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,
and
KEN RAYMOND, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION BY STATE RESPONDENTS

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QUESTIONS PRESENTED

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

2. Whether a district court's determination of adequate representation in ruling on a motion to intervene as of right is reviewed de novo or for abuse of discretion.

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

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INTRODUCTION

Petitioners seek to intervene in this lawsuit to defend a state law alongside the existing state defendants, the members of the North Carolina State Board of Elections ("State Respondents"). Yet they concede that the State Respondents are already actively defending the challenged law. The court of appeals held that Petitioners could not intervene as of right because they share the same ultimate objective as the State Respondents, and because their interests were already being adequately represented by the State Respondents through the North Carolina Attorney General, who is charged by law with representing the State's interests in court. That factbound and unsurprising ruling—that the state Attorney General is adequately defending state law—does not justify this Court's review.

Petitioners claim otherwise by citing to two purported Circuit splits on the federal intervention standard. But the first split is illusory, and the second is not implicated here.

First, the courts of appeals *all* apply a presumption of adequate representation when, as here, an existing party and a proposed intervenor share the same ultimate objective. It is true that some circuits, including the Fourth Circuit, apply a *stronger* presumption when the existing defendant is a governmental entity. But any division of authority on that question is irrelevant here: Below, the court of appeals explicitly held that it would have reached the same outcome no matter the strength of the presumption. Indeed, absent some indication that such semantic differences could ever have a practical

impact on intervention decisions, it is unlikely that this issue would ever be worthy of this Court's review.

Second, Petitioners have forfeited any argument that the court of appeals erred when it reviewed a portion of the district court's intervention decision for abuse of discretion. After all, Petitioners themselves told the court of appeals to apply an abuse-of-discretion standard. And Petitioners have never before questioned that standard—despite asking the court of appeals to revisit two of its *other* precedents. Even aside from Petitioners' forfeiture, moreover, any difference in the two standards of review is immaterial in this case. All the courts of appeals would review de novo the legal question Petitioners raise here: whether to apply a presumption of adequate representation because the State Respondents and Petitioners share the same ultimate objective of defending state law.

Petitioners have therefore not identified any issues that have divided the courts of appeals—at least not any that are implicated in this case.

But even if they had done so, this case would be a remarkably poor vehicle to review those questions. This is true for at least three reasons.

First, the questions raised in the Petition may well become moot before this Court can answer them. The court of appeals has already held that the plaintiffs in this case cannot show a likelihood of success on the merits of their claims. State Respondents have therefore moved for summary judgment in the district court below. Even if that motion is denied, trial is scheduled to begin in just a few short months. In addition, a state trial court has permanently enjoined the challenged law under the state constitution.

Although the State Respondents and Petitioners have both appealed that decision, intervening developments in either of the parallel state or federal proceedings could easily render this appeal moot.

Second, the issues that Petitioners ask this Court to review rest on their interpretation of an embedded state-law question—namely, that state law authorizes Petitioners, in addition to the Attorney General, to represent the State's interests in litigation. But that interpretation not only misreads the statutes in question, it would also violate the North Carolina Constitution. This Court typically does not review these kinds of unresolved and contested issues of state law. And with good reason: any ruling in Petitioners' favor could be overruled by the North Carolina state courts the following day.

Third, the decision below lacks any real practical significance. This case marks only the second time a circuit court has ever been asked to allow state officials to intervene to defend a law that the state Attorney General was *already adequately defending*. This Court rarely chooses to review issues that occur so infrequently. Moreover, the decision below will not control even whether Petitioners themselves may intervene in future cases. Under the relevant state statutes, Petitioners could potentially intervene to represent the state legislature's interests, as opposed to the State's interest—an outcome that the State Respondents have never opposed and that the decision below does not address. And finally, as the principal dissent below observed, when future cases do arise, it is possible that the decision below will not even be binding precedent.

For these reasons, the petition should be denied.

STATEMENT OF THE CASE

A. Petitioners Move to Intervene to Defend S.B. 824 Alongside the Attorney General.

North Carolina Senate Bill 824 requires a photo ID to vote. Soon after S.B. 824 was enacted, the North Carolina State Conference of the NAACP ("NAACP Respondents") sued the State Respondents and the Governor of North Carolina, seeking to stop them from enforcing the law.[1] Pet. App. 5-6.

After the NAACP Respondents sued, the President Pro Tempore of the North Carolina Senate and the Speaker of the North Carolina House of Representatives ("Petitioners") moved to intervene. Petitioners sought to intervene on behalf of the state legislature, both by-right and permissively. To support their claim to intervention, Petitioners asserted that the existing defendants would not defend this lawsuit. Pet. App. 6-8, 171-72. The State Respondents and the Governor, represented by the Attorney General, took no position on whether Petitioners should be allowed to intervene, but disagreed with Petitioners' contention that they were "not capable of defending this lawsuit." Pet. App. 164.

The district court denied Petitioners' motion. Pet. App. 156-57. It first addressed intervention by right. Under Rule 24(a), a party must be allowed to intervene if it files a timely motion and shows that (1) it has an interest in the subject matter of the action, (2) the interest will be impaired by the action, and (3)

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[1] The district court later granted the Governor's motion to dismiss, holding that he was not a proper party to this lawsuit. No party has challenged that ruling on appeal.

the interest is not adequately represented by the existing parties. Fed. R. Civ. P. 24(a).

The district court first held that Petitioners lacked a cognizable interest in this case. In their motion, Petitioners argued that they had an interest based on their statutory authority to represent the interests of the North Carolina legislature. Pet. App. 7. The court, however, held that legislators have an interest in defending the validity of statutes only when executive officials fail to do so, and here, the Attorney General was defending S.B. 824. Pet. App. 9.

