NO. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

3. Whether Petitioners are entitled to intervene as of right in this litigation.

PARTIES TO THE PROCEEDING

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

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

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

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *North Carolina State Conference of NAACP v. Berger*, 999 F.3d 915 (4th Cir.) (en banc opinion issued and judgment entered June 7, 2021).

- *North Carolina State Conference of NAACP v. Berger*, 970 F.3d 489 (4th Cir.) (opinion issued and judgment entered August 14, 2020).

- *North Carolina State Conference of NAACP v. Cooper*, No. 18-cv-1034 (M.D.N.C.) (memorandum opinion and order entered November 7, 2019).

The following proceedings are also directly related to this case under Rule 14.1(b)(iii) of this Court:

- *North Carolina State Conference of NAACP v. Raymond*, 981 F.3d 295 (4th Cir.) (opinion issued and judgment entered December 2, 2020).

- *North Carolina State Conference of NAACP v. Cooper*, 430 F. Supp. 3d 15 (M.D.N.C.) (memorandum opinion, order, and preliminary injunction entered December 31, 2019).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the en banc United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

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

JURISDICTION

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

STATUTORY PROVISIONS AND RULES INVOLVED

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

INTRODUCTION

It is "[t]hrough the structure of its government, and the character of those who exercise government authority," that "a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). An important exercise of State sovereign authority is the defense of state law from constitutional attack. The people of North Carolina, through their elected representatives, have determined that Petitioners—

the President Pro Tempore of the North Carolina Senate and Speaker of the North Carolina House of Representatives—as agents of the State, are necessary to the exercise of this sovereign authority. *See* Pet. App. 197–98 (N.C. GEN. STAT. § 1-72.2), 203–04 (N.C. GEN. STAT. § 120-32.6). Yet, in the decision below, the Fourth Circuit, in a sharply divided en banc decision, refused to heed the State's determination and instead affirmed a holding that the State's interest in the validity of its laws was adequately represented by executive branch officials who already were defendants in the case. Pet. App. 40.

The Fourth Circuit's holding on this issue implicates two circuit splits that are ripe for this Court's resolution. The first is whether a state-designated agent must overcome a presumption of adequate representation when seeking to intervene alongside another state official in defense of state law. In this case, the Fourth Circuit held that there is a strong presumption of adequate representation in such circumstances. Pet. App. 34–43. The Seventh Circuit applies an even stronger presumption, requiring state-designated agents to make a "showing of gross negligence or bad faith" to intervene alongside another government official. *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019). The Sixth Circuit, by contrast, applies no presumption but instead imposes a minimal burden on state-designated agents to establish that representation of their interests by an existing state-official party may be inadequate. *See Ne. Ohio Coal. for Homeless v. Blackwell*, 467 F.3d 999, 1007–08 (6th Cir. 2006)

(citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)).

The second circuit split implicated by the decision below is the proper standard of review to apply to a district court's decision on a motion to intervene as of right. Seven circuits review such decisions de novo (except for timeliness, which is reviewed for abuse of discretion).[1] Five circuits review such decisions for abuse of discretion.[2] This Court's guidance is necessary in this area because the standard of review often can be outcome determinative. Indeed, the en banc Fourth Circuit

[1] *See St. Bernard Parish v. Lafarge N. Am., Inc.*, 914 F.3d 969 (5th Cir. 2019); *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562 (5th Cir. 2016); *Sierra Club v. Glickman*, 82 F.3d 106 (5th Cir. 1996) (per curiam); *Blount-Hill v. Zelman*, 636 F.3d 278 (6th Cir. 2011); *Jordan v. Mich. Conf. of Teamsters Welfare Fund*, 207 F.3d 854 (6th Cir. 2000); *Kaul*, 942 F.3d 793; *N.D. ex rel. Stenehjem v. United States*, 787 F.3d 918 (8th Cir. 2015); *Sierra Club v. Robertson*, 960 F.2d 83 (8th Cir. 1992); *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603 (9th Cir. 2020); *Schultz v. United States*, 594 F.3d 1120 (9th Cir. 2010); *Barnes v. Sec. Life of Denver Ins. Co.*, 945 F.3d 1112 (10th Cir. 2019); *EEOC v. PJ Utah, LLC*, 822 F.3d 536 (10th Cir. 2016); *EEOC v. STME, LLC*, 938 F.3d 1305 (11th Cir. 2019); *Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship*, 874 F.3d 692 (11th Cir. 2017).

[2] *See T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33 (1st Cir. 2020); *In re Efron*, 746 F.3d 30 (1st Cir. 2014); *Floyd v. City of New York*, 770 F.3d 1051 (2d Cir. 2014) (per curiam); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984); *United States v. Territory of the V.I.*, 748 F.3d 514 (3d Cir. 2014); *In re Pet Food Prod. Liab. Litig.*, 629 F.3d 333 (3d Cir. 2010); Pet. App. 1; *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312 (D.C. Cir. 2015); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728 (D.C. Cir. 2003).

emphasized that, in reviewing the district court's decision on whether the North Carolina State Board of Elections adequately represented Petitioners' interests in this case, "[i]t is not for us to decide whether, in our best view, [Petitioners] have demonstrated that the State Board and Attorney General are inadequate representatives of the State's interest" because "[t]hat inquiry is firmly committed to the discretion of the district court." Pet. App. 40.

