NO. 21-248

In the Supreme Court of the United States

PHILIP E. BERGER, ET AL.,

Petitioners,

v.

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONS AND STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

This case is not a dispute over litigation tactics. Instead, this case implicates important questions of state sovereignty and a state's ability to designate agents to represent its interests in court. The ultimate question that this Court must decide is whether a federal court may disrespect a sovereign state's judgment that officials charged with administering state laws are not alone adequate representatives of the state's interest in defending those laws. The answer to that question is no. The federal courts should respect North Carolina's choice to "empower[] multiple officials to defend its sovereign interests." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, No. 20-601, slip op. at 8 (U.S. Mar. 3, 2022).

Respondents fail to grapple with the core of this dispute. Instead, their arguments largely assume or assert that Petitioners and the State Board have identical interests. But that is incorrect. The State Board is primarily concerned with administering election laws, whereas Petitioners seek to vindicate the State's interest in defending the constitutionality of its laws and having those laws in force promptly—reflecting just the sort of potential divergence of interests that this Court in *Trbovich* held sufficient to show inadequacy. Respondents also place undue weight on the North Carolina Attorney General's role as counsel for the State Board. Rule 24 focuses on the adequacy of existing *parties*, not their counsel, and that focus is entirely appropriate here where the Attorney General is ethically bound like any other lawyer to defer to the objectives of his clients. Finally, the parade of horribles Respondents claim will follow

from a ruling for Petitioners is wholly unfounded. Indeed, Petitioners have been required to be joined as defendants in constitutional challenges in state court since 2017, and the State Board has conceded that it regularly works in a cooperative fashion with Petitioners and would expect to do so here.

ARGUMENT

I. The State Is Not a Party and Petitioners Are Entitled to Intervene in Any Event.

Private Respondents argue (at 11–14) that Petitioners' intervention motion must be denied because the State is already an "existing party" to this action under Rule 24(a)(2). They are wrong for multiple reasons.

First, Private Respondents' argument is no longer viable after *Cameron*. While Private Respondents contend that it is a "category error" for a state's agents to seek intervention in a case in which other state officials are already named defendants, the Court allowed intervention under those precise circumstances in *Cameron*.

Second, Private Respondents pleaded this case to avoid sovereign immunity on the theory that "a suit challenging the constitutionality of a state official's action is *not* one against the State." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984) (emphasis added). Having come into court on that basis, Private Respondents cannot now argue that the State is an "existing party" after all.

Third, Private Respondents' argument is contrary to how the Federal Rules use the term

"party." The last clause of Rule 5.1(a)(1)(B) would be surplusage if a "state" were one of "the parties" to every action in which "its officers or employees" are sued "in an official capacity." And this Court has held that even though the federal government is "a real party in interest" in False Claims Act suits brought by relators, the government is not a "party" to such cases under Federal Rule of Appellate Procedure 4(a)(1) unless it intervenes. *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 931–35 (2009); *see also Cameron*, slip op. at 2–6 (Thomas, J., concurring). Private Respondents offer no explanation for how the State could be an "existing party" under Rule 24(a)(2) when it is not a "party" under those other rules.

Fourth, Private Respondents' argument fails because there is no third-party requirement for intervention under Rule 24(a); the rule says without limitation that "anyone" who satisfies its elements is entitled to intervene. In derivative actions, shareholders who disagree with the plaintiff about what is best for the corporation are sometimes entitled to intervene as of right. *See Robert F. Booth Tr. v. Crowley*, 687 F.3d 314, 318 (7th Cir. 2012) (Easterbrook, J.). That could not happen if the presence of a plaintiff already representing the corporation created an absolute bar to intervention by additional shareholders wishing to offer a different perspective on the corporation's behalf.

