NO. 21-248

IN THE
Supreme Court of the United States

PHILIP E. BERGER, *et al.*,
Petitioners,

v.

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*,
Respondents.

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

BRIEF OF LAWYERS DEMOCRACY FUND AND REPRESENTATIVE RODNEY DAVIS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Lawyers Democracy Fund (LDF) is a non-profit organization established to promote the role of ethics, integrity, and legal professionalism in the electoral process. To accomplish this, LDF primarily conducts, funds, and publishes research and in-depth analysis regarding the effectiveness of current and proposed election methods, particularly those that fail to receive adequate coverage in the national media. Robust defense of reasonable, validly-enacted election laws is essential to achieve these goals. As part of its mission, LDF is a resource for lawyers, journalists, policy-makers, courts, and others interested in elections.

The effort by a state legislature to intervene in a lawsuit to defend a reasonable election law it enacted is profoundly important. Not only is the legislature entitled to defend its election law enactments, and the public it represents has an interest, as a matter of federalism, but federal courts will benefit from hearing the legislature's defense. LDF supports efforts to improve judicial review of election laws. For these reasons, LDF has an interest in the North Carolina General Assembly's intervention in this case.

U.S. Representative Rodney Davis has represented the Thirteenth District of Illinois since 2013

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have provide written consent to the filing of this brief.

and has served since 2019 as Ranking Member of the U.S. House Committee on House Administration, which has broad jurisdiction over federal elections. Ranking Member Davis engages in targeted efforts to promote voter confidence and faith in elections processes and outcomes, to protect the division of sovereignty between States' primary constitutional role in regulating elections and Congress' secondary, fail-safe authority, and to engage with State and local officials and legislators to promote the good-faith enforcement of valid election laws.

States must be able to exercise their constitutional authority to regulate elections, which requires reasonable confidence that such statutes will be enforced and defended appropriately by those invested with that authority under law. When relevant state officers refuse to enforce or defend duly passed election statutes, the legislature's authority and ability to fulfill its responsibility under the Elections Clause are diminished.[2] Without state action, Congress might be

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[2] *See, generally*, Ranking Member Rodney Davis, U.S. H. of Reps., Comm. on H. Admin., Report, *The Elections Clause: States' Primary Constitutional Authority Over Elections* (117th Cong., Aug. 12, 2021), (available at https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/Report_The%20Elections%20Clause_States%20Primary%20Constitutional%20Authority%20over%20Elections%20%28Aug%2011%202021%29.pdf) (last accessed Jan. 14, 2022) (building on Prof. Natelson's excellent work). *See* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1 (Nov. 2010)).

forced to insert itself unnecessarily into the regulation of federal elections, irreparably harming the relationship between the States and the national government. Congress also experiences similar challenges, and without the ability to rely on government officials to enforce its statutes, Congress's power is also diminished. For these reasons, Ranking Member Davis has an interest in the North Carolina General Assembly's intervention in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The North Carolina statute at issue in this case is a commonsense solution to an increasingly common problem: the official charged with defending state law (typically, the attorney general) sides with the plaintiffs challenging the law, not because a defense would be frivolous, but because the official believes it would be good policy to repeal the law. The motives for this maneuver are often partisan. A state's attorney general may belong to a different party or ideological faction from the party or faction controlling the legislature that enacted the law. By declining to defend the law from a challenge brought by likeminded or politically allied plaintiffs, or to appeal an adverse judgment, the attorney general can work around both legislative and judicial processes to achieve an outcome adverse to the policy choice of the state legislature and the legal judgment of the courts—sometimes without doing any work at all. That problem is especially acute in election cases, which are frequently partisan contests bankrolled by big partisan donors.

According to the *en banc* majority of the Fourth Circuit, a state is powerless to thwart such mischief. Even if the state enacts a law—as North Carolina has done—designating someone other than (or in addition to) the attorney general to defend state law, that someone may *still* be excluded from the case, under a Rule 24 presumption that the attorney general's defense is adequate. And so long as the attorney general is mounting even a merely *pro forma* defense of the law, intervention of the state officials designated by

the state may be prohibited, thus empowering the attorney general unilaterally to later abandon that defense or decline to appeal an adverse but vulnerable judgment or petition this Court for certiorari. It is that latter scenario that actually occurred in North Carolina—and in other significant election-law cases—and created the impetus for the North Carolina General Assembly to establish its officers as necessary parties in challenges to state laws.

The decision below enjoys no support in this Court's precedents. They hold that the state is empowered to decide who represents it. If state law clarifies that the attorney general's representation is inadequate, that view binds the federal courts. In other words, just as state law—not federal law—has traditionally vested defense authority in state attorneys general, state law can make a different choice, and there is no federal basis to countermand the state's choice. Because North Carolina determined that its attorney general is not exclusively entrusted with authority to speak for North Carolina, and has assigned the legislature, through its legislative leaders ("Petitioners"), the choice of defending the law in court in the state's name and on its behalf, this Court's precedents command the lower federal courts to respect that decision and permit intervention.

The decision of the court below is erroneous because it applies federal intervention standards under Rule 24 without reference to that precedent. The question whether the state's interest in defending its own law is adequately represented can only be addressed by reference to the state's own choice of where

adequate representation lies. North Carolina has plainly spoken to that question, indicating that the attorney general's representation is inadequate *per se* where the legislative leaders exercise their option to defend the law. There is no basis for a federal court to conclude that state officials are adequately defending the law when the state has designated *different officials* with that determination.

The Court should clarify these principles and reverse the *en banc* judgment below.

