constitutional
5 law issue that you just raised show that your
6 perspective on this is different from the
7 legislature's?

8 MS. BOYCE: I don't believe so, Your
9 Honor. Our state constitutional law issue
10 arises out of Wallace versus Bone, as Justice
11 Sotomayor spoke of, and gets to the issue of
12 whether or not the legislature -- the
13 Petitioners can represent the state, not to
14 whether they might have a distinct legislative
15 interest as they've claimed here.

16 And just as Justice Sotomayor said,
17 Wallace v. Bone, much like the Buckley versus
18 Valeo federal analogue, says that a legislature
19 cannot represent a government's interest in
20 enforcement of law or, to -- to -- to say the
21 flip side of that, in defending the law.

22 So to the extent that Petitioners
23 claim to represent our state and to have the
24 authority to represent the state's interest in
25 litigation, Wallace versus Bone says that is a

1 crystal-clear violation of our state's
2 constitution.

3 JUSTICE KAGAN: So if the Petitioners
4 were here saying we have a distinct interest in
5 -- in defending the law pure, let's say, which
6 is a little bit different from what you do in
7 the executive branch, that's their -- their --
8 their theory, and so we -- you know, we have a
9 distinctively legislative interest and -- and --
10 and we're asking for intervention.

11 Would you -- would you be all right
12 with that? Like, as long as they said we're not
13 representing the state's interest, we're
14 representing a specifically legislative interest
15 which is not represented by the attorney
16 general, would you be, like, come on in under
17 intervention of right?

18 MS. BOYCE: I'm not sure -- I think it
19 would depend on the particular case, Your Honor.
20 We do not have an issue with them asserting a
21 legislative interest insofar as the question is
22 does that pose a constitutional problem? We
23 agree that they are entitled to assert a
24 legislative interest.

25 JUSTICE KAGAN: And would you also

1 agree that under the intervention rule, that
2 would be perfectly permissible? Their
3 representing a different interest. They're
4 asserting a different interest. You can't
5 adequately represent an interest that's not your
6 own. So as long as they were saying we're here
7 as the legislature representing a distinctively
8 legislative interest, all your objections would
9 fall away; is that correct?

10 MS. BOYCE: I think that's partially
11 correct. So -- because defining an interest can
12 be inherently malleable and, as we've seen from
13 Petitioners briefs, you can frame what I would
14 say is the same interest in many different ways.

15 The federal courts use different
16 litmus tests to assert whether or not the
17 interests sufficiently overlap, that they're
18 effectively the same. And that's where these
19 inquiries like do the parties have the same
20 ultimate objective, are there any claims that
21 the movant would wish to assert that the
22 existing party has declined to assert, things
23 like that are the -- the test that the federal
24 courts use to suss out whether or not the
25 interests sufficiently overlap.

1 JUSTICE KAGAN: And what's the result
2 under that test?

3 MS. BOYCE: I --

4 JUSTICE KAGAN: If -- if -- again, if
5 they were saying specifically legislative
6 interest, unadulterated, separate from any
7 executive interests that you -- you have?

8 MS. BOYCE: In this particular case, I
9 am still not sure that they have shown enough to
10 prove we haven't adequately represented their
11 interests because, as I said in my opening
12 remarks, they haven't actually identified any
13 daylight between their position and ours or any
14 claims that they wish to assert or any evidence
15 that they wish we were putting on that we
16 haven't put on.

17 But we certainly concede that in
18 certain cases that might be different. And
19 North Carolina does seem to grant them a
20 distinct legislative interest that would allow
21 them to move for Rule 24(a)(2) intervention in
22 other cases.

23 JUSTICE SOTOMAYOR: (a) or (b)?
24 Meaning I think of it as permissive
25 intervention.

1 MS. BOYCE: Your Honor, they're
2 certainly permitted to move for intervention --
3 for permissive intervention and, of course, have
4 done so in this case. And we would urge the
5 Court, insofar as it's inclined to let
6 Petitioners intervene, to permit them to
7 intervene through that route.

8 But the state's position is that North
9 Carolina state law does recognize a legislative
10 interest as well. And then the question is
11 just, on a case-by-case basis, whether or not
12 the attorney general who's already in the case
13 is, in fact, already adequately representing
14 that legislative interest, as well as the
15 broader state interest.

16 JUSTICE SOTOMAYOR: All right. In
17 that regard, may I ask, you've succeeded in the
18 Fourth Circuit, haven't you, in a vacatur of the
19 preliminary injunction?

20 MS. BOYCE: Yes, Your Honor.

21 JUSTICE SOTOMAYOR: On the ground that
22 you were likely to succeed on the merits that
23 S.B. 824 was constitutional?

