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.

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

BRIEF FOR NAACP RESPONDENTS

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QUESTIONS PRESENTED

1. Whether—as this Court and every circuit has held—a litigant who seeks to intervene to represent the same interest as an existing litigant must overcome a presumption of adequate representation, or whether Rule 24 entitles states to require federal courts to admit multiple state agents representing the same sovereign interest on a "minimal" showing of inadequacy.

2. Whether the Court should review a district court's adequacy determination *de novo* or for abuse of discretion.

3. Whether petitioners were entitled to intervene as of right.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued Page(s)

Cases—Continued Page(s)

Cases—Continued Page(s)

Cases—Continued Page(s)

Cases—Continued Page(s)

Constitutions, Statutes & Rules

Statutes & Regulations—Continued Page(s)

Treatises

Treatises—Continued Page(s)

Articles

Dictionaries

Other Authorities

INTRODUCTION

For 80 years, every federal court of appeals, both major treatises, the drafters of the federal rules, and this Court itself have all understood Federal Rule of Civil Procedure 24(a)(2) to embody a simple, commonsense rule: parties seeking to intervene as of right to represent the same interest as an existing party must overcome a presumption that the existing party adequately represents that interest. Would-be intervenors may demonstrate collusion, or malfeasance, or negligence. But they cannot force federal courts to accept two, or three, or ten entities all representing the same interest merely by pointing to disagreements about litigation tactics. A different standard, courts have universally recognized, would needlessly clutter and prolong litigation, burden litigants and the courts with duplicative (or inconsistent) filings and evidence, and promote chaos and confusion.

Respect for state sovereignty does not require upending this settled understanding. North Carolina remains perfectly free to choose who will represent its sovereign state interest in enforcing and defending its laws, including in federal court. So far as federal law is concerned, North Carolina may entirely displace the Attorney General as its agent. But neither Rule 24 nor any federalism principle entitles North Carolina to insist on *two* representatives in federal court.

In fact, Congress has spoken directly to the question whether a state may intervene as of right in federal lawsuits when it is already represented by a state official. The answer is no. Under 28 U.S.C. § 2403(b), "the State" may intervene as of right only if an "agency, officer, or employee thereof is not a party." That is for good reason: federal courts should not be in the business of adjudicating internecine disputes between state officials. Nor should federal courts be in the business of routinely declaring—as petitioners' rule would require—that a state

constitutional officer charged with defending state law is doing an "inadequate" job. That is especially so where the claimed inadequacy rests principally on the insulting notion—belied by decades of practice before this Court—that a Democrat or Republican cannot set aside his or her own political preferences and zealously defend a law enacted by a different party. If anything undermines a state's dignity, it would be a rule requiring federal courts to routinely flyspeck the litigation choices of state attorneys general and grade them on their "adequacy" in carrying out their constitutional duties.

STATEMENT

A. Legal Background

As originally adopted in 1938, Federal Rule of Civil Procedure 24(a) allowed for intervention of right in three circumstances: when required by federal statute, when the movant's property was likely to be affected by the pending case, and, key here, "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." Fed. R. Civ. P. 24(a)(2) (1938). Given longstanding equity practice rejecting intervention where the movant and party's interests were the same, the drafters understood Rule 24(a)(2) to require a strong showing of inadequacy in such cases: unless "the representative has or represents some interest adverse to that of the [proposed intervenor]," the intervenor must show "proof of collusion between the representative and an opposing party" or "non-feasance in [the representative's] duty of representation." 2 James Wm. Moore & Joseph Friedman, *Moore's Federal Practice* § 24.07, at 2333-34 (1st ed. 1938); *see* James Wm. Moore & Edward Hirsch Levi, *Federal Intervention: I. The Right to Intervene and Reorganization*, 45 Yale L.J. 565, 591-92 (1936) (same).

In 1961, this Court issued *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961), a major decision

interpreting Rule 24(a)(2). The Court denied an intervention request by small music publishers seeking to enter an antitrust lawsuit against their trade group, the American Society of Composers, Authors and Publishers (ASCAP). The case involved two antitrust claims. As to the first count, related to ASCAP's internal operations, ASCAP did not share the small publishers' interest, but Rule 24(a)(2) did not require intervention because the small publishers would not be "bound" by a judgment in a res judicata sense. *Id.* at 691. But as to the second, charging restraints of trade in ASCAP's external affairs, the Court held that ASCAP's representation was "entirely adequate." *Id.* at 692. Because ASCAP has "the same interests as appellants on this aspect of the litigation," *Sam Fox* held, "inadequacy of representation could arise … only on some showing that ASCAP … was in fact conducting the litigation in bad faith, collusively, or negligently." *Id.* at 692 n.4.

Rule 24(a)(2) was amended in 1966 to address *Sam Fox*'s res judicata requirement, which commentators believed was too rigid. *See* Fed. R. Civ. P. 24 Advisory Committee's note to 1966 amendment (hereinafter, "1966 Advisory Committee's Notes").[1] As to "the meaning of [the] concept" of "adequacy of representation," however, "there is no indication that any change was intended" in 1966. 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1909 (3d ed. 2021).

Amended Rule 24(a)(2), which has not substantively changed since 1966, now allows intervention of right when a movant claims a significantly protectable interest and "disposing of the action may as a practical matter impair

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[1] *See also Report of Comm. on Rules to the Judicial Conference of the United States* 29 (Sept. 1965), https://www.uscourts.gov/sites/default/files/fr_import/ST09-1965-1.pdf.

or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

Elsewhere, Congress and the Advisory Committee have specifically addressed intervention by state entities seeking to vindicate state law. In 1946, Rule 24(b) was amended to allow *permissive* intervention by a "state governmental officer or agency" that "administers" a statute on which the parties rely. Fed. R. Civ. P. 24(b) (1946).

In 1976, Congress addressed intervention by states in lawsuits challenging the constitutionality of state statutes. Pub. L. 94-381, § 5. That law, 28 U.S.C. § 2403(b), allows intervention of right where "a State or any agency, officer, or employee thereof is not a party." In 1991, Rule 24(c) was amended to provide for notification to state attorneys general to implement 28 U.S.C. § 2403(b)'s intervention guarantee; in 2006, that language was moved to Rule 5.1, where it remains. *See* Fed. R. Civ. P. 5.1 Advisory Committee's note to 2006 amendment.

B. District Court Proceedings

1. Plaintiffs (the NAACP respondents here) brought this lawsuit to enjoin enforcement of a North Carolina law—Senate Bill 824—that requires photo voter ID and vastly increases the number of poll observers. Plaintiffs allege that S.B. 824 violates the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act by discriminating against Black and Latino voters.

Plaintiffs sought declaratory and injunctive relief against the Governor and members of the North Carolina State Board of Elections, the parties who enforce S.B. 824 and thus the only parties capable of effecting relief. The Governor and State Board, represented by the Attorney General, moved to dismiss or to stay the proceedings. The State Board argued that the case should be dismissed for lack of jurisdiction under principles of federalism and abstention. C.A. App. 233-48. The Governor, meanwhile,

argued that he was not a proper party. C.A. App. 249-72. The district court denied the State Board's motion but granted the Governor's and dismissed him from the litigation. 397 F. Supp. 3d 786.

2. Petitioners, the President Pro Tempore of the North Carolina Senate and Speaker of the North Carolina House of Representatives, moved to intervene as defendants under Rule 24. J.A. 52-73. The district court denied intervention, holding that petitioners lacked a protectable interest and that the State's interests were being adequately defended by the State Board, represented by North Carolina's Attorney General and Department of Justice. Pet. App. 163-78. The court held that petitioners' participation would "unnecessarily complicate and delay the various stages of this case," through lengthy and repetitious motions, which will "hinder, rather than enhance, judicial economy." Pet. App. 180. The court granted petitioners *amicus* status and said they could renew their intervention motion if they "can demonstrate that Defendants have, in fact, declined to defend the lawsuit." Pet. App. 157.

Petitioners did not appeal. Instead, they filed a renewed motion to intervene six weeks later. J.A. 145-70. Petitioners cited *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), and the State Board's conduct in another case, *Holmes v. Moore*, 18 CVS 15292 (N.C. Super. Ct.), which petitioners said presented new evidence of inadequacy.

Notwithstanding their own delay, petitioners filed a "Motion for Ruling on Renewed Motion to Intervene" less than two months later, demanding court action within three days. D.C. Dkt. 71; Pet. App. 186. Less than a week later, petitioners began a deluge of filings. Petitioners improperly appealed the "de facto" denial of their renewed motion, and then filed a mandamus petition along with multiple stay motions. Pet. App. 186-87. The Fourth

Circuit dismissed petitioners' appeal, and denied their mandamus and stay requests.

The district court denied petitioners' renewed motion to intervene. Pet. App. 184-94. Given petitioners' failure to appeal the original denial, the court addressed only the "narrow exception" left open in that original order: whether movants presented any "newly available" "hard evidence" that the State Board had declined to defend this lawsuit. Pet. App. 187-88.

