APPENDIX

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APPENDIX A

ON REHEARING EN BANC

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-2273

[Filed June 7, 2021]

NORTH CAROLINA STATE CONFERENCE OF THE NAACP; CHAPEL HILL-CARRBORO NAACP; GREENSBORO NAACP; HIGH POINT NAACP; MOORE COUNTY NAACP; STOKES COUNTY BRANCH OF THE NAACP; WINSTON SALEM-FORSYTH COUNTY NAACP,

Plaintiffs – Appellees,

v.

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Appellants,

and

KEN RAYMOND, in his official capacity as a member of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections; JEFFERSON CARMON III, in his official capacity as a member of the North Carolina State Board of Elections; DAVID C. BLACK, in his official capacity as a member of the North Carolina State Board of Elections,

Defendants – Appellees.

Appeal from the United States District Court for the Middle District of North Carolina at Greensboro.
Loretta C. Biggs, District Judge.
(1:18-cv-01034-LCB-LPA)

Argued: December 7, 2020 Decided: June 7, 2021

Before GREGORY, Chief Judge, and WILKINSON, NIEMEYER, MOTZ, KING, AGEE, KEENAN, WYNN, DIAZ, FLOYD, THACKER, HARRIS, RICHARDSON, QUATTLEBAUM, and RUSHING, Circuit Judges.

Affirmed by published opinion. Judge Harris wrote the majority opinion, in which Chief Judge Gregory and Judges Motz, King, Keenan, Wynn, Diaz, Floyd, and Thacker joined. Judge Wilkinson wrote a dissenting opinion. Judge Niemeyer wrote a dissenting opinion. Judge Quattlebaum wrote a dissenting opinion, in

which Judges Niemeyer, Agee, Richardson, and Rushing joined.

ARGUED: Peter A. Patterson, COOPER & KIRK PLLC, Washington, D.C., for Appellants. Stephen K. Wirth, ARNOLD & PORTER KAYE SCHOLER LLP, Washington, D.C.; James Wellner Doggett, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees. **ON BRIEF:** David H. Thompson, Nicole J. Moss, Haley N. Proctor, Nicole Frazer Reaves, COOPER & KIRK PLLC, Washington, D.C.; Nathan A. Huff, PHELPS DUNBAR LLP, Raleigh, North Carolina, for Appellants. Joshua H. Stein, Attorney General, Olga E. Vysotskaya de Brito, Special Deputy Attorney General, Paul M. Cox, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees Damon Circosta, Stella E. Anderson, David C. Black, Ken Raymond, and Jefferson Carmon III. Irving Joyner, Cary, North Carolina; Penda D. Hair, Washington, D.C., Caitlin A. Swain, FORWARD JUSTICE, Durham, North Carolina; John C. Ulin, Los Angeles, California, James W. Cooper, Jeremy C. Karpatkin, Andrew T. Tutt, Jacob Zionce, ARNOLD & PORTER KAYE SCHOLER LLP, Washington, D.C., for Appellees North Carolina State Conference of the NAACP, Chapel Hill-Carrboro NAACP, Greensboro NAACP, High Point NAACP, Moore County NAACP, Stokes County Branch of the NAACP, and Winston Salem-Forsyth County NAACP.

PAMELA HARRIS, Circuit Judge:

In this appeal, we are asked to decide whether the leaders of the North Carolina House and Senate are entitled to intervene, on behalf of the State of North Carolina, in litigation over the constitutionality of the State's voter-ID law. What makes this case unusual is that North Carolina's Attorney General, appearing for the State Board of Elections, already is representing the State's interest in the validity of that law, actively defending its constitutionality in both state and federal court. Nevertheless, the legislative leaders have moved twice before the district court to intervene so that they *also* can speak for the State, insisting that this case requires not one but *two* representatives of the State's interest. Twice, the district court rejected these requests.

We see no abuse of discretion in that decision. At this point in the proceedings, the legislative leaders may assert only one interest in support of intervention: that of the State of North Carolina in defending its voter-ID law. It follows that they have a right to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure only if a federal court first finds that the Attorney General is inadequately representing that same interest, in dereliction of his statutory duties – a finding that would be "extraordinary." *See Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 801 (7th Cir. 2019). After reviewing the district court's careful evaluation of the Attorney General's litigation conduct, we are convinced that the court did not abuse its discretion in declining to make that extraordinary finding here. Because that is enough to preclude

intervention as of right under Rule 24(a)(2), and because we similarly defer to the district court's judgment denying permissive intervention under Rule 24(b), we affirm the district court.

I.

A.

In December 2018, the North Carolina General Assembly passed Senate Bill 824, "An Act to Implement the Constitutional Amendment Requiring Photographic Identification to Vote" ("S.B. 824"). After the House and Senate overrode a veto by North Carolina Governor Roy Asberry Cooper III, S.B. 824 was enacted on December 19, 2018, as North Carolina Session Law 2018-144.

This new voter-ID law requires, subject to some exceptions, that individuals voting either in person or by absentee ballot present one of ten forms of authorized photographic identification. *See* 2018 N.C. Sess. Laws 144, § 1.2(a). To make that easier, the law charges county boards of elections with providing qualifying ID cards free of charge, and provides a mechanism for those without ID to vote by provisional ballot. *See id.* §§ 1.1(a), 1.2(a). Along with these voter-ID provisions, S.B. 824 also expands the number of partisan poll observers, as well as the grounds any individual voter can raise to challenge another voter's ballot. *See id.* §§ 3.1(c), 3.3.

On December 20, 2018 – the day after the law's enactment – the North Carolina State Conference of the NAACP and several of the state's local NAACP branches (collectively, "the NAACP") filed suit

challenging S.B. 824. The complaint named as defendants Governor Cooper and several members of the North Carolina State Board of Elections (collectively, "the State Board"), all in their official capacities. The NAACP alleged that S.B. 824 has a disparate impact on African American and Latino residents of North Carolina, resulting in "effective denial of the franchise and dilution of minority voting strength" in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. J.A. 30. The complaint also alleged that several provisions of S.B. 824 intentionally discriminate against African American and Latino voters in violation of the Fourteenth and Fifteenth Amendments of the U.S. Constitution. The NAACP requested declaratory relief and an injunction against the implementation of the challenged provisions.

B.

In this appeal, we consider two successive requests by North Carolina's legislative leaders to intervene to defend against the NAACP's challenge to S.B. 824. The procedural history is complicated. But it also is necessary to understand the posture of this appeal and the resulting limits on our jurisdiction, so we describe it in some detail.

1.

In January of 2019, Philip E. Berger, the President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, the Speaker of the North Carolina House of Representatives, filed their first intervention motion, seeking to intervene on behalf of the North Carolina General Assembly to defend S.B. 824. The

state legislative leaders – whom we refer to as "the Leaders" – claimed entitlement to intervene as of right under Federal Rule of Civil Procedure 24(a)(2), and in the alternative asked for permission to intervene under Rule 24(b). The NAACP opposed the motion, and the Governor and the State Board, through the Attorney General as counsel, took no position.

In this first motion, the Leaders purported to speak on behalf of the General Assembly, rather than the State of North Carolina as a whole. That status, the Leaders argued, gave them a protectable interest justifying intervention as of right under Rule 24(a)(2). As the Leaders explained, a North Carolina statute, recently enacted, provides that they "jointly have standing to intervene *on behalf of the General Assembly* as a party in any judicial proceeding challenging a North Carolina statute," N.C. Gen. Stat. § 1-72.2(b) (emphasis added), and "request[s]" that federal courts permit participation by both the State's legislative and executive branches in cases challenging the validity of state law, *id.* § 1-72.2(a). According to the Leaders, the General Assembly's "institutional interest in seeing that [its] enactments are not 'nullified'" thus satisfied Rule 24(a)(2)'s interest requirement. J.A. 113–14 (quoting *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 803 (2015)).

Moreover, the Leaders continued, that interest was "not adequately represented" already by the existing defendants – the Governor and the State Board, through the Attorney General – for purposes of Rule 24(a)(2)'s adequacy prong. Pointing to past statements opposing voter-ID laws by the Governor and Attorney

General, as well as their activity in litigation over previous voter -ID laws in North Carolina, the Leaders claimed that the defendants "cannot be trusted to defend S.B. 824 in the same, rigorous manner as Proposed Intervenors – and very well might not defend the law at all." J.A. 117.

The district court denied the Leaders' motion on June 3, 2019, finding that the Leaders did not meet the requirements for either mandatory or permissive intervention. *See N.C. State Conf. of the NAACP v. Cooper*, 332 F.R.D. 161, 171, 173 (M.D.N.C. 2019) ("*NAACP I*"). The court first rejected the NAACP's threshold argument that the Leaders lacked Article III standing. Because the Leaders sought to intervene only as defendants, the court concluded, and were not themselves invoking the court's jurisdiction, it was not incumbent on them to establish Article III standing. *See id.* at 165. Acknowledging that courts are divided on this question, the district court found no "Fourth Circuit case setting forth such a requirement" and so "decline[d] to impose" one itself. *Id.*

The court turned then to intervention as of right, for which a movant must demonstrate: "(1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's interest is not adequately represented by existing parties to the litigation." *Id.* at 165 (quoting *Teague v. Bakker*, 931 F.2d 259, 260–61 (4th Cir. 1991)). The Leaders could not satisfy those requirements, the district court concluded, mostly because the existing defendants,

through the Attorney General, already were actively defending S.B. 824.

As to the interest prong, the court held that, at least while the Governor and the State Board remained in the case, the Leaders did not have a significantly protectable interest in likewise defending the statute's legality. *Id.* at 168. The court distinguished cases in which state legislators were permitted to intervene in defense of a statute "[w]hen it became apparent that neither the [state] Attorney General nor the named defendants would defend the statute," *id.* at 167 (quoting *Karcher v. May*, 484 U.S. 72, 75 (1987)); here, by contrast, the state defendants, represented by the Attorney General, already were defending against the NAACP's challenge to S.B. 824. The court recognized North Carolina's "public policy" in favor of intervention by the Leaders to represent the interests of the General Assembly, *id.* at 166–67 (quoting N.C. Gen. Stat. § 1-72.2(a)), but explained that intervention as of right under Rule 24(a)(2) remains subject to federal-law requirements, *see id.* at 167.

As to the adequacy prong, the district court held that because the Attorney General already was defending the lawsuit on behalf of the state defendants, the Leaders would be required to "mount a strong showing of inadequacy" to overcome a "presumption of adequate representation." *Id.* at 169 (quoting *Stuart v. Huff*, 706 F.3d 345, 352 (4th Cir. 2013)). The Leaders could not make that showing, the court concluded. The defendants already had moved to dismiss the NAACP's complaint, and there was no record evidence suggesting that the Governor, the State Board, or the Attorney

General had abdicated their responsibility to defend the law. *See id.* at 169–71.

The court also denied the Leaders' request for permissive intervention under Federal Rule of Civil Procedure 24(b). *Id.* at 173. The intervention of additional defendants, the court found, would delay litigation of the case, "detract[ing] from, rather than enhanc[ing], the timely resolution, clarity, and focus" of the proceedings. *Id.* at 172. Moreover, the court found, intervention likely would prejudice the plaintiffs, requiring the NAACP to "address dueling defendants, purporting to all represent the interest of the State, along with their multiple litigation strategies." *Id.*

The district court entered its denial of the Leaders' motion without prejudice. *Id.* at 173. Clarifying its disposition, the court indicated that it would entertain a renewed request for intervention "should it become apparent during the litigation" that the state defendants, through the Attorney General, "no longer intend to defend this lawsuit." *Id.* Barring any such change in circumstances, however, the Leaders' participation would be limited to amicus curiae briefs, which would allow the Leaders to bring to the court's attention any "unique contention" or argument not raised by the Attorney General. *Id.*

The Leaders did not appeal the district court's order denying their motion to intervene.

2.

Instead, six weeks later, the Leaders filed their second, renewed motion for intervention, again seeking intervention both as of right and by permission. The

Leaders acknowledged that the court already had denied those requests. But the court's order, the Leaders believed, was "not necessarily its final word on the matter," given its stated willingness to entertain a new motion if the Attorney General stopped defending the suit. J.A. 477.

Much of the Leaders' renewed case for intervention repeated arguments the district court already had rejected. But the Leaders also made two new points especially relevant here. First, the Leaders claimed that a recent Supreme Court decision, *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), had "clarified" the precise nature of the interests they sought to represent in litigation over S.B. 824. J.A. 485. In *Bethune-Hill*, the Leaders explained, the Supreme Court confirmed that a state may designate the legislature to serve as the state's own agent in federal litigation; and in its state statutes, the Leaders continued, North Carolina had done just that, designating them, by virtue of their positions in the legislature, as representatives of the State of North Carolina's interest in the validity and enforcement of its laws. The Leaders thus claimed, for the first time, to represent two different interests in defending S.B. 824: the distinct interest of the General Assembly, on which they had relied before, and now the interests of the State of North Carolina as well.

Second, the Leaders contended that the contingency the district court had envisioned in its first order had come to pass, because months of litigation in the district court and parallel state proceedings had made clear that the Attorney General was not vigorously

defending S.B. 824. In the federal case, the Leaders argued, the Attorney General, though winning dismissal of the Governor from the case, had argued only for abstention on federalism grounds and failed to develop the factual record through expert reports. And in the state-court case, *Holmes v. Moore*, No. 18-CVS-15292 (N.C. Super. Ct.) – in which the Leaders, too, were named as defendants – the Attorney General had moved to dismiss too few of the complaint's counts and been insufficiently aggressive as to discovery and its opposition to a preliminary injunction. All told, the Leaders concluded, the Attorney General's performance showed that he could not be trusted to defend S.B. 824, clearing what they called the "minimal" hurdle of Rule 24(a)(2)'s adequacy prong. J.A. 491 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)).

Two months after this second motion to intervene, but before the district court had ruled on it, the Leaders sought to accelerate the process with a ruling from our court. On the theory that the district court had "de facto denied" their motion by not acting on it, the Leaders filed an interlocutory appeal and petitioned for a writ of mandamus. In October of 2019, we dismissed the appeal for lack of jurisdiction, given the absence of a ruling by the district court, and denied the mandamus petition.

A month later, the district court denied the Leaders' motion, finding that their renewed case for intervention was no more convincing than their first. *N.C. State Conf. of the NAACP v. Cooper*, No. 1:18CV1034, 2019 WL 5840845, at *1 (M.D.N.C. Nov.

7, 2019) ("*NAACP II*"). Crucially for our purposes, the court refused to revisit arguments made by the Leaders in their first motion and rejected by the court in its first order. Because the Leaders had not timely appealed its prior order, the district court held, that order "remain[ed] undisturbed" and its rulings had become "the law of this case." *Id.* at *1–2. The court's decision thus focused on whether the Leaders had "presented evidence, newly available, that speaks to the narrow exception outlined in its prior order": whether the Attorney General, on behalf of the State Board, had "in fact declined to defend" S.B. 824. *Id.* at *2.

First, however, the district court briefly addressed the Supreme Court's *Bethune-Hill* decision and reaffirmed its view that the Leaders had no protectable interest in defending S.B. 824 so long as the Attorney General was doing so. The court acknowledged that under *Bethune-Hill*, North Carolina undoubtedly has the "prerogative to 'designate agents to represent [it] in federal court.'" *Id.* at *2 n.3 (quoting *Bethune-Hill*, 139 S. Ct. at 1951). But the district court found it "far from clear" that North Carolina law in fact had authorized the Leaders to defend the State's interests in court alongside the State's Attorney General – who *was* expressly charged with "appear[ing] for the State." *Id.* (quoting N.C. Gen. Stat. § 114-2). So the question remained, the district court concluded, whether the Attorney General continued to provide an adequate defense of S.B. 824.

Surveying the new evidence cited by the Leaders, the district court determined that the State's interests

already were adequately represented by the State Board and the Attorney General, precluding intervention as of right under Rule 24(a)(2). In the federal court proceedings, the district court emphasized, the State Board consistently had denied any substantive allegation of unconstitutionality, had moved to dismiss the suit on federalism grounds, and had filed an "expansive" brief opposing the NAACP's request for a preliminary injunction. *Id.* at *3. And the story in the *Holmes* state-court litigation – to the extent it was relevant to the adequacy of the Attorney General's federal-court representation – was the same: At most, the Leaders had identified "strategic disagreements" with the Attorney General, whose approach "fell well within the range of reasonable litigation strategies." *Id.*

As for permissive intervention, the court found its earlier judgment prescient. Since its last order, the court noted, the Leaders had "prematurely" filed a renewed motion to intervene, improperly appealed before any denial had been entered, and unsuccessfully sought the "extraordinary remedy of mandamus." *Id.* at *4. This litigation conduct confirmed that the Leaders' participation as parties would "unnecessarily complicate and delay" the progress of the case, and the court found no basis for reversing its earlier denial of permissive intervention. *Id.*

3.

Immediately after this second order denying intervention – but five months after the first – the Leaders filed a notice of appeal to this court. On appeal, the NAACP continued to oppose the Leaders'

efforts to intervene. The State Board, through the Attorney General, again took no position on permissive intervention, but argued that intervention as of right is unnecessary because it is adequately representing any interest the Leaders may have in the case.