II. No Presumption of Adequate Representation Applies.

A. Petitioners and the State Board Have Different Interests.

Respondents devote large portions of their briefs to the legal standard that applies when a proposed intervenor's interests are identical to those of an existing party, but they say almost nothing to support their assertion that Petitioners and the State Board have the same interests. They do not. While the State Board has said that it has an administrative "primary objective" in S.B. 824 litigation of "obtaining clear guidance on what law, if any, will need to be enforced," J.A. 203, Petitioners are exclusively focused on defending the voter ID law on the merits so that it can go into effect as promptly as possible. *See* Opening Br. 24–25.

Private Respondents argue that if Petitioners represent one of the State's interests, then they must represent all of them. NAACP Br. 33. But that argument begs the question whether a state with multiple interests in a lawsuit may designate multiple agents to represent those interests. "Respect for state sovereignty" requires courts to honor a state's choice to structure its government "in a way that empowers multiple officials to defend its sovereign interests in federal court." *Cameron*, slip op. at 8. Where a state has two interests that tug in opposite directions, it is both permissible and entirely reasonable for the state to choose to speak through officials with different perspectives. *See* Opening Br. 23–25. Indeed, our legal system relies on the presence of clashing perspectives to "sharpen[] the presentation of issues" in court.

Baker v. Carr, 369 U.S. 186, 204 (1962). It is wholly consistent with this tradition for North Carolina to assign distinct agents to represent distinct perspectives rather than assign a single agent to balance them.

The State Board argues that it is "already representing" "the State's interests in defending state law," State Br. 1; *see id.* at 43, but that does not make the interests of Petitioners and the State Board identical. In *Trbovich v. United Mine Workers of America*, the Secretary served as Trbovich's lawyer "for purposes of enforcing [his] rights." 404 U.S. 528, 539 (1972). But the Secretary was also required to serve "the vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." *Id.* (cleaned up). Although the Secretary and Trbovich had interests that overlapped, the Court required only a "minimal" showing of inadequate representation because the Secretary was required to advance *additional* interests that Trbovich did not share. *Id.* at 538 n.10. Likewise here, the distinct administrative interests that concern the State Board make the State Board's interests different from those of Petitioners.

The Fourth Circuit reasoned that the State Board's administrative interests are "consistent, not in conflict, with its ultimate goal of defending the constitutionality of S.B. 824." Pet.App.35. But the State Board has acknowledged that it did not seek a stay of the District Court's preliminary injunction "due to the disruptive effect such relief would have had on the [March 2020] primary election." JA.366 n.8. As that example illustrates, Petitioners' interest

in prevailing on the merits so that the challenged law can promptly take effect and the State Board's interest in administration "may not always dictate precisely the same approach to the conduct of the litigation." *Trbovich*, 404 U.S. at 539. That is enough to establish that the State Board's representation of Petitioners' interest "'may be' inadequate." *Id.* at 538 n.10.[1]

Nor do Petitioners and the State Board have identical interests merely because they are both arguing for the same result on the merits. That was also true in *Trbovich*, where the intervenor was only allowed to press "the claims of illegality presented by the Secretary's complaint." 404 U.S. at 537. As Judge Sykes has observed, to trigger a presumption of adequate representation, "it's not enough that a defense-side intervenor 'shares the same goal' as the defendant in the brute sense that they both want the case dismissed." *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 748 (7th Cir. 2020).

The *only* basis upon which Respondents attempt to distinguish *Trbovich* is that Petitioners' interests are supposedly identical to the interests of the State Board. Indeed, the State Board concedes that no presumption of adequate representation applies

[1] Private Respondents observe that *Trbovich* cited "an older edition of *Moore*'s quoting the pre-1966 version" of Rule 24. NAACP Br. 31 n.10. But the Court thereby reaffirmed Rule 24's liberal adequacy standard. The Court was aware of the 1966 amendment to Rule 24 when it decided *Trbovich* in 1972, *see* 404 U.S. at 538 n.9, and Private Respondents themselves acknowledge that the 1966 change did not alter the adequacy standard, *see* NAACP Br. 3.

except when a proposed intervenor's interests "overlap[] fully" with the interests of an existing party. State Br. 26. Because Petitioners' interests are not identical to those of the State Board, *Trbovich* leaves no room for a presumption of adequate representation.[2]

B. Even if Petitioners and the State Board Had Identical Interests, That Would Not Justify Presuming That the State's Designated Agents Are Adequately Represented.