The court also held that Petitioners could not show that the Attorney General's defense was inadequate. The court observed that, under Fourth Circuit precedent, "[w]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented." Pet. App. 170 (quoting *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976)). That presumption applied here, the court held, because Petitioners and the existing defendants shared the same objective of defending S.B. 824. In addition, Petitioners could not overcome the presumption because they had failed to produce "sufficient evidence" that the Attorney General was defending the law inadequately. Pet. App. 172.

The court observed that, under state law, the Attorney General has a constitutional, statutory, and common-law duty to defend the State's interests in court. Pet. App. 173. For example, a state statute directs the Attorney General to "appear for the State . . . in any cause or matter . . . in which the State may be a party or interested." N.C. Gen. Stat. § 114-2(1);

see also Martin v. Thornburg, 359 S.E.2d 472, 479 (N.C. 1987).

The court also denied Petitioners' request for permissive intervention. The court made clear, however, that it would consider a renewed intervention motion if the State Respondents ceased defending S.B. 824.

Petitioners did not appeal the district court's denial of their motion to intervene. Pet. App. 10.

B. Petitioners Move to Intervene Again.

Six weeks after Petitioners first moved to intervene, they did so again. In their new motion, they argued for the first time that two state statutes let them represent not only the legislature's interests, but the interests of the State as a whole. Pet. App. 11, 188 n.3 (citing N.C. Gen. Stat. §§ 1-72.2, 120-32.6).

In response, the State Respondents again did not oppose Petitioners' request for intervention. Pet. App. 187. However, the State Respondents reaffirmed that they remained "ready to defend the constitutionality" of S.B. 824 and disagreed with Petitioners' contention that state law let them act for the entire State in court. Pet. App. 187; D. Ct. Doc. 65.

When the district court did not immediately rule on their second motion to intervene, Petitioners filed a petition for mandamus in the Fourth Circuit, asking it to compel the district court to grant intervention. They also filed a notice of appeal from what they characterized as the court's "de facto" denial of their intervention motion. The Fourth Circuit denied the mandamus petition and dismissed the appeal. Pet. App. 12.

Soon thereafter, the district court denied Petitioners' renewed motion to intervene. In its order, the court noted that state law was not clear on whether Petitioners could represent the interests of the entire State in litigation. Pet. App. 12-13. The court then held that intervention was unwarranted in any event because the existing defendants were adequately defending S.B. 824. The court emphasized that the Attorney General had just filed an "expansive" brief for the State Respondents opposing the motion for preliminary injunction. Pet. App. 14.

C. Petitioners Appeal.

Petitioners appealed. On appeal, the State Respondents again took no position on whether Petitioners should be allowed to intervene. But the State Respondents did note that the Attorney General was adequately defending S.B. 824. Pet. App. 15. They also stressed that Petitioners did not have statutory or constitutional authority under North Carolina law to act for the entire State. But because addressing these sensitive and contested state-law issues was not necessary to resolve the appeal, the State Respondents urged the court not to reach them. Ct. App. Doc. 41.

A divided panel of the Fourth Circuit reversed the district court's denial of Petitioners' motion to intervene. Pet. App. 87. The panel majority construed North Carolina law—specifically N.C. Gen. Stat. § 1-72.2 and § 120-32.6—to allow Petitioners to represent the entire State in defense of state laws. Pet. App. 96. Accordingly, the panel held that the district court had erred in holding that Petitioners lacked a sufficient interest to intervene in this case. Pet. App. 96-108.

The panel also held that the district court should not have imposed a "strong" presumption of adequate representation, given §§ 1-72.2 & 120-32.6. As a result, the panel remanded the case for the district court to reconsider Petitioners' motion to intervene. Pet. App. 111-18, 120.

Judge Harris dissented. Among other things, she observed that §§ 1-72.2 & 120-32.6 appeared to allow Petitioners to act only for the state legislature—not the State as a whole. Pet App. 145-46. But the dissent would not have reached that sensitive issue of state law. Instead, the dissent would have held that intervention was unwarranted because the State Respondents, represented by the Attorney General, were already adequately defending S.B. 824. Pet. App. 121-42, 147-49.

The State Respondents petitioned for rehearing en banc. In their petition, they explained that rehearing was needed because the panel had unnecessarily decided an important and contested issue of state law. Resolution of that issue was unnecessary, the State Respondents explained, because they were already adequately defending the challenged statute. Ct. App. Doc. 86.

The full Fourth Circuit agreed to rehear the case en banc. It affirmed the district court by a 9-6 vote.

The en banc court first addressed the scope of its jurisdiction. It explained that because Petitioners had not appealed the district court's denial of their first motion to intervene, that first order was not properly on appeal. The court therefore held that it lacked jurisdiction to consider the first order's conclusion that Petitioners could not intervene to vindicate the interests of the General Assembly. Pet. App. 16-23.

Thus, the court could consider only the argument that Petitioners had made in their second motion—namely, that they should be permitted to intervene on behalf of the State as a whole.

The court declined to reach that issue of state law, however. Instead, the court held that, even assuming that state law allowed Petitioners to act for the entire State, Petitioners could not intervene because the Attorney General was already adequately representing the State's interest in defending S.B. 824. Pet. App. 24. The court reached that conclusion in two steps.

First, the court rejected Petitioners' argument that they did not have to overcome a presumption of adequate representation. The court observed that, like virtually all other circuits, it had long presumed that an intervenor's interests will be adequately represented if it shares the same objective as an existing party. Here, Petitioners and the existing defendants not only shared the same objective, they also shared the same underlying interest: defending S.B. 824. And the State's interest in defending S.B. 824 was already being adequately represented by the State Respondents through the Attorney General, who is charged by state law with representing the State's interests in court. These circumstances, the court held, support a presumption of adequate representation. Pet. App. 30-40.