The effect of these circuit splits can be seen by comparing this case with the Sixth Circuit's decision in *Northeast Ohio Coalition*. Both involved a challenge to a state voter ID law. Pet. App. 4–5; *Ne. Ohio Coal.*, 467 F.3d at 1004. The named defendants in both were executive branch officials charged with administering elections, and in both those administrative responsibilities had influenced the defense of the lawsuit. *See* Pet. App. 34–35; *Ne. Ohio Coal.*, 467 F.3d at 1008. In both, another government official with authority to represent the State's interest as an agent of the State sought to intervene on behalf of the State's General Assembly to defend the State's interest in the validity of its laws, and in both the district court denied intervention. Pet. App. 6–7, 12–13; *Ne. Ohio Coal.*, 467 F.3d at 1002, 1004. The principal distinction between the cases is that here the defendant state election officials serve at the pleasure of a Governor who sought to ensure this Court would not review a Fourth Circuit decision invalidating the State's prior voter ID law and who vetoed the current voter ID law and believes it to be unconstitutional. No such history of executive-branch opposition was present in *Northeast Ohio Coalition*.

Yet here, the en banc Fourth Circuit applied a presumption of adequate representation and held that the district court did not abuse its discretion in denying intervention. Pet. App. 39–41. In *Northeast Ohio Coalition*, by contrast, the Sixth Circuit held that the district court erred in denying intervention after reviewing de novo and refusing to apply a presumption of adequate representation. *Ne. Ohio Coal.*, 467 F.3d at 1007 n.2, 1011–12.

The questions presented by this case implicate weighty considerations of State sovereignty and the ability of States to defend the constitutionality of their laws. *See* Pet. App. 51–54 (Wilkinson, J., dissenting); Pet. App. 55–57 (Niemeyer, J., dissenting). North Carolina has determined that when a state statute is challenged in court, Petitioners, as agents of the State on behalf of the General Assembly, are necessary parties for the State's defense. Pet. App. 203–04 (N.C. GEN. STAT. § 120-32.6). In the face of this sovereign determination, a strong presumption of adequate representation when an executive-branch official already is defending the case does not show the proper respect for North Carolina's determination of which agents are necessary to the defense of its laws.

A strong presumption of adequate representation also has negative practical consequences. Most important, of course, is the risk that a State may be deprived of the most effective defense of its laws in federal court. This risk is particularly pronounced in divided government states where the executive branch may not be enthusiastic about defending the legislature's handiwork. *See* Pet. App. 54 (Wilkinson, J., dissenting). The presumption

also creates a caustic environment that harms state government cohesion because to overcome it, a proposed state government intervenor must essentially cast aspersions on the competency or motives of existing state defendants, unless those defendants have expressly disclaimed defense of the challenged law—a system that creates harmful incentives for state officials to attack each other in court filings. These practical consequences are particularly pernicious in divided government states.

This Court should grant review to resolve the conflicts in the lower courts on these important issues.

STATEMENT

I. The Governor and Attorney General Fail to Defend North Carolina's Former Voter ID Law.

In 2013, the North Carolina General Assembly passed and the then-Governor signed into law an election bill that created a photo ID requirement and made several other changes to the State's voting system (including reducing the early voting period and eliminating out-of-precinct voting, same-day registration and voting, and pre-registration by sixteen-year-olds). *See* 2013 N.C. Sess. Laws 381. In 2016, a partially divided panel of the Fourth Circuit held that the challenged provisions of the law, including the voter ID provisions, were invalid because, in the court's view, they were enacted with racially discriminatory intent. *See N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016). The State moved this Court to stay the Fourth Circuit's mandate pending a petition for a writ of certiorari,

and four of the eight Justices then on the Court indicated that they would have granted the motion. *North Carolina v. N.C. State Conf. of NAACP*, 137 S. Ct. 27 (2016).

After taking office, Governor Cooper moved to dismiss the State's petition over the objection of Petitioners, which resulted in a "blizzard of filings," *North Carolina v. N.C. State Conf. of NAACP*, 137 S. Ct. 1399, 1400 (2017) (Roberts, C.J., statement respecting the denial of certiorari), that raised questions about this Court's ability to grant certiorari. Attorney General Josh Stein, who filed the motion on behalf of the Governor, issued a press release suggesting that North Carolina's law unduly burdened the right to vote. *See* Doc. 8-5.[3] When this Court denied certiorari, the Chief Justice emphasized that "it is important to recall our frequent admonition that the denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *N.C. State Conf. of NAACP*, 137 S. Ct. at 1400 (Roberts, C.J., statement respecting the denial of certiorari) (cleaned up). Governor Cooper then issued a press release celebrating the denial of certiorari that he had orchestrated. Doc. 8-13.

[3] Unless otherwise specified, references to "Doc." refer to the docket entries in the District Court for this case: *N.C. State Conf. of NAACP v. Cooper*, No. 18-cv-1034 (M.D.N.C.).

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

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

This amendment built upon existing North Carolina law, which provided (and continues to provide) that "[t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State . . . shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute." Pet. App. 198 (N.C. GEN. STAT. § 1-72.2(b)).

III. Pursuant to a Constitutional Mandate, the North Carolina General Assembly Enacts A Non-Strict Voter ID Law.

In November 2018, the people of North Carolina amended the State's constitution to provide that "[v]oters offering to vote in person shall present photographic identification before voting. The General Assembly shall enact general laws governing

the requirements of such photographic identification, which may include exceptions." N.C. CONST. art. VI, § 2(4); *see also id.* art. VI, § 3(2) (same).