ARGUMENT

I. Attorneys General Have With Increasing Frequency Viewed a Vigorous Defense of Challenged Laws as Optional

This case is just the most recent of an increasingly common genre where plaintiffs associated with one policy or partisan viewpoint sue their friends in a state attorney general's office. Then, together, the parties seek to exclude other litigants who represent the opposing policy or partisan viewpoint to achieve an injunction, sometimes by settlement, without litigation on the merits, often against only a lackadaisical defense, or without an appeal. The transparent purpose of this strategy is to obtain the functional equivalent of a favorable court ruling outside the judicial process and the functional equivalent of a statutory repeal outside the legislative process. And this strategy often succeeds.

A. Following the federal model, states have traditionally assigned the role of defending state law from legal challenges to the state's attorney general.

See, e.g., Cal. Gov't Code. § 12512 (2001); Fla. Stat. § 16.01(4) (2001); N.Y. Exec. Law § 63(1). In that tradition, defense of challenged state law was generally viewed as a ministerial function under the doctrine that the attorney general is bound to defend state law vigorously, unless no colorable defense can be maintained. *See* Thomas R. Morris, *States Before the U.S. Supreme Court: State Attorneys General as Amicus Curiae*, 70 Judicature 298, 299 (1987); *see also* Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 Ind. L.J. 513, 557 n. 77 (2015). The Oregon Attorney General succinctly summarized this position: "It is our duty to defend the constitutionality of a statute unless no argument worthy of the court's consideration can be made in its behalf." Or. Att'y Gen. Op. No. OP-6500 n.3 (Oct. 15, 1993). Accordingly, prior to 1980, "most state AG offices were small, sleepy outposts," which were "placid and reactive." Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General As Amici*, 90 N.Y.U. L. Rev. 1229, 1268 & n.27 (2015).

But there is generally no legal mechanism to compel attorneys general to enforce or defend laws. *See, e.g.*, *Heckler v. Cheney*, 470 U.S. 821 (1985). And, like many traditions founded in institutional duty, this model has seen erosion in more recent years. State attorneys general have increasingly viewed themselves as policymakers, and see their defense (or lack thereof) of state law as a policy choice to be exercised like other policy decisions—*i.e.*, on the basis of an attorney general's partisan, ideological, or public-policy

views.[3] Attorneys general have begun "prosecuting cases and negotiating settlements that have had extraterritorial effects," *Reaching Too Far? The Role of State Attorneys General*, Federalist Society Panel (July 31, 2007),[4] "propos[ing] bills to their state legislature…, submit[ting] comments to federal agencies…, [and] convening task forces to address systemic issues," *About the State AG Project*, American Constitution Society.[5] State attorneys general have

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[3] This Court has likely noticed this shift, as increasing numbers of state attorneys general are filing amicus briefs taking positions on divisive legal and policy questions. *See* Lisa F. Grumet, *Hidden Nondefense: Partisanship in State Attorneys General Amicus Briefs and the Need for Transparency*, 87 Fordham L. Rev. 1859, 1863 (2019); *see also Multistate Amicus Briefs*, State Litigation & AG Activity Database, Dec. 31, 2019 (available at https://attorneysgeneral.org/amicus-briefs-u-s-supreme-court/statistics-and-visualizations-multistate-amicus-briefs/) (last accessed Jan. 17, 2022); *see also* Paul Nolette, *State Attorneys General Have Taken Off As A Partisan Force in National Politics*, Washington Post, Oct. 23, 2017 (available at https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/23/state-attorneys-general-have-taken-off-as-a-partisan-force-in-national-politics/) (last accessed Jan. 17, 2022); Emma Platoff, *America's Weaponized Attorneys General*, The Atlantic, Oct. 28, 2018 (available at https://www.theatlantic.com/politics/archive/2018/10/both-republicans-and-democrats-have-weaponized-their-ags/574093/) (last accessed Jan. 17, 2022).

[4] Available at https://fedsoc.org/events/reaching-too-far-the-role-of-state-attorneys-general (last accessed Jan. 17, 2022).

[5] Available at https://www.acslaw.org/projects/state-attorneys-general-project/about/ (last accessed Jan. 17, 2022).

been urged by their federal counterpart "not merely to use our legal system to settle disputes and punish those who have done wrong, but to answer the kinds of fundamental questions—about fairness and equality—that have always determined who we are and who we aspire to be, both as a nation and as a people." Eric Holder, U.S. Attorney General, Remarks as Prepared at the National Association of Attorneys General Winter Meeting, U.S. Dep't of Justice (Feb. 25, 2014).[6]

B. Experience has shown that one effective way for officials to use their executive power to answer fundamental questions is to frustrate courts' ability to afford different answers or to uphold legislative answers. As a result, an increasingly common fact pattern in constitutional litigation involves an attorney general's complete abdication of a challenged state law, a tepid defense, or else a choice not to appeal from a potentially vulnerable lower-court ruling.

Perhaps the most prominent example arose in last decade's wave of litigation over state marriage laws, which many state attorneys general declined to defend against federal equal-protection and due-process claims. They were urged to do so by their federal counterpart, the U.S. Attorney General, who adopted that approach with respect to the federal Defense of Marriage Act and advised that traditional marriage laws

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[6] Available at http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-1402251.html (last accessed Jan. 17, 2022).

ought to go undefended, not because they lack any colorable defense, but because they are "suspicious." *See* Holder, *supra*.

In a case that reached this Court, all relevant state executive officials in California, including its attorney general, declined to defend a voter-initiated amendment to the California constitution defining marriage as "between a man and a woman." *Hollingsworth v. Perry*, 570 U.S. 693, 701 (2013). The official proponents of the initiative intervened, and they alone sought to appeal the adverse district-court ruling. *Id.* at 702.