In August of 2020, a panel of this court held that the district court abused its discretion in denying the Leaders' renewed motion for intervention, vacated the district court's order, and remanded for reconsideration of the Leaders' request. *N.C. State Conf. of the NAACP v. Berger*, 970 F.3d 489 (4th Cir.), *reh'g en banc granted*, 825 F. App'x 122 (4th Cir. 2020) (mem.). Upon petitions for rehearing by the NAACP and the State Board, we vacated the panel opinion and now consider the case en banc.

There is one final turn in the procedural history of this case. In December of 2019 – while the Leaders' appeal from the district court's second order was pending – the district court ruled for the NAACP and preliminarily enjoined S.B. 824's enforcement. *See N.C. State Conf. of the NAACP v. Cooper*, 430 F. Supp. 3d 15, 54 (M.D.N.C. 2019). The State Board, represented by the Attorney General, promptly appealed that decision, and we allowed the Leaders to intervene in that appeal. In December of 2020 – while the question of intervention was under en banc reconsideration – we ruled for the State Board, holding that the district court had abused its discretion in issuing the preliminary injunction. *See N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 311 (4th Cir. 2020). A district court trial on the merits, originally scheduled for January 2021, now has been postponed pending the

resolution of this separate appeal regarding intervention.

II.

We begin with the scope of our appellate jurisdiction. Given the course of proceedings in the district court, we conclude that we have power to review only those questions resolved in the district court's second order denying intervention, as that is the only final order timely appealed to this court.

Subject to certain exceptions not applicable here, 28 U.S.C. § 1291 authorizes us to review only "final decisions of the district courts." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1707 (2017) (quoting 28 U.S.C. § 1291). For the purposes of this final-judgment rule, a "district court's denial of a motion to intervene is 'treated as a final judgment that is appealable.'" *Sharp Farms v. Speaks*, 917 F.3d 276, 289 (4th Cir. 2019) (quoting *Bridges v. Dep't of Md. State Police*, 441 F.3d 197, 207 (4th Cir. 2006)). This designation makes sense: "[F]rom the perspective of a disappointed prospective intervenor, the denial of a motion to intervene is the end of the case," even as proceedings continue in the district court with the original parties. *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 745 (7th Cir. 2020) (citation omitted). It follows that if a district court denies a motion to intervene, then a would-be intervenor must notice an appeal within 30 days of the entry of that final order. *See* 28 U.S.C. § 2107(a). If, on the other hand, no timely appeal is taken, then we will be left without jurisdiction to review the court's order. *See Sharp*

Farms, 917 F.3d at 289 (noting that failure to timely appeal denial of intervention is jurisdictional).

That is just what happened here. The district court denied the Leaders' first motion to intervene on June 3, 2019. The Leaders did not appeal that order within 30 days of its entry, so the district court's order became "final and conclusive" when the time to appeal expired. *See Old Dominion Tr. Co. v. First Nat'l Bank of Oxford*, 260 F. 22, 28 (4th Cir. 1919); *see also* 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure Jurisdiction § 3914.18 (2d ed. Oct. 2020 update) ("Failure to appeal denial of intervention upon entry of the order may forfeit the right to review . . . ."). And, critically, the Leaders' second and renewed motion to intervene does not save their failure to appeal the denial of the first. As appellate courts have recognized, "once a conclusive resolution has been reached[,] . . . a renewed motion for the same relief, or a belated request for reconsideration, does not reopen the time for appeal." *Fairley v. Fermaint*, 482 F.3d 897, 901 (7th Cir. 2007); *see also United States v. Boone*, 801 F. App'x 897, 904 (4th Cir. 2020) (Harris, J., concurring).

The Leaders dispute one and only one step in this straightforward analysis: According to the Leaders, even if orders denying intervention generally are final and appealable, the district court's first order was not, as it was entered "without prejudice." *See NAACP I*, 332 F.R.D. at 173. As the Leaders understand it, that without-prejudice dismissal expressly left open the possibility of further litigation, indicating that an amendment could cure any defect in their motion. It

follows, they argue, that the district court's denial of intervention was not a final order under our case law – which means that they had neither the ability nor the obligation to take an immediate appeal.

That argument misreads both our precedent and the district court's order. We have dealt extensively with the finality of without-prejudice dismissals of complaints, and we agree with the Leaders that we may analogize to those cases here. But what those cases stand for is the proposition that "[d]ismissals without prejudice . . . are *not* unambiguously non-final orders." *Bing v. Brivo Sys., LLC*, 959 F.3d 605, 612 (4th Cir. 2020) (emphasis added). Instead, we examine the finality and appealability of a without-prejudice dismissal "based on the specific facts of the case," considering such factors as whether amendment could cure the defects on which dismissal rests, what the "bottom-line effect" of the ruling is, and whether the district court "signaled that it was finished" with the issues before it. *Id.* at 610, 612 (quoting *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 345 (4th Cir. 2005)).

Applied to the "specific facts of [this] case," *id.* at 610, those factors point decisively to a final and immediately appealable order. The district court "signaled that it was finished" with the merits of the Leaders' first request for intervention, notwithstanding its styling of the denial as "without prejudice." As the court itself later explained, the window left open in its initial order was a "narrow" one, available only if the State Board and Attorney General "in fact declined to defend" S.B. 824 in the future. *NAACP II*, 2019 WL

5840845, at *2. Because that contingency had not yet – and might never – come to pass, the Leaders could not then amend or correct their motion to change the result. The bottom-line effect of the court's ruling was clear: The Leaders were not entitled to intervene under then-current circumstances. Under our precedent, that determination was final, and if the Leaders disagreed, then they were required to take a timely appeal.

That conclusion is consistent with the approach other circuits have taken in procedurally similar intervention appeals. The Seventh Circuit, for instance, recently confronted an order much like the one at issue here: a without-prejudice denial of a motion to intervene that expressly invited a renewed request if a "concrete, substantive conflict or actual divergence of interests should emerge." *Driftless Area Land Conservancy*, 969 F.3d at 745. That denial, the court held, was an immediately appealable final order – "without prejudice" notwithstanding. *Id.* "The possibility of a new motion if circumstances change does not block an immediate appeal," the court explained, because "[t]he contingency that the judge has in mind might never arise." *Id.*

The Leaders rely on a different and earlier Seventh Circuit case, *United States v. City of Milwaukee*, 144 F.3d 524 (1998), in which the court deemed non-final a district court's without-prejudice denial of intervention. But that case, the Seventh Circuit explained in *Driftless Area Land Conservancy*, was very different: There, the denial rested on a "purely technical error" in the intervention motion – the failure to include a proposed pleading – that could be cured immediately.

See 969 F.3d at 746 (discussing *Milwaukee*, 144 F.3d at 527–30). Cases like this one, by contrast – in which a district court denies intervention on the merits, but "without prejudice" in recognition that circumstances might change – are "not remotely analogous." *Id.* What matters for finality is not "the incantation of the words 'without prejudice,'" but "that the judge addressed the substantive merits of the intervention motion," not just a procedural flaw, and "conclusively denied" the motion. *Id.* at 745 (citation omitted).

And, again, the same rule holds even if – as here – would-be intervenors file a renewed motion to intervene, and then timely appeal the denial of that second motion. Under those circumstances, too, courts will not consider the merits of the initial denial, because that denial was not timely appealed. *See EPA v. City of Green Forest*, 921 F.2d 1394, 1401 (8th Cir. 1990) (concluding that court lacked jurisdiction over reasoning in earlier order denying intervention because "the notice of appeal from the denial of the first motion to intervene was not until after nearly sixteen months"); *Whitewood v. Sec'y Pa. Dep't of Health*, 621 F. App'x 141, 144 (3d Cir. 2015) (reviewing only order denying amended motion to intervene). As the Eighth Circuit cogently explained, "[t]he denial of a second motion to intervene covering the same grounds as the first motion to intervene does not reset the clock for purposes of an appeal; holding otherwise would defeat the statutory timeliness requirement." *Smith v. SEECO, Inc.*, 922 F.3d 398, 404 (2019).

It is true, as the Leaders note, that there are some cases in which courts will review the merits of an

initial denial of intervention, even when the putative intervenors have appealed only the denial of a second motion. But in each of those cases, the district court's second order denying intervention – the one appealed – itself made a "fresh evaluation" of the original intervention motion, so that the first order's reasoning and rulings merged into the second. *See Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 126–27 (D.C. Cir. 1972) (explaining that district court had exercised discretion to make a "fresh evaluation of the intervention application"); *see also*, *e.g.*, *Calvert Fire Ins. Co. v. Environs Dev. Corp.*, 601 F.2d 851, 857 n.3 (5th Cir. 1979) (explaining that district court had treated second intervention request as motion for reconsideration). Here, contrary to the Leaders' argument, there has been no wholesale merger. Instead, the district court expressly declined to reconsider its earlier analysis, evaluating only whether the Attorney General had become an inadequate representative of the Leaders' purported interest in the defense of S.B. 824.

Our jurisdiction in this appeal is correspondingly limited. We "start[] with the proposition that the original, unappealed order was correct when entered." *Devs. Sur. & Indem. Co. v. Archer W. Contractors, LLC*, 809 F. App'x 661, 664 (11th Cir. 2020) (quoting *Birmingham Fire Fighters Ass'n 117 v. Jefferson County*, 290 F.3d 1250, 1254 (11th Cir. 2002)). That means that we may not consider, on the Leaders' appeal from the district court's second order, issues put to rest in its first. Specifically, we cannot now review the Leaders' claim that they have a "protectable interest" under Rule 24(a)(2) in representing the

General Assembly's "institutional interest" in enforcement of S.B. 824. The district court rejected that argument in its first order denying intervention, *see NAACP I*, 332 F.R.D. at 168; that determination was not appealed, and so the Leaders may not advance that interest here. Also outside the scope of our review is the related question of whether the Leaders must establish Article III standing to represent any purported interest under Rule 24(a)(2). *See Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571–72 (7th Cir. 2009) (discussing relationship between standing and Rule 24(a)(2)'s interest prong). The district court concluded, again in its first order, that because the Leaders sought to intervene as defendants rather than plaintiffs, they would not be held to Article III's requirements. *See NAACP I*, 332 F.R.D. at 165; *see also Bethune-Hill*, 139 S. Ct. at 1951 (suggesting that legislature participating in litigation only to defend state statute does not "invok[e] a court's jurisdiction" and therefore need not demonstrate standing). And again, on appeal of the district court's second order, we treat that determination as conclusive.[1]

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[1] Because this question does not bear on our own Article III jurisdiction to hear this appeal, we are under no obligation to resolve it. Whether or not the Leaders needed or had standing to intervene in defense of S.B. 824, they clearly "have standing to appeal the denial of their intervention motion." *Doe v. Pub. Citizen*, 749 F.3d 246, 257 (4th Cir. 2014) (citation omitted). The alleged injury suffered by a disappointed would-be intervenor flows from the denial of intervention itself, and it may be redressed by an order allowing intervention. *See CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 475 (4th Cir. 2015) (final judgment does not moot pre-existing intervention appeal because appellate court still may offer remedy by ordering intervention); 15A Charles Alan

In sum, our jurisdiction over this appeal is coextensive with the district court's narrow focus in its second order denying intervention – the only order on appeal. We thus proceed to consider those issues, and only those issues, decided or "fresh[ly] evaluat[ed]," *see Hodgson*, 473 F.2d at 127, in that second order. As a result, our emphasis, like the district court's, is on the application of Rule 24(a)(2)'s adequacy prong to the Attorney General's defense of S.B. 824.

III.

As all parties agree, the intervention issue in this case is governed by federal law, and specifically by Federal Rule of Civil Procedure 24. State law, like the North Carolina statutes relied upon by the Leaders for their interest in this litigation, may "inform" the application of Rule 24, but it does not "supplant" Rule 24 or its criteria for intervention. *See Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 797 (7th Cir. 2019).

Rule 24 provides two avenues for federal-court intervention, one mandatory and one discretionary. Intervention as of right is governed by Rule 24(a)(2), under which federal courts must permit intervention when, on timely request – a factor undisputed here – a proposed intervenor "can demonstrate '(1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of

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Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure Jurisdiction § 3902.1 (2d ed. Oct. 2020 update) ("Persons denied intervention in the trial court clearly have standing to appeal the denial of intervention . . . .").

the action; and (3) that the applicant's interest is not adequately represented by existing parties to the litigation." *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013) (quoting *Teague v. Bakker*, 931 F.2d 259, 260–61 (4th Cir. 1991)). Importantly, all these requirements must be met before intervention is mandatory; a failure to meet any one will preclude intervention as of right. *See Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976). If that happens, then "a court may still allow an applicant to intervene permissively under Rule 24(b), although in that case the court must consider 'whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.'" *Stuart*, 705 F.3d at 349 (quoting Fed. R. Civ. P. 24(b)(3)).

As explained below, we conclude that the district court did not abuse its discretion in determining that the Leaders' purported interest in defending S.B. 824 on behalf of the State of North Carolina was adequately represented already by the State Board of Elections and Attorney General. That is enough to defeat the Leaders' claim to mandatory intervention. Accordingly, we need not consider whether the Leaders have satisfied Rule 24(a)(2)'s interest element under the theory addressed and rejected by the district court in its second order: that state law has designated them agents of the State's own undoubted interest in the validity of its laws. We may assume for purposes of this appeal, that is, that state law has endowed the Leaders with a "significantly protectable interest" for purposes of Rule 24(a)(2), *see Teague*, 931 F.2d at 261; even so, they have no right to intervene in federal court under

Rule 24(a)(2) because that same interest is adequately represented by existing parties to the litigation.[2]

As further detailed below, we also find no abuse of discretion in the district court's renewed consideration and denial of the Leaders' request for permissive intervention. Accordingly, we affirm the judgment of the district court.

A.

Turning to the district court's application of Rule 24, we bear in mind two key features of this case. First is the "necessarily limited" scope of our appellate review. *See Stuart*, 706 F.3d at 350. "It is well settled that district court rulings on both types of intervention motions are to be reviewed for abuse of discretion" only. *Id.* at 349 (citation omitted). This deferential standard of review stems in part from the district court's "superior vantage point" for evaluating the parties'

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[2] We must disagree with the principal dissent's suggestion that our inquiry into adequacy amounts to dicta. *See* Diss. Op. 61 n.3. It is true, as the dissent observes, that the district court rejected the Leaders' original claim to a protected Rule 24(a)(2) interest – based on the interests of the General Assembly – in its first order, which falls outside the scope of our appellate review. *See NAACP I*, 332 F.R.D. at 166–68. In its second order, however, which *is* on appeal, the district court considered the Leaders' separate claim to a Rule 24(a)(2) interest, this time as authorized agents of the State's interest in S.B. 824. *See NAACP II*, 2019 WL 5840845, at *2 n.3. As a result, we have before us live arguments on all prongs of Rule 24(a)(2); even with our review limited to the district court's second order, the Leaders could prevail if that order incorrectly assessed both interest and adequacy. That we choose to resolve the Leaders' claim on adequacy grounds alone makes our adequacy analysis the linchpin of this appeal, not dicta.

litigation conduct and whether an existing party adequately represents a proposed intervenor's interests. *Id.* at 350. But it also recognizes that "[q]uestions of trial management are quintessentially the province of the district courts," and that motions to intervene "can have profound implications for district courts' trial management functions": Parties added by intervention "can complicate routine scheduling orders, prolong and increase the burdens of discovery and motion practice, thwart settlement, and delay trial." *Id.* (citation omitted). So in this appeal, as in any under Rule 24, we are alert to the "boundaries of our reviewing role." *Id.*

That role is further informed by the second key feature of this case: its highly unusual posture. This is not a case like those decided by the Supreme Court and relied on by the Leaders here – *Bethune-Hill*, 139 S. Ct. 1945, *Hollingsworth v. Perry*, 570 U.S. 693 (2013), *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), and *Karcher v. May*, 484 U.S. 72 (1987) – in which a state representative, usually a state attorney general, is *not* defending state law, or has declined to appeal an adverse ruling. As the Supreme Court's multiple encounters with this recurring fact pattern attest, such cases may present difficult questions about the standing and right of other entities to intervene to continue a case in the state attorney general's stead. But at bottom, the issue in those cases is whether *any* state representative will be permitted to defend a state's interest in the validity of its laws, once the state's "default" representative has declined to do so. *See Kaul*, 942 F.3d at 800.

Here, by contrast, the State of North Carolina's "default" representative – the Attorney General– has *not* "dropped out of the case." *Id.* The Attorney General is charged, by North Carolina statute, with representing the State's interest in cases involving challenges to state law. *See* N.C. Gen. Stat. § 114-2(1) ("[I]t shall be the duty of the Attorney General . . . to appear for the State . . . in any cause or matter, civil or criminal, in which the State may be a party or interested."). And consistent with that duty, the Attorney General is very much *in* this case, defending the constitutionality of S.B. 824, on behalf of the State Board of Elections, in state and federal courts, including our own.