Pursuant to that mandate, the General Assembly passed S.B. 824 with bipartisan support. 2018 N.C. Sess. Laws 144. One of the three primary sponsors of the bill was Joel Ford, an African American Democrat, and several other Democrats also voted for the bill in its final form. S.B. 824 concerns only voter ID, and it is classified as "non-strict" because it contains a process allowing voters who do not present ID at the polls to cast a provisional ballot that will count without requiring them to present ID or take additional action after casting their ballot. *See* Wendy Underhill, *Voter Identification Requirements*, NAT'L CONF. OF STATE LEGISLATURES (archived Aug. 25, 2020), https://bit.ly/3s1mAem. The law therefore ensures that "[a]ll registered voters will be allowed to vote with or without a photo ID card." 2018 N.C. Sess. Laws 144 § 1.5(a)(10).

Two of S.B. 824's provisions are particularly aimed at ensuring that all lawfully registered voters will be able to cast a ballot. First, the law makes available free, no-documentation-required photo ID at county election offices in all of the State's 100 counties. *Id.* § 1.1(a). These free IDs are available at all times except between the end of early voting and election day, and they can be obtained and used to vote in a single trip during the State's multiple-week early voting period. Second, the law provides that voters who appear at the polls without ID may complete a reasonable impediment form to indicate the reason why they could not present ID and vote a

provisional ballot. *Id.* § 1.2(a). The ballot will count unless a bipartisan county elections board determines that the form is false; election officials are given no authority to second-guess the reasonableness of the claimed obstacle to presenting ID.

In these respects, North Carolina's law compares favorably with other voter ID laws that have been upheld by the courts. Indeed, many voter ID laws have withstood constitutional attack despite missing one or both of these features. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008); *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299 (11th Cir. 2021); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016); *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014); *Common Cause/Ga. v. Billups*, 554 F.3d 1340 (11th Cir. 2009). And South Carolina's voter ID law, which does have both of these features, satisfied the stringent preclearance requirements of Section 5 of the Voting Rights Act, because "the sweeping reasonable impediment provision . . . eliminates any disproportionate effect or material burden that South Carolina's voter ID law otherwise might have caused." *South Carolina v. United States*, 898 F. Supp. 2d 30, 40 (D.D.C. 2012).

The General Assembly presented S.B. 824 to Governor Cooper on December 6, 2018. *See* Senate Bill 824 / SL 2018-144, N.C. Gen. Assembly (2017–2018 Sess.), https://bit.ly/3rGreOH. Governor Cooper vetoed the bill on December 14. In his veto statement, he alleged that the bill has "sinister and cynical origins" and was "designed to suppress the rights of minority, poor and elderly voters." Doc. 8-1. The

General Assembly overrode the veto, thus enacting S.B. 824. *See* 2018 N.C. Sess. Laws 144.

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

On December 20, 2018—the day after S.B. 824 became law—Plaintiffs filed this suit in district court against Governor Cooper and the members of the North Carolina State Board of Elections. Plaintiffs' suit alleges that S.B. 824 disproportionately impacts African American and Latino voters in violation of Section 2 of the Voting Rights Act, intentionally discriminates against African American and Latino voters, in violation of Section 2 and the Fourteenth and Fifteenth Amendments of the United States Constitution, and unduly burdens the right to vote, in violation of the Fourteenth Amendment. *See* Doc. 1 ¶¶ 105–146. The district court's jurisdiction over this suit is established by 28 U.S.C. § 1331.

On January 14, 2019, Petitioners filed their first motion to intervene. Doc. 7. In this initial motion, Petitioners invoked the interest of "state legislatures . . . in seeing that their enactments are not 'nullified.' " Doc. 8 at 7 (quoting *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015)).

On June 3, the district court denied Petitioners' motion to intervene without prejudice. Pet. App. 155. The court held that legislators have an interest in defending the constitutionality of a state law only "when the executive declines to do so" and found that Defendants had not yet "expressed an intention to so

decline." Pet. App. 163–64. In addition, the court applied a "presumption" that Petitioners' interests would be adequately represented by Defendants. Pet. App. 170–72. The court concluded that Petitioners had not rebutted the presumption, and it denied intervention under Rule 24(a)(2). But the district court held "should it become apparent during the litigation that State Defendants no longer intend to defend this lawsuit, the Court will entertain a renewed Motion to Intervene by [Petitioners]." Pet. App. 182.

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

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

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

In response to the *Holmes* plaintiffs' preliminary injunction motion, the State Board did not contest the *Holmes* plaintiffs' likelihood of success on their

intentional racial discrimination claim. Instead, the State Board indicated that it had "*a primary objective . . . to expediently obtain clear guidance on what law, if any, will need to be enforced*." Doc. 61-14 at 14 (emphasis added). "With that in mind," the State Board explained, "if the Court is inclined to issue an injunction at this stage, the State Board requests that it be granted some flexibility in making technical preparations that will allow it to implement the law in the event the injunction were later vacated." *Id.* The State Board's response and subsequent supplemental brief therefore were focused not on the merits but rather on advising the court on how the court could craft injunctive relief in a manner that would permit the State Board "some flexibility to account for the possibility of enforcing the law in the future." *Id.* at 13; *see also* Doc. 61-15. In support of this response, the State Board offered a sole affiant: Karen Brinson Bell, the executive director of the State Board of Elections, who spoke to the implementation of S.B. 824 that had begun and potential issues going forward. *See* Doc. 61-16; *see also* Doc. 61-8 at 4–5.