California's attorney general opposed the intervenors' motion for a stay pending appeal, contending that the law "violates" the Constitution. Attorney General's Opposition to Emergency Motion for Stay Pending Appeal, *Perry v. Schwarzenegger*, No. 10-16696, Dkt. 8 (9th Cir. Aug. 13, 2010). But, of course, this Court had never held as much, and it ultimately did so only in a 5–4 decision. *See generally Obergefell v. Hodges*, 576 U.S. 644 (2015). The legal defense of marriage laws like California's, though ultimately held meritless, was not frivolous. *See Shapiro v. McManus*, 577 U.S. 39, 46 (2015) (concluding that "a legal theory put forward by a Justice of this Court" cannot be deemed "wholly insubstantial" or "obviously frivolous"). Yet the California attorney general achieved the defeat of California's marriage law without a ruling on the merits, simply by abdicating defense of the law, declining to appeal the adverse judgment, and opposing the appeal of the intervenors, who were found to lack appellate standing in this Court.

Hollingsworth, 570 U.S. at 707–15. Executives in at least seven states, including Pennsylvania, Nevada, and Virginia, also declined to defend their states' marriage laws. *See* Niraj Chokshi, *Seven Attorneys General Won't Defend Their Own State's Gay Marriage Bans*, Wash. Post, Feb. 20, 2014.[7]

Meanwhile, in a related case concerning the federal-law definition of marriage, a ruling on the merits was achieved only because the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives had intervened in the court below, the U.S. Department of Justice filed a notice of appeal (notwithstanding its contention that the legal challenge was meritorious), and BLAG prosecuted the appeal. *See United States v. Windsor*, 570 U.S. 744, 754–63 (2013).

This non-defense strategy is not unusual and not limited to one political party. *See, e.g.*, *California v. Texas*, 141 S. Ct. 2104, 2112 (2021) (ruling 7–2 against challenge to federal law backed in part by the U.S. Attorney General); Arizona Sec'y of State Katie Hobbs's Opposition to the State of Arizona's Motion to Intervene, *Democratic Nat'l Comm. v. Hobbs*, No. 18-15845 (9th Cir. Mar. 13, 2020) ECF No. 133 (voting legislation); Brief of Appellee Michele Reagan in Support of Appellants, *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253 (2016) (No. 14-232) 2015 WL 7713705 (Secretary of State argued that challenged districts violated the constitution); *Trans-High Corp.*

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[7] Available at https://www.washingtonpost.com/blogs/govbeat/wp/2014/02/20/six-attorneys-general-wont-defend-their-own-states-gay-marriage-bans/ (last accessed Jan. 17, 2022).

v. Colorado, 58 F.Supp.3d 1177 (D. Colo. 2013) (entering injunction barring enforcement of marijuana advertising law that attorney general declined to defend); *Planned Parenthood of Cent. New Jersey v. Verniero*, 41 F.Supp.2d 478, 482 (D.N.J. 1998), *aff'd sub nom. Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127 (3d Cir. 2000) (striking down a partial-birth-abortion ban which the Republican-appointed attorney general declined to defend).

And abandonment of defense can occur as a matter of degree and without an explicit advertisement. For example, in *Buquer v. City of Indianapolis*, 2013 WL 1332158 (S.D. Ind. Mar. 28, 2013), the attorney general elected to defend the state's challenged immigration law, but later "announced that the office would no longer defend [a particular provision] because it was clearly unconstitutional." Zoeller, *supra*, at 544–45. Nevertheless, the court denied state legislators' intervention motion because it characterized the attorney general's abdication as a disagreement of strategy. *Id.* at 545 (citing *Buquer v. City of Indianapolis*, 2013 WL 1332137 at *3 (S.D. Ind. Mar. 28, 2013).

C. This trend of dereliction is especially familiar in litigation challenging state election laws. These cases have become forums for resolution of some of the nation's most divisive, ideological, and partisan questions. This likely is due to the fact that the two major parties have arrived at a more or less settled—and divergent—set of views on which election administration mechanisms render the most accurate and trustworthy election results.

Accordingly, election lawsuits have seen the frequent abandonment of state laws by state executive officials—a fact noticed decades ago. *See* Robert G. Dixon Jr., *Democratic Representation: Reapportionment in Law and Politics* 153 (1968) (noting that abandoning redistricting laws for political reasons frequently creates "two sets of plaintiffs," the plaintiff and the attorney general). This became particularly common as state attorneys general viewed the Covid-19 pandemic as a policy basis to change state election law for the 2020 elections.

Some attorneys general, like Michigan's, chose simply not to defend state election laws challenged as unconstitutional (under state or federal law) as applied during the pandemic. *See League of Women Voters of Mich. v. Sec'y of State*, 959 N.W.2d 1, 9 (Mich. Ct. App. 2020) (observing that the state executive defendants "largely agree[ ] with plaintiffs' position"); *see also League of Women Voters of Mich. v. Sec'y of State*, 948 N.W.2d 70, 71 (Mich. 2020) (Viviano, J., concurring) (observing that the state executives agreed with plaintiffs' arguments "nearly from the start" of the litigation).

Another approach was to arrive at prompt consent decrees in what is often called "sue and settle" litigation. In Rhode Island, left-of-center advocacy organizations achieved a prompt settlement with the Democratic secretary of state to enjoin the state's witness-signature and notarization requirements for absentee ballots, over the objection of the Republican National Committee and local Republican Party. *Common Cause R.I. v. Gorbea,* 2020 WL 4365608, at *4 (D.R.I.