As we have explained, the only interest the Leaders may now assert in support of intervention under Rule 24(a)(2) is that of the State of North Carolina in the enforcement and validity of its laws. And indeed, that is the Leaders' primary argument on appeal: that state law has designated them, along with the Attorney General, to represent the interests of the State itself in federal court. *See* Reply Br. of Appellants 10; *see also Bethune-Hill*, 139 S. Ct. at 1951 (where state law designates a legislative entity to "represent [the State's] interests," that entity may "stand in for the State"). But those, of course, are precisely the interests already represented by the Attorney General in this case. So the unusual question presented here is whether a federal district court must allow not one but "two state entities . . . to speak on behalf of the State *at the same time*." *Kaul*, 942 F.3d at 800.

The Seventh Circuit recently – only after the district court issued its decisions – became the first federal court of appeals to confront precisely this question, and it explained why, under these circumstances, we must be especially circumspect in reviewing a district court's denial of mandatory intervention. In *Planned Parenthood of Wisconsin, Inc. v. Kaul*, just as here, a state legislative entity, relying on a purported authorization in state law, sought to intervene as of right to defend the State's interest in the constitutionality of one of its statutes. *See* 942 F.3d at 796. According to the Wisconsin legislature, the State's Attorney General, though defending the law, was doing so only nominally, failing to adequately represent Wisconsin's interests under Rule 24(a)(2). *See id.* The Seventh Circuit assumed without deciding that state law gave the legislature a Rule 24(a)(2) "interest" as a representative of the State itself. *See id.* at 797–98. But because that same interest already was represented by the Wisconsin Attorney General, the court explained, the legislature could satisfy Rule 24(a)(2)'s adequacy element only if it succeeded in the "unenviable task" of convincing a federal court that the Attorney General was inadequately representing the interests of his own State. *Id.* at 801. And that, the court concluded, would amount to an "extraordinary finding," not to be undertaken lightly and requiring something much more than a disagreement over litigation strategy. *Id.*; *see also id.* at 810 (Sykes, J., concurring).

With that as context, we turn to the district court's application of Rule 24 and, first and foremost, to its assessment of Rule 24(a)(2)'s adequacy prong.

B.

In its opinion denying the Leaders' renewed request for intervention, the district court reviewed the proceedings to date and concluded that the State Board of Elections and Attorney General continued to "actively and adequately" defend S.B. 824 for purposes of Rule 24(a)(2). *NAACP II*, 2019 WL 5840845, at *2. It carefully reviewed what the Leaders described as new evidence of an "unwillingness to robustly defend S.B. 824" in both the federal litigation before it and the parallel state litigation in *Holmes*, and found only "strategic disagreements" over choices that "fell well within the range of reasonable litigation strategies." *Id.* at *2–3. Because the State Board and Attorney General were adequately representing the State's interest in the constitutionality of S.B. 824, and because there was no reason to think they would abandon that duty in the future, the district court held, the Leaders had no entitlement to intervention as of right under Rule 24(a)(2). *See id.* at *4.

On appeal, the Leaders' primary challenge is to the legal standards employed by the district court in its Rule 24(a)(2) adequacy analysis. They also dispute the district court's application of those standards to the performance of the State Board and Attorney General in defending S.B. 824. We take the two challenges in turn.[3]

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[3] The principal dissent raises one additional point, arguing that the district court abused its discretion when it failed to consider, as part of its adequacy analysis, the import of the relevant North Carolina statutes. *See* Diss. Op. 74– 75. We disagree. Like the Seventh Circuit in *Kaul*, we think laws like N.C.

1.

In assessing whether an existing party to this litigation – the State Board, through the Attorney General – adequately represented the State's interest in the validity of S.B. 824, the district court applied two distinct legal standards. First, as it explained in its initial order, it applied the long-standing presumption of adequate representation that arises when "the party

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Gen. Stat. § 1-72.2 bear on the interest element of Rule 24(a)(2), not the adequacy element. 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. And if it did – if aspiring legislative intervenors could rely on a state-law policy preference for multiple representatives to satisfy both the interest prong *and* the adequacy prong of the test for mandatory intervention – then we would risk turning over to state legislatures, rather than district courts, control over litigation involving the states. *See Kaul*, 942 F.3d at 799, 802.

The Leaders appear to disavow this approach, recognizing the problems it would create. Instead, they assure us that state laws designating legislative agents as additional representatives will *not* lead necessarily to intervention as of right – precisely because the adequacy prong will remain an independent check. Even where laws like N.C. Gen. Stat. § 1-72.2 establish a protectable interest, that is, mandatory intervention will be "foreclose[d]" if "another party adequately represents the legislature's protectable interest." Appellants' Br. 32 n.2. Indeed, the Leaders seem never to have asked the district court, either, to consider N.C. Gen. Stat. § 1-72.2 in evaluating adequacy, as opposed to interest. Even apart from the merits of the position, we would find no abuse of discretion in the district court's failure to take up an argument that was not presented to it. *See Smith v. Marsh*, 194 F.3d 1045, 1052 n.5 (9th Cir. 1999); *see also Reaching Hearts Int'l, Inc. v. Prince George's County*, 478 F. App'x 54, 63 (4th Cir. 2012).

seeking intervention has the same ultimate objective as a party to the suit." *NAACP I*, 332 F.R.D. at 168 (quoting *Westinghouse*, 542 F.2d at 216). Because the Leaders' ultimate objective – upholding S.B. 824 – was the same as that pursued by the State Board and Attorney General, the court continued, the *Westinghouse* presumption could be overcome only if the Leaders could "demonstrate adversity of interest, collusion, or nonfeasance." *Id.* (quoting *Westinghouse*, 542 F.2d at 216). And second, the court understood our decision in *Stuart* to require that the Leaders make an especially "strong showing of inadequacy" to rebut the *Westinghouse* presumption because their objective was shared with a governmental defendant – the State Board – rather than a private litigant. *Id.* at 168 (quoting *Stuart*, 706 F.3d at 352).[4]

On appeal, the Leaders' primary argument is that the district court erred in applying both those standards. And it is true that no matter how deferential our review, application of an incorrect legal standard is an abuse of discretion that must be corrected on appeal. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014). In our view, however, the district court

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[4] The district court spelled out the challenged standards only in its first order denying intervention, which, as we have explained, falls outside the scope of our appellate jurisdiction. But the district court's second order – over which we do have jurisdiction – incorporates the same standards. *See, e.g.*, *NAACP II*, 2019 WL 5840845, at *3 (explaining that "mere strategic disagreements are not enough to rebut the presumption of adequacy" and citing *Stuart*, 706 F.3d at 353).

committed no such error in applying the standards at issue here.

We begin with *Westinghouse*'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. *Stuart*, 706 F.3d at 353. According to the Leaders, that presumption – which we and virtually all our sister circuits have applied for decades[5] – is inconsistent with the Supreme Court's more generous approach to intervention, and we should take this opportunity to overrule *Westinghouse* and abandon the presumption. We have rejected that argument before. *See Stuart*, 706 F.3d at 351–52 (rejecting claim that presumption of adequacy – heightened or otherwise – is inconsistent with Supreme Court precedent). And we continue to disagree.

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[5] Nearly every federal circuit has adopted some version of a presumption of adequacy when proposed intervenors share an objective or interest with existing parties. *See, e.g.*, *In re Thompson*, 965 F.2d 1136, 1142–43 (1st Cir. 1992); *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, 973 (3d Cir. 1982); *Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir. 1984); *United States v. Michigan*, 424 F.3d 438, 443–44 (6th Cir. 2005); *Kaul*, 942 F.3d at 799; *FTC v. Johnson*, 800 F.3d 448, 452 (8th Cir. 2015); *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003); *Tri -State Generation & Transmission Ass'n, Inc. v. N.M. Pub. Regul. Comm'n*, 787 F.3d 1068, 1072–73 (10th Cir. 2015); *Clark v. Putnam County*, 168 F.3d 458, 461 (11th Cir. 1999).

The Leaders rest their argument on a footnote in *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972), in which the Supreme Court described the burden for showing inadequacy as "minimal," requiring the proposed intervenor to show only "that representation of his interest 'may be' inadequate." But what *Trbovich* establishes is a "default" rule – a "liberal" one, to be sure, but one that may give way to more specific "standards for the adequacy of representation under Rule 24" based on the "context of each case." *See Kaul*, 942 F.3d at 799. In keeping with that context- specific approach, we, in the good company of our sister circuits, have determined that it is "perfectly sensible" to presume that a proposed intervenor's interests will be adequately represented by an existing party with whom it shares an objective, notwithstanding disagreements over litigation tactics. *Stuart*, 706 F.3d at 352–53.

"Nor could it be any other way," as we explained in *Stuart*. *Id.* at 354. Absent a meaningful presumption of adequacy, federal courts would be required under Rule 24(a)(2) to arbitrate, de novo, the inevitable differences over strategy that arise even among parties who share an ultimate goal, deciding which trial tactics do and do not amount to "adequate" representation. "It is not unusual for those who agree in principle to dispute the particulars." *Id.* But under the Leaders' more free-wheeling approach – which seems to have no obvious stopping point – every one of those disputes will necessitate a federal ruling as to whether the existing party's approach "may" lead to inadequate representation. As we concluded in *Stuart*, "[t]o have such unremarkable divergences of view sow the seeds

for intervention as of right risks generating endless squabbles at every juncture over how best to proceed." *Id.* We see no reason to revisit that conclusion here.

Nor are we persuaded by the Leaders' back-up claim: that even if the *Westinghouse* presumption remains good law, it does not apply in this case because they seek to advance an objective distinct from that of the existing party, the State Board, as represented by the Attorney General. We have covered some of this ground already. The Attorney General is charged by law with representing the interests of the State and its agencies in court, including in cases challenging state law. *See* N.C. Gen. Stat. § 114-2; *Martin v. Thornburg*, 359 S.E.2d 472, 479 (N.C. 1987). The Attorney General, on behalf of the State Board, is litigating the validity of S.B. 824 in state and federal court, seeking to uphold its legality. And as the Leaders conceded at oral argument before the en banc court, that is precisely the same objective that they would pursue if allowed to intervene.

In an effort to find some daylight between their own ultimate objective and that of the State Board and Attorney General, the Leaders suggest that the Board's institutional interest in administering elections gives it a distinct goal, not shared by the Leaders: an interest in expediently obtaining clear guidance from the courts as to what law will govern upcoming elections. And it is true that the State Board acknowledged that interest in a filing before the district court. *See* J.A. 589. But as we have explained, there is nothing unreasonable about the adoption by state defendants of a litigation strategy designed to produce an "expeditious final

ruling on the constitutionality" of state law. *Stuart*, 706 F.3d at 354. And here, the specific request of the State Board to which the Leaders allude – that any temporary relief granted by the court be flexible enough to allow for prompt implementation of the law if the preliminary injunction were later vacated – is consistent, not in conflict, with its ultimate goal of defending the constitutionality of S.B. 824. *See NAACP II*, 2019 WL 5840845, at *4 (explaining that "while a 'primary objective' of the State Board in opposing the preliminary injunction was to 'expediently obtain clear guidance,'" that objective did not come at the expense of a defense of S.B. 824).[6]

That brings us to the second of the standards the district court applied, requiring that the Leaders, in seeking to rebut the *Westinghouse* presumption, "mount a strong showing of inadequacy." *NAACP I*, 332 F.R.D. at 169 (quoting *Stuart*, 706 F.3d at 352). We held in *Stuart* that "a more exacting showing of inadequacy should be required where the proposed intervenor shares the same objective as a governmental party," like the State Board here, as opposed to a private litigant. 706 F.3d at 351. Governmental entities are entitled to this heightened presumption of

[6] That is enough to distinguish this case from *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999 (6th Cir. 2006), in which the Sixth Circuit allowed the State of Ohio and its legislature to intervene in defense of a voter-ID law. As the court explained, no presumption of adequacy applied in that case because the interest of the existing defendant, the Secretary of State, in smooth election administration meant that he did *not* share the State's objective of "defending the validity of Ohio laws." *Id.* at 1008.

adequacy, we reasoned, in part because they are uniquely well-situated to defend a state statute under attack, given their ability to speak in a representative capacity and their "familiarity with the matters of public concern that lead to the statute's passage in the first place." *Id.* Focusing on that reasoning, the Leaders argue that *Stuart* does not apply in a case like this one, where the proposed intervenor is not a private party, as in *Stuart*, but rather *another* governmental entity, equally well-suited to speak in defense of a state statute.

We agree with the Leaders to this extent: The better reading of *Stuart* is that it does not by its terms control this case. But "that is not, by itself, a reason to reach another result." *See Kaul*, 942 F.3d at 799 (addressing same question and choosing to extend prior precedent calling for heightened presumption of adequacy for governmental defendants). Rather, it leaves the question of whether *Stuart*'s heightened presumption of adequacy *should* be afforded to government defendants even when other governmental entities, like the Leaders here, seek to intervene on their side. We think it should.

Although some of *Stuart*'s reasoning does not translate to this context, one of its main pillars does: A government defendant, given its "basic duty to represent the public interest," is a presumptively adequate defender of duly enacted statutes. *Stuart*, 706 F.3d at 351. And when a "governmental official . . . is legally required to represent" the state's interest – as is the Attorney General here – then it is "reasonable, fair and consistent with the practical inquiry required

by Rule 24(a)(2) to start from a presumption of adequate representation and put the intervenor to a heightened burden" to overcome it. *Kaul*, 942 F.3d at 810 (Sykes, J., concurring). Nothing about that conclusion, which reflects no more than the normal assumption that government officials properly discharge their duties, *see United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926), should change just because the proposed intervenor also is a government entity with its own public duties.

Moreover, as the Seventh Circuit explained in *Kaul*, in cases like this one, a proposed intervenor's governmental status makes a heightened presumption of adequacy more appropriate, not less. A private party seeking to intervene can argue that although it seeks the same objective as the state's representative, the state's interests – informed, as they must be, by the concerns of the general public – do not perfectly overlap with his or her more individualized interests. *See Kaul*, 942 F.3d at 801. But the Leaders – like the legislature in *Kaul* – cannot make that argument, because they are seeking, as governmental parties, to represent precisely the same state interests as the state defendants already in the case. The Leaders, that is, "go[] further than sharing a *goal* with the Attorney General"; they "intend[]to represent the same *client*," the State of North Carolina. *See id.* (emphases added). Under those circumstances, the "alignment" between the Attorney General and the would-be governmental intervenors is one-for-one – closer than the alignment in *Stuart*. *Cf. Stuart*, 706 F.3d at 353. And under those circumstances, as we have emphasized, the Leaders have a right to intervene only if North Carolina's

Attorney General – charged by state law with representing the same interests they seek to advance – is inadequately representing his own State. Requiring a heightened showing of inadequacy to justify such an "extraordinary finding" strikes us as entirely appropriate. *See Kaul*, 942 F.3d at 801.

Finally, the practical concerns we identified in *Stuart* about a less exacting standard for inadequacy are not abated simply because a proposed intervenor is governmental and not private. Government intervenors, no less than private ones, run the risk of rendering litigation "unmanageable" in the federal courts. *Kaul*, 942 F.3d at 802; *see Stuart*, 706 F.3d at 350 (explaining "profound implications" of intervention on district courts' trial management). Faced with the prospect of intervention based only on a minimal showing of inadequacy, the original government defendant "could be compelled to modify its litigation strategy" to suit the putative intervenor's preferences "or else suffer the consequences of a geometrically protracted, costly, and complicated litigation." *Stuart*, 706 F.3d at 351.

And those baseline concerns are only magnified in a case like this, in which a government entity seeks intervention to represent the *same* state interest represented already by a state attorney general. "If the [Leaders] were allowed to intervene as [of] right, then [they] and the Attorney General could take inconsistent positions on any number of issues beyond the decision whether to move to dismiss, from briefing schedules, to discovery issues, to the ultimate merits of the case." *Kaul*, 942 F.3d at 801. And at that point – a point

almost certain to arise in this case, if past is prelude – a federal district court will have to "divin[e] the true position" and interests of the State of North Carolina, and which of its representatives, the Leaders or the Attorney General, better represents it. *Id.* Those are fundamentally political questions, and without a substantial presumption of adequacy, federal courts could be required to take sides in these political battles on a regular basis. *See Planned Parenthood of Wis., Inc. v. Kaul*, 384 F. Supp. 3d 982, 990 (W.D. Wis. 2019) ("[T]o allow intervention would likely infuse additional politics into an already politically-divisive area of the law and needlessly complicate this case.").

We do not, of course, question a sovereign state's authority to designate its preferred legal representative in court proceedings. *See Bethune-Hill*, 139 S. Ct. at 1951 (citing *Hollingsworth*, 570 U.S. at 710). If 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. But what the Leaders are asking for is more than that: The right of a state to designate not one but two representatives – or three, or more, because there is no discernible limiting principle here – in a single federal case, all purporting to speak for the state. *See Kaul*, 942 F.3d at 802. Under the Leaders' approach, a federal court would be required to accommodate that cacophony of parties, given the mandatory nature of Rule 24(a)(2), upon only a nominal showing of inadequacy, and regardless of the "intractable procedural mess" that could follow. *Id.* at 801–02. With

full respect for the states' sovereign autonomy, we decline to read Rule 24(a)(2) to leave federal district courts effectively "powerless to control litigation involving states." *Id.* at 802.