Second, the court held that no matter the strength of this presumption, the district court had not erred in finding that the State's interests were being adequately represented by the Attorney General. While Petitioners might be able to raise "garden-variety disagreements" with "the *way* in which the

Attorney General has chosen to defend S.B. 824," the district court rightly found that kind of tactical nitpicking "insufficient." Pet. App. 41-42 (emphasis added). Likewise, the district court had reasonably found that there was no evidence that the policy preferences of the Attorney General or Governor had affected the defense of S.B. 824. The court did note, however, that if the State Respondents were to someday abandon their defense of S.B. 824, then Petitioners would be free to seek intervention at that time. But, based on the current record, the court affirmed the district court's holding that the State's interest was being adequately represented. Pet. App. 40-49.

The principal dissent believed that much of the court's analysis was dicta. In the dissent's view, once the court concluded that it lacked jurisdiction over the issues in the district court's first order, Petitioners' renewed motion to intervene necessarily failed. Pet. App. 66 n.3. After all, the first order had held that Petitioners lacked an interest in this case sufficient to support intervention—a ruling which, standing alone, would defeat intervention. Thus, the dissent stated that the court's adequacy analysis would not bind future panels of the Fourth Circuit. Pet. App. 66 n.3.

D. A State Court Enjoins S.B. 824, While the State Respondents Successfully Defend the Law in Federal Court.

In the meantime, while Petitioners' motion to intervene was on appeal in the Fourth Circuit, proceedings continued in this case and in another challenge to S.B. 824 pending in state court.

First, in *Holmes v. Moore*, a group of plaintiffs have challenged S.B. 824 in state court as violating the

North Carolina Constitution. In that case, where the State Respondents and Petitioners are jointly defending S.B. 824, the plaintiffs moved for a preliminary injunction. Petitioners and the State Respondents both successfully opposed the motion. Pet. App. 12, 45. After the plaintiffs appealed, the State Respondents and Petitioners both asked that the trial court's decision be affirmed. The North Carolina Court of Appeals, however, reversed and ordered that a preliminary injunction be entered enjoining the State Respondents from enforcing S.B. 824. *Holmes v. Moore*, 840 S.E.2d 244, 266-67 (N.C. Ct. App. 2020).

The following year, the *Holmes* case proceeded to a trial on the merits. After the trial, the state court held that S.B. 824 violates the North Carolina Constitution and entered a permanent injunction barring its enforcement. D. Ct. Doc. 174-1. The State Respondents and Petitioners have both appealed that decision to the North Carolina Court of Appeals, where the appeal remains pending.

While these state court proceedings were ongoing, the federal proceedings regarding S.B. 824 have also continued, separate and apart from the deliberations involving intervention. The district court granted the NAACP Respondents' motion for a preliminary injunction, which the State Respondents had vigorously opposed. D. Ct. Doc. 120.

The State Respondents, through the Attorney General, appealed the preliminary injunction order to the Fourth Circuit. In that court, Petitioners successfully moved to intervene alongside the State Respondents in seeking to vacate the injunction. *N.C. State Conf. of the NAACP v. Raymond*, No. 20-1092

(4th Cir. Mar. 27, 2020) (order granting motion to intervene). A unanimous panel of the Fourth Circuit—the same panel that had divided on the question of intervention—reversed the district court and vacated the preliminary injunction. *See N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 310-11 (4th Cir. 2020). As the en banc Fourth Circuit later noted, this "reversal was based on the record the Attorney General created in the district court" and the victory "confirmed that the Attorney General's litigation approach was well within the range of acceptable strategy." Pet. App. 43-44. After the panel reversed the district court, the NAACP Respondents petitioned for rehearing en banc. The petition was denied after no judge called for a vote on the petition.

Back in the district court, the State Respondents have since moved for summary judgment. Petitioners have filed a brief in support of that motion. The motion currently remains pending. Trial is scheduled to begin on January 24, 2022. D. Ct. Doc. 173, 183.

REASONS FOR DENYING THE PETITION

I. The First Question Presented Does Not Warrant This Court's Review.

Petitioners first urge this Court to consider whether a "state agent authorized by state law to defend the State's interest in litigation must overcome a presumption of adequate representation to intervene as of right in a case in which a state official is a defendant." Pet. i. This question does not warrant this Court's review.

First, though Petitioners claim a circuit split on this question, the courts of appeals do not in fact have disparate approaches to resolving intervention

motions filed by "state-designated agents." Pet. 21-24. Rather, whether or not the proposed intervenor is a "state-designated agent," the courts uniformly focus on whether that intervenor shares an ultimate objective with an existing party. Because the courts of appeals have all coalesced around this same standard, the Court's intervention is not needed.

Second, the uniform rule that the courts of appeals apply makes sense, rendering this Court's review even less warranted.

A. There Is No Circuit Split on the Presumption of Adequate Representation.

1. All the courts of appeals apply the presumption.

The rules for deciding a motion to intervene as of right are the same in every circuit across the country: Under Rule 24(a), a party must be allowed to intervene if it files a timely motion and shows that (1) it has an interest in the subject matter of the action, (2) the interest will be impaired by the action, and (3) the interest is not adequately represented by the existing parties.[2] Fed. R. Civ. P. 24(a)(2).[3] Failure to

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[2] Some circuits use a four-part test and include timeliness of the intervention motion as one of the factors, whereas others use a three-part test and note the timeliness requirement separately. *Compare T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 39 (1st Cir. 2020) (four-part test), *with South Dakota ex rel. Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 785 (8th Cir. 2003) (three-part test).