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

On July 19, 2019, the state trial court declined to enjoin S.B. 824 because the *Holmes* plaintiffs had "failed to demonstrate a likelihood of success on the merits of their" intentional-discrimination claim—an

issue the State Board had not addressed. Doc. 67-3 at 6.

B. Meanwhile, in federal court, the State Board's administrative concerns also came to the fore. The named defendants filed motions to dismiss, but those motions did not engage with the merits of Plaintiffs' claims. Governor Cooper argued that his connection with the enforcement of S.B. 824 was not sufficient to include him as a party under *Ex parte Young*. Doc. 45 at 6–17. The State Board moved to dismiss or, in the alternative, to stay on abstention grounds, citing the parallel state court litigation. Doc. 43 at 13. The State Board argued that the litigation was "occur[ring] at a critical time when the State Board and its personnel are currently overseeing two special congressional elections and municipal elections this year, and are otherwise preparing for the 2020 general elections for which candidate filing begins this December." Doc. 52 at 11.

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

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

On July 19, 2019, Petitioners filed a renewed motion to intervene. Petitioners highlighted the State Board's confirmation in the *Holmes* litigation that it had a primary objective simply of obtaining guidance from the courts on what law it would need to apply. Doc. 61 at 18. And relying on this Court's decision in

Virginia House of Delegates v. Bethune-Hill, 139 S. Ct. 1945 (2019), Petitioners made clear that they were seeking to intervene to defend not only the General Assembly's interest but also "the interest of *the State* in defending the constitutionality of S.B. 824." Doc. 61 at 12.

On September 17, 2019, while the renewed motion to intervene was pending, Plaintiffs filed a motion for a preliminary injunction. *See* Doc. 72. While, unlike in *Holmes*, the State Board did engage with the merits in briefing, it continued to emphasize administrative concerns, arguing that the equities weighed against an injunction because it was "approaching a critical time for a photo ID requirement to be smoothly administered in advance of the 2020 elections cycle." Doc. 97 at 42.

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

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

On December 31, 2019, the district court granted Plaintiffs' preliminary injunction motion. *N.C. State Conf. of NAACP v. Cooper*, 430 F. Supp. 3d 15 (M.D.N.C. 2019). That date was the "very latest" the State Board had indicated it could learn of an injunction and give it effect for the March 2020 primary. Doc. 97-9 at 13–14. The State Board appealed the preliminary injunction but did not seek a stay pending appeal, thereby acquiescing in the injunction of the voter ID law for the March 2020 primary. As the State Board later informed the Fourth Circuit, it did not seek a stay "due to the disruptive effect such relief would have had on the primary election." Br. of Def.-Appellants at 16 n.8, *N.C. State Conf. of NAACP v. Raymond*, No. 20-1092 (4th Cir. March 9, 2020), Doc. 34. Indeed, the State Board opposed Petitioners' unsuccessful stay motion, largely based on concerns with administering the primary. *See* Doc. 127 at 3–7.

Petitioners sought and were granted leave to intervene in the preliminary injunction appeal. Order, *N.C. State Conf. of NAACP v. Raymond*, No. 20-1092 (4th Cir. March 27, 2020), Doc. 43. Governor Cooper filed an amicus brief in the Fourth Circuit supporting Plaintiffs and arguing that the preliminary injunction "should be made permanent, and that this unconstitutional law should never go into effect." Br. of Gov. Roy Cooper as Amicus Curiae Supporting Pls.-Appellees and Affirmance, 2020 WL 4201325, at *3,

N.C. State Conf. of NAACP v. Raymond, No. 20-1092 (4th Cir. July 20, 2020).

On December 2, 2020, the Fourth Circuit reversed the district court's decision. North Carolina's voter ID law "is more protective of the right to vote than other states' voter-ID laws that courts have approved," the court reasoned, and it is "hard to say that [the law] does not sufficiently go out of its way to make its impact as burden-free as possible." *N.C. State Conf. of NAACP v. Raymond*, 981 F.3d 295, 310 (4th Cir. 2020) (quotation marks omitted). The case is currently back in district court and scheduled to go to trial in 2022. Doc. 158.

In the *Holmes* litigation, a panel of the North Carolina Court of Appeals reversed the state trial court's denial of a preliminary injunction on February 18, 2020. *See Holmes v. Moore*, 840 S.E.2d 244 (N.C. Ct. App. 2020). The General Assembly subsequently passed a bill, which Governor Cooper signed into law, adding public assistance IDs to the list of qualifying voter ID, 2020 N.C. Sess. Laws 17—the lack of which was a key foundation of the Court of Appeals' decision. *See, e.g.*, *Holmes*, 840 S.E.2d at 262. Petitioners accordingly asked the trial court to lift the injunction. The State Board opposed, arguing that "the complexities of implementing the photo ID requirement at this time counsel against issuing this relief." Opp'n to Mot. to Dissolve Inj. at 1, *Holmes*, No. 18 CVS 15292 (N.C. Super. Ct. Wake Cnty. July 24, 2020). The court ultimately denied the motion, and the parties are awaiting a decision on the merits after participating in a multiple-week trial in April 2021.