Accordingly, we take this opportunity to clarify that *Stuart*'s heightened presumption of adequacy applies when governmental as well as private entities seek to intervene on the side of governmental defendants. The district court therefore did not err when it required the Leaders to make a "strong showing" of inadequacy to rebut the *Westinghouse* presumption. *NAACP I*, 332 F.R.D. at 169. We note, however, that this heightened presumption is not critical to the resolution of this case. As we explain below, with or without the overlay of a "strong showing" requirement, the Leaders cannot overcome the standard *Westinghouse* presumption that the State Board of Elections and Attorney General are adequately pursuing the shared objective of defending S.B. 824's validity.

2.

At this point in the analysis, we are in the heartland of the deference owed a district court's judgment under Rule 24(a)(2)'s adequacy prong. It is not for us to decide whether, in our best view, the Leaders have demonstrated that the State Board and Attorney General are inadequate representatives of the State's interest in S.B. 824's validity. That inquiry is firmly committed to the discretion of the district court. *Stuart*, 706 F.3d at 349–50. The only question before us is whether it can be said that the district court abused that wide discretion when it found in its second order that the Attorney General, consistent with his

statutory duties, continued to provide an adequate defense of S.B. 824. We see no such abuse of discretion here.

First, there is no ground to set aside the district court's finding – and indeed, we do not understand the Leaders to contest this point – that the State Board and Attorney General in fact continue to defend S.B. 824. At the outset of its opinion denying the Leaders' renewed motion to intervene, the district court determined that the Attorney General, on behalf of the State Board, had taken and continued to take active steps to defend S.B. 824 in court. In this federal action, the court explained, the Attorney General had "consistently denied all substantive allegations of unconstitutionality," moved to dismiss the case on federalism grounds, and recently filed an "expansive brief" opposing on the merits the plaintiffs' motion for a preliminary injunction. *NAACP II*, 2019 WL 5840845, at *3. And in state court, the Attorney General had moved to dismiss five of six counts of the *Holmes* plaintiffs' complaint and opposed a preliminary injunction. *See id.* at *3–4. This was not a case, in other words, in which the Attorney General actually had "abandoned"the defense of S.B. 824 or indicated that he would do so in the future. *Id.* at *4.

In arguing that the Attorney General nevertheless is an inadequate representative of the State's interest in S.B. 824 – and that the district court abused its discretion in finding otherwise – the Leaders consistently have advanced two central arguments. First, they object to the *way* in which the Attorney General has chosen to defend S.B. 824. According to the

Leaders, the Attorney General's litigation decisions in this action and in *Holmes* demonstrate an "unwillingness to *robustly* defend S.B. 824," *id.* at *2 (emphasis added), that amounts to "nonfeasance" sufficient to rebut the *Westinghouse* presumption of adequacy. The district court rejected that claim, *id.*, finding only the kind of garden-variety disagreements over litigation strategy that we and other courts consistently have deemed insufficient to overcome a presumption of adequacy, whatever the precise strength of the presumption and whether or not it includes a "strong showing" component*, see Stuart*, 706 F.3d at 349, 353; *see also Kaul*, 942 F.3d at 810–11 (Sykes, J., concurring). We think that judgment falls well within the district court's discretion.[7]

With respect to this federal court litigation, for instance, the Leaders' renewed motion focused on an

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[7] In its first order, the district court cited our longstanding rule that *Westinghouse*'s presumption of adequacy can be rebutted only by a showing of "adversity of interest, collusion, or nonfeasance." *See NAACP I*, 332 F.R.D. at 168 (quoting *Westinghouse*, 542 F.2d at 216). As the Leaders point out, there has been some criticism of courts' treatment of those factors, or factors like them, as necessary rather than sufficient to rebut the presumption of adequacy. *See* 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure Civil §1909 (3d ed. Oct. 2020 update); *Kaul*, 942 F.3d at 807–10 (Sykes, J., concurring). We can leave that issue for another day. Here, the district court found – in a determination to which we defer – that the Leaders' *only* evidence of inadequacy amounted to no more than differences over litigation tactics. However wide the range of evidence that will rebut the presumption of adequacy, "disagreements about litigation strategy" will not do the trick. *See Kaul*, 942 F.3d at 810 (Sykes, J., concurring).

alleged lack of vigor in the State Board's opposition to the NAACP's preliminary injunction request. In particular, the Leaders argued, the Board did not hire experts to submit reports in opposition to that request, nor move to stay the preliminary injunction once entered. But we confronted very similar objections in *Stuart*, in which the proposed intervenor criticized the Attorney General for presenting only legal argument and not factual evidence at the preliminary injunction stage, and for forgoing an appeal of a preliminary injunction to litigate the case to final judgment. *See Stuart*, 706 F.3d at 353. That sort of "disagreement over how to approach the conduct of the litigation," we held, is insufficient to rebut the presumption of adequacy, as evidence of either nonfeasance or adversity of interests. *Id.* at 353–54; *see also id.* at 354 ("It was eminently reasonable for the Attorney General to believe that the interests of North Carolina's citizens would best be served by an expeditious final ruling on the constitutionality of the Act, as opposed to prolonged intermediate litigation over the preliminary injunction."); *Saldano v. Roach*, 363 F.3d 545, 555 (5th Cir. 2004) ("Simply because the [intervenor] would have made a different [litigation] decision does not mean that the Attorney General is inadequately representing the State's interest . . . .").

And indeed, the course of litigation since the district court's intervention decision has only confirmed that the Attorney General's litigation approach was well within the range of acceptable strategy. After the district court issued a preliminary injunction, the State Board promptly and successfully appealed that decision, securing a reversal of the preliminary

injunction. *See N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 311 (4th Cir. 2020). Although we permitted the Leaders to intervene to make legal arguments in that appeal, our reversal was based on the record the Attorney General created in the district court, without the need for additional fact or expert evidence. *See id.* at 310–11.

Likewise, the district court was within its discretion in finding no new evidence of nonfeasance or inadequacy in the Attorney General's then-recent litigation choices in the state-court *Holmes* case.[8] There, the Leaders faulted the State Board for seeking dismissal of only five of the complaint's six counts, reserving a dispositive challenge to the fact-intensive claim of intentional discrimination for later in the proceedings. But as the district court observed, the State Board's approach was vindicated when the state court agreed to dismiss all five claims it had challenged but not the intentional- discrimination claim separately challenged by the Leaders. *NAACP II*, 2019 WL

[8] The district court expressed some doubt as to whether the State Board's litigation choices in *Holmes* – a case in a different forum, involving different (though overlapping) parties and claims – had any bearing at all, "predictive" or otherwise, on the adequacy of the State Board's defense of S.B. 824 in this federal action. *NAACP II*, 2019 WL 5840845, at *3. "Proposed Intervenors do not point to a single case suggesting that a defendant's performance . . . in one lawsuit invites intervention in another." *Id.* at *3. Nevertheless, the district court went on to review the conduct of the *Holmes* litigation, finding no evidence of inadequate representation. Because we affirm that finding as within the district court's discretion, we need not decide what role, if any, inadequate representation in one case should play in the application of Rule 24(a)(2) in another.

5840845, at *3; *see Stuart*, 706 F.3d at 354 ("The reasonableness of the Attorney General's choice is particularly manifest given that it was largely successful . . . ."). The district court also addressed the Leaders' concern that the State Board had not mounted a "substantive defense" to the preliminary injunction sought by the plaintiffs: that injunction was denied after *both* the State Board and the Leaders opposed and argued against it, and there was no evidence, the court found, that the credit for this victory should not be shared. *See NAACP II*, 2019 WL 5840845, at *4. Finally, though the Leaders alleged that the State Board took an insufficiently aggressive approach to discovery in *Holmes*, the district court found it "entirely reasonable" for the Board to "focus its energies elsewhere," given that the Leaders, by their own account, had taken the lead on these matters. *See id.*; *see also* Appellants' Br. 45.

In short, after canvassing the recent litigation conduct cited by the Leaders in their renewed motion, the district court determined that the State Board, through the Attorney General, continued to "actively and adequately" defend S.B. 824. *See NAACP II*, 2019 WL 5840845, at *2. The Leaders' objections, the court concluded, remained "mere strategic disagreements" about the pursuit of a shared objective, insufficient to rebut the presumption of adequacy. *Id.* at *3. We owe substantial deference to that judgment, *see Stuart*, 706 F.3d at 349–50, and see no reason to disturb it here. Indeed, we are inclined to agree with the district court that the Leaders' new evidence of alleged inadequacy – coming in a case in which the Attorney General successfully moved to dismiss the Governor as a

defendant, vigorously opposed a preliminary injunction, and then successfully appealed from the entry of that injunction – reflects no more than routine disagreement about litigation tactics. And if those disagreements were themselves enough to rebut the presumption of adequacy, that "would simply open the door to a complicating host of intervening parties with hardly a corresponding benefit." *Id.* at 353.

That leaves the Leaders' second central argument: the suggestion that the Attorney General is not mounting an even more aggressive defense of S.B. 824 because he, like the Governor, is opposed to voter-ID laws as a matter of public policy. The Leaders point us to past statements by both the Attorney General and the Governor opposing a prior voter-ID law, arguing that it curtailed the right of North Carolina citizens to vote. And after he assumed his current position, the Leaders emphasize, the Attorney General, acting on behalf of the then-incoming Governor, moved to dismiss a petition for certiorari review of a decision holding that same voter-ID law unconstitutional. *See North Carolina v. N.C. State Conf. of the NAACP*, 137 S. Ct. 1399, 1399 (2017) (mem.). Whether framed as an argument for collusion or for adversity of interests, the import of the Leaders' claim is the same: This Attorney General – as well as the State Board he represents, consisting of members appointed by the Governor – cannot be trusted to defend S.B. 824.[9]

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[9] The district court expressly addressed this claim in its initial order denying intervention, *see NAACP I*, 332 F.R.D. at 169–71, over which we lack jurisdiction. But because the challenge here goes to the very probity of the lawyers before the district court, we

That is a startling accusation. The Attorney General has a statutory duty to represent and defend the State and its interests in this litigation. *See* N.C. Gen. Stat. § 114-2. And that is to say nothing of his ethical obligations, which require zealous representation of his client, *see* Revised Rules of Professional Conduct of the North Carolina State Bar, Rule 0.1[2] (preamble), and prohibit him from falsely assuring the district court that he is "meeting [his] duty to defend this action," J.A. 662; *see* Revised Rules of Professional Conduct of the North Carolina State Bar, Rule 3.3 (candor to court). That the Attorney General may have expressed policy views at odds with S.B. 824 in the past is no ground for a federal court to infer that he would abdicate his official duty to the State by subterfuge, mounting a sham defense of the statute. To suggest otherwise is 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. *See Kaul*, 942 F.3d at 810–11 (Sykes, J., concurring) (concluding that "political and policy differences" between proposed legislative intervenor and state attorney general regarding challenged law are not evidence of inadequate representation).

In any event, the district court found there was no evidence in the record indicating that the Attorney General's policy preferences left him without the proper "level of interest" or "incentive" to robustly

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think it necessarily merges into the district court's second assessment of the adequacy of representation, before us now on appeal.

litigate on behalf of S.B. 824. *NAACP I*, 332 F.R.D. at 170. Nor, the court determined, has the Governor's control of appointments to the State Board caused the Board to fall short in its defense of that law. *See id.* at 171. Any suggestion that the Governor might use his appointment power to direct the State Board or Attorney General to slow-walk the State's defense of S.B. 824, the court held, was no more than "conclusory speculation," insufficient on the current record to rebut the presumption of adequate representation. *Id.* at 170, 171. We see no abuse of discretion in that considered judgment.[10]

That is not to say, of course, that there never could be a case in which a state attorney general's political opposition to a statute – or the opposition of some other state legal representative – might cause an abdication of the duty to defend that law in court. Should the

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[10] On this en banc appeal, the Leaders point us to one new litigation development: In the State Board's successful appeal from the district court's preliminary injunction, the Governor filed an amicus brief urging us to affirm entry of the injunction to avoid confusion during the 2020 election cycle. *See* Brief of Roy Cooper as Amicus Curiae, *N.C. State Conf. of the NAACP v. Raymond*, No. 20-1092 (4th Cir. July 20, 2020). The Governor's brief, filed by private counsel, focused narrowly on the practicalities of lifting the preliminary injunction right before an election and during a pandemic, and by itself does not indicate that either the State Board or the Attorney General – who sought and won a reversal of the preliminary injunction – had failed or would fail to adequately defend the law on the merits. Given the limited nature of our review in this posture, we think it appropriate for the district court to consider in the first instance what bearing this brief might have on the adequacy of the State Board's defense of S.B. 824 going forward, should the Leaders again seek intervention.

Attorney General or State Board in fact abandon their defense of S.B. 824 in the future, failing to file an appeal or petition for certiorari in the appropriate circumstance or otherwise to litigate on the law's behalf, then we would have the changed circumstance the district court hypothesized in its first order denying intervention. At that point, the Leaders would be free to seek intervention once again, and the district court free to reconsider the Rule 24(a)(2) factors – and in particular, whether state law authorized the Leaders to step into this newly created breach to represent the State's interest in the validity of its statute. But on the present record, we defer to the district court's judgment that the Leaders' renewed request for intervention as of right was premature and without support.

C.

Finally, we turn to the district court's reevaluation and reaffirmation, in its second order, of its denial of permissive intervention under Rule 24(b). This is not the focus of the Leaders' appeal, and for good reason. Here, the deference accorded the district court is at its zenith: The discretion Rule 24(b) affords the district court is "even broader" than that under Rule 24(a)(2), *R&G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 11 (1st Cir. 2009), and "a challenge to the court's discretionary decision to deny leave to intervene must demonstrate a *clear* abuse of discretion in denying the motion," *McHenry v. Comm'r*, 677 F.3d 214, 219 (4th Cir. 2012) (internal quotation marks omitted). The Leaders cannot meet that high standard.

The district court's original decision to deny permissive intervention – while allowing amicus

participation – rested on its finding that the addition of the Leaders as parties would result in unnecessary complications and delay, jeopardizing the court's ability to reach final judgment in a timely manner and likely prejudicing the plaintiffs, who would be required to address "dueling defendants" with multiple litigation strategies all purporting to represent the same state interest. *NAACP I*, 332 F.R.D. at 172. In its decision reviewing the Leaders' renewed motion – the decision on appeal – the district court expressly reaffirmed that finding. *NAACP II*, 2019 WL 5840845, at *4. And indeed, the court found, the Leaders' litigation conduct in the intervening months – appealing a purported "de facto" denial of their motion before the court had ruled on it, and seeking the extraordinary remedy of mandamus – had only "further convinced" it that intervention would "distract from the pressing issues in this case." *Id.*

The Leaders disagree, as is their right, insisting that their presence as parties, rather than amici, would facilitate and not hinder the prompt and equitable resolution of this litigation. But the district court's contrary conclusion is a factual judgment, informed by its "on the scene presence" and going directly to its trial management prerogatives, to which we owe the most substantial deference. *See Stuart*, 706 F.3d at 350 (internal citation omitted). We have no grounds for setting aside the court's finding as a "clear abuse of discretion." *McHenry*, 677 F.3d at 219. Moreover, that finding is sufficient by itself to justify the denial of permissive intervention under Rule 24(b)(3), which mandates the consideration of two – and only two – factors: undue delay and prejudice to existing parties.

See Fed. R. Civ. P. 24(b)(3); *McHenry*, 677 F.3d at 225 (describing undue delay and prejudice as the "core considerations" under Rule 24(b)(3)). Whatever other discretionary factors the court might have taken into account under Rule 24(b) – that is, once it found that the Leaders' intervention was likely to cause undue delay and prejudice to the plaintiffs – it did not abuse its discretion, let alone "clearly" so, by denying permissive intervention on that basis alone.

IV.

For the reasons given above, the judgment of the district court is affirmed.

AFFIRMED

WILKINSON, Circuit Judge, dissenting:

Every attorney general who looks in the mirror sees a governor. Or so it is said. Therein lies a temptation. When a challenge is brought to an unpopular or controversial state law, an attorney general's defense of the law may be less than wholehearted. If the plaintiffs in the case are politically influential, the temptation to pull punches becomes even stronger. It casts no aspersions on anyone to note the obvious: North Carolina's voter photo ID law is a very controversial statute. *See* 2018 N.C. Sess. Laws 144.

The attorney general's office exists at the crossroads of law and politics. Electoral ambitions frequently collide with an AG's obligations both to his client and to the court. But this fact alone does not allow courts to be cynical. Perhaps I am naïve in not taking a darker view of human nature, but I believe that when a state

statute is under challenge, an AG's professional and ethical obligations—and certainly those of the Department of Justice which he leads—will most often prevail over the political itch. The AG, after all, is the state's chief legal officer, and that should mean a lot.

How to disentangle the legal from the political? Trial courts are best equipped to do so. The district court is best situated to assess the "adequacy" of an existing party's representation of a proposed intervenor's interest. *See* Fed. R. Civ. Pro. 24. The parties are right there in front of it. Adequacy moreover is a judgment call. The court of appeals thus has a duty to respect the abuse of discretion standard under which a district court operates and, beyond that, not to gratuitously make the administration of the trial court's docket an unmanageable task.