[3] *See also T-Mobile Ne. LLC*, 969 F.3d at 39; *Floyd v. City of New York*, 770 F.3d 1051, 1057 (2d Cir. 2014); *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 220 (3d Cir. 2005); *N.C. State Conf. of NAACP v. Berger*, 999 F.3d 915, 927 (4th Cir. 2021) (en

satisfy any of these requirements forecloses mandatory intervention. *See id.*

The rules for assessing adequate representation are similarly uniform across all the courts of appeals. Applicants for intervention bear the burden of proving that their interests will be inadequately represented by the existing parties. *See, e.g.*, *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005); *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996). And, as relevant here, when proposed intervenors "share the same ultimate objective as a party to the suit," they "must overcome [a] presumption of adequate representation." *Michigan*, 424 F.3d at 443-44; *see also* 7C Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 1909 (3d ed. 2007) (explaining that when "the interest of the absentee is identical with that of one of the existing parties . . . representation will be presumed adequate unless special circumstances are shown"). This presumption applies in every single one of the courts of appeals.[4] And as shown below, it also

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banc); *Entergy Gulf States La., L.L.C. v. EPA*, 817 F.3d 198, 203 (5th Cir. 2016); *Grubbs v. Norris*, 870 F.2d 343, 344-45 (6th Cir. 1989); *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 773 (7th Cir. 2007); *Barnett*, 317 F.3d at 785; *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003); *United States v. Albert Inv. Co.*, 585 F.3d 1386, 1391, 1399 (10th Cir. 2009); *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989); *In re Brewer*, 863 F.3d 861, 872-73 (D.C. Cir. 2017); *Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fishermen's Ass'ns*, 695 F.3d 1310, 1315 (Fed. Cir. 2012).

[4] *T-Mobile Ne. LLC*, 969 F.3d at 39; *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179-80 (2d Cir. 2001); *In re: Cmty. Bank of N. Va.*, 418 F.3d 277, 315 (3d Cir. 2005); *Westinghouse*, 542 F.2d at 216; *Bush v. Viterna*, 740 F.2d 350 (5th Cir. 1984); *Michigan*, 424 F.3d at 443–44; *Planned Parenthood of Wisconsin,*

applies no matter who the existing parties to the litigation are.

Simply put, the circuit split that Petitioners ask this Court to resolve does not exist.

2. *Northeast Ohio* is not to the contrary.

Petitioners resist this reality and maintain that the Sixth Circuit has charted a different course when the proposed intervenor is a "state-designated agent." Pet. 22-23. Petitioners are mistaken. The Sixth Circuit has not broken from its sister circuits.

Like every other circuit, the Sixth imposes a "presumption of adequate representation" when a proposed intervenor "shares the same ultimate objective as a party to the suit." *Coal. to Def. Affirmative Action v. Regents of Univ. of Mich.*, 701 F.3d 466, 490-91 (6th Cir. 2012) (cleaned up), *reversed on other grounds by Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291 (2014); *see also, e.g.*, *Michigan*, 424 F.3d at 443-44; *Purnell v. City of Akron*, 925 F.2d 941, 949-50 (6th Cir. 1991); *Jansen v. City of Cincinnati*, 904 F.2d 336, 342-43 (6th Cir. 1990); *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987); *Reliastar Life Ins. Co. v. MKP Invs.*, 565 F. App'x 369, 373 (6th Cir. 2014).

Inc. v. Kaul, 942 F.3d 793 (7th Cir. 2019); *FTC v. Johnson*, 800 F.3d 448 (8th Cir. 2015); *Arakaki*, 324 F.3d at 1086; *Tri-State Generation & Transmission Ass'n v. N.M. Pub. Regulation Comm'n*, 787 F.3d 1068, 1072–73 (10th Cir. 2015); *Clark v. Putnam County*, 168 F.3d 458, 461 (11th Cir. 1999); *Env't Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979); *Wolfsen Land & Cattle Co.*, 695 F.3d at 1316.

Petitioners insist that the Sixth Circuit has carved out an exception to this rule for "state-designated agents." But that is simply not true.

In *Northeast Ohio*, the case on which Petitioners rely, the plaintiff organizations sued the Ohio Secretary of State challenging parts of Ohio's voter ID law. *Ne. Ohio Coal. for Homeless v. Blackwell*, 467 F.3d 999, 1002 (6th Cir. 2006). After the district court enjoined the law, the Secretary indicated that he did not intend to appeal. *Id.* at 1004. At that point, Ohio's Attorney General moved to intervene for the State, and the Sixth Circuit permitted him to do so. *Id.* at 1004, 1012. In so doing, the Sixth Circuit cited the "presumption of adequate representation" that applies when a proposed intervenor "share[s] the same ultimate objective as a party to the suit." *Id.* at 1008 (cleaned up). But, the court said, that presumption did not apply in the case at hand, because the proposed intervenor (the State, acting through the Attorney General) and the existing party (the Secretary) "d[id] not have the same ultimate objective" in the circumstances of that case. *Id.* (cleaned up).

As this synopsis makes clear, the Sixth Circuit did not announce a new rule in *Northeast Ohio*. Rather, the Sixth Circuit simply engaged in a factbound, case-specific application of the same uniform rule applied throughout the country: If the proposed intervenor and existing parties share the same ultimate objective, a presumption of adequate representation applies. Because the Court concluded that the parties did not share the same ultimate objective, it did not apply the presumption in that particular case. But the Sixth Circuit, like all the courts of appeals, has continued to routinely apply the presumption in later

cases where the parties do share the same ultimate objective. *See, e.g.*, *Reliastar*, 565 F. App'x at 373.