24 MS. BOYCE: Yes, Your Honor. That's
25 correct.

1 JUSTICE SOTOMAYOR: So it wasn't on an
2 equities argument with respect to administrative
3 burdens?

4 MS. BOYCE: No, Your Honor.

5 JUSTICE SOTOMAYOR: You're defending
6 on the merits?

7 MS. BOYCE: Absolutely.

8 JUSTICE SOTOMAYOR: What is the status
9 of -- it's been placed on hold below waiting for
10 this case.

11 MS. BOYCE: Yes, that's correct. It
12 has been stayed. And I would note that, in
13 fact, we moved, at the point that this Court
14 granted cert, for permissive intervention on the
15 legislators' behalf because we have an interest
16 in actually seeing this case through to
17 resolution and -- and having the chance to
18 defend law and vindicate our ability to enforce
19 the law.

20 But the district court denied that
21 motion as moot and stayed the case until this
22 case is resolved by this Court.

23 But I say --

24 JUSTICE SOTOMAYOR: How about --

25 MS. BOYCE: -- that to --

1 JUSTICE SOTOMAYOR: How about the
2 issue of this -- your summary judgment motion on
3 the merits? You made one on the merits as well,
4 correct?

5 MS. BOYCE: Yes, Your Honor. That's
6 correct. And that --

7 JUSTICE SOTOMAYOR: Has that ruled --
8 been ruled on?

9 MS. BOYCE: No, it has not. It -- it
10 remains pending.

11 JUSTICE SOTOMAYOR: Can this case
12 become moot on the -- because of the state court
13 action?

14 MS. BOYCE: It could, Your Honor, yes.
15 Currently, the -- the law is enjoined by the
16 state trial court via a permanent injunction,
17 and we are currently appealing that decision
18 alongside the legislators. And -- and that has
19 gone straight up to our North Carolina Supreme
20 Court.

21 JUSTICE SOTOMAYOR: If you --

22 MS. BOYCE: So if --

23 JUSTICE SOTOMAYOR: And that is
24 scheduled for argument when?

25 MS. BOYCE: It's not yet scheduled for

1 argument, Your Honor, but I assume it will be
2 argued at some point this year.

3 JUSTICE SOTOMAYOR: I read somewhere
4 that it's likely this summer?

5 MS. BOYCE: I -- I believe that's
6 correct, Your Honor, but I -- I -- I don't
7 believe that there's a firm date quite yet.

8 JUSTICE SOTOMAYOR: So if you lose
9 there, then this case becomes moot, correct?

10 MS. BOYCE: That's correct, Your
11 Honor. That's a point we made in brief in
12 opposition. Because of the parallel nature of
13 this litigation, it is possible that this case
14 would become mooted.

15 And I would also note that the
16 parallel litigation is -- is part of what drove
17 our decision not to move to stay the preliminary
18 injunction that Petitioners have raised so
19 frequently.

20 The problem there, of course, was that
21 the district court enjoined the law at the end
22 of January 2019, and we had made clear that at
23 the start of January 2020, we would need to move
24 immediately to mail ballots for the primaries in
25 2020. And we knew that there was this parallel

1 state court litigation that might lead to an
2 injunction, once again causing us to change
3 course.

4 And so we acknowledged and conceded
5 candidly in our briefs that because of our
6 obligations to enforce all of the state's
7 elections laws, that we recognize they might put
8 us in -- in an impossible situation, were we to
9 move to stay the federal court case and then
10 immediately find that the state court had
11 enjoined the law, which, of course, is precisely
12 what did end up happening in February 2020.

13 So I -- I just wanted to clarify the
14 record on that point regarding the motion to --

15 JUSTICE BREYER: Suppose -- suppose
16 that I thought, hypothetically, one,
17 intervention, which we're getting into under 24,
18 is vast, as a subject. All right.

19 Two -- and I don't know that much
20 about it. I don't want to deny that I know some
21 things, but, I mean, maybe I'm going too far in
22 this argument. But -- but, regardless, I'm not
23 an expert, okay?

24 Two, suppose I think it's terribly
25 important in an election case that the

1 legislature have a right to -- to be there in
2 the court or be there in some form. They'll be
3 -- amicus briefs, permissive intervention. But
4 I'm worried about saying under general -- but
5 then there's this other parallel thing, and the
6 election is coming along. Okay?

7 So what do I do?

8 MS. BOYCE: Well, our position would
9 be --

10 JUSTICE BREYER: Aside from saying,
11 well, we win, but, I mean -- go ahead.

12 MS. BOYCE: Yes. I mean, our position
13 is that, as they have brought this case to the
14 Court asking only for mandatory intervention on
15 behalf of the state, which we think gives rise
16 to a significant constitutional problem, the
17 only proper outcome for this Court is to deny
18 mandatory intervention. Again, we are not
19 opposed to the idea --

20 JUSTICE BREYER: Second choice.

21 MS. BOYCE: -- that if they were to
22 ask for permissive intervention, that that would
23 be an acceptable choice. And, I think, for many
24 reasons, which I can list quickly, that would be
25 preferable to intervention as of right.