Even accepting Respondents' faulty premise that Petitioners and the State Board have identical interests, a presumption of adequate representation still should not apply. Respondents cite a welter of cases in which courts have looked with skepticism upon intervention motions filed by people whose interests were identical to those of an existing party. But apart from the lower court opinions that generated the circuit split identified in the Petition, none of the cases Respondents cite arose in the special context presented here: state officials seeking to

[2] So long as the Court hews to *Trbovich*, it need not decide who bears the burden regarding Rule 24(a)(2)'s adequacy prong; Petitioners easily satisfy whatever "minimal" burden the Rule could be understood to impose under that decision. *Trbovich*, 404 U.S. at 538 n.10. To the extent the Court departs from *Trbovich*, however, it should not do so by half-measures. The Rule's text clearly puts the burden on those opposing intervention to establish that "existing parties adequately represent [the intervenor's] interest." FED. R. CIV. P. 24(a)(2). The Wright and Miller treatise is not alone in making this observation. *See Caterino v. Barry*, 922 F.2d 37, 42 n.4 (1st Cir. 1990); *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967).

intervene pursuant to state law in a case in which other state officials with a different perspective are already parties. This context is important for at least two reasons.

First, representation that might be "adequate" under other circumstances can be inadequate where the enforceability of a state's duly enacted laws is concerned. Even Respondents' cherry-picked dictionary definitions recognize that whether something is "adequate" must be determined by reference to the "specific requirement[s]" of the situation, State Br. 21 (quoting WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 11 (1963)), and the situation here is a lawsuit that implicates North Carolina's "weighty interest . . . in protecting its own laws," *Cameron*, slip op. at 9. It is true that some dictionaries say that "adequate" can mean "barely sufficient." State Br. 21 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 25 (1961)). But in the context of Rule 24, "adequate" representation is best understood as representation "[f]ully satisfying what is required." *Adequate* (adj.), OXFORD ENGLISH DICTIONARY (3d ed. 2011). States must receive "a fair opportunity to defend their laws in federal court," and that "constitutional consideration" makes the adequacy inquiry in this case different from the cases Respondents cite. *Cameron*, slip op. at 8–9.

Second, states are unlike other litigants in that they are structured to protect liberty by dividing power among separately selected officials who do not answer to each other. As a result, a federal court's ruling on an intervention motion in this setting has consequences for not only how state law will be

defended but also who can settle the case and thus dispose of it. The state and federal litigation over North Carolina's voter ID law illustrates this reality. Petitioners are parties to the state court case, which other state officials cannot settle without Petitioners' consent. 2021 N.C. Sess. Laws 180, § 18.7(b). Yet because intervention was denied in this parallel federal case, control of the defense is entirely in the hands of state executive branch officials. The distribution of power within state government should not depend on whether a plaintiff sues in state or federal court, and whatever presumptions lower courts apply in other settings should have no bearing on how the Court assesses adequacy of representation in this unique context.

Moreover, Respondents exaggerate the extent to which courts disfavor intervention when a movant's interests are identical to those of an existing party. The passage from *Sam Fox* upon which Respondents rely is dicta; the "phase of the case" that the Court referenced in its footnote was not the basis for the appellants' motion to intervene. *See Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 685–86, 692 n.4 (1961). And as Respondents acknowledge, Rule 24 was later amended to abrogate *Sam Fox*'s core holding.[3]

[3] Private Respondents seek support for their position in case law concerning adequacy of representation in the class action context. NAACP Br. 21–23. But it is easier to demonstrate inadequate representation under Rule 24 than Rule 23. *See* 3 NEWBERG ON CLASS ACTIONS § 9:35 (5th ed. 2021). If the test for "adequate" representation were the same under both rules, an unnamed class member could never intervene as of right in a

Respondents also err in arguing that because bad faith, collusion, or nonfeasance is *sufficient* to demonstrate inadequate representation, it is *necessary* for Petitioners to prove one of those three specific things to prevail. *See Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 809 (7th Cir. 2019) (Sykes, J., concurring); 7C Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1909 (3d ed. 2021 update). Thus, even if Petitioners and the State Board could be said to have the same "interests" despite their differing perspectives, there is no precedent that compels applying a presumption of adequate representation.