Applying that rule to the facts of this case makes clear that the decision below is perfectly consistent with *Northeast Ohio*. Here, as both the original Fourth Circuit panel and the en banc court concluded, the proposed intervenors (Petitioners) and the existing defendants (State Respondents) *do* share "the same ultimate objective." Pet. App. 112 ("[T]he Proposed Intervenors and the State Defendants appear to seek the same ultimate objective—the defense of S.B. 824"); Pet. App. 34 (highlighting the legislators' concession at oral argument that they, too, would be "seeking to uphold [the] legality" of S.B. 824, if permitted to intervene). Thus, Petitioners aim to defend the legality of the voter ID law, just as the State Respondents are already doing.

That point bears repeating: There is no dispute that the State Respondents, through the Attorney General, *are* defending North Carolina's voter ID law. Petitioners themselves have conceded as much. Pet. App. 27, 41 (noting that Petitioners have not "contest[ed]" whether the State Respondents "in fact continue to defend S.B. 824"). And rightly so. The State Respondents successfully overturned on appeal a preliminary injunction enjoining S.B. 824, have continued to defend the law in the district court by filing a summary judgment motion, and are preparing to defend the law at the January 2022 trial.

Because Petitioners and the State Respondents share an ultimate objective—defending S.B. 824—this case does not clash with *Northeast Ohio*. Petitioners are therefore wrong to suggest that this case would have come out differently in the Sixth Circuit.

The Fourth Circuit, to be sure, has joined the Seventh Circuit in placing a "strong" thumb on the scale against intervention in cases where a governmental defendant is already defending a statute. Pet. App. 35 (quoting *Stuart v. Huff*, 706 F.3d 345, 352 (4th Cir. 2013)). But any minor difference between this "strong" presumption and the standard presumption that all other courts of appeals apply is not worthy of this Court's attention—and Petitioners do not argue otherwise. After all, the Fourth Circuit itself made clear that its stronger presumption had no effect on the outcome in this case. Pet. App. 40 ("We note . . . that this heightened presumption is not critical to the resolution of this case. . . . [W]ith or without the overlay of a 'strong showing' requirement, the Leaders cannot overcome the standard . . . presumption that the State Board of Elections and Attorney General are adequately pursuing the shared objective of defending S.B. 824's validity."). Thus, whether the presumption is stronger when the would-be intervenor and the existing parties are both government entities is not implicated by this case. Without *Northeast Ohio*, then, Petitioners' alleged circuit split evaporates. Petitioners have not identified any court that has ever declined to impose a presumption of adequate representation where the proposed intervenors shared an ultimate objective with an existing party. This Court should decline Petitioners' invitation to be the first.

B. The Fourth Circuit's Decision Was Correct.

This Court's review is also not warranted because the Fourth Circuit's decision was correct. Specifically, the court correctly held that a presumption of

adequate representation applies in these circumstances.

Rule 24 provides that persons may not intervene by right when "existing parties adequately represent th[eir] interest" in the case's outcome. Fed. R. Civ. P. 24(a)(2). By focusing the adequacy analysis on the nature of the intervenor's interest, Rule 24 naturally creates a presumption of adequate representation when the intervenor and the existing parties share the same interest. For this reason, every circuit has held that Rule 24 creates this presumption, *see supra* note 4. This rule is perfectly consistent with this Court's guidance that an intervenor's burden to show inadequacy is "minimal" when interests *diverge*. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972).

Nor, like the court observed below, could it be any other way: Without the presumption, routine disagreement about litigation tactics among persons who share the same interest could result in intervention, potentially flooding the courts with intervenors. Pet. App. 33.

The presumption applies here, moreover, because Petitioners share the same interest as the State Respondents. Petitioners seek to intervene "to defend the State's interest in litigation." Pet. i. But state law directs the Attorney General "to appear for the State . . . in any cause or matter . . . in which the State may be a party or interested." N.C. Gen. Stat. § 114-2(1). And the Attorney General is fulfilling that responsibility here by directing the defense of S.B. 824 for the State. Thus, because the Attorney General is already defending "the State's interest" in this case, the presumption of adequacy applies. Pet. i.

Petitioners nonetheless argue that their interests diverge from the State Respondents, who are supposedly charged with "implementing . . . state law," not "defend[ing] its validity." Pet. 26. But the Attorney General—whose duties include defending state law in court—is directing the State Respondents' defense of S.B. 824. When the Attorney General defends the constitutionality of state law, the State's interest in defending its laws is vindicated. *See Martin*, 359 S.E.2d at 479; *cf. Hendon v. N.C. State Bd. of Elections*, 633 F. Supp. 454, 457-59 (W.D.N.C. 1986) (holding that a state agency could not order the Attorney General to abandon defense of a statute).

The petition also suggests, in passing, that if a state statute designates multiple agents for a State, then Rule 24's presumption of adequacy should disappear. Pet. 27. Below, the Fourth Circuit did not address that argument, because Petitioners did not raise it in the district court and expressly disavowed it on appeal. Pet. App. 30 n.3.

Petitioners had good reason for declining to make this argument below: It is contrary to the basic principle that federal law governs procedural matters in federal court. *See* Wright, Miller, & Kane, *supra*, § 1905 ("It is wholly clear that the right to intervene in a civil action pending in a United States District Court is governed by Rule 24 and not by state law."); Fed. R. Civ. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts."). State law, to be sure, can vest parties with interests that allow for intervention. But it cannot alter Rule 24's procedural rules that govern intervention, like the presumption of adequacy. *See* Wright, Miller, & Kane, *supra*, § 1905 ("State law is relevant in determining whether" an interest exists,

but "the mode, time, and manner" of asserting that interest "is a procedural matter to be determined by the federal rules rather than by state law").

In sum, the first question presented raises a splitless question on which the federal courts of appeals have coalesced around a sensible, uniform rule. It does not warrant this Court's review.