1 The first would be that it avoids
2 these complicated questions of state law, about
3 who gets to represent the state, whether, in
4 fact, North Carolina has deemed the attorney
5 general inadequate, which we vigorously disagree
6 with.

7 The second reason would be because
8 Rule 24(a)(1) already recognizes an automatic
9 right for parties who are granted a mandatory
10 intervention under federal law. It has no
11 parallel congruent provision for state law. And
12 one would think that if Congress or the advisory
13 committee had intended to grant states the
14 ability to automatically admit intervenors, that
15 they would have included it there.

16 And then, finally, when the rules were
17 revised in 1944 to add the provisions in the --
18 in 24(b), the permissive intervention section,
19 that allows certain state officials a thumb on
20 the scale for permissive intervention, the
21 committee specifically considered moving state
22 officials into 24(a)(2) and allowing them the
23 right the intervene automatically, and declined
24 to do so.

25 For all -- so for all of those

1 reasons, if the Court is concerned about
2 legislators' ability to protect their
3 legislative interest, this distinct narrow
4 legislative interest, the proper course would be
5 to grant them permissive intervention, not
6 mandatory intervention as of right.

7 I do quickly, in whatever time I have
8 left, want to push back aggressively against the
9 notion that North Carolina would be free to
10 simply abolish the attorney general. It may be
11 true that that would be permissible under
12 federal law. It would clearly not be
13 permissible under North Carolina state law.

14 The attorney general is a
15 constitutional officer with -- who is identified
16 as the chief legal officer of the state of North
17 Carolina. And, of course, statutory law
18 reinforces his obligations. But the state of
19 North -- North Carolina could not simply
20 delegate his responsibilities to someone else.

21 CHIEF JUSTICE ROBERTS: I'm sure your
22 bosses will be happy to hear that that's what --
23 that was your position.

24 MS. BOYCE: I believe I would have
25 been remiss if I did not mention that.

1 I do want to briefly touch on Cameron
2 as well, since that was one of the many
3 intervention cases that this Court has heard
4 this term, and note that Cameron is wholly
5 consistent with our position.

6 In Cameron, what the Court was
7 concerned about was whether a state might find
8 itself without a fair defense and with no one
9 there to defend its laws. We, of course,
10 acknowledge the significance of that interest to
11 the states.

12 But here we have an attorney general
13 who has committed to robustly defending this law
14 who has prevailed in overturning a preliminary
15 injunction on appeal. So there is no situation
16 where the state is going to be left without
17 someone to defend it.

18 Cameron says, of course, that a state
19 is free to designate its own agents, and we
20 accept that proposition, but that does not mean,
21 A, that a state can force federal courts to hear
22 from numerous actors, all of whom purport to
23 speak on behalf of the state, or that a state
24 can designate agents in a way that flouts its
25 state constitution.

1 And we think that both of those
2 counsel against mandatory intervention here.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer, anything further?

5 Justice Alito?

6 Justice Sotomayor?

7 Justice Kagan?

8 Justice Gorsuch?

9 Justice Barrett, no?

10 Thank you, counsel.

11 MS. BOYCE: Thank you.

12 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.
13 Thompson.

14 REBUTTAL ARGUMENT OF DAVID H. THOMPSON
15 ON BEHALF OF THE PETITIONERS

16 MR. THOMPSON: Yes, Mr. Chief Justice,
17 just a few quick points.

18 They claim they are not trying to pick
19 their opponent, but they are because they filed
20 in federal court, not in state court. If they
21 had filed in state court, we would be there as
22 defendants, Number 1.

23 Number 2, they invoked the prospect of
24 intramural fights but there are frequently
25 instances, it happens all the time in 1983

1 litigation, that a plaintiff will name a
2 variety, a multiplicity of state defendants, and
3 they haven't been able to point to a single
4 example of when the multiplicity of state
5 defendants in a 1983 suit somehow has created
6 problems in terms of administration of justice.

7 And that's because of the presumption
8 of good faith. And they acknowledge at page 55
9 of their brief, candidly and forthrightly, that
10 they have no doubt, that if we come into this
11 case, we will work cooperatively with them, as
12 we have done on many occasions before.

13 They invoke the role of the attorney
14 general. But Rule 24 talks about parties, not
15 lawyers. And the party here is the State Board
16 of Election, which has the responsibility for
17 administering the election.

18 They say that they've prevailed in the
19 Fourth Circuit. The March 2020 primary was held
20 without this law in effect. And the reason it
21 wasn't in effect is because they prioritized
22 their administrative responsibilities over the
23 merits and the Purcell violation.

24 And then, finally, there was a
25 discussion about, well, maybe this case will be

1 rendered moot by the state court. There's been
2 no -- the briefing hasn't been completed.
3 There's no argument. We don't know how the
4 North Carolina Supreme Court will rule.

5 And it could be capable of repetition
6 yet evading review, even if that proceeding
7 ultimately one day did moot things out.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

11 (Whereupon, at 12:37 p.m. the case was
12 submitted.)

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Official - Subject to Final Review

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