On this question, the court found it "abundantly clear that the State Board is actively and adequately defending this lawsuit," noting that the Attorney General had filed an "expansive" brief opposing plaintiffs' motion for a preliminary injunction. Pet. App. 189. The district court again denied permissive intervention, explaining that petitioners' recent litigation conduct "further" confirmed that "intervention would only distract from the pressing issues in this case." Pet. App. 193-94. Petitioners appealed.

3. Meanwhile, the case proceeded in district court. The parties exchanged discovery, and Department of Justice attorneys deposed plaintiffs' experts. Plaintiffs moved for a preliminary injunction, C.A. App. 797-842, and the State Board opposed, submitting over 1,400 pages of evidence in response, C.A. App. 1751-3230.

Without seeking leave or providing notice to the parties, petitioners filed a brief opposing preliminary relief and attaching hundreds of additional pages of new evidence, including new expert testimony. C.A. App. 1341-2425. The court struck petitioners' brief but permitted them to submit a compliant *amicus* brief. D.C. Dkt. 117.

The district court granted plaintiffs' motion for a preliminary injunction. 430 F. Supp. 3d 15. The court found that S.B. 824 was "impermissibly motivated, at least in part, by discriminatory intent," and that the voter-ID and

ballot-challenge provisions likely violated the constitution. *Id.* at 53. The State Board appealed.

C. Appellate Proceedings

Petitioners' intervention appeal and the State Board's preliminary injunction appeal were assigned to the same three-judge panel.

1. On intervention, the panel divided 2-1. The majority construed N.C. Gen. Stat. § 1-72.2(a) to permit petitioners to represent the State's interest in defending challenges to state law and held that, given that interpretation, the district court should not have imposed a "strong" presumption that the Attorney General adequately represents the State's interest. Pet. App. 111-18. The panel then vacated and remanded for the district court to reconsider petitioners' intervention motion. Pet. App. 120.

Judge Harris dissented. As for petitioners' purported interest, she observed that § 1-72.2 empowers petitioners to act only "on behalf of the General Assembly," not the *State*. Pet. App. 145-46 (quoting § 1-72.2(b)). But she concluded that it was unnecessary to decide that unsettled question of state law because the Attorney General adequately represented the State's interests. Pet. App. 121-42, 147-49.

The Fourth Circuit granted rehearing *en banc*.

2. The same three-judge panel unanimously reversed the district court's preliminary injunction of S.B. 824. As the *en banc* court later noted, this "reversal was based on the record the Attorney General created in the district court." Pet. App. 44.

3. The *en banc* court affirmed denial of intervention 9-6.

Writing for the majority, Judge Harris first explained that, because petitioners had not appealed the denial of their first intervention motion, they could no longer assert the General Assembly's "institutional interest."

Pet. App. 21. Rather, appellate jurisdiction—at least with regard to petitioners' purported interest—was limited to whether petitioners could intervene on behalf of the State. Pet. App. 16-23. But the *en banc* court declined to reach that unsettled question of state law. Instead, the court "assume[d]" *arguendo* that petitioners could rely on the State's interest in defending S.B. 824, but affirmed because the Attorney General was "adequately representing" that interest under Rule 24. Pet. App. 23-49.

The court applied Rule 24's "well-established presumption of adequacy, which may be overcome on a showing of adversity of interest, collusion, or malfeasance—but not by mere 'disagreement over how to approach the conduct of the litigation' in question." Pet. App. 32. That presumption flows from the fact that petitioners and the existing State Board defendants share not only the same objective but "precisely the same" interest: the State's interest in the enforcement of state law. Pet. App. 37. The court explained that petitioners must offer an especially "strong" showing of inadequacy because the State's interest in defending S.B. 824 is already represented by the Attorney General, the constitutional officer state law charges with representing the State's interests in court. Pet. App. 37-38. But the "heightened presumption was not critical" because petitioners could not overcome even the standard presumption. Pet. App. 40.

The court emphasized that it did not "question [North Carolina's] authority to designate its preferred legal representative in court proceedings" or even to "remove the Attorney General and substitute some other representative." Pet. App. 39. But petitioners instead sought to intervene *alongside* the Attorney General, "to designate not one but two representatives … purporting to speak for the state." *Id.* Rule 24, the court held, does not require federal courts to "accommodate that cacophony of

parties" unless petitioners overcome a presumption of adequacy. *Id.*

The court then held that the district court had not abused its discretion in finding that petitioners raised only "garden-variety disagreements over litigation strategy," which did not demonstrate inadequacy, especially given the Attorney General's successful preliminary injunction appeal. Pet. App. 42. The court also rejected petitioners' "startling accusation" that the Governor's and Attorney General's policy preferences meant they "cannot be trusted to defend S.B. 824." Pet. App. 46-47. If the Attorney General ever abandoned defense of the law, the court reiterated, petitioners could renew their motion. Pet. App. 48-49.

Back in district court, the State Board moved for summary judgment. D.C. Dkt. 177. The district court subsequently stayed further proceedings pending this Court's decision. D.C. Dkt. 194.

SUMMARY OF ARGUMENT

I. Intervention under Rule 24(a) applies to third parties, not "existing parties." Petitioners, however, seek to intervene not on their own behalf, nor on behalf of North Carolina's legislature, but as "additional agents" of a party that is already present and represented in this lawsuit—the State. Pet. Br. 24, 34. Rule 24 simply doesn't cover requests to admit additional representatives of an existing party, and the Court may affirm (or dismiss) on that basis alone.

II. As the drafters of Rule 24(a)(2) recognized from inception, and as this Court and every court of appeals has confirmed, would-be intervenors are presumptively adequately represented when their interests are identical to an existing party's. Echoing the leading treatise and the principal article cited in the Advisory Committee's notes, this Court held in *Sam Fox Publishing Co. v. United*

States, 366 U.S. 683 (1961), that intervenors who have the "same interest" as existing parties must show "bad faith, collusi[on], or negligen[ce]." Petitioners offer no justification sufficient to disturb that settled interpretation, which is compelled by Rule 24's text and is consistent with this Court's many cases interpreting materially identical language in Rule 23 to focus solely on identifying conflicts of interest.

Nothing about a presumption of adequacy in this context offends state sovereignty. North Carolina is free to pick its representative in federal court, but Rule 24 does not obligate district courts to accept two representatives. Congress made clear in 28 U.S.C. § 2403(b) that state representatives may intervene of right in litigation like this *only if* the state or one of its agencies or officers "is not [already] a party." And as this Court has repeatedly recognized, the presumption that a party adequately represents its own interest is at its zenith for government officials like the Attorney General, who is charged by law and oath with faithfully defending state statutes.

Jettisoning the presumption of adequacy would lead to intractable practical problems and drastically increase the burden and expense of litigation. Petitioners' theory means that intervenors could prove inadequacy, even when an existing party shares their same interest, by identifying differences in litigation strategy. But that standard is easily satisfied in every case and would require federal courts to let in dozens of parties with the same interest—say, dozens of shareholder-defendants or dozens of counties with identical laws—all serving their own discovery and expert reports and briefs. Jettisoning the presumption in the state context would be worse yet, because it would require federal courts to routinely malign state officials by declaring them to be inadequate representatives of their own state.

III. This Court held in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), that Rule 24(a)(2) adequacy determinations are reviewed for abuse of discretion. That decision is controlling and correct. This Court has repeatedly held that abuse of discretion review applies to assessments that turn on factual determinations and familiarity with the issues and litigants. As petitioners' arguments in this case show, "adequacy" is an inherently fact-specific and context-sensitive inquiry that calls for deference to district courts' on-the-scene judgments. That is why the analogous determination of adequate representation under Rule 23 is uniformly reviewed for abuse of discretion.

IV. Finally, if this Court determines that *any* presumption of adequacy applies, it must affirm. Petitioners' evidence of inadequacy comprises strategic differences or hypotheticals in which the attorney general reverses his position, and petitioners do not contend that they can overcome any presumption or establish collusion or malfeasance. But if the Court announces a new adequacy standard, it should remand. Not only is the district court best situated to address adequacy under any new standard, but petitioners' interest argument depends on disputed questions of state statutory and constitutional law that the lower courts should address in the first instance.

ARGUMENT

I. Petitioners Assert Interests Only as Agents of an Existing Party and thus Cannot Intervene Under Rule 24

Petitioners are ineligible to seek intervention under Rule 24 because they are not third parties. Rather, they seek to intervene as additional agents of a party already present—the State of North Carolina. The decision below can be affirmed on this basis alone.

A. Rule 24(a) Applies to Third Parties, Not Existing Ones

Rule 24(a) authorizes intervention of right by anyone who "claims an interest relating to" the case "unless existing parties adequately represent that interest." The Rule's text reflects that "intervention" has long been understood to be a right of third parties—not "existing parties." This Court has held, for example, that "intervention" is "[t]he legal procedure by which … a third party is allowed to become a party to the litigation." *United States v. City of New York*, 556 U.S. 928, 933 (2009) (quoting Black's Law Dictionary 1154 (8th ed. 2004)). "[T]he term to intervene … covers the right of one to interpose in, or *become a party to*, a proceeding already instituted." *Id.* (quoting *Rocca v. Thompson*, 223 U.S. 317, 330 (1912)) (cleaned up). This definition of intervention has remained constant through all the amendments to Rule 24.[2]

Rule 24 thus enables entry of third parties with an interest in the litigation, including in some (rare) cases when that interest is the same as an existing party's. But Rule 24(a) does not contemplate intervention by an additional representative of an existing party. Disputes about who should speak for a principal present questions of agency, not intervention. *See, e.g.*, *LaTele Television, C.A. v. Telemundo Commc'ns Grp.*, 9 F.4th 1349, 1351, 1358 (11th Cir. 2021).