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

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

On June 7, 2021, a divided en banc court affirmed by a vote of 9–6. Judge Harris authored the majority opinion, which first confirmed that the court had jurisdiction to consider whether Petitioners had a right to intervene to defend the State's interest in S.B. 824. Pet. App. 19–23.[4] On the merits, the majority held that the heightened presumption of adequacy set forth in *Stuart v. Huff*, 706 F.3d 345 (4th Cir. 2013), "applies when governmental as well as private entities seek to intervene on the side of governmental defendants." Pet. App. 40. Reviewing the district court's determination for abuse of discretion, the majority concluded that the district court did not abuse its discretion in finding "that the Attorney General, consistent with his statutory duties,

[4] The majority also concluded that the court lacked jurisdiction to consider whether Petitioners could intervene to defend the General Assembly's institutional interest in S.B. 824, since Petitioners had raised that issue in their initial motion to intervene. *See* Pet. App. 21–22. While Petitioners believe the Fourth Circuit did have jurisdiction to address whether they could intervene to defend the General Assembly's interest, that issue is not relevant to this Petition because Petitioners raise only their right to intervene to defend the State's interest.

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

Judge Quattlebaum authored the principal dissent, joined by Judges Niemeyer, Agee, Richardson, and Rushing. In his view, the district court erred by "ignor[ing] North Carolina's law requesting two agents in cases challenging the constitutionality of its duly-enacted statutes," and it then "compounded the error by setting the bar for the Intervenors to clear too high." Pet. App. 64 (Quattlebaum, J., dissenting). Judge Quattlebaum also faulted the majority for failing to apply "the minimal burden set forth by the Supreme Court in *Trbovich*." Pet. App. 80.

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

Judge Wilkinson, the author of *Stuart v. Huff*, dissented as well. Unlike in *Stuart*, Judge Wilkinson explained, "the prospective intervenor is not a private party . . . but a coordinate branch of state government." Pet. App. 53 (Wilkinson, J., dissenting). What is more, "State law envisions a role for the General Assembly when a state statute is under challenge," Pet. App. 53, and that role is particularly

apt in election-law cases since the U.S. Constitution delegates to state legislatures the power to "prescribe[ ]" the "Times, Places and Manner of holding Elections," Pet. App. 54 (quoting U.S. CONST. art. I, § 4, cl. 1). Finally, "in 'divided government' states like North Carolina, the danger that the executive or judicial branches may seek to override the constitutionally prescribed legislative role is more than theoretical." Pet. App. 54. Based on this "confluence of factors," Judge Wilkinson "would recognize a right to intervention in these narrowest of circumstances." Pet. App. 54.

REASONS FOR GRANTING THE PETITION

This Court's review is needed to resolve two splits of authority in the lower courts. Federal courts of appeals have reached inconsistent holdings on whether a presumption exists that a state government official that is a party to a case adequately represents the interests of a state-designated agent who is attempting to intervene under Rule 24(a)(2). Similarly, the courts of appeals are deeply divided over the proper standard of review to apply to decisions of district courts on motions to intervene as of right.

This Court should grant review to resolve the important issues presented by this case and to resolve the conflict in authority that they have engendered. These questions strike at the heart of a State's sovereign authority to designate agents to represent its interests in court. And as this case demonstrates, they are of particular importance in the context of divided government and litigation involving controversial matters.

I. This Court Should Grant Review to Determine Whether a State-Designated Agent Must Overcome a Presumption of Adequate Representation When Seeking to Intervene Alongside Another State Official.

A. The Circuits Are Split Over Whether a Presumption of Adequate Representation Applies.

Rule 24(a)(2) guarantees a right to intervene to parties who timely seek to protect an interest that may be impaired by the action, "unless existing parties adequately represent that interest."

This Court last provided guidance on the standards that should govern intervention as of right under Rule 24(a)(2) in *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972). In *Trbovich*, the U.S. Secretary of Labor filed an action under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") to set aside an election of union officers. The LMRDA gave the Secretary exclusive authority to challenge union elections in court and "prohibit[ed] union members from initiating a private suit to set aside an election." *Id.* at 531. Despite this vesting of exclusive authority in the Secretary, this Court did not apply any presumption against the union member who sought to intervene. To the contrary, this Court held that Rule 24(a)(2)'s requirement that a proposed intervenor's interest not be adequately represented by an existing party "is satisfied if the applicant shows that representation of his interest may be inadequate; and the burden of making that showing should be treated as minimal."

Id. at 538 n.10 (cleaned up). And applying that standard, this Court held that "there [was] sufficient doubt about the adequacy of representation to warrant intervention" because the Secretary served two functions—serving as the union member's "lawyer" and advancing the broader public interest in "free and democratic union elections"—that "may not always dictate precisely the same approach to the conduct of the litigation." *Id.* at 538–39.