C. That Petitioners Are Seeking to Intervene on the Side of Existing Governmental Parties Does Not Justify Applying a Presumption of Adequate Representation.

The Fourth Circuit placed a heavy thumb on the scale against intervention because Petitioners were seeking to join the same side as existing governmental defendants. Pet.App.35–37. Private Respondents say that "[e]very court of appeals" applies a presumption in such cases, NAACP Br. 25, but they are wrong, *see, e.g.*, *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015). Tellingly, Respondents offer no response to the opening brief's arguments against this presumption. Presuming that existing governmental parties adequately represent

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properly certified class action. Although that is what this Court held in *Sam Fox*, Rule 24 was later amended to overturn that "poor result[]." FED. R. CIV. P. 24, Advisory Committee Notes, 1966 Amendment.

proposed intervenors is at odds with the text of Rule 24, cannot be reconciled with this Court's decisions in *Trbovich* and *Cascade*, and is contrary to cases on adequacy favorably cited by the Advisory Committee—most notably *Atlantic Refining Co. v. Standard Oil Co.*, 304 F.2d 387, 391–92 (D.C. Cir. 1962). *See* Opening Br. 26–31.

Respondents cannot fill the gap by complaining that the way North Carolina law allocates litigation authority is "insulting" to the Attorney General and state executive branch officials, who have responsibility to pursue administrative interests. NAACP Br. 2. No less than the State Board, Petitioners are state officials authorized to participate in this case under North Carolina law. Thus, even if there were a basis for presuming adequate representation by governmental parties in other contexts (there is not), that would not justify applying the presumption *against* proposed governmental intervenors such as Petitioners.

Nor should the Court credit Private Respondents' hyperbolic claim that refusing to apply a presumption in this setting "would make trial management impossible." NAACP Br. 26. It is utterly routine for multiple state officials to be named as defendants in a federal lawsuit, and nothing requires state officials to speak with one voice through a single attorney in such cases. This Court often hears cases in which state officials disagree about where a State's interests lie, *see* Opening Br. 32, and officials from a single state can even sue each other in federal court, *Va. Office for Prot. & Advoc. v. Stewart*, 131 S. Ct. 1632 (2011). Indeed, had Governor Cooper not obtained dismissal

he could have hired outside counsel while the Attorney General continued to represent the State Board. *See Martin v. Thornburg*, 359 S.E.2d 472, 480 (N.C. 1987). District courts use standard case management techniques in cases involving multiple state parties all the time, and there is nothing uniquely unmanageable about a case involving state officials who become parties through intervention as of right.

D. Rule 24 Permits States to Speak Through More Than One Agent in Federal Court.

Private Respondents argue that federal law generally requires States to speak in federal court through a single agent. NAACP Br. 23–25. This argument cannot be reconciled with the Court's recent recognition of "the authority of a State to structure its executive branch in a way that empowers multiple officials to defend its sovereign interests in federal court." *Cameron*, slip op. at 8. Private Respondents' argument is also at odds with *Karcher v. May*, 484 U.S. 72 (1987), in which this Court "held that *two* New Jersey state legislators … could intervene in a suit against the State to defend the constitutionality of a New Jersey law." *Hollingsworth v. Perry*, 570 U.S. 693, 709 (2013) (emphasis added); *see also Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1952 (2019).