Rule 5.1 and 28 U.S.C. § 2403(b) confirm the one-party-one-representative principle and expressly apply it to constitutional litigation against states. Those authorities provide that any party questioning the constitutionality of a state statute must, to enable intervention, notify

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[2] Black's Law Dictionary 1003 (3d ed. 1933) ("The act by which a third party demands to be received as a party in a suit pending between other persons."); Black's Law Dictionary 956 (4th ed. 1968) (same).

"the state attorney general" unless the existing parties to the lawsuit "include the state, one of its agencies, or one of its officers or employees in an official capacity." Fed. R. Civ. P. 5.1(a); *see* 28 U.S.C. § 2403(b). In other words, notice and intervention are required only if "the state" or "one" of its representatives is not already a party. *Id.*

B. Petitioners Seek to Join This Case as Agents of an Existing Party, Not as Third Parties

These principles make petitioners ineligible for intervention. This action seeks declaratory and injunctive relief against officers of the State Board of Elections in their official capacities. Thus, for all relevant purposes, the State of North Carolina is "the real party in interest." *Karcher v. May*, 484 U.S. 72, 78 (1987). "A suit against a state officer in his official capacity is, of course, a suit against the State." *Diamond v. Charles*, 476 U.S. 54, 57 n.2 (1986); *see Printz v. United States,* 521 U.S. 898, 930-31 (1997) (similar).

Petitioners have never sought to displace the Attorney General or challenged his statutory authority, *see* N.C. Gen. Stat. § 114-1(1), (2), to act as the State's agent here. Nor has the executive declined to defend the law such that *no* existing agent in the case represents the State's interest as a party. *Cf. United States v. Windsor*, 570 U.S. 744, 754 (2013).

Rather, petitioners seek to appear only as "additional agents" of the State, Pet. Br. 24, 34—an existing party—because they believe the Attorney General and official-capacity defendants are not adequately representing the sovereign interest "in defending the validity of its laws," Pet. Br. 43; *see* Pet. i (asserting only "the State's interest"); Pet. Br. 1 (asserting only "sovereign authority"). While petitioners below asserted a right to intervene to protect both (1) interests "of the Legislature" and (2) sovereign interests in defending legislation "as agents of the

State," C.A. Br. 22; *see* J.A. 159, petitioners have since unambiguously disavowed their first theory of intervention. Pet. 18 n.4 ("Petitioners raise only their right to intervene to defend the State's interest," and disclaim "the General Assembly's institutional interest").[3]

Petitioners thus go "further than sharing a goal with the Attorney General." *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 801 (7th Cir. 2019). They "intend[] to represent the same client—the State of [North Carolina]." *Id.* Under these circumstances, invocation of Rule 24(a) is a category error. Petitioners cannot meet Rule 24's threshold "third-party" requirement; they do not qualify as "third parties" any more than a defendant-company's board member who believes the general counsel is doing a poor job. The decision below can be affirmed, or the writ dismissed as improvidently granted, on that basis alone.

II. The Attorney General Is Entitled to a Presumption that He Adequately Represents the State's Interests

Under Rule 24(a)(2), courts must permit intervention when someone "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Petitioners seek to intervene exclusively to represent the very same interest—the State's sovereign interest in defending and enforcing its laws—as an existing party, the State Board represented by the Attorney General.

Every interpretive tool—text, history, precedent, and purpose—confirms that Rule 24 establishes a presumption of adequacy where the would-be intervenor's

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[3] Because of this disclaimer in the petition for certiorari, the Elections Clause, U.S. Const. art. I, § 4, is not implicated here.

interests are identical to an existing party's. That presumption is only stronger where the existing party is the state.

A. This Court's Precedent and Rule 24's Text, History, and Context Establish a Presumption of Adequacy in Identity-of-Interest Cases

Since the federal rules were adopted in 1938, this Court, every single federal courts of appeals, and Rule 24's drafters have understood the rule, consistent with its plain terms, to embody a presumption of adequate representation when intervenors seek to assert the same interest as an existing party. Petitioners thus ask this Court to upset the universal, unbroken understanding that has governed federal intervention practice for 80 years.

1. Rule 24(a)(2) mandates intervention for parties with a protectable interest "unless existing parties adequately represent that interest." "Adequately" is not a high bar—it means simply "in a manner fitted to satisfy the requirements of the case; sufficiently, suitably." Oxford English Dictionary 108 (1933); Webster's New International Dictionary 31 (2d ed. 1934) (defining "adequate" as "[e]qual to or sufficient for some (specific) requirement; proportionate, or correspondent; fully sufficient"); Black's Law Dictionary 53 (3d ed. 1933) ("Sufficient; proportionate; equally efficient; equal to what is required; suitable to the case or occasion; satisfactory."); Black's Law Dictionary 61 (4th ed. 1968) (same).

As a matter of plain English and common sense, an existing party presumptively represents its *own* interest "in a matter fitted to satisfy the requirements of the case." Indeed, "our adversary system" of litigation depends on this understanding: it "is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Greenlaw v. United States*, 554 U.S. 237, 244 (2008); *see also Strickland v. Washington*, 466 U.S.

668, 689-90 (1984) ("counsel is strongly presumed to have rendered adequate assistance" and "judicial scrutiny of counsel's performance must be highly deferential").

The presumption of adequacy merely enforces this commonsense understanding. Courts properly require that intervenors who seek to represent the same interest as existing parties must offer something concrete—not differing tactical decisions, but actual malfeasance or other evidence of insufficiency—to disprove the premise embedded in our law that parties adequately represent their own interest. If the Advisory Committee or Congress had intended petitioners' interpretation, they would have used a term far more demanding than "adequately."

2. The uniform understanding of Rule 24 since its adoption confirms that parties are presumed to adequately represent their own interest. Since 1938, the leading treatise on the federal rules—created by James Moore, one of the rules' drafters—has recognized that a proposed intervenor must show that an existing party sharing the same interest engaged in "collusion" or "nonfeasance." 2 *Moore's Federal Practice* § 24.07, at 2333-34 (1st ed. 1938).[4] Otherwise, the existing party is deemed adequate to represent both parties' shared interest. Even before the federal rules were adopted, in 1936, Professor Moore explained that federal courts routinely denied intervention in identity-of-interest cases unless the proposed intervenor could show "collusion" or "nonfeasance." *See* Moore & Levi, *supra*, at 591-92. "The theory is that stockholders are represented by the directors and officers, bondholders by the trustees, and all creditors by the receiver," because the directors and officers have the

[4] The full quote reads: "Inadequacy of representation is shown if there is proof of collusion between the representative and an opposing party, if the representative has or represents some interest adverse to that of the petitioner, or fails because of non-feasance in his duty of representation."

same interest as the shareholder, the trustee has the same interest as the bondholder, and so on. *Id.* Moore's article was the principal source cited in the 1937 Advisory Committee's notes. *See* Fed. R. Civ. Pro. 24 Advisory Committee's note to 1937 adoption.

This basic rule thus long predates the adoption of the federal rules and reflects the existing equity practice on which Rule 24 drew: parties had no absolute right to intervene when their interests were the same as an existing party's. *See, e.g.*, *O'Connell v. Pac. Gas & Elec. Co.*, 19 F.2d 460, 461 (9th Cir. 1927) (denying intervention where proposed intervenors sought to represent the same interest as the defendant city because there was "no allegation of fraud," "collusion," or "bad faith"); *City of New York v. New York Telephone Co.*, 261 U.S. 312, 316 (1923) ("completely within the discretion of the District Court" to deny intervention to New York City where state Public Service Commission "fully represented" its same interests).

3. In a controlling 1961 decision that petitioners have not asked this Court to overrule, this Court adopted this settled understanding. The Court held in *Sam Fox* that adequacy is presumed under Rule 24(a) where a would-be intervenor seeks to represent the "same interests" as an existing party. 366 U.S. at 692 n.4. Specifically, where a proposed intervenor has "the same interests as [an existing party]," the proposed intervenor can establish "inadequacy of representation … only on some showing that [the existing party] was in fact conducting the litigation in bad faith, collusively, or negligently." *Id.* That holding was dispositive of intervention with respect to the government's antitrust claims relating to the trade group ASCAP's "external affairs." *Id.* at 692. As to those claims, the Court held, ASCAP and its members were aligned, "the representation of ASCAP is entirely adequate," and intervention was accordingly denied. *Id.*

The 1966 amendments to Rule 24 ratified *Sam Fox*'s holding that proposed intervenors who share the same interest as an existing party must show bad faith, collusion, or negligence to prove inadequacy. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). The 1966 amendments modified Rule 24's interest prong to respond to *Sam Fox*'s separate holding that an intervenor lacked a protectable interest unless it would be bound by the judgment in a res judicata sense. *Supra* p.3. But the amendments preserved Rule 24's adequacy prong: "There is no indication that any change was intended" in 1966 "in the meaning of [the] concept" of "adequacy of representation." 7C Wright & Miller § 1909. For that reason, "cases on what is or is not adequate representation decided under the former rule are equally authoritative on that aspect of the question under the amended rule." *Id.*; *see Bowen v. Massachusetts*, 487 U.S. 879, 905 n.40 (1988) (where Congress alters one portion of statute, this Court's interpretation of unaltered portion remains binding).