In the wake of *Trbovich*, the courts of appeals have split over whether a state-designated agent must overcome a presumption of adequate representation when seeking to intervene alongside another state official in defense of state law. The Sixth Circuit has rejected any such presumption. In *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999 (6th Cir. 2006), plaintiff organizations sued the Ohio Secretary of State seeking an injunction against Ohio voter ID provisions the Secretary was responsible for implementing. The Secretary, represented by the Ohio Attorney General's Office, unsuccessfully opposed the plaintiffs' motion for a temporary restraining order. While the Secretary continued to oppose the plaintiffs' preliminary injunction motion after entry of the TRO, *see* Def. J. Kenneth Blackwell's Mem. in Opp'n to Prelim. Inj., Doc. 29, *Ne. Ohio Coal.*, No. 06-cv-896 (S.D. Ohio Oct. 31, 2006), he did not wish to appeal the TRO. The Ohio Attorney General therefore moved to intervene "on behalf of the State of Ohio and the General Assembly, who wish[ed] to participate in arguing the constitutionality of the statutes at issue." *Ne. Ohio Coal.*, 467 F.3d at 1006.

The district court denied intervention, and the Attorney General appealed.

On appeal, the plaintiffs argued that the Attorney General was required to "overcome [a] presumption of adequate representation" due to the Secretary of State's presence in the case, *id.* at 1008, but the Sixth Circuit rejected the argument. Instead, consistent with *Trbovich*, it held that the Attorney General's "burden with respect to establishing [the State's] interest is not adequately protected by the existing party to the action is a minimal one; it is sufficient to prove that representation *may* be inadequate." *Id.* at 1008. And it held that the Attorney General met this minimal burden because "the Secretary's primary interest is in ensuring the smooth administration of the election, while the State and General Assembly have an independent interest in defending the validity of Ohio laws and ensuring that those laws are enforced." *Id.* The court accordingly reversed the district court's decision denying intervention.

By contrast, the Fourth and Seventh Circuits apply robust presumptions against state-designated agents intervening when another state official is defending a case. *See* Pet. App. 35–38; *Kaul*, 942 F.3d at 799.

In *Stuart v. Huff*, the Fourth Circuit held that a private party seeking to intervene alongside a government defendant sharing the same ultimate objective must make a "very strong showing" of inadequacy to overcome a presumption of adequate representation. 706 F.3d at 351. And then in this case, the en banc Fourth Circuit, by a sharply divided 9–6

vote, extended the *Stuart* presumption to situations in which state-designated agents seek to intervene alongside other state officials. Pet. App. 35–38. The Seventh Circuit has adopted an even stricter test, requiring state-designated agents seeking to intervene beside other state officials in defense of state law to make "a concrete showing of . . . bad faith or gross negligence before permitting intervention." *Kaul*, 942 F.3d at 801.

What standard applies to a state-designated agent's motion to intervene to defend state law in a case where another state official is a party is an important question that implicates a State's sovereign interest in defending the constitutionality of its laws. *See* Pet. App. 55–56 (Niemeyer, J., dissenting). This Court's intervention is needed to resolve the split in authority in the Circuits on this important question.

B. A Presumption of Adequate Representation is Inconsistent with the Text of Rule 24, This Court's Precedent, and Proper Respect for a State's Sovereign Authority.

1. A presumption of adequate representation is inconsistent with the text of Rule 24. Nothing in the Rule's text suggests that the "adequacy" of an existing party's representation should form a significant barrier to intervention. By mandating that an interested party "must [be] permit[ted]" to intervene "*unless*" its interests are adequately represented, the Rule suggests that the other elements required for intervention as of right under Rule 24(a)(2) should be the primary focus of the inquiry and that courts should only exclude proposed intervenors on adequacy

of representation grounds when it is clear that intervention is unnecessary to protect the proposed intervenor's interests.

Courts that apply a presumption of adequacy do damage to this text by requiring state agents duly authorized to defend state laws to make a *further* substantial showing of why they should not *still* be kept out of the case. By contrast, the Sixth Circuit's approach is more faithful to the language of the rule. Indeed, an expression of skepticism that *any* party, even a government entity, will adequately represent the interests of another is the necessary implication of a rule that permits intervention "unless" an existing party adequately represents the movant. *See Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969).

2. A presumption of adequate representation also is incompatible with this Court's decision in *Trbovich*, which held that to intervene as of right, a proposed intervenor need only satisfy a "minimal" burden that representation by the existing parties "may be inadequate." *Trbovich*, 404 U.S. at 538 n.10 (cleaned up). In *Trbovich*, even though the Secretary of Labor had exclusive authority to challenge union elections in court, *id.* at 531, this Court did not apply any presumption against the union member who sought to intervene.

Although *Trbovich* involved a private party seeking to intervene on the same side as a government official, there is no basis for applying a stricter approach when the proposed intervenor is another government agent—and this is especially so when the proposed intervenor is deemed by state law to be necessary to defense of the State's interest. Under *Ex*

Parte Young, the defendants in federal court generally will be executive branch officials charged with implementing the challenged statute. If the exclusive litigating authority vested in the Secretary of Labor in *Trbovich* did not give rise to a presumption of adequate representation, the happenstance that an official is charged with implementing a challenged statute cannot give rise to such a presumption. Furthermore, this Court in *Trbovich* reasoned that the distinct roles played by the Secretary of Labor could introduce competing considerations into his approach to the conduct of litigation. The same is true for state officials responsible both for implementing a state law and defending it in court. The responsibility to implement a statute and the responsibility to defend its validity "may not always dictate precisely the same approach to the conduct of . . . litigation." *Id.* at 539.

3. A presumption of adequate representation also is insufficiently respectful of sovereign determinations about which agents are necessary to defend a State's interests in federal court.