Moreover, Private Respondents' argument fails on its own terms. While 28 U.S.C. § 2403(b), Rule 5.1, and Rule 24(b)(2) all address situations in which a state may or must be permitted to appear in court through *at least* one agent, none of those provisions

purports to limit the number of agents who may represent a state's interests in federal court. "[D]eeper, constitutional considerations" strongly counsel against interpreting any provision of the Federal Rules to impose such a restriction. *See Cameron*, slip op. at 7. If anything, the provisions that Private Respondents cite only underscore the reasonableness of North Carolina's choice to designate separate agents to represent its separate legal and administrative interests in this case. While Rule 5.1 reflects the vital state interest in defending the constitutionality of state statutes, Rule 24(b)(2)(A) separately concerns permissive intervention in litigation that involves "a statute or executive order *administered* by [a state] officer" (emphasis added). Nothing in federal law compels a State to designate a single official to represent both of those potentially diverging interests in federal litigation.

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

Because the legal error of applying a presumption of adequate representation is an abuse of discretion, this Court need not decide whether abuse of discretion or de novo review applies. But if the Court does decide the issue, it should hold that de novo review applies.[4]

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[4] Petitioners have not forfeited the argument that adequacy should be reviewed de novo. *Contra* State Br. 30–31. Petitioners advanced that argument before the en banc Fourth Circuit. *See* Oral Argument at 2:12–3:28, *N.C. State Conf. of NAACP v. Berger*, 999 F.3d 915 (4th Cir. 2021) (No. 19-2273), https://bit.ly/3GWWfUB ("OA"). And even if Petitioners had not

Contrary to Respondents' arguments (at State Br. 31–32; NAACP Br. 36–37), *Georgia v. Ashcroft*, 539 U.S. 461 (2003), did not establish that abuse-of-discretion review applies. There, the district court issued two intervention orders. The second did not specify whether it was granting intervention as of right or permissive intervention. App. J.S. 214a, *Georgia v. Ashcroft*, No. 02-182. Since it was not clear whether the district court acted pursuant to Rule 24(a) or (b), for this Court to have determined that intervention was improper it would have had to have found an abuse of discretion. Consequently, *Georgia* cannot be interpreted to have held that abuse-of-discretion review applies to a district court's determination on adequacy of representation.

Tellingly, the circuits which apply de novo review have continued to do so after *Georgia*. *See* Pet. for a Writ of Cert. at 3 n.1 (collecting cases). Indeed, no court of appeals has suggested that *Georgia* held that abuse-of-discretion review applies to a district court's determination of adequacy of representation under Rule 24(a)(2).

Finally, the standard of review was not discussed or contested in the parties' briefs in *Georgia*. It therefore was not an issue in the case, and the Court's statements about it are entitled to minimal, if any, precedential weight. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004).

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done so there would be no forfeiture, since this would be simply "a new argument to support what has been [Petitioners'] consistent claim." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Respondents next quibble with this Court's other cases that Petitioners cited, contending that none "addresses the standard for reviewing a district court's determination of *adequacy*." State Br. 31–32; *see also* NAACP Br. 37. But this argument does nothing to undermine the fact that this Court's historical practice has been effectively to review the substantive intervention of right standards, including adequacy of representation, de novo without any deference to the analysis of the lower courts. *See* Opening Br. 39–40.

In *Trbovich*, for example, this Court showed no deference to any district court determinations. 404 U.S. at 538–39. And in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, this Court's statement that the existing parties fell "far short of representing" the proposed intervenor's interest also showed no deference to the district court. 386 U.S. 129, 136 (1967).

Although on the merits Respondents emphasize that the interests asserted are the most important factor determining adequacy of representation, the State Board frames the issue in assessing the standard of review as a "predominantly factual" inquiry. State Br. 32. But the proper inquiry for adequacy of representation is whether Petitioners have shown that "representation of [their] interest *may be* inadequate." *Trbovich*, 404 U.S. at 538 n.10 (emphasis added). It is not a backward-looking inquiry about whether representation *has been* inadequate to date. *Contra* NAACP Br. 41. The adequacy determination will typically turn on objective factors such as the statutory interests and

incentives created by a party's role and undisputed facts—factors that the appellate courts are well-equipped to weigh. Moreover, given the timeliness requirement, motions to intervene will frequently be filed and decided at the outset of litigation before the district court has extensive experience with the parties.