The decision to preserve the meaning of "adequate representation" was deliberate. As the 1966 Advisory Committee's reporter explained, the committee "undertook only" to address Rule 24's interest prong, and rejected requests to let a proposed intervenor "be his own judge of whether his interest is being adequately represented," because jettisoning adequacy would lead to "a cluttering of lawsuits with multitudinous useless intervenors." Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 403 (1967).

The drafters of the 1966 revision also were well aware of the longstanding rule that adequate representation is presumed in same-interest cases. Not only was that rule endorsed in *Sam Fox*, but the Committee Notes cited a 1962 American Law Reports article explaining that, "while not an absolute rule," "it has been held in a number

of cases that where the applicant's interest is identical with that of a party to the litigation, his interest is adequately represented by that party." 84 A.L.R.2d 1412, § 5(b) (1962).

Numerous additional judicial decisions prior to 1966 reflected this rule. Surveying intervention law in 1962, the Eighth Circuit explained "that inadequacy of representation is or may be shown by proof of collusion between the representative and an opposing party, by the representative having or representing an interest adverse to the intervener, or by the failure of the representative in the fulfillment of his duty." *Stadin v. Union Elec. Co.*, 309 F.2d 912, 919 (8th Cir. 1962); *see Alleghany Corp. v. Kirby*, 344 F.2d 571, 573 (2d Cir. 1965) (citing *Sam Fox* for the proposition that a shareholder could not intervene as of right in suit defended by board "absent any allegations of bad faith, collusion or negligence").[5]

Indeed, the only changes to Rule 24's adequacy prong in 1966 made it *harder* to intervene. Original Rule 24 allowed intervention when representation "is *or may be*" inadequate, *see* Fed. R. Civ. P. 24(a)(2) (1938), but the 1966 amendments eliminated "may be," requiring proof that representation "is" inadequate. And while original Rule 24 required no inadequacy showing for intervenors who had a property interest, *see* Rule 24(a)(3) (1938), the 1966 revision required all intervenors to show inadequacy absent a statute granting unconditional intervention.

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[5] Petitioners point (at 30-31) to *Atlantic Refining Co. v. Standard Oil Co.*, 304 F.2d 387 (D.C. Cir. 1962), which petitioners say rejected a "bad faith or malfeasance" requirement to intervene on the government's side. But movants there were private oil companies, not intervenors seeking to assert a party's "same interests." *Sam Fox*, 366 U.S. at 692 n.4. In any event, the Advisory Committee believed *Atlantic Refining* reached a "poor result[]." 1966 Advisory Committee's Notes.

4. Since 1966, every single federal court of appeals has adopted and routinely applied the same rule the *en banc* Fourth Circuit applied below: a "presumption of adequacy" that "may be overcome on a showing of adversity of interest, collusion, or malfeasance—but not by mere disagreement over how to approach the conduct of the litigation." Pet. App. 32 (quotation marks omitted); *see, e.g.*, *Baker v. Wade*, 743 F.2d 236, 240 (5th Cir. 1984) ("In this circuit, as in others, representation is presumed adequate unless the applicant alleges that the representatives engaged in collusion, nonfeasance, or had an interest antagonistic to his."); *Bumgarner v. Ute Indian Tribe of Uintah & Ouray Rsrv.*, 417 F.2d 1305, 1308-09 (10th Cir. 1969) (where "interests … are identical," showing that intervenors "would have handled the defense of the case differently … is not sufficient to challenge the adequacy of representation").[6]

Both major federal procedure treatises agree. 6 *Moore's Federal Practice* § 24.03[4][a][iii] (3d ed. 2021) ("[i]f a movant's interests in litigation are the same as the interests of one or more of the existing parties, adequate representation is assured," and a movant must show "collusion," "adversity," or "nonfeasance" to displace the presumption); 7C Wright & Miller § 1909 (if "interest of the absentee is identical with that of one of the existing

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[6] *See also United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982); *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179-80 (2d Cir. 2001); *Del. Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 970, 971-73 (3d Cir. 1982); *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976); *United States v. Michigan*, 424 F.3d 438, 443-45 (6th Cir. 2005); *Kaul*, 942 F.3d at 799; *Stadin*, 309 F.2d at 919; *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003); *Tri-State Generation & Transmission Ass'n, Inc. v. N.M. Pub. Reg. Comm'n*, 787 F.3d 1068, 1072-73 (10th Cir. 2015); *Athens Lumber Co. v. FEC*, 690 F.2d 1364, 1366 (11th Cir. 1982); *Env't Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979).

parties or one of the existing parties is charged by law with representing the interest of the absentee," "representation will be presumed adequate" absent a showing of collusion or the like).

5. To rule for petitioners, this Court would have to upend the settled law of every circuit, reject the views of the rule's drafters in both 1938 and 1966, and overturn the Court's own adequacy holding in *Sam Fox*. *Stare decisis* alone compels affirmance.

Petitioners do not come close to presenting the "special justification" necessary to jettison *Sam Fox*'s inadequacy holding and the unbroken historical practice. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989); *see Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014). They do not contend that the presumption has become "unworkable" or that any other justification for overruling precedent applies. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 459 (2015). Nor could they. Every court of appeals has applied the presumption for decades, and when Congress had the opportunity to address this universal understanding of adequacy in 1966 (and again when it amended Rule 24 in 1987, and 1991, and 2006, and 2007), it chose to leave the presumption intact. *See Kimble*, 576 U.S. at 456-57.

6. Finally, this Court's interpretation of "adequate" representation under Rule 23(a)(4), which conditions class certification on proof that "the representative parties will fairly and adequately protect the interests of the class," strongly supports a presumption in identity-of-interest cases under Rule 24(a)(2). As this Court has repeatedly held, "[t]he adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *see Gen. Tel. Co. of the Nw. v. Equal Emp. Opportunity Comm'n*, 446 U.S. 318, 331 (1980) (similar). Rule 23 adequacy turns on

"whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

Where interests are the same, Rule 23 adequacy is presumptively established absent malfeasance or incompetence. The adequacy "test of Rule 23(a) is met" if the existing party and proposed intervenor have no "interests conflicting" and those interests have been "competently urged." *Sosna v. Iowa*, 419 U.S. 393, 403 (1975); *see Amchem*, 521 U.S. at 625-26 & n.20 (adequacy established where class representative "possess[es] the same interest and suffer[s] the same injury as the class members," absent indication of "[in]competency"). Moreover, "perfect symmetry of interest is not required," *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012), only "fundamental" conflicts defeat adequacy, and "a conflict will not defeat the adequacy requirement if it is merely speculative or hypothetical," *Ward v. Dixie Nat. Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) (Wilkinson, J.); *see also* 5 *Moore's Federal Practice* § 23.25[2][b][ii], [viii] (3d ed. 2021) (collecting cases).

This Court's interpretation of "adequacy" in Rule 23 to focus on ferreting out conflicts-of-interest applies equally to Rule 24. For one thing, this Court generally reads terms in the federal rules "*in pari materia*." *Hamling v. United States*, 418 U.S. 87, 134-35 (1974). More important, Rule 24's conception of adequate representation was designed to align with Rule 23's. The 1966 Advisory Committee's notes explain that the revision "draws upon the revision" of Rule 23 such that, under the revised Rule 24, a "member of a class should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court." The only difference is that

adequate representation under Rule 24 "is not confined to formal representation like that provided by … a representative party in a class action"—rather, "practical representation" will do. 1966 Advisory Committee's Notes.

B. The Presumption of Adequacy Applies With Greater Force Where the State Represents the Proposed Intervenors' Interest

The justifications for a presumption of adequacy are stronger yet where intervenors seek to intervene as agents of the state. Federal law and the federal rules direct that states are entitled to only one representative as of right—not two or more. And this Court's presumption that government officials will adequately carry out their representative duties counsels strongly against declaring such officials "inadequate" on the basis of disagreement about their litigation choices.

1. Federal Law Instructs that States Get Only One Representative to Defend State Law

Federal law embodies a strong presumption that states are entitled to only one representative of right in cases challenging state laws. Federal law speaks specifically to intervention by states in challenges to state laws in three places: 28 U.S.C. § 2403(b), Rule 5.1, and Rule 24(b)(2). These provisions refute petitioners' argument that state agents are entitled to special solicitude whenever they seek to intervene.