July 30, 2020). That tactic succeeded in thwarting judicial review of what were likely meritless claims. On appeal in the First Circuit and on application for a stay in this Court, the dispositive factor against appellate relief was that "state election officials support the challenged decree, and no state official has expressed opposition." *Republican Nat'l Comm. v. Common Cause R.I.*, 141 S. Ct. 206, 207 (2020); *Common Cause R.I. v. Gorbea*, 970 F.3d 11, 17 (1st Cir. 2020) ("Indeed, no Rhode Island official has stepped forward in these proceedings, even as amicus, to tout the need for the rule. This silence…does fairly support the view that the rule is not of great import for any particular regulatory purpose in the eyes of Rhode Island officials and lawmakers"). This was the result, even though this Court had previously found that the underlying legal theory was unlikely to succeed. *See Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020) (granting stay in similar case). The difference between success and failure of such a challenge turned not on the merits, but on whether the state officials named as defendants held the challengers' political and policy views. *See Republican Nat'l Comm.*, 141 S. Ct. at 207 (distinguishing *Merrill* "and similar cases" on this basis).

A long line of similar decisions followed. *See, e.g., League of Women Voters of Va. v. Va. State Bd. of Elections*, 458 F.Supp.3d 442, 448 (W.D. Va. 2020) (approving consent decree enjoining witness requirement for absentee ballots in the June 2020 primary election); *League of Women Voters of Va. v. Va. State Bd. of Elections*, 481 F.Supp.3d 580, 596 (W.D. Va.

2020) (approving consent decree enjoining witness requirement for absentee ballots in the November 2020 general election); Notice of Settlement, *Democratic Party of Ga. v. Raffensperger*, No. 1:19-cv-5028 (N.D. Ga. Mar. 6, 2020), ECF No. 56 (case voluntarily dismissed on settlement compromise of absentee ballot signature matching, absentee ballot rejection notification, and rejected absentee ballot cure procedures); *see also* Notice of Voluntary Dismissal, *League of Women Voters of Pa. v. Boockvar*, No. 2:20-cv-03850-PBT (E.D. Pa. Sept. 14, 2020) ECF No. 39 (plaintiffs moved for voluntary dismissal based on approval of Pennsylvania Secretary Boockvar's revised guidance, shortly following their complaint, stating that "the Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections"); Consent Decree, *Goldman v. Va. Dep't of Elections*, No. CL20006468 (Va. Cir. Ct. 2021) (consent decree reducing state ballot petition signature qualifying amount and associated petition signature obtainment requirements); Consent Decree, *Adeli v. Va. Dep't of Elections*, No. CL21000438-00 (Va. Cir. Ct. 2021) (Dkt. BL-11) (consent decree establishing contactless petition signature procedures to qualify for party primary election).

And it hardly mattered whether a given state's legislature had already enacted election legislation tailored to the unique challenges the pandemic posed. In North Carolina, for example, the General Assembly addressed the pandemic through legislation updating the state's election laws. But a challenge followed nonetheless, as did a "secretly-negotiated" consent

judgment in state court. *Moore v. Circosta*, 494 F.Supp.3d 289, 331 (M.D.N.C. 2020). This executive settlement choice yet again succeeded, as a subsequent federal suit was unsuccessful. *See id.*; *Moore v. Circosta*, 141 S. Ct. 46 (2020). Pennsylvania saw a similar lawsuit and a similar result. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 349 (Pa. 2020); *Republican Party of Pa. v. Boockvar*, 208 L. Ed. 2d 266 (Oct. 28, 2020).

D. The federal courts, including this Court, have discerned only the narrowest federal grounds to counteract this cooperation between state officials and plaintiffs of their own partisan and ideological stripes. *Hollingsworth* established that Article III standing will likely foreclose most persons other than the state's designated representative from appealing an adverse judgment, and intervention doctrine is increasingly construed to incorporate standing doctrine. *Cf. Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651 (2017).

Where adversity even exists, the state attorney general remains empowered to enter a consent decree over the objection of intervenors. Although courts review consent decrees, the standards that have emerged are "guided by the general principle that settlements are encouraged." *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999). The question is whether the settlement is "fair, adequate, and reasonable," *id.* (citation omitted), not whether the court agrees with the legal positions of the plaintiffs and defendants. That is why many of the above-identified consent decrees were approved notwithstanding that

this Court had found the underlying theories infirm. Further, although courts assess whether consent decrees are "a product of collusion," *id.* (citation omitted), collusion is not necessarily the problem here. Plaintiffs suing members of their own party, who have spoken and campaigned on the issues being advanced in the lawsuit, need not make back-channel communications to the defendants to find common ground in achieving mutually desirable policy outcomes. Collusion is, in any event, difficult to detect.

During the pandemic-related election litigation, the sole doctrine that emerged limiting state executive authority to abdicate state law was the Electors Clause of Article II of the Constitution (and, presumably, the Elections Clause of Article I). *See Republican Party of Pa. v. Dagraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting from denial of certiorari). In *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), the Minnesota attorney general reached a consent decree rewriting various state election laws, including a ballot-receipt deadline. Candidates to the Electoral College challenged this decree under the Electors Clause, which requires that laws governing the selection of presidential electors be established by "the Legislature" of each state, U.S. Const. art. II, sec. 1, cl. 3, and the Eighth Circuit agreed that the consent decree was likely unconstitutional. *Id.* at 1059–60. No matter how "well-intentioned and appropriate from a policy perspective" the decree might be, the "state executive official" may not "re-write the state's election code." *Id.* at 1060 (citing Minn. Stat. § 203B.08). This

Court issued a similar ruling on an emergency application in *Republican Party of Pennsylvania v. Boockvar*, 208 L. Ed. 2d 293 (Nov. 6, 2020).