II. Petitioners' Second Question Presented Has Been Forfeited and Is Not Certworthy in Any Event.

The second circuit split that Petitioners identify is not properly before this Court. Petitioners contend that the Fourth Circuit erroneously reviewed the denial of their intervention motion for abuse of discretion. Pet. 28-30. This issue, however, was neither presented nor preserved below, and, hence, it has been forfeited. In any event, any division of authority is not implicated here: the Fourth Circuit applied de novo review to the pure legal question at the heart of this petition, and every other court of appeals would have done the same. Further review is therefore unwarranted.

This Court "normally decline[s] to entertain" questions that a party "failed to raise . . . in the courts below." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016); *see also City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam). That longstanding norm should bar review of the second question presented.

Petitioners have never before challenged the abuse-of-discretion standard of review during the lifespan of this case. In their opening brief to a panel of the Fourth Circuit, Petitioners stated, without

objection, that abuse of discretion was the relevant standard. Opening Brief at 23, *N.C. State Conf. of the NAACP v. Berger*, 970 F.3d 489 (4th Cir. 2020) (No. 19-2273) ("Denial of a motion to intervene as of right is reviewed for abuse of discretion."). That initial panel, to be sure, was bound by circuit precedent adopting the abuse-of-discretion standard. But parties routinely preserve arguments for subsequent review in their appellate briefing. *See, e.g.*, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (observing that petitioner had dedicated "a few pages of its appellate brief" to preserving an argument, even though contrary precedent rendered it "futile"). Petitioners declined to do so and, thus, forfeited any challenge to the standard of review. *See OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015) ("That argument was never presented to any lower court and is therefore forfeited."); *see also F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 175 (2004) ("The Court of Appeals . . . did not address this argument, and, for that reason, neither shall we." (citation omitted)); *see also Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

This rule applies with added force here, moreover, because the Fourth Circuit resolved the case en banc. Petitioners could have advocated a departure from prior circuit precedent to the en banc court—and in fact did so on a separate issue. *See* Supplemental En Banc Brief at 1-2, *N.C. State Conf. of the NAACP v. Berger*, 999 F.3d 915 (4th Cir. 2021) (No. 19-2273) (urging the en banc court to overrule two other circuit precedents). Yet Petitioners said nothing to signal their disagreement with the Fourth Circuit's longstanding abuse-of-discretion standard. It is no

surprise, then, that the en banc court—like the panel before it—did not reconsider the court's settled standard.

Even aside from Petitioners' forfeiture, the second question presented is not worthy of this Court's attention. Petitioners are correct that some courts of appeals say that they review the denial of a Rule 24(a) intervention motion for abuse of discretion, whereas others say that they apply de novo review. But these different labels mask the narrow scope of any actual disagreement. The courts of appeals apply the *same* standards of review to the many subsidiary questions of law and fact that are embedded in any intervention decision. After all, "the abuse-of-discretion standard is not a monolith: within it, abstract legal rulings are scrutinized de novo, factual findings are assayed for clear error, and the degree of deference afforded to issues of law application waxes or wanes depending on the particular circumstances." *T-Mobile Ne. LLC*, 969 F.3d at 38.

Take the decision below. The Fourth Circuit focused on one prong of the Rule 24(a) test: adequacy of representation. Within that prong, the court focused on a question of law: whether Petitioners needed to overcome a presumption of adequate representation. A purely legal question of this kind is reviewed de novo by *every* federal court of appeals—even those that apply an abuse-of-discretion standard of review overall. *See id.*; *see also, e.g.*, *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003) (noting that while denials of intervention are reviewed for an abuse of discretion, "pure issues of law . . . are reviewed de novo" and "findings of fact . . . for clear error"); *cf. U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge,*

LLC, 138 S. Ct. 960, 965 (2018) (explaining how embedded legal questions are reviewed de novo, "without the slightest deference," even when those questions are part of a broader legal analysis that may be subject to a less deferential standard of review).

And, indeed, that is precisely how the Fourth Circuit reviewed the district court's decision—without any deference to the district court's rulings on questions of law. Pet. App. 30-40 ("[I]t is true that no matter how deferential our review, application of an incorrect legal standard is an abuse of discretion that must be corrected on appeal."). Petitioners' preferred de novo standard was thus already the standard that the court below applied—and that all courts of appeals would apply—to decide Petitioners' first question presented.

Finally, review is not needed here, because abuse of discretion is the better approach for reviewing intervention decisions by trial courts. Again, this case shows why. After a district court resolves the legal question of the proposed intervenor's burden, the remaining analysis hinges on a case-specific and fact-intensive inquiry into whether the existing parties adequately represent the intervenor's interests. The district court is best positioned to answer that question, as it will have served as the primary audience for any representation that has already taken place. *See* Pet. App. 25 (emphasizing the district court's "superior vantage point for evaluating the parties' litigation conduct") (cleaned up); Pet. App. 52 (Wilkinson, J., dissenting) ("The district court is best situated to assess the 'adequacy' of an existing party's representation of a proposed intervenor's interest. The parties are right there in front of it." (citation omitted)). Moreover, because intervention is, at

bottom, a question of trial management, district courts should be afforded significant latitude in assessing how the addition of a party would affect the efficient presentation of the issues in of a particular case. *See Clinton v. Jones*, 520 U.S. 681, 706 (1997) (acknowledging the "broad discretion" that arises out of district courts' "power to control [their] own docket[s]"). De novo review undermines any such latitude.[5]

III. This Case Is a Poor Vehicle for Addressing the Questions Presented.

For multiple reasons, this case is a poor vehicle for addressing the questions presented. First, this appeal may soon become moot. Second, Petitioners ask this Court to enmesh itself in unresolved and contested issues of state law. Third, this case's highly unusual posture makes it unlikely that the issues here will have any effect on future cases.