Start with 28 U.S.C. § 2403(b), which governs intervention of right in cases challenging the "constitutionality of any statute of [a] State affecting the public interest." In such cases, "the court … shall permit the State to intervene" only if the "State or any agency, officer, or employee thereof *is not a party*." 28 U.S.C. § 2403(b) (emphasis added). Rule 5.1, which implements § 2403(b), requires parties raising constitutional challenges to state law to notify the state attorney general—and allows the

attorney general to intervene—if "the parties *do not include* the state, one of its agencies, or one of its officers or employees in an official capacity." Fed. R. Civ. P. 5.1(a), (c) (emphasis added).

Federal law thus speaks directly to the question whether a state agent is entitled to intervene to assert an interest in defending the constitutionality of state laws when another state agent is already doing so, and it answers *no*. And as petitioners concede, federal law preempts any contrary state policy in this context. Pet. Br. 21; *see also Shady Grove Orthopedic Assocs. v. Allstate Ins.*, 559 U.S. 393, 403-04 (2010). Petitioners' proposition (at 47-48) that Rule 24(a)(2) already requires intervention whenever a state announces that it wants a particular agent to represent its interest, and that the state's position establishes both interest and adequacy, would render § 2403(b) largely superfluous. At minimum, § 2403(b) establishes that a single representative is *presumptively* adequate.

Rule 24(b)(2) provides further compelling evidence that Rule 24(a) confers no special status on states. Rule 24(b)(2) allows for *permissive* intervention by a "state governmental officer or agency" in cases involving a "claim or defense" based on "a statute or executive order administered by the officer or agency." In other words, Rule 24(b)(2) contemplates that there will be cases in which states or their agents have interests that may be impaired under Rule 24(a) but nonetheless have no absolute right to intervene.

Permissive rather than mandatory intervention in those circumstances was intentional. When the state "officer or agency" language was added to Rule 24(b) in 1946, the Advisory Committee rejected a proposal to "transfer[]" the category "from the permissive side to a right," explaining that intervention motions by state officials and agencies "may be just an unnecessary interference with a

lawsuit." *Proceedings of Advisory Comm. on Rules for Civil Procedure*, vol. 1, at 199-200 (1946).[7] Permissive intervention, the Committee concluded, properly enables district courts to let states in if there is "reason for it." *Id.*

2. The Presumption that Government Officials Adequately Represent the Government in Court Strongly Supports a Presumption Here

As every court of appeals has held, the case for a presumption of adequacy under Rule 24 is even stronger for government actors because of the presumption that governmental representatives in legal proceedings will discharge their duties.

The rule that "[r]epresentation by the governmental authorities is considered adequate in the absence of gross negligence or bad faith on their part" is as well-established as the presumption of adequacy in identify-of-interest cases. Moore & Levi, *supra*, at 594. Every court of appeals has held that "[a] presumption of adequate representation also arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee." *Baker*, 743 F.2d at 241; *see* 7C Wright & Miller § 1909.[8] That rule reflects this Court's longstanding presumption that government officials will faithfully defend their government's laws and policies in court.

And this Court has recognized that government officials will adequately represent their government's interest in the Rule 24(a) context: "The Department of Justice is the representative of the public in these antitrust suits.

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[7] *Available at* https://www.uscourts.gov/sites/default/files/fr_import/CV03-1946-min-Vol1.pdf.

[8] *See, e.g.*, *Del. Valley*, 674 F.2d at 971-73 (denying intervention by state legislators when state attorney general was representing state); *Env't Defense Fund*, 631 F.2d 738 (denying intervention by local water districts when state was a party).

So far as the protection of the public interest in free competition is concerned, the interests of those intervenors w[ere] adequately represented." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 177 (1948). The Court has also applied it to state parties, denying Philadelphia's intervention motion in an original action because the rule that a state "'must be deemed to represent all its citizens' … is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration." *New Jersey v. New York*, 345 U.S. 369, 372-73 (1953). "An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, … which interest is not properly represented by the state." *Id.*

North Carolina's Attorney General is charged by law to "appear for and to defend the State or its agencies in all actions in which the State may be a party or interested." *Martin v. Thornburg*, 359 S.E.2d 472, 480 (N.C. 1987). Rule 24 embodies a presumption that the State Board and Attorney General will adequately discharge their duty to defend S.B. 824. Thus, as Judge Sykes explained, even where a state statute authorizes intervention, a legislature's "political and policy differences with the Attorney General …, as well as disagreements about litigation strategy in this and other cases," cannot show inadequacy. *Kaul*, 942 F.3d at 810 (concurrence).

C. Eliminating the Presumption Would Burden the Judiciary and Existing Parties and Draw Courts into Political Disputes

Courts have universally applied a presumption of adequacy for practical reasons also: eliminating it would make trial management impossible. District courts would be required to admit multiple parties representing the same interest, all entitled to serve discovery, consume time at depositions, share argument, and present and cross-examine witnesses at trial. Jettisoning the

presumption in this context, moreover, would embroil courts in political disputes among government agents vying to represent the state's interests and impugning each other's efforts, as has occurred here.

1. Federal courts are already overworked, with the Judicial Conference warning of "staggering" increases. *Judicial Conference's Recommendation for More Judgeships, S. Comm. on the Judiciary*, 117th Cong. 9 (2020) (statement of Hon. Brian S. Miller).[9] Some districts average as many as four years between filing and trial, which leads to "increase[d] expenses for civil litigants" and even a "lack of respect for the Judiciary and the judicial process." *Id.*

Eliminating the presumption of adequacy would seriously exacerbate this "profound" problem, *id.*, contrary to Rule 1's mandate that the federal rules "should be construed, administered, and employed … to secure the just, speedy, and inexpensive determination of every action." Eliminating the presumption of adequacy "run[s] the risk of rendering litigation 'unmanageable' in the federal courts." Pet. App. 38. Unlike an *amicus*, "[a]n intervenor becomes a full-fledged party, able to conduct discovery, file motions, and add new issues and complexity and delay to the litigation." *N.M. Off-Highway Vehicle All. v. U.S. Forest Serv.*, 540 F. App'x 877, 883 (10th Cir. 2013) (Gorsuch, J., dissenting). More intervenors "would vastly complicate and delay already complicated and lengthy actions." *South Carolina v. North Carolina*, 558 U.S. 256, 289 (2010) (Roberts, C.J., concurring in part); *see Allen Calculators, Inc. v. Nat'l Cash Reg. Co.*, 322 U.S. 137, 141-42 (1944). As the Advisory Committee's reporter explained, it was precisely to avoid that outcome—"a cluttering of lawsuits with multitudinous useless

[9] *Available at* https://www.uscourts.gov/sites/default/files/judge_brian_s._miller_testimony_june_2020_0.pdf.

intervenors"—that the inadequacy prong was retained in 1966. Kaplan, *supra*, at 403.

Absent the presumption, "multitudinous useless intervenors" would spring up in all manner of cases. Every county board of elections could intervene in suits concerning state voting laws. *E.g.*, *United States v. New York State Bd. of Elections*, 312 F. App'x 353, 354-55 (2d Cir. 2008) (applying presumption to affirm denial of county board's motion to intervene). Every shareholder could intervene in derivative actions. *E.g.*, *In re Ambac Fin. Grp., Inc., Derivative Litig.*, 257 F.R.D. 390, 394 (S.D.N.Y. 2009). Every property owner could intervene in local permitting disputes. *E.g.*, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996).

Petitioners note (at 31) that district courts may not consider practical consequences once Rule 24(a)(2)'s elements are established in any particular case, but such consequences are manifestly relevant, *see* Fed. R. Civ. P. 1, when this Court considers interpreting those elements to greatly expand intervention as of right. Rule 24 balances fairness to absentees with manageability and fairness to existing parties. Expansive intervention as of right imposes real costs: existing litigants may be forced to respond to double or triple or quadruple the number of experts, and the same for summary judgment briefs, and so on. Or litigants whose interests are affected directly will be forced to divide limited time at trial among a dozen intervenors whose similar law or policy could potentially be affected by precedent set in the case. Sometimes, Rule 24(a)(2) will require intervention anyway. But fairness and orderly case management counsels strongly against intervention as of right for multiple parties representing identical interests on a "minimal" inadequacy showing.

2. Worse than the delay and raw increase in work entailed by petitioners' approach is the *kind* of work it would

impose: resolving "intramural dispute[s]" within state governments. *New Jersey*, 345 U.S. at 373. The burden on courts is "magnified" where "a government entity seeks intervention to represent the *same* state interest represented already by a state attorney general." Pet. App. 38.

Where two bodies of state government purport to speak for the state, district courts will be required to determine which "better represents" the state's interests—a "fundamentally political question." Pet. App. 39. This creates an "intractable procedural mess": where the two state agents disagree, "[t]he district court would … have no basis for divining the true position of the [state] on issues like the meaning of state law, or even for purposes of doctrines like judicial estoppel." *Kaul*, 942 F.3d at 801-02. And federal courts will be required to resolve these questions on a "regular basis." Pet. App. 39. Thirteen states currently have divided government. State laws authorizing intervention by state legislators are growing more popular. *E.g.*, H.B. 6553 (Mich. 2018) (approved by legislature; vetoed by governor). Indeed, without the presumption of adequacy, a state could "designate not one but two representatives—or three, or more, because there is no discernible limiting principle here—in a single federal case." Pet. App. 39.