Respondents argue that "Petitioners' theory of inadequacy rests largely on 'multifarious,' 'case-specific' facts," *id.* at 40. Not so. Petitioners' arguments on adequacy center on the facts that North Carolina law deems Petitioners necessary parties and that the State Board has legally required administrative responsibilities that may impact its defense of the case. That these administrative responsibilities *have* influenced the State Board's defense illustrates why it may be an inadequate defender of North Carolina's interest in the validity of S.B. 824. *See Ne. Ohio Coal. for Homeless v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006).

United States v. Hooker Chemicals & Plastics Corp., 749 F.2d 968 (2d Cir. 1984), does not help Private Respondents. While *Hooker* sided with the circuits that apply the abuse of discretion standard, *id.* at 990–91, it also recognized that historically "the standard of review under Rule 24(a)(2) was *de novo* review for any error," *id.* at 990. And it admitted that abuse of discretion review "may tend in practice to blur somewhat the distinction between intervention as of right under Rule 24(a)(2) and permissive intervention under Rule 24(b)." *Id.* at 991. *Hooker* further cited Judge Friendly's article acknowledging that abuse-of-discretion review was consistent with

"sustaining a wide scope of appellate review in certain circumstances," Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 764 n.62 (1982)—circumstances certainly present when a state's defense of its laws is at stake.

IV. Petitioners Are Entitled to Intervene.

Of the four intervention factors, Respondents challenge only interest and adequacy and argue that they are not met or should be determined on remand. These arguments lack merit, and the Court should hold that Petitioners are entitled to intervene. Proper resolution of the issues is clear and there is no need to remand for additional proceedings and delay. *See Trbovich*, 404 U.S. at 538.

A. Petitioners Are Authorized to Assert North Carolina's Interest in the Validity of the State's Laws.

Respondents argue that state law only authorizes Petitioners to assert the General Assembly's institutional interests, but their arguments are refuted by the plain text of the relevant statutes. Those statutes establish that Petitioners are authorized to appear on behalf of the General Assembly *as agents of the State to assert the State's interests*. The key provision is N.C.G.S. § 120-32.6(b). That provision is entitled, "General Assembly Acting *on Behalf of the State of North Carolina* in Certain Actions" (emphasis added). It provides that when "the constitutionality of an act of the General Assembly" is at issue, Petitioners, "*as agents of the State* through the General Assembly, shall be necessary parties." *Id.* (emphasis added). It then specifies that "the General

Assembly shall be deemed to be the State of North Carolina to the extent provided in G.S. 1-72.2(a)," *id.*—*i.e.*, that the General Assembly "constitutes the legislative branch of the State of North Carolina," *id.* § 1-72.2(a); *see also* N.C.G.S. § 1-72.2(b). North Carolina law, like New Jersey law in *Karcher*, thus provides that the state legislature, through its leaders, has "authority under state law to represent the State's interests" in litigation. 484 U.S. at 82. Notably, the Wisconsin Supreme Court held that a similar, albeit less explicit, statute authorized the Wisconsin Legislature to assert the state's interest in defense of its laws in litigation. *Democratic Nat'l Comm. v. Bostelmann*, 949 N.W.2d 423, 428 (Wis. 2020).

The State Board argues that allowing Petitioners to assert the State's interest would violate the North Carolina Constitution's separation of powers clause. State Br. 50–55. North Carolina courts "will not declare a law invalid unless [the court] determine[s] that it is unconstitutional *beyond a reasonable doubt*." *Cooper v. Berger*, 809 S.E.2d 98, 111 (N.C. 2018) (emphasis added). The State Board does not make such a showing.

As an initial matter, the argument proves too much. If it were correct, then Petitioners could not assert the State's interest if allowed to intervene permissively or if the Attorney General affirmatively ceased defense of state law. The North Carolina Constitution does not hamstring defense of state law in that manner.