The state executive branch officials who typically are sued in federal court may face distinct political pressures or incentives that could affect their approach to the conduct of litigation in a way different than the pressures or incentives faced by a different agent of the State, such as a representative of the legislative branch. *See* Pet. App. 51–54 (Wilkinson, J., dissenting). It is no surprise that disputes about intervention by state-designated agents often arise in cases involving controversial topics such as abortion or voting laws. Just as in *Trbovich*, the people of a

State—the ultimate client when a state law is being challenged—"may have a valid complaint about the performance of" the official responsible for implementing a law who must function as "[their] lawyer" in litigation challenging it. *Trbovich*, 404 U.S. at 528, 539. It follows that there cannot be any presumption that such an official adequately represents the interests of a State when another state-designated agent seeks to intervene. Indeed, under this Court's precedents establishing that "states have great deference in deciding who represents their interests," Pet. App. 69 (Quattlebaum, J., dissenting), if there is going to be a presumption in this context at all it should be *against* adequate representation and *in favor* of intervention by an agent a State deems necessary to the defense of its statutes.

A presumption of adequacy, moreover, promotes acrimony and discord between state officials. Instead of looking to objective factors such as differences in function that could lead to different approaches in litigation, and rather than requiring only a minimal showing to justify intervention, courts applying such a presumption look to factors such as "adversity of interest, collusion, or malfeasance," Pet. App. 32, or "bad faith or gross negligence," *Kaul*, 942 F.3d at 804. State-designated agents seeking to intervene thus are presented with the unappealing prospect of attacking the motives or competence of their fellow state officials when seeking to intervene alongside them. Federal courts should avoid intervention standards that create incentives for state officials to impugn the motives and cast aspersions on one another in court.

II. The Court Should Grant Review to Determine What Standard of Review Applies to a Decision on a Motion to Intervene As of Right.

A. The Circuits are Split on the Standard of Review.

The question of what standard of review applies to a district court's decision on a motion to intervene as of right under Rule 24(a)(2) has deeply divided the circuit courts. Seven circuits review such decisions de novo (except for timeliness, which they review for abuse of discretion). *See St. Bernard Parish*, 914 F.3d 969; *Wal-Mart Stores, Inc.*, 834 F.3d 562; *Glickman*, 82 F.3d 106; *Blount-Hill*, 636 F.3d 278; *Jordan*, 207 F.3d 854; *Kaul*, 942 F.3d 793; *Stenehjem*, 787 F.3d 918; *Robertson*, 960 F.2d 83; *Oakland Bulk & Oversized Terminal, LLC*, 960 F.3d 603; *Schultz*, 594 F.3d 1120; *Barnes*, 945 F.3d 1112; *PJ Utah, LLC*, 822 F.3d 536; *STME, LLC*, 938 F.3d 1305; *Tech. Training Assocs., Inc.*, 874 F.3d 692. By contrast, five circuits—the First, Second, Third, Fourth, and D.C. Circuits—review such decisions for abuse of discretion. Pet. App. 25–26; *see also T-Mobile Ne. LLC*, 969 F.3d 33; *In re Efron*, 746 F.3d 30; *Floyd*, 770 F.3d 1051; *Hooker Chems. & Plastics Corp.*, 749 F.2d 968; *Territory of the V.I.*, 748 F.3d 514; *In re Pet Food Products Liab. Litig.*, 629 F.3d 333; *Crossroads Grassroots Pol'y Strategies*, 788 F.3d 312; *Fund for Animals, Inc.*, 322 F.3d 728.

As this case demonstrates, the standard of review can have a substantial impact on review of intervention decisions on appeal. The en banc Fourth Circuit emphasized that "[i]t is not for us to decide whether, in our best view, [Petitioners] have

demonstrated that the State Board and Attorney General are inadequate representatives of the State's interest in S.B. 824's validity" because "[t]hat inquiry is firmly committed to the discretion of the district court." Pet. App. 40.

This Court should grant review to clarify the proper standard of review to apply to a district court's decision on a motion to intervene as of right under Rule 24(a)(2).

B. The Proper Standard of Review is De Novo.

Questions of law are reviewed de novo, and "an application for intervention of right seems to pose only a question of law." *See* 7C Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1902 (3d ed. 2021 update). The inquiry under Rule 24(a)(2) is whether Petitioners are entitled to intervene "*as of right*." This is not a discretionary judgment. "Rule 24(a) considerably restricts the court's discretion whether to allow intervention of right by providing that such a party *shall* be permitted to intervene." *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 382 n.1 (1987) (Brennan, J., concurring). This Court's decision in *Trbovich* accordingly exhibited no deference to the district court's denial of intervention.

Furthermore, the three factors (apart from timeliness) that determine whether a proposed intervenor is entitled to intervene—whether the proposed intervenor has an interest in the subject matter of the action; whether the protection of the interest would be impaired because of the action; and whether the applicant's interest is not adequately

represented by existing parties to the litigation—require legal determinations, not discretionary judgments. Indeed, the proper inquiry for the adequacy of representation factor is whether Petitioners have shown that "representation of [their] interest *may be* inadequate," *Trbovich*, 404 U.S. at 538 n.10 (emphasis added), which requires a forward-looking, predictive judgment that is emblematic of a legal determination. It is not a backward-looking inquiry about whether representation has been inadequate to date in the case. What is more, *Trbovich*'s functional analysis of the incentives faced by parties to litigation is well-suited to de novo review. An application for intervention as of right thus poses a question of law that should be reviewed de novo. *See Sierra Club*, 960 F.2d at 85.