Petitioners (at 31-33) attempt to downplay these concerns with examples where courts have *permitted* separate state actors to intervene or where plaintiffs have *chosen* to sue multiple state actors. But abandoning the presumption of adequacy would require intervention in all these cases—even where the district court assesses that intervention would cause delay and prejudice.

Petitioners incorrectly state that the Court "need not impugn the integrity of any state official" to rule in their favor. Pet. Br. 33. Yet they argue, under their "minimal" inadequacy standard, that the Attorney General cannot

be trusted to defend S.B. 824 because he opposed a different voter ID law. Pet. Br. 51-52. It is precisely this argument—that the Attorney General "would abdicate his official duty to the State by subterfuge, mounting a sham defense of the statute"—that the *en banc* Fourth Circuit considered "a disservice to the dignified work of government lawyers who each day put aside their own policy and political preferences to advocate dutifully on behalf of their governments and the general public." Pet. App. 47. Eliminating the presumption of adequacy will force courts to decide these sorts of internecine political disputes with greater frequency and to routinely declare that state officials are "inadequately" discharging their constitutional duties.

D. Petitioners' Remaining Arguments Lack Merit

1. This Court Has Never Rejected a Presumption of Adequacy

This Court's decisions in *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), and *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), did not reject a presumption of adequacy in identity-of-interest cases. *Contra* Pet. Br. 27-29. *Trbovich* involved conflicting interests, and *Cascade* found extraordinary malfeasance.

In *Trbovich*, the Court allowed a union member to intervene in the Secretary of Labor's suit to overturn a union election, because the Secretary's and union member's interests were not "identical." 404 U.S. at 538. The Secretary's sovereign role representing the "public interest" could conflict with the individualized, "narrower interest of the complaining union member." *Id.* at 539 (quotation marks omitted). It was in that context of potentially *conflicting* interests that the Court noted that Rule 24(a) applicants can "show[] that representation of his interest 'may be' inadequate" and that the burden is "minimal." *Id.* at 538 n.10.

Trbovich's "minimal" burden standard does not apply when the proposed intervenor's interest is the same as an existing party's. Indeed, the very source *Trbovich*'s footnote cited—*Moore's Federal Practice*—has from its very first edition recognized "collusion" or "nonfeasance" as requirements for showing inadequacy unless the representative "has or represents some interest adverse to that of the" proposed intervenor. *Supra* pp. 16-17 & n.4. As Judge Wilkinson has explained, *Trbovich* merely "stand[s] for the conventional proposition that where the existing party and proposed intervenor seek divergent objectives, there is less reason to presume that the party (government agency or otherwise) will adequately represent the intervenor." *Stuart v. Huff*, 706 F.3d 345, 352 (4th Cir. 2013); *accord United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 986-87 (2d Cir. 1984).[10]

Petitioners' other case, *Cascade*, said nothing about how to evaluate inadequacy in identity-of-interest cases. Cascade was a private gas distributor seeking to intervene to challenge a consent decree breaking up a gas monopoly, where the to-be-divested company was its sole supplier. 386 U.S. at 133. No one suggested that the United States represented Cascade's interests.

Cascade confirms, moreover, that proof that the government is inadequately enforcing or defending the laws cannot be "minimal." The Court found inadequacy only after concluding that the United States had engaged in extraordinary malfeasance: it "knuckled under to El Paso," the monopolist, and entered into a settlement that was "permeated" with "evil" and violated the Court's "prior opinion and mandate." *Id.* at 136, 141-42.

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[10] *Trbovich*'s "may be" language was eliminated from the rule in 1966; as Judge Friendly noted, *Trbovich* relied on an older edition of *Moore's* quoting the pre-1966 version. *Hooker*, 749 F.2d at 986 n.16.

2. A Presumption of Adequacy Does Not Frustrate State Policies

Respect for state dignity and sovereignty is a reason to presume adequacy of representation here. *New Jersey*, 345 U.S. at 373. At minimum, petitioners are wrong that the presumption somehow infringes on those interests.

a. The question presented is not whether states can choose their representatives in federal court. They can. *Kaul*, 942 F.3d at 802. If North Carolina repealed the law directing the Attorney General to "appear for the State … in any cause or matter … in which the State may be a party or interested," and to "represent all State departments" and "agencies," N.C. Gen. Stat. § 114-1(1), (2), and replaced him with the legislative leaders, it might violate the North Carolina Constitution, but Rule 24 would pose no obstacle.

So nothing about a presumption of adequacy fails to respect the "importance" (Pet. Br. 20) of the state interest in defending and enforcing its laws. Nothing frustrates North Carolina's ability to decide "who should speak for it" or "empowers plaintiffs … to decide which state agents will control the defense." Pet. Br. 21. And nothing requires any federal court to "displac[e] a State's allocation of governmental power and responsibility." Pet. Br. 21 (quoting *Alden v. Maine*, 527 U.S. 706, 752 (1999)).

What the presumption means, instead, is that a state, like other litigants, cannot force a federal court to let it speak through two different representatives in the same litigation. The presumption does not determine substance or outcomes, so it raises no concern about "substantial variations [in outcomes] between state and federal litigation," Pet. Br. 22 (quoting *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001))—a principle that applies only in diversity anyway. In any event, "[a] Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid

in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes)." *Shady Grove*, 559 U.S. at 409 (plurality).

Petitioners say that states have "more than one interest," that the State Board has pressed an interest in "administering elections" in addition to defending its laws, and that petitioners are "exclusively focused on defending the law." Pet. Br. 24-25. But petitioners cannot have it both ways. They concede that election administration is a significant state interest. Pet. Br. 48-49. Having come into court on the theory that they represent the State's interest, not the legislature's, they cannot contend that the court must let them in because the legislature apparently has less interest in election administration. Nor does their theory have any stopping point. Must federal courts let in fifty different state representatives all seeking to defend state law but deprioritizing certain interests in their briefs?

Petitioners' federal examples (at 24) are inapposite. They involved *amicus* briefs, not intervention. And in both examples, a second organ of government filed an *amicus* brief where it *disagreed* with the first on the merits. Petitioners cite no example of any court allowing one representative of the United States to intervene as of right in a case where another representative was already defending the relevant law.

b. Nor do petitioners identify any evidence that Rule 24 was intended to allow for intervention in such cases. Professors Moore and Levi extensively cataloged the pre-Rules practice and cited no decision allowing intervention by one arm of a government to defend a statute that another arm was already defending. *See* Moore & Levi, *supra*; *accord* 2 Thomas Atkins Street, *Federal Equity Practice* §§ 1349-70 (1909).

Finally, nothing in this Court's decisions concerning state legislators' standing to appeal suggests that Rule 24 entitles states to designate multiple agents to represent them simultaneously in federal court.

In *Bethune-Hill*, Virginia's House of Delegates intervened on behalf of itself, asserting the House's particularized interest in the House redistricting plan rather than Virginia's interest in defending state laws. 139 S. Ct. at 1952-53. The Court held that the House's interest did not confer appellate standing, and that Virginia law did not authorize the House to represent the State's interests more broadly. The Court characterized the latter question as whether the House could "displace Virginia's Attorney General as representative of the state" given his failure to appeal. *Id.* at 1950. The Court did not decide any question concerning Rule 24 or adequacy, much less in a context where the state's agent is actively defending the statute. *See Kaul*, 942 F.3d at 800.

In *Karcher*, legislative leaders intervened as defendants only after the attorney general and defendant state entities declined to defend the statute. 484 U.S. at 75. After the leaders lost their leadership positions, this Court held that they lacked standing to appeal because they no longer represented the legislature "on behalf of the State." *Id.* at 81. The Court again did not decide any question concerning adequacy, intervention where the attorney general is defending a statute, or Rule 24.

And *Hollingsworth v. Perry*, 570 U.S. 693 (2013), held that proponents of Proposition 8 lacked standing to defend it on appeal, even though state officials declined to do so, because the proponents "have no role … in the enforcement of Proposition 8," *id.* at 707, and were not "agents of the State," *id.* at 713. The dissent disputed whether a formal agency relationship was required where "the State's usual legal advocates decline" to defend a statute, *id.* at 727-28, but no justice suggested that federal courts were

required to let states appoint additional defenders where the attorney general *was* defending.

3. The Word "Unless" Does Not Support Burden-Shifting

Trbovich requires the "applicant [to] show[]" inadequacy," 404 U.S. at 538 n.10, disposing of petitioners' argument (at 26) that existing parties bear that burden. So do the 1966 Advisory Committee's notes, which explain that the intervenor must "show the inadequacy of the representation of his interest," that a trust beneficiary can intervene "if he can show" inadequacy, and that an absent class member can intervene if he "is able to establish [inadequacy] with sufficient probability." 1966 Advisory Committee's Notes; *see also* 6 *Moore's Federal Practice* § 24.03[4][a] (3d ed. 2021) ("The person seeking intervention has the burden of proof on adequate representation."). Wright & Miller, which petitioners cite, recognizes that its contrary view is at odds with *Trbovich*. 7C Wright & Miller § 1909 n.5.