Nothing in the North Carolina Constitution makes assertion of the State's interest in litigation the

exclusive province of the executive branch generally or the Attorney General specifically. Indeed, the constitution simply states that the "duties [of the Attorney General] shall be prescribed by law." N.C. CONST. art. III, § 7(2). The Attorney General thus only has the statutory authority granted to him in the "discretion of the General Assembly." *Bailey v. State*, 540 S.E.2d 313, 320 (N.C. 2000). What is more, North Carolina law allows for private citizens "[to] bring a civil action for a violation of [North Carolina's False Claims Act] for the person and *for the State*," N.C.G.S. § 1-608(b) (emphasis added), demonstrating that assertion of the State's interest in litigation may extend beyond the executive branch.

The propriety of the legislature defending the State's interest in litigation is confirmed by case law. In *Cooper v. Berger*, for example, the Governor, alleging a statute enacted by the General Assembly was unconstitutional, filed a complaint against the "State," represented by the Attorney General, and Petitioners. In determining that the case did not present a nonjusticiable political question, the North Carolina Supreme Court held that there was no separation of powers issue with the Governor suing Petitioners. *Cooper*, 809 S.E.2d at 107. And Petitioners exclusively defended the State's interest in the validity of the challenged law. The Attorney General, by contrast, took no position on the merits but merely asked for entry of "such relief as may be just and proper." Answer of the State of North Carolina, *Cooper v. Berger*, No. 17CVS005084, 2017 WL 2901685 (N.C. Super. Ct. Wake Cnty. May 30, 2017). And *Cooper v. Berger* is hardly alone in

featuring Petitioners acting in their official capacities to defend state law. *See, e.g.*, *Harper v. Hall*, 2022-NCSC-17; *State ex rel. McCrory v. Berger*, 781 S.E.2d 248 (N.C. 2016).

The North Carolina cases that the State Board cites in support of its separation-of-powers argument are unavailing. First, advisory opinions are non-precedential and merely represent the individual views of the justices who signed them. *See State ex rel. Martin v. Preston*, 385 S.E.2d 473, 481 (N.C. 1989); *contra* State Br. 51–52. Second, the State Board's other cases standing for the proposition that North Carolina legislators cannot constitutionally control how laws are enforced after their enactment have no application here, where Petitioners are not seeking to *enforce* a law, but only to defend its constitutionality. *Contra, e.g.*, *State ex rel. Wallace v. Bone*, 286 S.E.2d 79, 88 (N.C. 1982). Third, the state trial court order in *North Carolina Alliance* that Respondents cite, NAACP Br. 46; State Br. 50, should not be given weight. It is the opinion of a single trial judge on a question of state law not at issue here (Petitioners' settlement authority), and it was an order approving entry of a consent judgment obtained, in the words of a federal district court, by "misrepresentations" and statements that were "patently not true." *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457, 2020 WL 6058048, at *9 (M.D.N.C. Oct. 14, 2020).

Accordingly, the Court should hold that state law authorizes Petitioners to assert the State's interest in litigation. *See, e.g.*, *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535–37 (2021) (plurality op.); *Fulton v.*

City of Philadelphia, 141 S. Ct. 1868, 1887 n.21 (2021) (Alito, J., concurring in the judgment).

B. The State Board Is Not an Adequate Representative of the State's Interest.

The State Board's representation is inadequate under any standard given North Carolina's law deeming Petitioners necessary parties and the State Board's interest in administering elections. Opening Br. 18–34, 47–52.

Despite Rule 24(a)(2)'s instruction to courts to analyze whether "existing parties" adequately represent the proposed intervenors' interest, *id.*, the State Board insists that the non-party Attorney General's "duty to defend the State" is relevant to the Rule 24(a)(2) analysis, State Br. 37. But the Attorney General is required to defer to his clients' objectives just like any other lawyer. *Contra* State Br. 38 (citing *Hendon v. N.C. State Bd. of Elections*, 633 F. Supp. 454, 457–59 (W.D.N.C. 1986)). Indeed, since *Hendon* was decided, North Carolina law has been amended to clarify that when the Attorney General represents state agencies he is required to "act in conformance with Rule 1.2 of the Rules of Professional Conduct of the North Carolina State Bar," N.C.G.S. § 114-2(2), and thus generally must "abide by [his] client's decisions concerning the objectives of representation," N.C. Rules of Professional Conduct 1.2(a).