But even that doctrine remains unconfirmed. Other courts have disagreed with the doctrine *Carson* recognized, and this Court denied certiorari in a case that would have presented that issue. *Degraffenreid*, 141 S. Ct. at 732. Only after further litigation will the metes and bounds of that doctrine become clear. And, beyond the context of federal elections and clear usurpation of legislative power on the part of executive officials, the Electors and Elections Clauses will impose no limits.

II. North Carolina Has Addressed the Problem of Suits Among Friends in the Manner This Court s Precedent Expressly Approves

This Court's precedent has implicitly facilitated (without endorsing) attorneys general in abdicating their defense duty and construed standing doctrine to forbid other litigants from filling the vacuum. Thus, with some exceptions, this Court's precedent signals that the federal judiciary will not view a state attorney general's abdication of the defense of state law as a problem within its purview to correct. But this Court has not left states powerless to cure this dereliction. Quite the opposite, this Court's precedent makes clear that states may pass laws either directing defense of state laws to other functionaries or else affording alternative defense mechanisms.

A. The leading case is *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), yet an-

other election lawsuit featuring a state attorney general's yielding a defensible state law up to partisan allies in the courts and achieving an obvious partisan outcome.

In that case, Plaintiffs affiliated with the Democratic Party challenged a redistricting plan enacted by Republicans in the Virginia House of Delegates and signed by a Republican governor. (In fact, they filed the suit soon after a new Democratic governor took office.) The state attorney general took no role in defending the plan. The House of Delegates hired outside counsel, mounted a robust defense, obtained a complete victory before a three-judge panel, and defended the law in a subsequent appeal decided in this Court. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 796 (2017) (defining the "State" as the Virginia House of Delegates). The decision was affirmed in part and remanded. *Id.* at 802. On remand, the district court invalidated the districts not affirmed in this Court's decision, 326 F.Supp.3d 128 (E.D. Va. 2018), and the House appealed. This time, the Virginia attorney general not only declined to defend the law, but actively opposed the appeal, contending that he alone had authority to appeal and, by choosing not to, frustrated the House's ability to do so. State Appellees' Motion to Dismiss, *Va. House of Delegates v. Bethune-Hill*, No. 18-281 at *2–3 (Oct. 9, 2018).[8]

[8] Notably, it did not occur to the plaintiffs in that case initially to argue that the House lacked standing. The state attorney general was the sole party to raise the argument

This Court agreed in a 5–4 decision. 139 S. Ct. at 1945. The majority concluded that the injury inflicted by the district court's injunction flowed to Virginia as a state, not the House of Delegates, which it determined had suffered "no cognizable injury." *Id.* at 1955. Because the state was the only party who had "standing to defend the constitutionality of its statute," the Court proceeded to look to state law to see how Virginia had "chosen to speak as a sovereign entity." *Id.* at 1951–52. According to the Court, the Virginia attorney general was the "single voice" who had authority to defend the state's interest in its own law. *Id.* at 1952. The Court announced that Virginia had decided, through the state attorney general, that it "would rather stop than fight on." *Id.* at 1956.

The majority opinion ignored the partisan underpinnings of the case, a point the dissent found "astounding." *Id.* at 1957 (Alito, J., dissenting). "If the selection of a districting plan did not alter what the legislative body does, why would there be such pitched battles over redistricting efforts?" *Id.* Indeed, *Virginia House of Delegates* is the paradigmatic case where vesting sole defense authority with the state attorney general is dubious policy. As a redistricting case, it was among the most partisan of all litigation, as commentators have recognized for decades. Dixon Jr., *supra*, 153. And the appeal was more than color-

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for the first time in briefing on the House's motion for a stay pending appeal. State Appellees' Response in Opposition, *Va. House of Delegates v. Bethune-Hill*, No. 18A629 at *9 (Dec. 20, 2018).

able: the panel below had split 2–1, as a dissenter concluded that the challenge should fail as to each of the eleven districts at issue on remand. *Bethune-Hill*, 326 F.Supp.3d at 193 (Payne, J. dissenting). The U.S. Solicitor General, even while opining that the Virginia House lacked standing, argued that the appeal should succeed on the merits. Transcript of Oral Argument at 36, *Bethune Hill v. Va. State Bd. of Elections*, 139 S. Ct. 1945 (2019) (No. 18-281); Brief of the United States as Amicus Curiae in Support of Neither Party at 18–33, *Bethune Hill v. Va. State Bd. of Elections*, 139 S. Ct. 1945 (2019) (No. 18-281). And the Virginia House had a compelling additional challenge to the remedial plan, based on arguments that the court-appointed special master had erroneously utilized a racial quota. Transcript of Oral Argument at 20, *Bethune Hill v. Va. State Bd. of Elections*, 139 S. Ct. 1945 (2019) (No. 18-281). In short, there was more than a colorable appeal available.