The word "unless" does not suggest a shift in burden from "where it usually falls, upon the party seeking relief," *Schaffer v. Weast*, 546 U.S. 49, 58 (2005), or otherwise renders the inadequacy requirement toothless. *Contra* Pet. Br. 26. To the contrary, when Congress wanted to require existing parties to demonstrate adequacy to defeat intervention, it has so specified. *E.g.*, 42 U.S.C. § 9613(i) (allowing CERCLA intervention "unless the President or the State shows" adequacy); § 11046(h)(2) (similar). Moreover, "[s]tatutes and opinions (judicial and administrative) teem with reservations, exceptions, provisos, and unless clauses." *Andershock's Fruitland, Inc. v. U.S. Dep't of Agric.*, 151 F.3d 735, 737 (7th Cir. 1998). Petitioners cite no support for their assertion (at 26) that the adequacy clause is not a "primary focus" of Rule 24.

III. Adequacy Determinations Are Reviewed for Abuse of Discretion

Petitioners' argument advocating *de novo* review conflicts with controlling precedent and is incorrect on first principles.

A. This Court's Precedent Requires Abuse-of-Discretion Review

This Court has already held that intervention decisions under Rule 24(a)—and adequacy determinations in particular—are reviewed for abuse of discretion.

In *NAACP v. New York*, the Court applied abuse-of-discretion review to Rule 24(a) timeliness determinations. 413 U.S. 345, 364, 366 (1973). Assessing timeliness, *NAACP* held, requires understanding "the facts and … the history of the case," issues within the special competence of the district court. *Id.*

In *Georgia v. Ashcroft*, the Court extended *NAACP*'s abuse-of-discretion standard to Rule 24(a)(2) adequacy determinations. 539 U.S. 461, 477 (2003). The *Georgia* district court granted intervention of right "because it found that the intervenors" had "'identifie[d] interests that are not adequately represented by the existing parties.'" *Id.* (quoting App. J.S. 218a). This Court affirmed, holding that "the District Court did not abuse its discretion" in concluding that the applicants "me[t] the requirements of Rule 24." *Id.* (citing *NAACP*, 413 U.S. at 367). The Court's citation to *NAACP* confirms that its extension of the abuse-of-discretion standard to Rule 24(a)'s non-timeliness factors was deliberate.

Petitioners are flat wrong (at 40 n.2) that the *Georgia* district court "did not explain whether it granted intervention as of right under Rule 24(a)(2) or permissive intervention under Rule 24(b)(2)." This Court quoted the district court's invocation of the Rule 24(a)(2) test. *Georgia*, 539 U.S. at 477. And the district court's order

invoking that test explicitly cited Rule 24(a)(2): Intervenors "identif[y] interests that are not adequately represented by the existing parties. Therefore, the Court grants movants' request to intervene as to the State Senate and State House Plans. Fed. R. Civ. P. 24(a)(2)." App. J.S. 218a.[11]

Against these conclusive precedents, petitioners invent (at 39-40) a "historical practice" under which this Court "implicitly" has reviewed adequacy *de novo*. To start, every authority forming this supposed practice predates *Georgia v. Ashcroft* by decades. Pet. Br. 39-40; *see id.* at 41 (same for cases cited in 1966 commentary). None of these cases actually mentions the standard of review. And even then, the supposed "practice" is consistent with abuse-of-discretion review. *Trbovich*, for example, reversed after finding "clear" doubt on adequacy, 404 U.S. at 358; *Cascade* concluded that the existing parties' representation fell "far short" and ordered the case reassigned to another district court, 386 U.S. at 135-36, 142-43. Other cases affirmed or reversed denial of intervention on grounds other than adequacy, *Allen Calculators*, 322 U.S. at 141, or did not even involve Rule 24(a)(2), *Bhd. of R.R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519 (1947). None casts doubt on this Court's subsequent holdings endorsing abuse of discretion review.

B. Rule 24(a)(2)'s Text, Structure, and History Support Abuse-of-Discretion Review

Rule 24(a)(2) requires courts to assess whether "existing parties adequately represent" an interest. The ordinary meaning of "adequately" suggests discretion—it means "sufficiently" or "suitably," words that connote judgment. Oxford English Dictionary 108 (1933); *see id.* (3d ed. 2011) (similar).

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[11] *Available at* 2002 U.S. S. Ct. Briefs LEXIS 815.

Courts universally review adequacy determinations under Rule 23(a) for abuse of discretion, strongly supporting abuse-of-discretion rule here. *See* 7A Wright & Miller § 1765 (citing examples); *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) (holding that class certification generally is "committed … to the discretion of the district court"). Rule 24(a) and Rule 23(a) adequacy determinations arise under materially identical text and were designed to be "overlapping" and interrelated. *Lelsz v. Kavanagh*, 710 F.2d 1040, 1044 (5th Cir. 1983); *see* 3 William Rubenstein *et al.*, *Newberg on Class Actions* § 9:35 (5th ed. 2021); 1966 Advisory Committee's Notes. They must be reviewed under the same standard.

Petitioners point (at 41) to the 1966 Advisory Committee's citation to five circuit decisions, but none discussed the standard of review. The notion that these cases "implicitly" foreclosed deference (*id.*) is belied by the fact that three came from the Second and D.C. Circuits, which apply the abuse-of-discretion standard. *See Chance v. Bd. of Educ.*, 496 F.2d 820, 826 (2d Cir. 1974); *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 913 (D.C. Cir. 1977). In fact, the Committee cited those decisions for the proposition that "[a] party to an action may provide practical representation to the absentee …, and the adequacy of this practical representation *will then have to be weighed*." 1966 Advisory Committee's Notes (emphasis added). Assessments requiring weighing by the factfinder are quintessentially discretionary. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008).

It does not matter that intervention under Rule 24(a) is mandatory if its requirements are met. *Contra* Pet. Br. 35, 38. Discretionary determinations often have mandatory consequences—like Rule 11 sanctions, which are also reviewable for abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990). "That sanctions 'shall' be imposed when a violation is found does not

have any bearing on how to review the question whether the attorney's conduct violated Rule 11." *Id.*[12]

And petitioners' theory that a rule cannot confer discretion unless it uses the word "discretion" (Pet. Br. 36) or declares that a finding is one "for the district court to make" (Pet. Br. 38) finds no support in the caselaw and would require *de novo* review of timeliness determinations and class-certification decisions as well.

Abuse-of-discretion review would not inappropriately blur mandatory and permissive intervention. *Contra* Pet. Br. 35-37. If a district court clearly errs in finding representation adequate, and Rule 24(a)'s other requirements are met, correction of the error would require granting intervention. This is the sense in which Rule 24(a)(2) intervention "pose[s] only a question of law"—if its factors are satisfied, the court cannot exercise *additional* discretion to deny intervention. Pet. Br. 36 (quoting 7C Wright & Miller § 1902). But all manner of ultimate legal conclusions depend on "subsidiary" findings (Pet. Br. 37) reviewed deferentially. *See, e.g.*, *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 324-25 (2015) (applying clear-error review "when a court of appeals reviews a district court's resolution of subsidiary factual matters," even though ultimate issue presents a "question of law").

C. District Courts Are Best Positioned To Assess Adequacy

Finally, "the sound administration of justice" counsels strongly for abuse-of-discretion review. *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1166-67 (2017). Adequacy of representation, like other findings this Court has deemed discretionary, "depends greatly on factual determinations" and benefits from "[f]amiliar[ity] with the issues

[12] The "shall" language has since been amended.

and litigants." *Cooter*, 496 U.S. at 402-03 (Rule 11 sanctions); *see*, *e.g.*, *NAACP*, 413 U.S. at 366 (Rule 24 timeliness); *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014) (whether patent case is "exceptional"); *Pierce v. Underwood*, 487 U.S. 552, 562 (1988) (whether party's position is "substantially justified"); *McLane*, 137 S. Ct. at 1167 ("whether to enforce an EEOC subpoena").

As Judge Friendly explained, "the great variety of factual circumstances in which intervention motions must be decided, the necessity of having the 'feel of the case' in deciding these motions, and other considerations essential under a flexible reading of Rule 24(a)(2) … are precisely those which support an abuse of discretion standard of review." *Hooker*, 749 F.2d at 991. On this point, even the dissenters below agreed: "The district court is best situated to assess the 'adequacy' of an existing party's representation of a proposed intervenor's interest. The parties are right there in front of it." Pet. App. 52 (Wilkinson, J., dissenting); *see* Pet. App. 59 (Quattlebaum, J., dissenting) (similar).

To be sure, sometimes "objective factors" or "undisputed facts" (Pet. Br. 42) could determine adequacy. Or sometimes legal error may require reversal. But that is a feature, not a bug. Abuse-of-discretion review is not "bifurcated" (Pet. Br. 37); it appropriately accounts for the fact that intervention will rest on "different kinds of determinations" in different cases. *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003).

This case illustrates the point. Petitioners' theory of inadequacy rests largely on "'multifarious,'" "case-specific" facts. *McLane*, 137 S. Ct. at 1167. They call adequacy analysis "highly contextual." Pet. Br. 19. Below, they relied on a hodgepodge of documentary evidence—from press releases and campaign statements to letters and court filings—all of which purportedly showed that

the Governor lacked sufficient "ability and incentive to litigate," and that the State Board "ultimately will likely take the Governor's side." J.A. 65-70; *see* J.A. 166 (renewed motion). In this Court, too, petitioners rely extensively on comparative litigation strategy. Pet. Br. 2-14, 47-50. They impugn the credibility of the Attorney General, suggesting that he will ignore his state-law duty because he opposed voter ID "[a]s a state senator." Pet. Br. 51.