A. This Case Could Become Moot Before the Court Could Decide It.

North Carolina's voter ID law is currently being challenged in both federal and state court. Either of these parallel proceedings could render this appeal moot before the Court is able to decide the questions

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[5] Petitioners also ask this Court to decide the ultimate issue of whether they are entitled to intervene in this case. Even if this Court were to reconsider the legal standards that apply under Rule 24(a)(2), this factbound question would not be worthy of this Court's review. Among other reasons, analyzing this question would require the Court to address the fact-specific issue of whether the Attorney General's robust defense of S.B. 824 has been adequate. Questions such as these would be more appropriately decided on remand to the courts below.

presented. This serious jurisdictional risk counsels strongly against a grant of certiorari.

First, in *Holmes v. Moore*, a group of plaintiffs has challenged S.B. 824 on state constitutional grounds. *See* D. Ct. Doc. 174-1. Petitioners and the State Respondents together have mounted a robust defense of the law, including at a fifteen-day bench trial before the state trial court. *Id.* at 2. On September 17, 2021, however, the court entered a final judgment holding that S.B. 824 violates the North Carolina Constitution. *Id.* at 101-02. The State Respondents and Petitioners have appealed that ruling. But there is a possibility that the trial court's decision could be affirmed by the state appellate courts in the coming months—leaving S.B. 824 subject to a permanent injunction under state law. If so, these federal proceedings will become moot.

The parallel state court proceedings are not the only threat to this Court's jurisdiction. The federal proceedings in which Petitioners seek to intervene may also be over before this Court could decide this appeal. The State Respondents have filed a motion for summary judgment—a motion that Petitioners have filed an amicus brief supporting—that is currently pending in the district court. D. Ct. Doc. 178, 183.

In addition, even if the district court does not grant summary judgment, a merits trial is scheduled to begin this coming January. After trial, it is possible that the district court will issue a final judgment in the State Respondents' favor. Such a ruling would also moot this appeal.

In sum, a reasonable possibility exists that this appeal will be rendered moot before this Court is able

to issue a decision. This possibility counsels strongly against this Court granting review.

B. Petitioners Ask This Court to Resolve Contested Issues of State Law.

This case is a poor vehicle for another reason: The questions in this case are inescapably intertwined with unresolved questions of North Carolina law.

Petitioners assert that their right to represent the State's interest under Rule 24 stems from their status as "state-designated" agents under state law. Pet. 21. In support, they cite state statutes that purportedly authorize Petitioners to act as "agents of the State" in cases challenging the validity or constitutionality of state statutes. Pet. 8. When one examines state law, however, it is far from clear that Petitioners—who serve as two of the 170 members of the North Carolina General Assembly—can represent the interests of the entire State in litigation.

To start, the cited statutes, on their face, authorize Petitioners to act on behalf of the General Assembly alone. Specifically, the statutes allow Petitioners to participate in litigation in their capacity as "the legislative branch of the State of North Carolina." N.C. Gen. Stat. § 1-72.2(a); *see id.* § 1-72.2(b) (providing that Petitioners may intervene "on behalf of the General Assembly"); *id.* § 120-32.6(c) (granting private counsel for Petitioners' authority over "representation [of] the General Assembly"). Thus, as noted in the panel dissent below, the statutes relied on by Petitioners appear to allow them to act only for the legislature, not the State as a whole. Pet. App. 145-46; *see also* Pet. App. 143 (explaining further, however, that the panel dissent would decline to reach this sensitive issue of state law).

Moreover, if the cited statutes were construed to authorize Petitioners to act for the entire State, and not just the legislative branch, they would violate the state constitution. The North Carolina Constitution includes an express separation-of-powers guarantee that the state supreme court has long read to prohibit legislators from influencing how statutes are administered once the legislative process is complete. *See* N.C. Const. art. I, § 6 . For that reason, it has held that the General Assembly cannot delegate authority to a committee of legislators to make decisions about how statutes are implemented after their enactment. *In re Separation of Powers*, 295 S.E.2d 589, 594 (N.C. 1982); *State ex rel. Wallace v. Bone*, 286 S.E.2d 79, 88-89 (N.C. 1982).

For example, in *Wallace v. Bone*, the North Carolina Supreme Court held that the legislature could not appoint individual legislators to serve on the state Environmental Management Commission—an agency created to promulgate rules and regulations for the protection of the State's air and water resources. 286 S.E.2d at 87-89. Because "the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws," the court explained that "the legislature cannot . . . retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality." *Id.* at 88.

Here, the State's interest in this lawsuit is necessarily executive in nature, as the underlying challenge seeks an injunction barring S.B. 824's *enforcement*. Moreover, it is the Attorney General, not the General Assembly, who is charged with the executive duty to represent the State and its agencies

in litigation. Thus, under the North Carolina Constitution, the General Assembly cannot assign the responsibility for representing the State in litigation (a purely executive act) to two of its members. *Id.* Indeed, the only state court to consider these state-law questions confirmed that Petitioners can "appear and be heard, or in some cases to request to do so, in certain lawsuits *on behalf of the legislative branch alone*." Ct. App. Doc. 107 at 10. To hold otherwise, the court held, "would violate the North Carolina Constitution's separation of powers clause." *Id.* at 11. When the state supreme court was asked to stay this decision, it declined to do so. *Id.* at 16-17.

Of course, Petitioners have not asked directly for this Court to decide these sensitive issues of state law. But resolving the questions presented in Petitioners' favor would necessarily require this Court to do so. Petitioners do not argue otherwise. There is no dispute that Petitioners' claim to intervention presupposes that two members of the General Assembly have the authority under North Carolina law to "defend [the] State's interests" in litigation. Pet. 26. And Petitioners agree that this is a question of state law: they argue that "a State's sovereign authority to designate agents to represent its interests in court" must be afforded "proper respect" by federal courts. Pet. 20, 24.