This was, however, transparently a case where Democratic interests stood much to gain from the judgment. The injury the injunction imposed on Virginia had the clear side effect of benefiting the Democratic Party. In fact, the *Washington Post* announced that the remedial plan the district court adopted was a significant success for the attorney general's Democratic Party. Gregory S. Schneider, *Federal Judges Choose Va. Redistricting Map Favorable to Democrats*, Wash. Post, Jan. 23, 2019.[9] And the remedial

[9] Available at https://www.washingtonpost.com/local/virginia-politics/federal-judges-choose-va-redistricting-map-

plan came into being only after Virginia's Democratic governor announced that a potential legislative remedy being negotiated on a bipartisan basis in the Virginia General Assembly would be vetoed—no matter how many legislative Democrats voted for the plan. Gregory S. Schneider, *Va. Gov. Northam Threatens Veto Over GOP Redistricting Plan*, Wash. Post, Oct. 2, 2018.[10] Nor could the state attorney general argue with any credibility that he was saving resources in declining to appeal: opposing the Virginia House's appeal cost his office jurisdictional and merits briefing by a team of the state's most qualified attorneys and argument by the state solicitor general, who did all that and also filed opposing briefs to the House's stay motion. There is no serious explanation for the attorney general's decisions in *Virginia House of Delegates* but partisanship. And, unsurprisingly, the Democratic Party gained control of the body in the next election. Gregory S. Schneider, *Democrats Flip Virginia Senate and House, Taking Control of State Government for the First Time in a Generation*, Wash. Post, Nov. 5, 2019.[11]

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favorable-to-democrats-six-gop-house-districts-would-get-bluer/2019/01/22/401b2618-1ebc-11e9-9145-3f74070bbdb9_story.html (last accessed Jan. 17, 2022).

[10] Available at https://www.washingtonpost.com/local/virginia-politics/republicans-to-convene-va-house-of-delegates-oct-21-to-take-up-redistricting/2018/10/02/bab6638a-c654-11e8-b1ed-1d2d65b86d0c_story.html (last accessed Jan. 17, 2022).

[11] Available at https://www.washingtonpost.com/polls-open-in-virginia-balance-of-power-in-state-government-is-

B. But this Court did not hold the states hostage to that outcome. The Court need not revisit *Virginia House of Delegates* in this case because the decision announced its own limiting principle: the controlling fact was that Virginia law delegated defense authority exclusively to the state attorney general alone, and thus the injury to the state was the attorney general's alone to appeal.[12] Any dispute with the policy outcome was therefore deemed a dispute with Virginia law, not with this Court's policy dictates. *Virginia House of Delegates* therefore made clear that the rule it announced could be altered by state law, since the same principle requiring deference to the Virginia attorney general's choices would require deference to other state choices where states choose differently. *See* 139 S. Ct. at 1951.

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at-stake/2019/11/05/bdb57972-ff5b-11e9-8501-2a7123a38c58_story.html (last accessed Jan. 17, 2022).

[12] In this regard, the Court failed to consider a different construction of state law along the lines Judge Jones articulated in *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 842 (5th Cir. 1993), which opined that the state attorney general's role is as an *attorney* bound to the wishes of the *client*. In *Virginia House of Delegates*, it was actually the State Board of Elections, not the state attorney general, with the power to direct the litigation positions taken by that litigant, which was the state attorney general's only client in the case. 139 S. Ct. at 1948. As between the Virginia House of Delegates and the Virginia State Board of Elections, no statute provided that the latter, rather than the former, was the right party to be making litigation choices.

In particular, *Virginia House of Delegates* pointed to an Indiana law that afforded standing to the state legislature to defend state law. *Id.* at 1952 (citing Ind. Code. § 2-3-8-1 (2011) (empowering the legislature "to employ attorneys other than the Attorney General to defend any law enacted creating legislative or congressional districts for the state of Indiana")). This Court made clear that if, like Indiana, Virginia "had designated the House to represent its interests…[the Court] would agree that the House could stand in for the State." *Id.* at 1951. In this way, the Court recognized the principle that states may take a variety of approaches to ensure there are two opposing parties-in challenges to its law. *See* Zoeller, *supra*, at 552. The plain directive of *Virginia House of Delegates* is that federal courts must defer to state choices in this department.

C. North Carolina General Statute § 1-72.2 is exactly the type of statute *Virginia House of Delegates* announced can and should be construed to afford legislative leaders the right to defend the state's interest in litigation. In response to the kind of political conflicts so common everywhere, the statute explicitly allows the General Assembly's officers (Petitioners here) to step in as defendants in their sole and unreviewable discretion. It expressly identifies "the General Assembly," through "the Speaker of the House of Representatives and the President Pro Tempore of the Senate," as "the State of North Carolina" for purposes of litigation. *Id.* § 1-72.2(a). And it authorizes those leaders to intervene and otherwise control the defense of state law. *Id.* § 1-72.2(b).

Perhaps most significantly, it affords the North Carolina attorney general *a subordinate role* in this scheme. The other litigant defined as the state itself is the state's *governor*. The statute provides that "the Governor constitutes the executive branch" and that "both the General Assembly and the Governor constitute the State of North Carolina." *Id.* § 1-72.2(a). Thus, the only person who can arguably claim to compete with Petitioners' right to defend North Carolina—as the state itself—is the governor, but the governor is not a party to this proceeding because the governor himself asked to be dismissed and was dismissed. Further, any disagreement between Petitioners and the governor would cleanly be resolved by state law in Petitioners' favor, as it provides that Petitioners (through counsel of their choice) "shall possess final decision-making authority" in the litigation. N.C. Gen. Stat. § 120-32.6(c).