Open-ended intervention greatly complicates the trial court's duty to have the trains run on time. More coordination of such mundane matters as continuances, status conferences, and discovery deadlines is required. Scheduling preferences are not the only snag. The more parties to a litigation, the more inevitable divergences in strategy arise, and the more complex the suit becomes. Intervenors are no aid to simplicity. *Cf.* Fed. R. Civ. Pro. 24(b)(3) (recognizing the risk of delay in the context of permissive intervention). Multi-party litigation tends to take longer to resolve and tends, as well, to run up attorneys' fees. Incurring all these costs seems especially unnecessary where, for many a would-be intervenor, amicus status is quite sufficient. In other cases, intervenors are best diverted from litigation to the legislative realm. When appeals—like this one—are

taken on preliminary questions only tangentially related to the actual merits of the suit, the danger of intervention interminability is compounded.

I find much to commend in Judge Harris's opinion, which underscores these points well. And here we face the added fact that the Attorney General has both taken an appeal from the preliminary injunction entered against the state statute and prevailed before this court in having the statute upheld. *See NC State Conf. of the NAACP v. Raymond*, 981 F.3d 295 (4th Cir. 2020).

So why then allow intervention? And here Judge Quattlebaum has ably presented the argument. This case may present just that narrow set of circumstances in which intervention should be permitted. For one, the prospective intervenor is not a private party as in *Stuart v. Huff*, 706 F.3d 345 (4th Cir. 2013), but a coordinate branch of state government. State law envisions a role for the General Assembly when a state statute is under challenge. North Carolina has enacted statutes that ask federal courts to allow both the executive and legislative branches of the state government to participate in actions challenging the constitutionality of its laws. *See* N.C. Gen. Stat. § 1-72.2(a); *see also id.* §§ 114-2, 120-32.6. As for the executive, the Attorney General of North Carolina has a general statutory duty to represent the state, its agencies, and its officers in any court proceedings. *See id.* § 114-2(1), (2). That is a common responsibility of attorneys general across the nation. North Carolina, however, has seen fit to supplement the Attorney General's representation of the state when there are

challenges to the constitutionality of state statutes. North Carolina law allows for the General Assembly, through its two houses' presiding officers, to represent the interests of the state. *See id.* §§ 1-72.2, 120-32.6.

While it is by no means clear that state law can mandate that federal courts allow a single state to speak with dual voices in federal proceedings, it is altogether clear that federal law itself has an especially important role to play in election law cases. No less an authority than our Constitution leaves the legislatures of the states the power to "prescribe[]" the "Times, Places and Manner of holding Elections." U.S. Const. art. I, § 4, cl. 1. This important task was not delegated to state government in general but to state legislatures in particular. *See id.* The North Carolina photo ID law provides a clear example of prescribing the "Manner of holding Elections." Thus the "interests" of the proposed intervenors in this case could hardly be more apparent. And in "divided government" states like North Carolina, the danger that the executive or judicial branches may seek to override the constitutionally prescribed legislative role is more than theoretical.

As a result, given the confluence of factors before the court, I would recognize a right to intervention in these narrowest of circumstances. I would not under any circumstances let intervention loose as a contagious legal principle.

NIEMEYER, Circuit Judge, dissenting:

While I compliment Judge Harris' craftsmanship in discussing Federal Rule of Civil Procedure 24, I concur in Judge Quattlebaum's fine opinion and request that he show me as joining it. I write separately only to emphasize that the issue is, I believe, more than a procedural one under Rule 24.

While intervention under Rule 24 is, to be sure, the relevant *procedural* question — one of federal law — the relevant parties and their interests are substantive issues that are to be determined by state law, and this aspect is mostly finessed by the majority's ruling. To accomplish its result, the majority collapses, for purposes of its discussion, the North Carolina parties into the singular "State of North Carolina" and their interests into the singular "State's interest." It then concludes that under Rule 24 the Attorney General is adequately representing North Carolina and North Carolina's interests and therefore no other party having an interest in a North Carolina statute may intervene. I think this is more than a convenient formulation, as it fails to address the inherent underlying issues necessary in deciding the Rule 24 motion.

The plaintiffs in this case seek a declaration that a North Carolina election law is invalid, and they named as defendants the Governor and the North Carolina State Board of Elections. Yet, state law anticipates that the State will be sued when the validity or constitutionality of an act of the General Assembly is challenged. *See* N.C. Gen. Stat. § 1-72.2(a). Section 1-72.2(a) provides that the "General Assembly and the

Governor constitute the State of North Carolina" in such a suit, and therefore, a court should allow the General Assembly and the Governor "to participate in" "any action in any federal court in which the validity or constitutionality of an act of the General Assembly . . . is challenged." *Id*. That is declared to be the "public policy of the State." *Id*. And state law further authorizes the General Assembly to retain counsel of its own choosing and not necessarily the Attorney General, thus contemplating that the General Assembly might find the Attorney General's counsel inadequate or otherwise undesirable. *See* N.C. Gen. Stat. § 1-72.2(b). The majority opinion fails to take proper account of this state law, which I suggest lies at the substantive root of this case.

To be sure, the procedural principles of Rule 24 intervention must be applied in this case to ensure that the proper parties are before the court. But underlying that application are questions of substantive state law regarding who the relevant parties are and who defends the state's interest. The majority opinion does not, except most obliquely, address these questions. And its failure to recognize these aspects is especially significant in view of the history of S.B. 824, which entails a story of political conflicts and differences between the branches of North Carolina government. Indeed, giving homage to state law in these circumstances seems to be explicitly mandated, as the Supreme Court noted when it stated, "If the State had designated the House to represent its interests, and if the House had in fact carried out that mission, we would agree that the House could stand for the State."

Virginia House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1951 (2019).

Here, the State of North Carolina, as sovereign, did designate the General Assembly to represent its interests. And if we give its choice effect, then the analysis conducted by the majority in concluding that the General Assembly may not be allowed to intervene under Federal Rule 24 because the Attorney General is doing a good job is substantively flawed.

QUATTLEBAUM, Circuit Judge, with whom Judges NIEMEYER, AGEE, RICHARDSON, and RUSHING join, dissenting:

North Carolina recognized a potential problem. It anticipated that there could be times when its executive branch would not vigorously enforce the state's duly-enacted legislation. To address that concern, North Carolina passed a law that requests the North Carolina General Assembly be permitted, alongside the executive branch, to defend any federal action challenging a North Carolina statute.

More specifically, North Carolina enacted N.C. Gen. Stat. § 1-72.2, first passed in 2013 and modified in 2017, which provides that for any action challenging an act of the General Assembly, "[i]t is the public policy of the State of North Carolina that . . . the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina; the Governor constitutes the executive branch of the State of North Carolina; [and] that, when the State of North Carolina is named as a

defendant in such cases, *both* the General Assembly and the Governor constitute the State of North Carolina . . . ." N.C. Gen. Stat. § 1-72.2(a) (emphasis added). It then requests that a federal court presiding over an action where the State of North Carolina is a named party allow both the legislative branch and the executive branch of the State of North Carolina to participate as a party in such an action.[1] *Id*.

Subsequently, North Carolina passed its current voter identification bill. In response, the state chapter of the NAACP and several county branches (collectively the "NAACP") sued North Carolina's Governor—who, like the NAACP, opposed the bill— and the members of the State Board of Elections that the Governor appointed, claiming the law was unconstitutional.

North Carolina's Attorney General, who also publicly opposed the law, was tasked with defending it on behalf of the Governor and the State Board of Elections. The authority for the Attorney General to defend the law was grounded in North Carolina law. N.C. Gen. Stat. Ann. § 114-2 provides that "[p]ursuant to Section 7(2) of Article III of the North Carolina

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[1] North Carolina passed other laws to address this same concern. For example, N.C. Gen. Stat. § 120-32.6 provides "[w]henever the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action in any State or federal court, the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, shall be necessary parties and shall be deemed to be a client of the Attorney General for purposes of that action as a matter of law and pursuant to Section 7(2) of Article III of the North Carolina Constitution."

Constitution, it shall be the duty of the Attorney General: (1) To defend all actions in the appellate division in which the State shall be interested, or a party, and to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested."

However, North Carolina's Speaker of the House of Representatives and President Pro Tempore of the Senate (the "Leaders") believed that the NAACP's challenge to the voter identification law involved the exact situation contemplated by N.C. Gen. Stat. § 1-72.2. As a result, they moved to intervene to defend the law. They claimed a significantly protectable interest in the litigation that, without intervention, would practically be impaired. And they claimed that their interest was not being adequately represented by the Governor and the State Board of Elections due both to the public opposition to the bill expressed by the Governor and the Attorney General and to what they described as the half-hearted way the Attorney General was defending the law in this case and in a parallel case in state court—*Holmes v. Moore*, No. 18-cv -15292 (N.C. Super. Ct.). The district court denied the Leaders' motion to intervene, prompting this appeal.

For good reason, district courts are afforded discretion in resolving motions to intervene. Appellate courts should generally avoid micromanaging district courts in such matters. But this is not your run of the mill intervention case. Here, the district court excluded from its analysis the express policy of North Carolina as reflected in its democratically-enacted statutes. Although federal courts need not completely defer to

that public policy decision, the district court cannot fail to give the State's choice any weight.

The district court also applied the incorrect legal standard, extending the heightened burden of a "strong showing" of inadequacy to circumstances where, until today, it did not apply. For both of these reasons, I would vacate the district court's order denying intervention and remand so that the district court can consider the requested intervention, evaluating all relevant factors, under the proper legal standard.

I.

In 2018, the North Carolina General Assembly ratified Senate Bill 824, titled "An Act to Implement the Constitutional Amendment Requiring Photographic Identification to Vote" ("S.B. 824"), which established, among other things, photographic voter identification requirements for elections in North Carolina. Governor Roy Asberry Cooper, III, vetoed the bill, explaining that requiring "photo IDs for in-person voting is a solution in search of a problem." J.A. 128. Governor Cooper went on to state that "the fundamental flaw in the bill is its sinister and cynical origins: It was designed to suppress the rights of minority, poor and elderly voters. The cost of disenfranchising those voters or any citizens is too high, and the risk of taking away the fundamental right to vote is too great, for this law to take effect." J.A. 128.

The Senate and House voted to override the veto. Thus, S.B. 824 was enacted as North Carolina Session Law 2018-144. The day after it was passed, the NAACP sued Governor Cooper; the Chair of the North

Carolina Board of Elections; the Secretary of the North Carolina State Board of Elections; and seven other members of the North Carolina State Board of Elections[2] (the "State Defendants") challenging the validity of S.B. 824. In its complaint, the NAACP contends that S.B. 824 has a disparate impact on African American and Latino citizens of North Carolina in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as well as the Fourteenth and Fifteenth Amendments to the United States Constitution.

Relevant here, in challenging S.B. 824, the NAACP sued the Governor—who publicly and aggressively opposed the bill—and the State Board of Elections—which is made up of members appointed by the Governor. As a result, the parties defending S.B. 824 were parties with a historical opposition to the law or entities under the indirect control of such parties. Further, the Attorney General tasked to represent the State Defendants has a similar history of opposing North Carolina's voter ID laws. For example, in early 2017, Attorney General Josh Stein moved to dismiss a petition to the United States Supreme Court in *North Carolina v. North Carolina State Conference of NAACP*, a suit regarding the North Carolina voting law passed in 2013. *See North Carolina v. N.C. State Conf. of NAACP*, 137 S. Ct. 1399 (2017). He also issued a press release that same day stating that he supported

[2] Because the State Board was reconstituted to consist of five governor-appointed members after the complaint was filed, those members were substituted as parties to the action in the district court as reflected in the district court's order.

"efforts to guarantee fair and honest elections, but those efforts should not be used as an excuse to make it harder for people to vote." J.A. 142. From a perception standpoint, the action bore the hallmarks of a friendly suit.

In January 2019, the Leaders moved under Federal Rule of Civil Procedure 24 to intervene on behalf of the North Carolina General Assembly to oppose the NAACP's challenges to S.B. 824. Seeking to intervene as a matter of right under Rule 24(a) and, alternatively, permissively under Rule 24(b), the Leaders argued that state law, specifically N.C. Gen. Stat. § 1- 72.2(a) and (b), expresses the public policy of the State of North Carolina that the President Pro Tempore of the Senate and the Speaker of the House represent the State of North Carolina in defense of its statutes. They further argued that N.C. Gen. Stat. § 1-72.2 requests that federal courts permit their intervention to adequately represent the State and General Assembly's interests where the constitutionality of statutes, like S.B. 824, is challenged. The State Defendants neither consented nor objected to the motion to intervene, while the NAACP opposed the requested intervention.

In June 2019, the district court denied the motion to intervene, largely concluding that the State Defendants were represented by the Attorney General, who under North Carolina law, is charged with representing the State in defense of its existing laws, that the State Defendants had not abdicated their responsibility to defend S.B 824, and that, accordingly, the Leaders failed to make the requisite "strong showing of

inadequacy" to overcome the presumption of adequate representation. The district court's denial was without prejudice and invited a renewed motion if the Leaders could show that the State Defendants no longer intended to defend the lawsuit and the requirements for intervention were otherwise satisfied. While denying the motion to intervene, the district court allowed the Leaders to participate in the action by filing amicus curiae briefs.

Six weeks later, in July, the Leaders filed a renewed motion to intervene, arguing that it was apparent that the State Defendants would not fully defend S.B. 824. In November, the district court denied the renewed motion. The court concluded that its previous Rule 24 analysis, as set forth in its initial order, remained "the law of this case," focusing on whether the Leaders presented newly available evidence demonstrating that the State Defendants declined to defend this lawsuit. J.A. 3239, 3241. It then evaluated the Leaders' new allegations, determining they did not involve any new evidence. The district court thus denied the renewed motion to intervene, this time with prejudice, and reiterated that the Leaders could participate in the action by filing amicus curiae briefs.

On November 11, 2019, the Leaders filed a notice of appeal from the order denying their renewed motion to intervene.

II.

We review the denial of a motion to intervene for abuse of discretion. *In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991). But while our review is deferential,

we still must ensure that the district court included the relevant factors in its intervention analysis. *See Hill v. W. Elec. Co. Inc.*, 672 F.2d 381, 387 (4th Cir. 1982) ("[W]e think the court failed to consider or gave insufficient weight to another factor possibly militating in favor of intervention."). Another of our responsibilities is to ensure that intervention decisions are not based on incorrect legal principles. *See Stuart v. Huff*, 706 F.3d 345, 349–50 (4th Cir. 2013); *see also Feller v. Brock*, 802 F.2d 722, 729–30 (4th Cir. 1986) (finding that denial of intervention as of right to apple pickers was reversible error and admitting intervenors as parties-defendant); *Hill*, 672 F.2d at 385–86, 392 (remanding action for proper consideration of the motion for permissive intervention because the district court did not properly apply legal standards). Here, the district court erred in both respects. It first ignored North Carolina's law requesting two agents in cases challenging the constitutionality of its duly-enacted statutes. And then it compounded the error by setting the bar for the Intervenors to clear too high.

III.

Federal Rule of Civil Procedure 24 permits two types of intervention: intervention as a matter of right under subsection (a) and permissive intervention under subsection (b). The Leaders first claim that they are entitled to intervene as a matter of right. They alternatively claim they should be able to intervene permissively.

A.

Rule 24(a)(2) allows intervention as of right when the movant 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 the movant's interest is adequately represented by existing parties. Fed. R. Civ. P. 24(a)(2). There are three requirements for intervention as of right. "[T]he moving party must show that (1) it has an interest in the subject matter of the action, (2) disposition of the action may practically impair or impede the movant's ability to protect that interest, and (3) that interest is not adequately represented by the existing parties." *Newport News Shipbuilding and Drydock Co. v. Peninsula Shipbuilders' Ass'n,* 646 F.2d 117, 120 (4th Cir. 1981). Although the Majority's decision is limited to the adequacy requirement, I will consider all three.[3]

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[3] The Majority concludes that our jurisdiction over this appeal is limited to the district court's narrow focus in its second order denying intervention on the application of Rule 24(a)(2)'s adequacy prong to the Attorney General's defense of S.B. 824. Maj. Op. at 20. I do not find our jurisdictional focus to be as narrow as the Majority. The district court's June 2019 order, which denied the initial motion to intervene without prejudice, should not be regarded as an appealable final order. In addition to being issued without prejudice, the order did not outright deny the motion to intervene and invited the Leaders to file a renewed motion. Thus, in my view, it was not sufficiently final to trigger immediate review. In contrast, the second order was a final order. Importantly, the second order relied on the reasoning from the first order and, in doing so, signified that the first order "should continue to govern the same issues in subsequent stages in the

1.

A party seeking to intervene must have "an interest relating to the property or transaction that is the subject of the action . . . ." Fed. R. Civ. P. 24(a)(2). The district court found that the Leaders lacked a sufficient interest because the Executive State Defendants had not completely abdicated their responsibility to defend S.B. 824. J.A. 378 (holding that "because State Defendants in this action are presently defending the challenged legislation and have expressed no intention

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same case." *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). The court then denied the Leaders' motion with prejudice. For those reasons, I would find that the second order, including its analysis and reference to the earlier order, was sufficiently conclusive for appellate review. *See Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 126–27 (D.C. Cir. 1972) ("We are satisfied that the June 20 order . . . constituted a fresh evaluation of the intervention application, well within the discretionary power of the District Court to make, and amenable to review on the merits by this court.").