This conclusion is highlighted by the contrast between intervention as of right under Rule 24(a)(2) and permissive intervention under Rule 24(b). If intervention under Rule 24(a)(2) were merely an analysis committed to the discretion of the district court and reviewable only by abuse of discretion, the inquiry would threaten to collapse with Rule 24(b). But Rule 24(a), which governs intervention *as of right*, *i.e.*, as a matter of law, must be differentiated from Rule 24(b), which governs permissive intervention, *i.e.*, intervention at the discretion of the district court.

III. Under the Proper Standards, Petitioners Are Entitled to Intervene As of Right.

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

First, by mandating that an interested party "must [be] permit[ted]" to intervene "*unless*" its interests are adequately represented, Rule 24(a)(2) places the initial burden on the non-intervening party to affirmatively demonstrate that it adequately represents the intervening party's interests. Respondents have failed to make that showing here, where North Carolina law provides that Petitioners "shall be necessary parties" "as agents of the State through the General Assembly" "*whenever* the validity or constitutionality of an act of the General Assembly . . . is the subject of an action in any . . . federal court," Pet. App. 203–04 (N.C. GEN. STAT. § 120-32.6(b)); *see also* Pet. App. 201–02 (N.C. GEN. STAT. § 114-2(10)); Pet. App. 198 (N.C. GEN. STAT. § 1-72.2(b)), and the State Board of Elections' administrative interests have the potential to (and in fact have) affected its defense of S.B. 824, Respondents have failed to satisfy their burden, and Petitioners must be permitted to intervene.

Second, even setting aside the proper burden-shifting framework under Rule 24(a)(2), this Court's reasoning in *Trbovich* logically entails the conclusion that Petitioners must be allowed to intervene because Defendants' representation of Petitioners' interests "may be inadequate." 404 U.S. at 538 n.10. This Court explicitly rejected the Secretary's argument that the union member's "interest must be adequately represented unless the court is prepared to find that the Secretary has failed to perform his statutory duty." *Id.* at 538. It was enough to justify intervention that the Secretary had an additional interest "in assuring free and democratic union elections"

generally to justify intervention, since the Secretary's dual functions "may not always dictate precisely the same approach to the conduct of the litigation." *Id.* at 539.

This same conclusion—that the State Board of Elections' representation of Petitioners' interests *may be* inadequate—follows here as well because the State Board's and Petitioners' incentives are not necessarily aligned. Even if the State Board has as *an* objective the defense of the validity of S.B. 824, it has an *additional* objective not shared by Petitioners as representatives of the State of North Carolina's interests—namely, the State Board has the "*primary* objective . . . to expediently obtain clear guidance on what law, if any, will need to be enforced." Doc. 61-14 at 14. And just as in *Trbovich*, this difference in interests "may not always dictate precisely the same approach to the conduct of the litigation." *Trbovich*, 404 U.S. at 539. And, indeed, it has not. As the State Board stated in its opening brief in the Fourth Circuit, it declined to seek a stay of the district court's preliminary injunction because of its election administration concerns. *See* Br. of Def.-Appellants at 16 n.8, *N.C. State Conf. of NAACP v. Raymond*, No. 20-1092 (4th Cir. March 9, 2020), Doc. 34.[5] In *Northeast Ohio Coalition*, the Sixth Circuit concluded that because the Ohio Secretary of State's "primary interest [was] in ensuring the smooth administration

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

of the election, while the State and General Assembly have an independent interest in defending the validity of Ohio laws and ensuring that those laws are enforced," intervention as of right was warranted under *Trbovich*'s standard. 467 F.3d at 1008. Intervention as of right is warranted here for the same reasons.

There is an additional factor here that puts "extra icing on a cake already frosted," *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021), in support of intervention. That is the role of Governor Cooper. While no longer a defendant, Governor Cooper has constitutional authority to control the State Board of Elections. *See Cooper v. Berger*, 809 S.E.2d 98, 111–12 (N.C. 2018). He accordingly appoints the State Board's members, who serve at his pleasure. *See* N.C. GEN. STAT. §§ 163-19(b), 163-28; *Cooper*, 809 S.E.2d at 114.

Governor Cooper is a staunch opponent of voter ID. This opposition has included Governor Cooper's seeking the dismissal of a petition for certiorari in this Court seeking review of the Fourth Circuit decision enjoining the State's prior voter ID law, vetoing S.B. 824 and deriding it as "designed to suppress the rights of minority, poor and elderly voters," Doc. 8-1, and submitting an amicus brief in support of Plaintiffs' preliminary injunction in the Fourth Circuit in this very case. Governor Cooper has allowed the State Board to defend S.B. 824 to date, but there is no guarantee that he will continue to do so. Governor Cooper's role is thus an additional reason why Petitioners are entitled to intervene. Federal courts are sensitive to even an appearance of impropriety in

the judges deciding a case. *See* 28 U.S.C. § 455. When considering the delicate question of the constitutionality of a state law, they similarly should be sensitive to even an appearance that an existing party's defense of the law will be inadequate—particularly when state law designates another agent essential to defending the State's interest.

Accordingly, Petitioners are entitled to intervene as of right in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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