This scheme places the other participants in this case beneath Petitioners when it comes to speaking for North Carolina. To begin, state statute makes clear that, in constitutional challenges where Petitioners choose to defend state law, Petitioners "shall be deemed to be a client of the Attorney General for purposes of that action as a matter of law…." *Id.* § 120-32.6(b); *see also id.* § 114-2(2) (it shall be the duty of the Attorney General to "represent all state departments, agencies, institutions, commissions, bureaus or other organized activities of the State…[and shall] act in conformance with Rule 1.2 of the Rules of Professional Conduct"). This means that the attorney general is obligated to follow Petitioners' directives—

not the other way around. N.C. R. of Professional Conduct 1.2 ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation…."). North Carolina law also empowers Petitioners to "employ[] counsel in addition to or other than the Attorney General," as Petitioners have done here. N.C. Gen. Stat. § 120-32.6(c). Where that occurs, "[t]he lead counsel…shall possess final decision-making authority," and "[o]ther counsel…shall, consistent with the Rules of Professional Conduct, cooperate with such designated lead counsel." *Id.* There is no basis for the attorney general to claim authority exceeding that of Petitioners, when his role is plainly subordinate.

Meanwhile, the State Board of Election fails to cite any statute providing that it "constitute[s] the State of North Carolina" for purposes of the defense of state law. N.C. Gen. Stat. § 1-72.2(a). Although one need not doubt its status as a proper and even a necessary defendant in this case under the doctrine of *Ex parte Young* and Rule 19, state law does not elevate it to the level of Petitioners for purposes of controlling the defense of state law. *See Ex Parte Young*, 209 U.S. 123 (1908); Fed. R. Civ. P. 19.

There can then be no serious question about what these statutory provisions, together, provide. For purposes of this case, Petitioners *are* the state of North Carolina, and, because Respondents have no colorable claim to that status, their interest in defense of the challenged state statute is subordinate to Petitioners' interest. Indeed, as Petitioners' brief recounts (at 3–4), it was that precise fact pattern that gave rise to

the General Assembly's legislation—overriding the governor's veto—declaring its officers "necessary parties" in cases like this one. N.C. Gen. Stat. § 120-32.6(b). This occurred in a voter identification case like this one, where the state attorney general acted on policy disagreements with the law by declining to petition this Court for review of a divided and controversial Fourth Circuit decision invalidating that law and actively opposing the petition of the General Assembly's leaders. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016); *North Carolina v. N.C. State Conf. of NAACP*, 137 S. Ct. 27 (2016). The Fourth Circuit's decision in that case bears an uncanny resemblance on the merits to the recent *en banc* Ninth Circuit decision this Court reversed in *Brnovich v. Democratic National Comm.*, 141 S. Ct. 2321 (2021). It will remain unknown what outcome would have resulted had the attorney general supported the appeal in *NAACP v. McCrory*, but there is no room to doubt that the General Assembly intended to prevent that non-outcome from occurring again. And it did so in precisely the manner this Court approved in *Virginia House of Delegates*.

III. Intervention Doctrine Must Be Construed Against the Backdrop of States' Authority To Choose Their Representatives in Court

The *en banc* Fourth Circuit majority managed to give this case the same procedural outcome as occurred in *NAACP v. McCrory*, even though the General Assembly unmistakably legislated against that outcome. It did so by sidestepping the *Virginia House*

of Delegates analysis. It claimed that the General Assembly may intervene "only if…the Attorney General is inadequately representing" the interest of the State, *N.C. State Conf. of the NAACP v. Berger*, 999 F.3d 915, 918 (4th Cir. 2021), and purported to construe federal law governing mandatory and permissive intervention, rather than North Carolina's legislation assigning Petitioners the right to defend state law, *id.* at 926 ("[T]his case is governed by federal law"). Specifically, the Fourth Circuit held that the General Assembly's leaders failed to establish that their interest was not adequately represented for intervention purposes by the attorney general. *Id.* at 928.

A. This ignores that whether a state is adequately represented in court is necessarily decided according to *state law*, because it is the state itself that has the power to declare its representatives. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Here, state law provides that Petitioners "constitute the State of North Carolina." N.C. Gen. Stat. § 1-72.2(a). That being so, the state has spoken and declared that it is *not* adequately represented without their participation, should they elect to participate. There was no basis for the Fourth Circuit to conclude that the attorney general's representation is adequate, against the clear announcement of North Carolina that it is not.

B. The Fourth Circuit acknowledged that, "[i]f North Carolina's General Assembly, in its considered judgment, believes that the Attorney General is not adequately representing the State in this or any case,

then it of course is free to remove the Attorney General and substitute some other representative, including the Leaders." *Berger*, 999 F.3d at 934. Nevertheless, it claimed that *Virginia House of Delegates* permits a state to choose only *one* representative. *Id.* at 934. But *Virginia House of Delegates* said nothing of the sort. It clearly explained that "*Virginia* has…*chosen* to speak as a sovereign entity with a single voice." 139 S. Ct. at 1952. It did not hold that North Carolina must choose as Virginia has chosen.

The very example the Court cited, Indiana, permits both the Indiana Attorney General and the Indiana legislature to represent the state in redistricting litigation. *Va. House of Delegates*, 139 S. Ct. at 1952 (citing Ind. Code. § 2-3-8-1). The Fourth Circuit's single-voice demand arbitrarily curtails states' authority to define their own instruments of government and contravenes this Court's precedent. *See, e.g.*, *Hollingsworth*, 570 U.S. at 710. It further restricts multiple state officials, necessarily joined under *Ex parte Young* and Rule 19, from choosing independent lawyers. And the Fourth Circuit's apparent concern that honoring North Carolina law would "leave federal district courts effectively powerless to control litigation involving states," 999 F.3d at 934, is difficult to understand. The sole consequence of intervention is the additional briefing and evidentiary presentation of another litigant. And it is not unusual for multiple state defendants to be named in a single case,

often because relief against multiple state enforcement officers is essential for the plaintiff.[13]

C. Moreover, the Fourth Circuit failed to justify excluding Petitioners, rather than the attorney general, as the proper remedy for this concern. As explained, North Carolina has established a clear hierarchy of decisionmakers and raised Petitioners *above* the attorney general in that hierarchy. So any federal need to restrict North Carolina to a single voice would seem best resolved by permitting Petitioners to intervene and hire outside counsel to represent Petitioners and the Board of Elections—and to oust the attorney general. As far as *federal* law is concerned, that outcome is in no way less justified than what the Fourth Circuit chose. And, as far as *state* law is concerned, it appears to be the more proper outcome, assuming only one voice for North Carolina may be heard.