Additionally, the Majority's view of our jurisdiction has a decided impact on what part of its opinion constitutes binding precedent going forward. The Majority's decision concerning jurisdiction effectively resolves the first two requirements against the Leaders. Consequently, while its jurisdictional analysis is binding precedent of this Circuit, the Majority's subsequent discussion of the adequacy issue, properly construed, is dicta and not binding in future cases. *See Pittston Co. v. United States*, 199 F.3d 694, 703 (4th Cir. 1999) ("Dictum is [a] 'statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that, being peripheral, may not have received the full and careful consideration of the court that uttered it.'" (quoting *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988)).

to do otherwise, [the Leaders] have failed to demonstrate that they have a significantly protectable interest in likewise defending the constitutionality of S.B. 824 sufficient to warrant a right to intervene under Rule 24(a)(2)"). This analysis disregards the North Carolina law requesting federal courts permit the General Assembly to defend state statutes in federal court.

Rather than look to the North Carolina law, the district court relied on cases finding that individual legislators lack a sufficient protectable interest to intervene in litigation over statutes for which they voted. As a general principle, I agree. But that is not what we have here. The Leaders rely not only on their general position as legislators, but also on N.C. Gen. Stat. § 1-72.2. Under the statute, in any action in federal court challenging the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution, "[i]t is the public policy of the State of North Carolina that . . . the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina; the Governor constitutes the executive branch of the State of North Carolina; [and] that, when the State of North Carolina is named as a defendant in such cases, *both* the General Assembly and the Governor constitute the State of North Carolina . . . ." N.C. Gen. Stat. § 1-72.2(a) (emphasis added). It goes on to request that a federal court presiding over an action where the State of North Carolina is a named party allow both the legislative branch and the executive branch of the State

of North Carolina to participate as a party in such an action. *Id.*

Importantly, this statute does not limit the role of the General Assembly to instances in which the executive branch declines to defend or participate in the action. Of course, as the district court noted in its initial order, § 1- 72.2 only requests that a federal court allow the legislative branch to participate. The requirements of Rule 24(a)(2) must still be satisfied. But statutes of a separate sovereign that express the state's interest and role in the litigation cannot be cast aside and excluded from the merits of the intervention decision. In other words, while this North Carolina statute does not mandate federal intervention, it sets forth the nature of the state's interests.

Neither the Supreme Court nor this Court has imposed the standard followed by the district court—that the Attorney General must decline to defend the lawsuit in order to trigger a protectable interest on the part of the Leaders. In fact, Supreme Court jurisprudence, while perhaps not squarely on point, suggests the opposite.

In *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), the Supreme Court addressed whether the Virginia House of Delegates and its Speaker had, as intervenors, standing to appeal to defend Virginia's redistricting plan after the Commonwealth of Virginia announced it would not file an appeal to the Supreme Court. *Bethune-Hill*, 139 S. Ct. at 1950. The Commonwealth moved to dismiss the House's appeal for lack of standing. The Supreme Court granted that motion and dismissed the appeal.

The Court held that the "House, as a single chamber of a bicameral legislature, has no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part." *Id.* But while holding that the House lacked standing there, *Bethune-Hill* also emphasized "a State has standing to defend the constitutionality of its statute." *Id.* at 1951 (citation omitted). "[A] State must be able to designate agents to represent it in federal court," and "if the State had designated [a legislative branch] to represent its interests . . . the [legislative branch] could stand in for the State." *Id.* (citation omitted). That choice, the Court explained, "belongs to Virginia." *Id.* at 1952. While in that case, Virginia had chosen to speak only with "a single voice," that of the executive, nothing in the opinion suggested it could not have dual agents. *Id.* Indeed, the main point from *Bethune-Hill* is that states have great deference in deciding who represents their interests. *Id.* at 1952.

The Supreme Court's guidance in *Bethune-Hill* is consistent with its earlier decision in *Hollingsworth v. Perry*, 570 U.S. 693 (2013). There, the Court held that "the Speaker and the President, in their official capacities, could vindicate that interest in federal court on the legislature's behalf," noting that "a State has a cognizable interest 'in the continued enforceability' of its laws that is harmed by a judicial decision declaring a state law unconstitutional." *Hollingsworth*, 570 U.S. at 709–10 (citations omitted). And the Court further provided that "[t]o vindicate that interest or any other, a State must be able to designate agents to represent it in federal court," because a state is a political corporate body that can only act through its agents. *Id.*

at 710 (citing *Poindexter v. Greenhow*, 114 U.S. 270, 288 (1885)). "That agent is typically the State's attorney general. But state law may provide for other officials to speak for the State in federal court . . . ." *Id*.

And here the Leaders represent the entire bicameral legislative branch in North Carolina, making this matter comparable to *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S.Ct. 2652 (2015). In that case, the Court recognized the Arizona legislature's standing to challenge a ballot initiative threatening its authority over redistricting. *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) ("We have recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests.").

As the Majority points out, in *Bethune-Hill*, *Hollingsworth* and *Arizonans for Official English*, the state representative was no longer defending the state or declined to appeal an adverse ruling. That distinction, to the Majority, means those decisions have little bearing here. I disagree. In emphasizing the principle that a state must be able to designate its agents to represent it in federal court, none of those decisions limited that principle to situations where the initial agent was no longer participating in the defense or declined to appeal an adverse ruling. For example, and most recently, the Supreme Court, in *Bethune-Hill,* reiterated the Court's earlier holding that "a State must be able to designate agents" for representation in federal court. *Bethune-Hill*, 139 S. Ct. at 1951 (quoting *Hollingsworth*, 570 U.S. at 710). Relevant here, the

Court referenced "agents"—plural not singular, without further limitation. *See id.* Thus, I would not impose on these Supreme Court decisions a limitation not imposed by the Court itself.

Finally, in determining that the Leaders lacked a sufficient interest in the S.B. 824 litigation, the district court also found the Leaders' reliance on the Supreme Court case *Karcher v. May*, 484 U.S. 72 (1987), misplaced. The district court reasoned that the issue before the Supreme Court there was whether public officials, who participated as intervenors in their official capacities, could continue to appeal an adverse judgment after leaving office—an issue that the district court indicated is not present here. Respectfully, the district court reads *Karcher* too narrowly. *Karcher* also confirmed that "[t]he authority to pursue the lawsuit on behalf of the legislature belongs to those who succeeded [the legislators] in office." *Id.* at 77. Although the issues presented here may not be identical to those presented there, *Karcher* reiterates the role that active legislators play in defending a lawsuit depends on a particular state's law, which is an issue relevant to the interests asserted by the Leaders.

Bethune-Hill, *Hollingsworth*, *Arizona State Legislature* and *Karcher*[4] indicate that the determination of the sufficiency of the interests of the Leaders in this litigation requires a careful

[4] Although these decisions primarily focus on standing, the issues presented overlap with the question of the movant's interests in the litigation under Rule 24(a)(2). *See generally Hollingsworth,* 570 U.S. at 710 (noting the legislature's authority to represent the state's interests).

consideration of N.C. Gen. Stat. §1-72.2(a). In my view, the district court failed to do this. Although it cited the statute in full in its first order, its only discussion of the statute in relation to the question of the Leaders' interests was mentioning how the statute only requested that a federal court allow intervention. That is, of course, true as far as it goes. But that brief discussion does not go to the merits of the Leaders' interest in the case. Even though the North Carolina statute does not require that the Leaders' motion be granted, that statute bears on the merits of the intervention decision.

And this is the case even if you follow the Majority's view that we may only review the second order. When the district court issued its initial order, it lacked the benefit of *Bethune-Hill*. But its second order addresses *Bethune-Hill*, even if only in a footnote, stating, without analysis, that *Bethune-Hill* does not "change the calculus." J.A. 3241. The second order also cites N.C. Gen. Stat. §1-72.2(a). Despite *Bethune-Hill*'s guidance, however, the district court only refers to the statute a single time, stating that it is "far from clear whether [the Leaders] are authorized to intervene when the State Board and Attorney General are already defending a suit in federal court." *Id.* Importantly, just as it failed to analyze *Bethune-Hill*, the district court failed to analyze the North Carolina statutes, concluding that it did not have to do so as long as the State Board and Attorney General were defending the suit. Once again, it is not our job to micromanage how the district court weighs the relevant factors in the intervention analysis. But it is our job to ensure that relevant factors, one of which

here is §1-72.2(a), are not excluded from the analysis. I would remand the case to the district court to consider the North Carolina statute in the analysis of the Leaders' interest in the litigation—with particular attention to the Supreme Court's instructions that the state may choose its agents to defend its statutes in federal court and that the North Carolina statute does so here.

2.

Having found no protectable interest, the district court predictably found the Leaders failed to satisfy Rule 24(a)'s second requirement—whether the disposition of this case would practically impair or impede their ability to protect their interest absent intervention. As a remand is needed to address the Leaders' alleged protectable interest, remand is also necessary to address this second requirement.

3.

Finally, I turn to adequate representation—the third requirement for intervention as of right. On this issue, the Leaders complain the State Defendants have consistently failed to adequately defend North Carolina's voter identification legislation. They argue that the State Defendants' efforts have been less than rigorous in *Holmes*, the parallel state court case, which, according to Leaders, is consistent with the State Defendants' withdrawal of a viable petition for certiorari to the Supreme Court in litigation over North Carolina's prior voter identification law. Further, the Leaders argue the State Defendants have continued this pattern since the order denying intervention.

Specifically, the State Defendants elected not to call expert witnesses at the hearing on the preliminary injunction over the implementation of S.B. 824 and have represented that they will not call experts at the trial. In addition, the Governor has filed an amicus brief in support of the NAACP regarding the appeal of the preliminary injunction issued by the district court. Finally, the Leaders point to the public comments of the Governor and Attorney General described above. They claim this record reveals an adversity of interest with the State Defendants which satisfies Rule 24(a)'s inadequacy requirement.

The district court, as noted above, determined that the Leaders had not made a sufficient showing of inadequacy. While we afford district courts discretion in resolving motions to intervene, a court necessarily abuses its discretion when it applies the wrong legal standard to evaluate adequacy and when it excludes pertinent factors from consideration. Here, the district court did both.

a.

Beginning with the legal standard for adequacy, the district court initially acknowledged that a would-be intervenor generally bears a minimal burden of showing inadequacy of representation by an existing p arty. *See Trbovich v. United Mine Workers*, 404 U.S. 528 (1972). But it also applied a presumption of adequacy from our *Commonwealth of Virginia v. Westinghouse Electric Corporation*, 542 F.2d 214, 216 (4th Cir. 1976) decision that arises when a party seeking intervention has the same ultimate objective as a party to the suit. Under that presumption, the

proposed intervenor must establish one of three factors—adversity of interest, collusion or nonfeasance—to overcome this presumption and meet the inadequacy requirement. The district court identified those three factors and attempted to apply them in its order.

The district court then concluded its adequacy analysis by holding "[the Leaders] have failed to sustain their burden of demonstrating the requisite '*strong showing of inadequacy*' to overcome the presumption of adequate representation by State Defendants and their counsel, the Attorney General." J.A. 386 (emphasis added). In using the phrase "strong showing of inadequacy," the district court added a heightened burden to overcome the *Westinghouse* presumption. In imposing that heightened burden, it cited our decision in *Stuart v. Huff*, 706 F.3d 345 (4th Cir. 2013), which requires intervenors to "mount a strong showing of inadequacy" where defendants are represented by a government agency. *Stuart*, 706 F.3d at 352.

I disagree that the Leaders needed to overcome that presumption by the heightened standard of a "strong showing." *See Trbovich*, 404 U.S. at 538 n.10. That heightened standard from *Stuart* does not, and should not, apply here.

In *Stuart*, abortion-services providers sued state officials over a North Carolina statute restricting abortions. 706 F.3d at 347. A group of pro-life medical professionals and others sought to intervene claiming the state defendants would not adequately protect their interests. Thus, we addressed whether "to permit

private persons and entities to intervene in the government's defense of a statute . . . ." *Id.* at 351 (emphasis added). We held that, in such a situation, "the putative intervenor must mount a strong showing of inadequacy" in the context of those private persons and entities on the basis of government entities' duty to represent the people in public litigation matters. *Id.* at 352.

We explained two primary reasons for requiring a "strong showing" of inadequacy. First, we noted that in the face of a constitutional challenge to its statute, "the government is simply the most natural party to shoulder the responsibility of defending the fruits of the democratic process." *Id.* at 351. We added "[i]t is after all the government that, through the democratic process, gains familiarity with the matters of public concern that lead to the statute's passage in the first place." *Id.* Our discussion distinguished between the government and private citizens. And it is eminently reasonable to make that distinction. But in *Stuart*, we did not distinguish between different officials or branches of the government, and to do so now would not be reasonable. With no intent to disparage the Attorney General, I see no reason he is either the "most natural" agent to defend S.B. 824—a law that he has *publicly opposed*—or is more familiar with the matters of public concern that led to its passage in the first place as opposed to the Leaders. If anything, it would be more natural for the agents of the government that supported passage of the statute to defend its constitutionality than those who openly opposed it. That, of course, is a judgment best left to states. And when, like here, the state makes such a judgment, it

must be considered when determining whether to permit intervention in a federal lawsuit challenging a state statute like S.B. 824.

Second, we noted that "to permit private persons and entities to intervene in the government's defense of a statute upon only a nominal showing would greatly complicate the government's job." *Id.* That makes sense. Allowing private citizens party status in a state's defense of its laws raises a host of concerns ably identified in *Stuart*. But this, of course, is not a case where a member of the public is seeking to intervene in the government's defense. The Leaders here, like the State Defendants, are representatives of the State of North Carolina. In fact, they have been designated by that State as its agents for defending the constitutionality of North Carolina's laws. And while one might argue that allowing a second governmental entity to intervene to represent North Carolina complicates the government's job, any such complication is its own doing. When, as here, a state passes a statute designating its agents for defending the constitutionality of its laws, it is not for us to second guess that decision.

Stuart was, and remains, an important decision. Nothing I say here is intended to suggest otherwise or to in any way carve back its application. But the "strong showing" standard it imposed was for situations in which private litigants seek to intervene in the government's defense. The reasons set forth in *Stuart* for requiring a "strong showing" of inadequacy simply are not present here. Thus, *Stuart* does not govern and should not be expanded. That does not

mean the Leaders' motion should be granted. It just means it should not be saddled with the heightened burden of making a "strong showing."

The Majority, in concluding that *Stuart* should be extended, relies in part on the Seventh Circuit's decision in *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793 (7th Cir. 2019). And *Kaul* does, in fact, impose a heightened burden—one requiring a proposed intervenor to establish gross negligence or bad faith—to overcome the presumption of adequacy that circuit applied when a state attorney general was defending the constitutionality of a law. *Id*. at 801. In fact, the burden it imposes is more onerous than that required under *Stuart*. But with respect to the Majority and our sister circuit, I find the burden *Kaul* applied is too far removed from the text of Rule 24 to be persuasive. After all, the Rule itself imposes no presumption. In my view, any judicially created presumption should be undertaken with care. And I respectfully disagree with the Majority's suggestion that *Kaul* aligns with our *Stuart* decision. Following *Kaul* would extend *Stuart* beyond its context of a private citizen seeking to intervene to defend the constitutionality of a state law and impose, without justification, a heightened burden not found in Rule 24.

Further, I find the reasoning of *Kaul* puzzling. There, the Seventh Circuit left no doubt that it would defer to the Legislature if it were to designate one agent to represent the state regardless of which entity it was. In fact, the Seventh Circuit said it could "see no reason why a federal court would bat an eye if a state required its attorney general to withdraw from his

representation and allow another entity, including a legislature, to take over a case." *Kaul*, 942 F.3d at 802. It would not, however, defer to a statute that called for the Legislature to litigate alongside the Attorney General. But in *Bethune-Hill, Hollingsworth, Arizona State Legislature* and *Karcher*, the Supreme Court has made clear that states should be able to select their agents to defend the constitutionality of their laws and here we have statutory language that gives the North Carolina General Assembly final decision-making authority with respect to the defense of a challenged act. *See* N.C. Gen. Stat. Ann. § 120-32.6. That said, I see no reason we should have any more of a problem with a state selecting two representatives than with it selecting one. The key point is that it is the state's choice.

Kaul also contends a heightened burden is needed to avoid drawing the district courts into an "intractable procedural mess that would result from the extraordinary step of allowing a single entity, even a state, to have two independent parties simultaneously representing it." *Id.* at 801. I agree that having two independent parties representing a state is unusual. But in my view, it is going too far to impose a heightened burden based on that risk. After all, district courts are afforded broad discretion to utilize the many options available to it to handle complex procedural matters. And they do this all the time with situations no less complex than what we have here. I am convinced that district courts possess the necessary tools to address any complexities arising from the

state's decision to have more than one representative defending the constitutionality of its laws.[5]

For all of these reasons, I would not extend *Stuart*'s heightened burden of a strong showing of inadequacy to the situation presented here.

b.