These arguments cannot be squared with *de novo* review. Questions about "how the litigation has played out so far," Pet. Br. 49, or whether the State Board has inappropriately "prioritize[ed] … its interest in election administration," Pet. Br. 50, or whether a party's presentation was sufficiently "vigorous[]," Pet. Br. 9, or whether counsel is credible, Pet. Br. 51-52, are not the types of questions appellate courts answer in the first instance. *Cooter*, 496 U.S. at 401-02. They are best entrusted to courts with "superior familiarity with, and understanding of, the dispute." *United States v. Clarke*, 573 U.S. 248, 256 (2014).

IV. The Court Should Affirm the Denial of Intervention or, at Minimum, Remand

If the Court concludes that any presumption of adequacy applies, it must affirm: petitioners do not contend that they can satisfy any inadequacy standard beyond a "'minimal' threshold" that representation "'may be' inadequate." Pet. Br. 47. If the Court holds that a "minimal" standard applies, however, it should remand for the lower courts to address adequacy under that standard, as well as to address whether petitioners have a protectable interest. That latter question—which the Fourth Circuit assumed without deciding—presents novel questions of state law this Court should not decide in the first instance.

A. If the Court Reaches the Question, It Can Affirm Denial of Intervention With or Without a Presumption of Adequacy

If the Court announces a new adequacy standard, it should vacate and remand for application of that standard. *See, e.g.*, *Perdue v. Kenny A.,* 559 U.S. 542, 546 (2010).

But if the Court does assess adequacy, it should affirm. Unless Rule 24(a) requires intervention on a mere showing of differences of opinion about trial strategy—a standard that would read the inadequacy prong out of existence—petitioners fail to establish inadequacy.

The record demonstrates that the State Board and the Attorney General have zealously defended S.B. 824 from day one. The State Board and the Governor (both represented by the Attorney General) moved to dismiss on several bases. C.A. App. 233-72. The Governor won dismissal. C.A. App. 391-413. Since then, the State Board has continued to defend S.B. 824, including by deposing plaintiffs' experts, opposing plaintiffs' motion for a preliminary injunction, C.A. App. 1705-50, and submitting over 1,400 pages of evidence supporting that opposition, C.A. App. 1751-3230. The State Board successfully overturned the preliminary injunction "based on the record the Attorney General created in the district court." Pet. App. 44. The State Board has now moved for summary judgment on all claims. Nothing about the State Board's conduct suggests that it is unwilling or unable to continue defending this lawsuit.

Petitioners point (at 47-48) to state law and purported federalism concerns, arguing that Rule 24's adequacy prong must advance the State's choices about who should represent it in court. Even if state law actually authorized petitioners to represent the State, *but see infra* pp. 45-46, that would bear only on whether petitioners can assert a legally protectable interest at all; petitioners cannot bootstrap their interest into a showing of inadequacy too. As

the Fourth Circuit observed, "[a] state's policy judgment about the value of legislative intervention may bestow a protectable interest in certain court cases, but it does not override our normal standards for evaluating the adequacy of existing representation in those cases." Pet. App. 29-30 n.3.

Petitioners' contrary view "would risk turning over to state legislatures, rather than district courts, control over litigation involving the states." *Id.*; *see Kaul*, 942 F.3d at 799, 802. Indeed, petitioners acknowledged below that, if the adequacy determination were not independent, it would mean "automatic intervention as of right by every legislative body" authorized to represent the State. C.A. Br. 32 n.2. For that reason, they did not cite state law or policy as evidence of inadequacy below. C.A. Br. 36-43. They were correct then and are incorrect now.

Petitioners further assert that they are "focus[ed] entirely on defending [S.B. 824's] constitutionality," and not on the State's interest in "overseeing elections." Pet. Br. 48. But as petitioners concede (at 49), properly administering elections is an important state interest, not least because it implicates enforcement of many other state laws. That the State Board is representing *both* the State's "interest in election administration" (Pet. Br. 50) *and* the State's interest in defending and executing its laws does not render the Board inadequate under any plausible meaning of the term. *Hooker*, 749 F.2d at 991 (argument that intervenors' "interests are more 'focused'" than existing parties' does not establish inadequacy).

When petitioners finally say *how specifically* they think the Attorney General has performed inadequately, they muster only quibbles over litigation strategy. Petitioners complain (at 49) that the State Board did not move to dismiss on the merits. But plaintiffs' claims of intentional racial discrimination are inherently fact-intensive.

Petitioners protest (at 49-50) that the State Board offered 1,400 pages of evidence but no expert witnesses at the preliminary injunction stage, but that is not unusual. Monday-morning quarterbacking on litigation strategy cannot demonstrate inadequacy—especially when the State Board's strategy *won*. Pet. App. 43-44.

Petitioners argue (at 50) that the State Board's litigation conduct in *Holmes* (the parallel state-court challenge) demonstrates potential inadequacy. But conduct in a *different* case doesn't establish inadequacy, as a party's briefing strategy may appropriately differ in a situation like *Holmes* where it has active co-defendants (petitioners) spearheading the law's defense on the merits. Pet. App. 45. The State Board's affiant spoke to election administration, while petitioners' affiants spoke to whether the law they passed was based on racial animus. *See* Pet. Br. 50-51. Petitioners' and the State Board's choice to divide the legal issues between themselves in *Holmes* does not support an inference that the State Board might stop defending S.B. 824's constitutionality here.

Finally, petitioners speculate (at 51-52) that the Governor (who is no longer a party) or the Attorney General might someday shirk their duty to defend state law for political reasons. But that "startling accusation" (Pet. App. 47) is belied by every decision the Attorney General has made in this case thus far. Petitioners' speculation (at 51) that the Governor could direct Board members to stop defending S.B. 824 because they serve "at his pleasure," is not only unseemly but false. N.C. Gen. Stat. § 143B-16 (governor may remove members only for cause).

"Should the Attorney General or State Board in fact abandon their defense of S.B. 824 in the future," petitioners "would be free to seek intervention once again." Pet. App. 48-49. In the meantime, speculative conspiracy

theories cannot establish inadequacy, under any standard.

B. Rule 24(a)(2)'s Interest Prong Requires Remand

This case comes to the Court on the "assum[ption]" that petitioners have the requisite significantly protectable interest. Pet. App. 24. Whether that is true turns "upon state law," *United States v. Stitt*, 139 S. Ct. 399, 407 (2018), namely, N.C. Gen. Stat. §§ 1-72.2 and 120-32.6, which petitioners (at 43) say assign them the right to represent the State's interest in enforcing and defending state law, the only interest they continue to assert. But both plaintiffs and the Attorney General dispute petitioners' interpretation; these laws "ha[ve] yet to be given an authoritative construction by North Carolina's courts," Pet. App. 145; and "the lower [federal] courts have not considered," much less resolved, these issues, *Stitt*, 139 S. Ct. at 407.

In such circumstances, this Court's long-settled practice is to remand. *See id.* The practice reflects not only that this is "a court of review, not of first view," *id.*, but also "that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States," *Frisby v. Schultz*, 487 U.S. 474, 482 (1988); *see McKesson v. Doe*, 141 S. Ct. 48, 50-51 (2020) (declining to answer question presented because it presented an "unsettled" issue of state law).

Remand is particularly prudent where, as here, the meaning of state law is not only fiercely contested but also raises sensitive constitutional questions under North Carolina's separation of powers clause. North Carolina's legislative branch argues that N.C. Gen. Stat. §§ 1-72.2 and 120-32.6 authorize its leaders to intervene *on behalf of the State*. *See* Pet. Br. 47-48. The State Board, represented by the Attorney General, disagrees, as do plaintiffs. That view is supported by the law's plain text, which provides that petitioners may intervene only "on behalf of the

General Assembly." N.C. Gen. Stat. § 1-72.2(b); *see* § 120-32.6(b) (petitioners "deemed to be the State" only "to the extent provided in" § 1-72.2(a)). And the only state court to consider the question has confirmed that these statutes permit petitioners to "appear … on behalf of the legislative branch alone," not to assert "any interest of the State in the execution and enforcement of its laws." *N.C. All. for Retired Ams. v. N.C. Bd. of Elections*, 2020 WL 10758664, at *4 (N.C. Super. Oct. 5, 2020). A contrary interpretation, the court held, "would violate the North Carolina Constitution's separation of powers clause." *Id.*

The Court often declines to pass on federal questions when doing so would require it to weigh in on the "unsettled relationship between the state constitution and a [state] statute." *Harris Cnty. Comm'rs Ct. v. Moore*, 420 U.S. 77, 84 (1975). If this Court does not affirm the district court's adequacy finding, it should remand for the lower courts to address Rule 24's interest prong in the first instance.

CONCLUSION

The Court should affirm the judgment of the Fourth Circuit.

Respectfully submitted.

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