The Fourth Circuit also attempted to distinguish this case from others where intervention (it suggested) would be appropriate under its standard because "[t]his is not a case of *not* defending state law…." 999 F.3d at 928. But this argument ignores that the voter identification litigation is not over and the final opportunities for appeal have not yet been exhausted. In *Virginia House of Delegates*, after all,

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[13] For example a plaintiff challenging a state campaign finance law may need to sue a centralized state campaign-finance agency, as well as a local district attorney with criminal enforcement authority. *See, e.g.*, *Wis. Right To Life, Inc. v. Barland*, 751 F.3d 804, 809 (7th Cir. 2014). Nothing in federal law requires those parties to retain the same attorney or to take the same positions in the case.

the attorney general supported the Virginia House's defense of the challenged redistricting law at the trial level and in the appellee posture in this Court, and only after an injunction was entered did he withdraw that support and actively oppose the appeal. Likewise, the result in *NAACP v. McCrory* that the North Carolina General Assembly sought to preclude was a failure to petition for certiorari. At those stages, intervention is likely to be deemed untimely. That is why North Carolina law gives Petitioners "standing to intervene" from the outset of a case. N.C. Gen. Stat. § 1-72.2(b).[14]

D. The Fourth Circuit also failed to explain how its approach assuages North Carolina's legitimate policy concern with poor litigation defenses. In fact, the *en banc* majority opined that the dereliction necessary to overcome the presumption of adequate representation will only be found in "extraordinary" cases. 999 F.3d at 918 (citation omitted). That apparently means that in a case like this, where the attorney general presents no expert report and no meaningful percipient-witness testimony on the core question of intent, *see* Brief for Petitioner 11, 9, his representation is *still* deemed adequate. And the litigants willing to proffer such evidence are thereby excluded, apparently on the theory that the question whether to litigate a case well or litigate it poorly is

[14] Indeed, the attorney general's vehement opposition to intervention speaks for itself. If the attorney general truly intended to defend state law vigorously, what is the purpose of expending so much effort merely to exclude Petitioners from this case?

merely "a disagreement over litigation strategy." 999 F.3d at 929.

But litigation in general, and election law litigation in particular, usually turns on the quality of presentation, rendering qualified expert testimony essential to any meaningful prospects of success. For example, competent litigation under Section 2 of the Voting Rights Act, the statute at issue in this case, requires statistical estimates concerning racial voting patterns. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 52–53 (1986) (plurality opinion) (relying on an expert analysis that "evaluated data from 53 General Assembly primary and general elections" and "subjected the data to two complementary methods of analysis...to determine whether blacks and whites in these districts differed in their voting behavior" (footnote omitted)); *see also Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213, 225 (2d Cir. 2021) (describing the current state of the literature). To present no expert analysis would in many instances place private attorneys in this line of work on calls with their malpractice insurance carriers.

E. All of this would be clear if the roles were altered. If a plaintiff challenged state law without suing the traditional official rendered a necessary party by state law (such as the board of elections or secretary of state), that official's intervention would be permitted without question. The Federal Rules of Civil Procedure overtly recognize this problem, permitting attorneys general to intervene when a state statute is challenged, Fed. R. Civ. P. 5.1.

But states are permitted to be non-traditional. One example is seen in cases involving redistricting commissions, which states often vest with authority not only to enact redistricting legislation, but also to *defend* that legislation through counsel of their choice. *See, e.g.*, Ariz. Const. art. IV, Pt. 2 § 1(20); Mich. Const. art. IV § 6, Mich. Ct. R. 7.306. Thus, challenges to Arizona redistricting litigation must be brought against the Arizona Independent Redistricting Commission. *See, e.g.*, *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253 (2016).

Harris is another illuminating example, because the Arizona attorney general, representing the Arizona secretary of state, argued in this Court that the Arizona Independent Redistricting Commission's redistricting plan was unconstitutional. Brief of Appellee Michele Reagan in Support of Appellants at 10–20, *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253 (2016) (No. 14-232) 2015 WL 7713705. Under the Fourth Circuit's rubric, if the plaintiffs there had sued the secretary of state alone, represented by the attorney general, the Commission would not have been permitted to intervene, and the attorney general could have thwarted the defense by entering a consent decree. As the case turned out, the Commission's position was accepted and the attorney general's was not. *Harris*, 578 U.S. at 264–65.

North Carolina plainly intended to place Petitioners in the role Arizona assigned to the Arizona Independent Redistricting Commission. Although suing the secretary of state in Arizona is essential to obtaining relief, the state views the

Commission as the party responsible to control defense of the law. So too in North Carolina. North Carolina law requires that the Rule 5.1(c) notice of constitutional challenge be served on Petitioners. N.C. Gen. Stat. § 114-2(9). It deems Petitioners "necessary parties." N.C. Gen. Stat. § 120-32.6(b). It permits them to hire outside counsel. N.C. Gen. Stat. § 120-32.6(c). And it gives them final "decision-making authority." *Id.* Excluding Petitioners from this case is no more justifiable than excluding the Arizona Independent Redistricting Commission would have been in *Harris*.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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