But if the Leaders need not satisfy the heightened standard of a strong showing, what is the proper standard? To answer that question, I return to *Westinghouse*. There, we indicated the standard for establishing inadequacy generally was the minimal burden set forth by the Supreme Court in *Trbovich*. *Westinghouse*, 542 F.2d at 216. As already noted, we then held that if the proposed intervenor seeks the same ultimate relief as an existing party, the proposed intervenor must show either adversity of interest, collusion or malfeasance. *Id.* But while our *Westinghouse* decision concludes that a proposed intervenor seeking the same ultimate relief as an existing party must show one of those three factors, it does not hold or even suggest any change from the minimal burden of establishing those factors. Thus, in my view a remand is needed so that the district court can evaluate whether the Leaders have established adversity of interest, collusion or malfeasance using the "minimal" burden standard of *Trbovich*. *Trbovich*, 404 U.S. at 538 n.10 (noting that the requirement of Rule

[5] Consistent with my view, after the panel granted the Leaders' motion to intervene in the appeal, North Carolina's two representatives divided oral argument time and allocated the various positions in a way that created no undue burden on us.

24 is satisfied if the applicant shows that representation of his interest may be inadequate and noting that the burden of making that showing is minimal); *Westinghouse*, 542 F.2d at 216 ("[A]ppellant's burden of showing an inadequacy of representation is minimal.").

c.

Having described the proper standard for evaluating adequacy, I turn to the pertinent factors the district court should consider in applying this standard. Using the standard outlined above, the district court should consider the evidence presented by the parties, as well as N.C. Gen. Stat. § 1-72.2.

The district court did not consider §1-72.2 in its adequacy analysis. But in enacting that statute, North Carolina has expressed its desire for the Leaders to represent it in litigation like the case before us. Implicit in that expression is the state's belief that, without the involvement of the Leaders, it will not be adequately represented. North Carolina, in enacting the statute, made the predictive judgment that there will be cases where the Executive Branch will not adequately represent its interests. And without stating one way or the other as to whether the Leaders should prevail, the public comments of the Governor and the Attorney General, and the other information they allege, are sufficient to require the statute to be considered. To be clear, this statute should not and does not automatically satisfy the Rule 24(a) intervention requirements. But it does bear on the adequacy analysis and, thus, must be considered.

B.

Last, the district court also denied the Leaders' alternative request for permissive intervention. But it erred in doing so without even considering the North Carolina statute requesting that the General Assembly be permitted to intervene.

Permissive intervention contemplates intervention upon timely application "when an applicant's claim or defense and the main action have a question of law or fact in common." *See Newport News Shipbuilding & Drydock Co.*, 646 F.2d at 118 n.1. "If intervention of right is not warranted, a court may still allow an applicant to intervene permissively under Rule 24(b), although in that case the court must consider 'whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.'" *Stuart*, 706 F.3d at 349 (quoting Fed. R. Civ. P. 24(b)(3)).

Of note, the district court expressed concern with the potential for delays, which could result from adding the Leaders as parties, and with the additional burdens on the court and potential prejudice to the NAACP. And our appellate review of those concerns is deferential because "Rule 24's requirements are based on dynamics that develop in the trial court . . . ." *Id.* at 350. The trial court, in its broad discretion, is thus well positioned to evaluate those requirements. But "[w]hile the efficient administration of justice is always an important consideration, fundamental fairness to every litigant is an even greater concern." *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 470 (4th Cir. 1992). And "liberal intervention is desirable to dispose of as much of a controversy 'involving as many

apparently concerned persons as is compatible with efficiency and due process.'" *Feller*, 802 F.2d at 729 (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)).

In denying permissive intervention, the district court failed to even consider N.C. Gen. Stat. § 1-72.2. Given the import of that statute as discussed above, it should have done so in deciding how to exercise its discretion. Rule 24(b)(3) does not impose a limitation on what may be considered. Again, without suggesting an outcome or the weight the statute or other factors should be afforded, I would remand the case for consideration of the permissive intervention request.

IV.

For the above-stated reasons, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 19-2273
(1:18-cv-01034-LCB-LPA)

[Filed June 7, 2021]

NORTH CAROLINA STATE CONFERENCE OF THE NAACP; CHAPEL HILL-CARRBORO NAACP; GREENSBORO NAACP; HIGH POINT NAACP; MOORE COUNTY NAACP; STOKES COUNTY BRANCH OF THE NAACP; WINSTON SALEM-FORSYTH COUNTY NAACP,

Plaintiffs – Appellees,

v.

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Appellants,

and

KEN RAYMOND, in his official capacity as a member of the North Carolina State Board of

Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections; JEFFERSON CARMON III, in his official capacity as a member of the North Carolina State Board of Elections; DAVID C. BLACK, in his official capacity as a member of the North Carolina State Board of Elections,

Defendants – Appellees.

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX C

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 19-2273

[Filed August 14, 2020]

NORTH CAROLINA STATE CONFERENCE OF THE NAACP; CHAPEL HILL-CARRBORO NAACP; GREENSBORO NAACP; HIGH POINT NAACP; MOORE COUNTY NAACP; STOKES COUNTY BRANCH OF THE NAACP; WINSTON SALEM-FORSYTH COUNTY NAACP,

Plaintiffs – Appellees,

v.

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Appellants,

and

KEN RAYMOND, in his official capacity as a

member of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections; JEFFERSON CARMON, in his official capacity as a member of the North Carolina State Board of Elections; DAVID C. BLACK, in his official capacity as a member of the North Carolina State Board of Elections,

Defendants – Appellees.

Appeal from the United States District Court for the Middle District of North Carolina at Greensboro.
Loretta C. Biggs, District Judge.
(1:18-cv-01034-LCB-LPA)

Argued: May 27, 2020 Decided: August 14, 2020

Before HARRIS, RICHARDSON, and QUATTLEBAUM, Circuit Judges.

Vacated and remanded by published opinion. Judge Quattlebaum wrote the opinion, in which Judge Richardson joined. Judge Harris wrote a dissent.

ARGUED: David Henry Thompson, COOPER & KIRK PLLC, Washington, D.C., for Appellants. Stephen K. Wirth, ARNOLD & PORTER KAYE SCHOLER LLP, Washington, D.C.; Paul Mason Cox, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees. **ON BRIEF:** Peter A.

Patterson, Nicole J. Moss, Haley N. Proctor, Nicole Frazer Reaves, COOPER & KIRK PLLC, Washington, D.C.; Nathan A. Huff, PHELPS DUNBAR LLP, Raleigh, North Carolina, for Appellants. Joshua H. Stein, Attorney General, Olga E. Vyotskaya de Brito, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for State Board Appellees. Irving Joyner, Cary, North Carolina; Penda D. Hair, Washington, D.C., Caitlin A. Swain, FORWARD JUSTICE, Durham, North Carolina; John C. Ulin, Los Angeles, California, James W. Cooper, Jeremy C. Karpatkin, Andrew T. Tutt, Jacob Zionce, ARNOLD & PORTER KAYE SCHOLER LLP, Washington, D.C., for Appellees North Carolina State Conference of the NAACP, Chapel Hill-Carrboro NAACP, Greensboro NAACP, High Point NAACP, Moore County NAACP, Stokes County Branch of the NAACP, and Winston Salem-Forsyth County NAACP.

QUATTLEBAUM, Circuit Judge:

Philip E. Berger, President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, Speaker of the North Carolina House of Representatives, appeal the district court's denial of their renewed motion to intervene in an action brought by North Carolina State Conference of the NAACP, Chapel Hill-Carrboro NAACP, Greensboro NAACP, High Point NAACP, Moore County NAACP, Stokes County Branch of the NAACP and the Winston Salem-Forsyth County NAACP (collectively, the "NAACP"). For the reasons set forth below, we vacate the district court's order denying the motion and

remand for further consideration consistent with this opinion.

I.

On December 6, 2018, after being referred to several committees and going through amendments and readings in both the House and Senate, the North Carolina General Assembly ratified Senate Bill 824, titled "An Act to Implement the Constitutional Amendment Requiring Photographic Identification to Vote" ("S.B. 824"), which established, *inter alia*, photographic voter identification requirements for elections in North Carolina. The bill was presented to Governor Roy Asberry Cooper, III, that same day. On December 14, 2018, Governor Cooper vetoed the bill. On December 18, 2018, the Senate voted to override the veto, and the next day, the House voted similarly. Thus, on December 19, 2018, S.B. 824 was enacted as North Carolina Session Law 2018-144.

On December 20, 2018, the NAACP sued Governor Cooper; the Chair of the North Carolina Board of Elections; the Secretary of the North Carolina State Board of Elections; and seven other members of the North Carolina State Board of Elections[1] (the "State Defendants") challenging the validity of S.B. 824. In its complaint, the NAACP contends that S.B. 824 has a disparate impact on African American and Latino citizens of North Carolina in violation of Section 2 of

[1] Because the State Board was reconstituted to consist of five governor-appointed members after the complaint was filed, those members were substituted as parties to the action in the district court as reflected in the district court's order.

the Voting Rights Act of 1965, 42 U.S.C. § 1973, as well as the Fourteenth and Fifteenth Amendments of the United States Constitution. The NAACP sought, among other relief, a declaration that the challenged provisions of S.B. 824 violate Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments, and an injunction against the implementation of the provisions of S.B. 824 that impose voter-identification requirements.

Relevant here, in challenging S.B. 824, the NAACP sued the Governor (who publicly opposed the bill) and the State Board (which is composed of members appointed by the Governor). The NAACP did not sue the North Carolina General Assembly, any of its general members, or any other proponents of the bill. As a result, the parties defending the bill were parties with an historical opposition to the bill or entities under the indirect control of such parties. Further, the Attorney General tasked to represent those defendants has a similar history of opposing the bill under challenge.

On January 14, 2019, Berger and Moore (the "Proposed Intervenors") moved under Federal Rule of Civil Procedure 24 to intervene on behalf of the North Carolina General Assembly to oppose the NAACP's challenges to S.B. 824. Seeking to intervene as a matter of right under Rule 24(a) and, alternatively, permissively under Rule 24(b), the Proposed Intervenors argued that state law, specifically N.C. Gen. Stat. § 1-72.2(a) and (b), expresses the public policy of the State of North Carolina that the President Pro Tempore of the Senate and the Speaker of the

House represent the State of North Carolina in defense of its statutes. They further argued that the statute provides they have standing as agents of the State of North Carolina in such actions and requests that federal courts permit their intervention to adequately represent the State and General Assembly's interests in statutes, like S.B. 824, whose constitutionality is challenged. The State Defendants neither consented nor objected to the motion to intervene while the NAACP opposed the request to intervene as of right or permissively. (J.A. 371.)

On June 3, 2019, the district court denied the motion to intervene, largely concluding that the State Defendants were required by provisions of the North Carolina Constitution and other North Carolina statutes to defend the State, that the State Defendants had not abdicated their responsibility to defend S.B 824, and that, accordingly, the Proposed Intervenors failed to demonstrate the requisite "strong showing of inadequacy" to overcome the presumption of adequate representation by the State Defendants. The district court's denial was without prejudice to the motion being renewed if the Proposed Intervenors could show that the State Defendants no longer intended to defend the lawsuit and the requirements for intervention were otherwise satisfied. While denying the motion to intervene, the district court allowed the Proposed Intervenors to participate in the action by filing amicus curiae briefs.

On July 19, 2019, the Proposed Intervenors filed a renewed motion to intervene, arguing that it was apparent that the State Defendants would not fully

defend S.B. 824. On September 17, 2019, after the State Defendants filed opposition papers, the Proposed Intervenors moved to ascertain the status of their renewed motion, noting that they had not been a part of discovery and initial planning of the S.B. 824 litigation, and informing the district court that, if their renewed motion was not ruled on by September 23, 2019, they planned to appeal the "de facto denial" of their motion and/or file a mandamus petition with the Fourth Circuit. (J.A. 778.)

On September 23, 2019, the Proposed Intervenors, having received no ruling from the court, noticed the appeal seeking review of a "de facto" denial of their renewed motion to intervene (No. 19-2048) and petitioned for a writ of mandamus directing the district court to permit intervention (No. 19-2056). The NAACP moved to dismiss the appeal. On October 8, 2019, we denied the mandamus petition and granted the motion to dismiss the interlocutory appeal, concluding that we lacked appellate jurisdiction based on the record at the time.

On November 7, 2019, the district court denied the renewed motion. The court concluded that its previous Rule 24 analysis, as set forth in its June 3 order, remained undisturbed and declined to revisit its rulings from that order. It then evaluated the Proposed Intervenors' new allegations determining they did not involve any new evidence that the State Defendants had declined to defend the lawsuit. The district court thus denied the "Renewed Motion to Intervene" with prejudice and reiterated that the Proposed Intervenors

were permitted to participate in the action by filing amicus curiae briefs.

On November 11, 2019, the Proposed Intervenors filed a notice of appeal from the order denying their renewed motion to intervene. (J.A. 3248.)

II.

Before we address the merits of the appeal, we must first consider several threshold matters.

A.

The NAACP argues that the Proposed Intervenors' failure to appeal the denial of their initial motion to intervene divests us of appellate jurisdiction to consider this appeal. In response, the Proposed Intervenors argue we have jurisdiction to review the denial of the renewed motion to intervene which merged with the order denying their initial motion to intervene.

We may exercise jurisdiction only over final orders and certain interlocutory and collateral orders. *See* 28 U.S.C. §§ 1291; 1292; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545 (1949). The denial of a motion to intervene under Rule 24 is treated as a final judgment that is appealable. *See Sharp Farms v. Speaks*, 917 F.3d 276, 289 (4th Cir. 2019); *Bridges v. Dep't of Maryland State Police*, 441 F.3d 197, 207 (4th Cir. 2006). Once the district court enters the order denying intervention, a party has 30 days to file a notice of appeal from that order and may not await final judgment in the underlying action to do so. *Sharp*

Farms, 917 F.3d at 289; *see also* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A).

Thus, we must determine whether the district court's June 3, 2019 order, which denied the initial motion to intervene without prejudice and indicated that the Proposed Intervenors would be able to renew their motion if the circumstances changed, should be regarded as an appealable final order.

In this inquiry, we are guided by the Supreme Court's decision in *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987). There, the district court denied a nonprofit's motion to intervene as of right but granted the motion for permissive intervention subject to conditions. *Stringfellow*, 480 U.S. at 373. After the nonprofit appealed challenging the conditions of the permissive intervention, the Supreme Court addressed the question of "whether a district court order granting permissive intervention but denying intervention as of right is immediately appealable." *Id.* at 372. The Supreme Court held that a grant of intervention was not an immediately appealable collateral order because the district court did not outright deny the motion to intervene. *See id.* at 375-376. Thus, the intervenor retained the power to appeal any final judgment and, as a result, could then challenge the conditions of the permissive intervention imposed by the lower court. *Id.* Therefore, the Supreme Court held that it could not "conclude that [the proposed intervenor's] interests will be 'irretrievably lost in the absence of an immediate appeal.'" *Stringfellow*, 480 U.S. at 376 (quoting *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 431 (1985)).

Stringfellow, while different from this case in that it involved granting intervention with conditions, nevertheless teaches that we should examine the orders here to see if they outright denied the motion and if the Proposed Intervenors' interests will be irretrievably lost absent an immediate appeal. Looking first at the June 3, 2019 order, we first note the district court denied the motion to intervene without prejudice. Not every denial of a motion to intervene "without prejudice" necessarily lacks sufficient conclusiveness to warrant immediate review. *See Rhode Island v. U.S. E.P.A.*, 378 F.3d 19, 26 (1st Cir. 2004); *see also Bing v. Brivo Systems, LLC*, 959 F.3d 605, 611 (4th Cir 2020) (considering the district court's opinion in light of the entire record in determining that an order dismissing a complaint without prejudice is a final, appealable order). But, in addition to being without prejudice, the order here invited a renewed motion upon changed circumstances. Because of these provisions, the June 3 order did not outright deny the motion to intervene and lacked the conclusiveness needed to trigger immediate review. Accordingly, the June 3 order was not a final appealable order.

In contrast, the November 7, 2019 order was an outright denial of the motion to intervene. Unlike the June 3 order, it was with prejudice. And in denying the renewed motion to intervene, the district court referred to its analysis from the June 3 order indicating that it remained in effect. It then addressed and rejected additional arguments from the Proposed Intervenors arising from what they claimed to be new facts and circumstances. These terms make clear the November 7 order, including its analysis from the June 3 order,

was sufficiently conclusive for appellate review. *See Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 126–27 (D.C. Cir. 1972) ("We are satisfied that the June 20 order…constituted a fresh evaluation of the intervention application, well within the discretionary power of the District Court to make, and amenable to review on the merits by this court."). Accordingly, we have jurisdiction under 28 U.S.C. § 1291.

B.