Thus, any decision of this Court in Petitioners' favor would not only be inconsistent with North Carolina separation-of-powers precedents, but could be overridden by the North Carolina state courts at any time. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 499-500 (1941) ("The last word" on the meaning of Texas law belongs "to the supreme court of Texas. In this situation a federal court of equity is

asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication."); *see also Montana v. Wyoming*, 563 U.S. 368, 377 (2011) (state courts, not federal courts, are "the final arbiter[s] of what is state law" (cleaned up)); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1887 n.21 (2021) (Alito, J., concurring) (Because this Court's "interpretation of state and local law is not binding on state courts," "[s]hould the Pennsylvania courts interpret [state law] differently, they would effectively abrogate the Court's decision in this case.").

In similar situations, this Court has recognized that it should decline to review cases that turn on unsettled issues of state law. *E.g.*, *McKesson v. Doe*, 141 S. Ct. 48, 48 (2020) (per curiam) (declining to address the question presented because it turned on an "unsettled" issue of Louisiana law); *cf. Pearson v. Callahan*, 555 U.S. 223, 238 (2009) ("A constitutional decision resting on an uncertain interpretation of state law is also of doubtful precedential importance."). Here, too, the fact that Petitioners' claim to intervention relies on unresolved and contested issues of state law counsels strongly against this Court's review.

C. The Questions Presented Are Unlikely to Have Any Impact on Future Cases.

Finally, this Court's review is unwarranted because the questions presented are likely to have limited, if any, practical significance. This is true for at least three reasons.

First, as the Fourth Circuit recognized below, this case involves an "unusual" question that appears to have arisen only once before: "whether a federal district court must allow not one but 'two state

entities . . . to speak on behalf of the State *at the same time*.'" Pet. App. 27 (quoting *Kaul*, 942 F.3d at 800); *see* Pet. App. 28 (noting that the Seventh Circuit in *Kaul* was "the first federal court of appeals to confront precisely this question"). This "highly unusual posture" is very different from the more common situation, where "the state's 'default' representative," "usually a state attorney general, is *not* defending state law." Pet. App. 26. Given how rarely one party seeks to intervene to defend laws for the State when another party is already doing so, the questions presented here are likely to have very little impact beyond this case.[6]

Second, because of this case's unusual procedural history, the decision below will not determine even whether *Petitioners themselves* are able to intervene in future cases. As discussed above, Petitioners originally sought to intervene on behalf of the General Assembly—and not the State. Pet. App. 6-7. And as also explained above, this theory of intervention is the only one that could be consistent with North Carolina law. *Supra* III.B. Indeed, the State Respondents have *never opposed* Petitioners' requests to intervene on this basis.

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[6] The fact that the State's "'default' representative—the Attorney General—has *not* 'dropped out of the case,'" Pet. App. 27 (quoting *Kaul*, 942 F.3d at 800), is only one way that this case differs markedly from *Cameron v. EMW Women's Surgical Center*, cert. granted, No. 20-601 (Mar. 29, 2021). In *Cameron*, the Kentucky Attorney General has asked this Court to reverse the Sixth Circuit's holding that he waited too long to intervene after the named state defendant stopped defending state law. *Id.*, Pet. i. In this case, all parties agree that Petitioners' motion to intervene was timely and that the State Respondents are actively defending the challenged law. *See supra* I.A.2.

But Petitioners do not seek this Court's guidance on whether they may intervene to represent the legislature's interests. Pet. 18 n.4 (stating that "whether [Petitioners] could intervene to defend the General Assembly's interest . . . is not relevant to this Petition because Petitioners raise only their right to intervene to defend the State's interest"). Nor could they: As the Fourth Circuit held, it lacked jurisdiction over that issue because Petitioners declined to appeal the district court's denial of their first intervention motion. Pet. App. 16-23.

In future cases, however, Petitioners would be free to renew their original theory of intervention—and to preserve that theory for appellate review. Because the decision below does not even control the outcome of future intervention motions by Petitioners, this case does not merit this Court's review.[7]

Third, again because of this case's unusual procedural posture there is a serious question whether the Fourth Circuit's rulings here *even constitute binding precedent*. This is so because, as the principal dissent pointed out below, much of the majority's analysis is arguably dicta. Pet. App. 66 n.3.

Recall again that the Fourth Circuit below concluded that it lacked appellate jurisdiction over the district court's denial of Petitioner's first intervention motion. In that first order, the district court held that Petitioners had failed to show that they had an

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[7] In addition, because Petitioners have disclaimed any interest in representing the General Assembly, this case offers no occasion to consider whether state legislatures have a greater interest supporting intervention in cases involving rules related to voting. *See* Pet. App. 54 (Wilkinson, J., dissenting) (citing U.S. Const. art. I, § 4).

interest that would be impaired absent intervention—i.e., that they had failed to satisfy the first two prongs of the Rule 24(a)(2) intervention test. Pet. App. 9. In the district court's second order, it arguably did not disturb these earlier rulings, and instead focused on whether Petitioners had shown that the State Respondents were defending S.B. 824 inadequately—that is, it arguably addressed only the *third* prong of the Rule 24(a)(2) test. Pet. App. 13.

Thus, in the principal dissent's view, because the court's "decision concerning jurisdiction effectively resolves the first two [Rule 24(a)(2)] requirements against [Petitioners]," the court's subsequent analysis of adequacy, "properly construed, is dicta and not binding in future cases." Pet. App. 66 n.3. As a result, Petitioners are seeking this Court's review to resolve questions that were possibly not even answered by a precedential ruling below. This possibility counsels strongly against this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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