Respondents further miss the mark in insisting that this case simply is about "differences of opinion about trial strategy." NAACP Br. 42; *see also* State Br. 42. Because of the conflicting incentives created by the State Board's administrative responsibilities

mandated by state law, Petitioners are entitled to intervene, wholly apart from whether the State Board is doing a bad job. It therefore is irrelevant whether the State Board's defense of S.B. 824 has "thus far proven successful." State Br. 39. And where Petitioners have pointed to the State Board's litigation tactics, they primarily have done so to illustrate examples where their "*primary* objective … to expediently obtain clear guidance on what law, if any, will need to be enforced" has come to the fore. JA.203 (emphasis added). In response to one of those examples, the State Board says that it did not seek an emergency stay of the district court's preliminary injunction "because a stay would have altered the State's voting rules *while voting was already underway* in the March 2020 primary." State Br. 41. But the district court issued its preliminary injunction on December 31, 2019, before absentee ballots started to be sent to voters on January 13, 2020.

Respondents unwittingly advance Petitioners' cause in describing how Petitioners and the State Board have split the defense of S.B. 824 in the parallel state-court challenge. Whereas the State Board "spoke to election administration," NAACP Br. 44—an "issue[] that [is] uniquely within the [Board's] expertise," State Br. 43—Petitioners spoke primarily to the merits of the racial discrimination claim and "plaintiffs' unfounded allegation that Petitioners passed S.B. 824 with discriminatory intent," *id.* That natural division of labor is precisely what is to be expected given the respective roles in government of Petitioners and the State Board.

Respondents contend that Petitioners did not argue below that state law can inform the adequacy inquiry. That is incorrect. This argument was both pressed and passed on below, either one of which puts it properly before this Court. *See Verizon Commc'ns v. FCC*, 535 U.S. 467, 530 (2002); Suppl. En Banc Br. of Prop. Intervenors-Appellants at 12, *N.C. State Conf. of NAACP v. Berger*, No. 19-2273 (4th Cir. Dec. 2, 2020), Doc. 114; OA at 16:24–20:35; Pet.App.29 n.3. And regardless it is an additional argument in support of Petitioners' consistent claim that they are entitled to intervene and therefore properly before the Court under *Lebron*.

To be clear, Petitioners are not arguing that state law can dictate intervention. Rather, Petitioners' argument is that when state law deems an existing party inadequate, and when that existing party and the party the state deems necessary have meaningfully different perspectives based on their different roles in state government, a federal court has no basis to second-guess the state's adequacy determination.

At any rate, under *Trbovich* the competing incentives alone, wholly apart from a statute like North Carolina's, establish inadequacy. Thus, while North Carolina law is critical for establishing Petitioners' authority to assert the State's interest in litigation, it is informative but not necessary to demonstrate that the State Board is not an adequate representative of the State's interest in defending its laws.

Governor Cooper's control of the executive branch is additional (albeit unnecessary) reason to

conclude the State Board's defense may be inadequate. The State Board disagrees that it is subject to Governor Cooper's control, citing N.C.G.S. § 143B-16. State Br. 44–46. But Section 143B-16 only applies to certain "named departments." N.C.G.S. § 143B-2. The State Board is not one of them.

Because removal protection is not explicitly provided, the Governor may remove those officials in his discretion. *Cf. James v. Hunt*, 258 S.E.2d 481, 488 (N.C. 1979); *see also* Pl.-Appellant Governor Roy A. Cooper, III's Appellant Br., *Cooper v. Berger*, No. 52PA17-2, 2017 WL 4465259, *69 (N.C. Aug. 3, 2017).

At any rate, if Governor Cooper did lack control of the State Board that too would strengthen the case for intervention, as without Petitioners in the case defense of S.B.824 would lie solely in the hands of unelected bureaucrats answerable to no one.

CONCLUSION

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

Respectfully submitted,

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