Next, as it did before the district court, the NAACP argues the Proposed Intervenors lack Article III standing to intervene. The NAACP maintains that invalidating S.B. 824 would not cause the General Assembly any cognizable injury. It further alleges that a state statute, in this case N.C. Gen. Stat. § 1-72.2, could not confer Article III standing on a state legislature.[2]

An Article III court must have jurisdiction to reach the merits of a case. "One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). A litigant must prove that he has (1) suffered a concrete and particularized injury, that (2) is fairly traceable to

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[2] Below, in addressing this argument, the district court noted that the NAACP failed to cite, nor did it independently find, a Fourth Circuit case holding that an intervenor-defendant must also establish Article III standing. Given an apparent "silence on the issue by the Fourth Circuit," the district court declined to impose a standing requirement on the Proposed Intervenors. (J.A. 372.)

the challenged conduct, and (3) is likely to be redressed by a favorable decision. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992)). While most standing questions consider whether a plaintiff has satisfied the requirement in initially filing suit, Article III requires that an "'actual controversy' persist throughout all stages of litigation." *Hollingsworth*, 570 U.S. at 705 (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013)). The standing requirement therefore "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997); *see also Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950–51(2019).[3]

Critical to the standing inquiry is N.C. Gen. Stat. § 1-72.2. The statute provides that, as to any action in federal court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, "[i]t is the public policy of the State of North Carolina that . . . the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative

[3] The Supreme Court's *Town of Chester. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1648 (2017) decision indicates that a litigant seeking to intervene of right need only to meet the requirements of Article III if pursuing relief not requested by a party. Proposed Intervenors argue that, under that decision, they need not establish standing since they are seeking the same relief as the State Defendants. But we need not resolve that question because, whether required or not, the Proposed Intervenors have established standing.

branch of the State of North Carolina; the Governor constitutes the executive branch of the State of North Carolina; that, when the State of North Carolina is named as a defendant in such cases, *both* the General Assembly and the Governor constitute the State of North Carolina…." N.C. Gen. Stat. § 1-72.2(a) (emphasis added). It goes on to request that a federal court presiding over an action where the State of North Carolina is a named party allow both the legislative branch and the executive branch of the State of North Carolina to participate as a party in such an action. *Id.* The statute then addresses standing. The "Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, … shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." N.C. Gen. Stat. § 1-72.2(b).

To be sure, neither this nor any other state statute automatically establishes Article III standing. That is an issue for the federal courts to decide. But by the same token, the statute must inform our understanding and analysis of the standing issue presented here. That is particularly true given the Supreme Court's consistent instructions that a state has standing to defend constitutional challenges to its laws and to select its agents for doing so.

In *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), the Supreme Court addressed whether the Virginia House of Delegates and its Speaker had, as intervenors, standing to appeal to

defend Virginia's redistricting plan after the Commonwealth of Virginia conveyed it would not file an appeal to the Supreme Court.[4] The Commonwealth moved to dismiss the House's appeal for lack of standing. The Supreme Court granted that motion and dismissed the appeal. The Court held that the "House, as a single chamber of a bicameral legislature, has no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part." *Bethune-Hill*, 139 S. Ct. at 1950. But while holding that the House lacked standing there, *Bethune-Hill* also emphasized "a State has standing to defend the constitutionality of its statute." *Id.* at 1951 (citation omitted). And "a State must be able to designate agents to represent it in federal court" and "if the State had designated [a legislative branch] to represent its interests . . . the [legislative branch] could stand in for the State." *Id.* (citation omitted).

The Supreme Court's guidance in *Bethune-Hill* is consistent with its earlier decision in *Hollingsworth*. There, the Court held that "the Speaker and the President, in their official capacities, could vindicate that interest in federal court on the legislature's behalf," noting that "a State has a cognizable interest 'in the continued enforceability' of its laws that is harmed by a judicial decision declaring a state law unconstitutional." *Hollingsworth*, 570 U.S. at 709-710 (citations omitted). And the Court further provided that "[t]o vindicate that interest or any other, a State must be able to designate agents to represent it in

[4] We recognize that the district court did not have the benefit of *Bethune-Hill* at the time of the June 3 order.

federal court," because a state is a political corporate body that can only act through its agents. *Id.* (citing *Poindexter v. Greenhow*, 114 U.S. 270, 288 (1885)). "That agent is typically the State's attorney general. But state law may provide for other officials to speak for the State in federal court . . . ." *Hollingsworth*, 570 U.S.at 710.

Further, the Proposed Intervenors represent the entirety of the bicameral legislative branch in North Carolina which makes this matter comparable to *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S.Ct. 2652 (2015). In that case, the Court recognized the Arizona legislature's standing to challenge a ballot initiative threatening its authority over redistricting. *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) ("We have recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests.").

Our colleague in dissent points out that in *Bethune-Hill*, *Hollingsworth* and *Arizonans for Official English*, the state representative was no longer defending the state or declined to appeal an adverse ruling. That distinction, to the dissent, means those decisions have little bearing here. But while those decisions emphasized the principle that a state must be able to designate its agents to represent it in federal court, none limited that principle to situations where the initial agent no longer was participating in the defense or declined to appeal an adverse ruling. More specifically, Justice Ginsburg, in *Bethune-Hill,*

reiterated the Court's earlier holding that a state must be able to designate agents for representation in federal court and wrote "if the State had designated [a legislative branch] to represent its interests . . . the [legislative branch] could stand in for the State." *Bethune-Hill*, 139 S. Ct. at 1951. But in so stating, the Court did not limit intervention to such scenarios where a state representative was no longer a part of the lawsuit. We decline to impose a limitation to these Supreme Court decisions not imposed by the Court.

Based on N.C. Gen. Stat. § 1-72.2 and the Supreme Court decisions described above, we find that the Proposed Intervenors have established Article III standing for the purposes of intervention before the district court.

C.

Next, while the State Defendants take no position on whether the Legislative Intervenors should be allowed to intervene before the district court, they assert N.C. Gen. Stat. § 1-72.2(a) violates North Carolina's express guarantee of separation of powers. The NAACP asserts the same in challenging the statute as an unconstitutional usurpation of and the hinderance to the power of the Executive branch. They insist that, under the North Carolina Constitution, only the Executive branch can enforce North Carolina's laws. The Legislative Intervenors, in response, claim that they are only defending the challenged statute, not enforcing it, which does not run afoul of the North Carolina Constitution.

Having considered the arguments, we agree with the Proposed Intervenors. Of course, "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. CONST. art. I, § 6. And the state's "Governor shall take care that the laws be faithfully executed." N.C. CONST. art. III, § 5(4); *see Cooper v. Berger*, 822 S.E.2d 286, 289–90 (N.C. 2018) (noting the Governor's important responsibility in "ensuring that [North Carolina's] laws are properly enforced."). But that does not preclude the participation of the Proposed Intervenors in a court action challenging the validity or constitutionality of an act of the General Assembly in accordance with statutory provisions. N.C. Gen. Stat. § 1-72.2(a); *see also* N.C. Gen. Stat. § 120-32.6 ("Whenever the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action in any State or federal court, the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, shall be necessary parties and shall be deemed to be a client of the Attorney General for purposes of that action as a matter of law and pursuant to Section 7(2) of Article III of the North Carolina Constitution."). Execution of the law and defense of a challenged act are different acts. The Proposed Intervenors are not seeking to act on behalf of the Executive branch nor would any intervention, if granted, permit them to do so. In fact, obstructing the legislative branch from performing its role in defending the duly enacted legislation might violate separation of powers principles. *See generally United States v. Windsor*, 570 U.S. 744, 762 (2013) (addressing

separation-of-powers principles). Thus, we reject the arguments of the NAACP and the State Defendants that § 1-72.2 infringes on the powers of the Executive Branch in violation of the North Carolina Constitution's separation of powers provisions.[5]

III.

With these threshold matters addressed, we turn to the merits of the district court's denial of the Proposed Intervenors' motion to intervene. We review the denial of a motion for intervention for abuse of discretion. *In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991). But while our appellate review of district court rulings on the intervention is deferential, part of our responsibility is to ensure intervention decisions not based on incorrect legal principles. *See Stuart v. Huff*, 706 F.3d 345, 349–50 (4th Cir. 2013); *see also Feller v. Brock*, 802 F.2d 722, 729-30 (4th Cir. 1986) (finding that denial of intervention as of right to apple pickers was reversible error and admitting intervenors as parties-defendant); *Hill v. W. Elec. Co. Inc.*, 672 F.2d 381, 385–86, 392 (4th Cir. 1982) (remanding action for proper consideration of the motion for permissive intervention because the district court did not properly apply legal standards).

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[5] In responding to the NAACP's separation of powers arguments, we see nothing in the statute that requires a resolution be passed by the General Assembly in order for the Proposed Intervenors to intervene in this lawsuit. Thus, the Proposed Intervenors should not be faulted for not obtaining "authorization" to intervene.

Using that standard, we address the requirements for intervention. Intervention in a federal action is governed by Federal Rule of Civil Procedure 24. The Rule allows for two types of intervention: intervention as a matter of right under subsection (a) and permissive intervention under subsection (b). The Proposed Intervenors first claim that they are entitled to intervene as a matter of right. They alternatively claim they should be able to intervene permissively.

A.

Rule 24(a)(2) allows intervention as of right when the movant 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 the movant's interest is adequately represented by existing parties. Fed.R.Civ.P. 24(a)(2). There are three requirements for intervention as of right. "[T]he moving party must show that (1) it has an interest in the subject matter of the action, (2) disposition of the action may practically impair or impede the movant's ability to protect that interest, and (3) that interest is not adequately represented by the existing parties." *Newport News Shipbuilding and Drydock Co. v. Peninsula Shipbuilders' Ass'n,* 646 F.2d 117, 120 (4th Cir. 1981). We will consider each of these requirements.

1.

Starting with the first requirement,[6] a party seeking to intervene must have "an interest relating to the property or transaction that is the subject of the action. . . ." Fed.R.Civ.P 24(a)(2). In determining that the Proposed Intervenors lacked a sufficient interest, the district court held, "because the State Defendants in this action are presently defending the challenged legislation and have expressed no intention to do otherwise, Proposed Intervenors have failed to demonstrate that they have a significantly protectable interest in likewise defending the constitutionality of S.B. 824 sufficient to warrant a right to intervene under Rule 24(a)(2)." (J.A. 378.) Thus, the district court based its decision that the Proposed Intervenors did not establish a protectable interest on the fact that the State Defendants had not abdicated their responsibility to defend S.B. 824.

In support of this proposition, the district court cited several district court decisions holding individual

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[6] Of course, timeliness of the motion is a "cardinal consideration" of whether to permit intervention and must be considered as an initial matter. *See Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999) (citation omitted). To determine if a motion to intervene is sufficiently timely, the trial court should assess (1) "how far the underlying suit has progressed," (2) the "prejudice any resulting delay might cause the other parties" and (3) "why the movant was tardy in filing its motion." *Alt. v. U.S. E.P.A.*, 758 F.3d 588, 591 (4th Cir. 2014). The Proposed Intervenors did not delay in filing the renewed motion to intervene after their initial motion was denied, and it was filed relatively early in the case. From the arguments, this issue is not in dispute on appeal and we see no need to further address it here.

legislators do not have a sufficient protectable interest to intervene in litigation over statutes for which they voted. But that is not what we have here. The Proposed Intervenors rely not only on their general position as legislators, but on N.C. Gen. Stat. § 1-72.2. Under that statute, as noted above, it is the policy of the State of North Carolina that "both the General Assembly and the Governor constitute the State of North Carolina. . . ." N.C. Gen. Stat. § 1-72.2(a). And subsection (b) provides the "Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, … shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." N.C. Gen. Stat. § 1-72.2(b). Finally, under N.C. Gen. Stat. §120-32.6 (b), "[w]henever the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action in any State or federal court, the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, shall be necessary parties. . . ."

Importantly, these statutes do not limit the role of the General Assembly to instances where the executive branch declines to defend or participate in the action. Of course, as the district court noted, § 1-72.2 only requests that a federal court allow the legislative branch to participate. The requirements of Rule 24(a)(2) must still be satisfied. However, in applying those Rule 24 principles, courts should not disregard the statute of a separate sovereign that expresses the

state's and the Legislature's interest and role in the litigation. In other words, while these North Carolina statutes do not mandate the federal intervention, they set forth the nature of the legislative branch's interests, and § 1-72.2 has done so, in some form, since 2013.

The presence of these statutes distinguishes this case from those cited by the district court. And we see no requirement elsewhere that the Attorney General must decline to defend the lawsuit in order to trigger a protectable interest on the part of the Proposed Intervenors. Thus, the district court's decision to that effect was in error.

In determining that the Proposed Intervenors lacked a sufficient interest in the S.B. 824 litigation, the district court also found the Proposed Intervenors' reliance on the Supreme Court case *Karcher v. May*, 484 U.S. 72 (1987), misplaced. The district court reasoned that the issue before the Supreme Court there was whether public officials, who participated as intervenors in their official capacities, could continue to appeal an adverse judgment after leaving office—an issue, the district court indicated, that is not present here. Respectfully, the district court reads *Karcher* too narrowly. *Karcher* also confirmed that "[t]he authority to pursue the lawsuit on behalf of the legislature belongs to those who succeeded [the legislators] in office." *Id.* at 77. Although the issues presented here may not be identical to those presented there, *Karcher* reiterates the role that active legislators play in defending a lawsuit depending on a particular state's law, which is an issue relevant to the interests asserted by the Proposed Intervenors.

Further, *Bethune-Hill*, while primarily a standing case, informs our analysis of whether the Proposed Intervenors have a sufficient interest under Rule 24(a)(2). As we noted earlier, *Bethune-Hill* confirmed that "a State must be able to designate agents to represent it in federal court" and "if the State had designated [a legislative branch] to represent its interests . . . the [legislative branch] could stand in for the State." *Bethune-Hill*, 139 S. Ct. at 1951.

Karcher and *Bethune-Hill*, along with *Hollingsworth* and *Arizona State Legislature*,[7] indicate that the determination of the sufficiency of the interests of the Proposed Intervenors in this litigation requires a careful consideration of N.C. Gen. Stat. §1-72.2(a). The district court erred in not doing so. Although it cited the statute in full, its only discussion of it in relation to the question of the Proposed Intervenors' interests was mentioning how the statute only requested that a federal court allow intervention. We remand the case to the district court to more fully consider the North Carolina statute in the analysis of the Proposed Intervenors' interest in the litigation—with particular attention to the Supreme Court's instructions that the state may choose its agents to defend its statutes in federal court and the North Carolina statutes seeming to do so here.

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[7] Although these decisions primarily focus on standing, the issues presented overlap with the question of the movant's interests in the litigation under Rule 24(a)(2). *See generally Hollingsworth v. Perry*, 570 U.S. 693, 709 (2013) (noting the legislature's authority to represent the state's interests).

2.

Next, the district court briefly addressed Rule 24(a)'s second requirement in responding to the Proposed Intervenors' contention that disposition of this case would practically impair or impede their ability to protect their interest absent intervention. But because it concluded that the Proposed Intervenors failed to demonstrate a significant protectable interest sufficient to warrant intervention as of right, the district court necessarily determined they could not show this case threatens to impair any such interests. Having determined that remand is needed to address the Proposed Intervenors' alleged protectable interest, remand is also necessary to address this second requirement.

If, on remand, the Proposed Intervenors have presented a significantly protectable interest, the district court must then determine whether the movant "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest. . . ." Fed.R.Civ.P 24(a)(2). The focus of the requirement is on whether the proposed intervenor would suffer a "*practical* disadvantage or impediment" if not permitted to intervene. *Newport News Shipbuilding & Drydock Co.*, 646 F.2d at 121 (emphasis added). Thus, the rule does not require the showing of impairment or impediment of only a legal nature. *See Francis v. Chamber of Commerce of U. S.*, 481 F.2d 192, 195 (4th Cir. 1973); *see also Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001) (noting "the court is not limited to consequences of a strictly legal nature" and that the "would-be intervenor

must show only that impairment of its substantial legal interest is possible. . . ."). In *Francis*, this Court noted that:

> Prior to the 1966 amendment of Rule 24, the rule was that a party could not intervene under 24(a) unless it might be bound by the judgment in the pending action. The term bound was interpreted to mean bound in the *res judicata* sense. The Rule now requires only that the "disposition of the action may as a practical matter impair or impede his (the applicant's) ability to protect that interest." This was designed to liberalize the right to intervene in federal actions.

Francis, 481 F.2d at 195 n.8; *see also* 7C Wright & Miller, Federal Practice and Procedure, § 1908.2 (3d ed.) ("It generally is agreed that in determining whether disposition of the action will impede or impair the movant's ability to protect its interest the question must be put in practical terms rather than in legal terms."). Thus, it is possible that "this practical disadvantage or impediment" would not be "significantly relieved by allowing the [proposed intervenors] to participate as amicus in the district court proceeding." *Newport News Shipbuilding & Drydock Co.*, 646 F.2d at 121; *see also Feller*, 802 F.2d at 730 ("Participation by the intervenors as amicus curiae is not sufficient to protect against these practical impairments.").

The Proposed Intervenors argue the time-sensitive nature of the case; the adequacy of the State Defendants' defense of the constitutionality of S.B. 824;

and their interest in engaging in discovery, presenting experts and participating in motions practice, all evidence risks to the protection of their interests. The district court did not consider these issues because it determined that the Proposed Intervenors lacked a sufficient interest under Rule 24(a). But we have concluded that determination to be inadequate and remanded the case for further consideration. Because the Proposed Intervenors may have interests which may be practically impaired if not permitted to intervene in the action before the district court, we conclude that remand is necessary on this issue as well.

3.

Finally, we turn to the adequate representation requirement for intervention as of right. Beginning with the standard for assessing the adequacy of the existing parties to protect the movant's interests, the district court initially acknowledged that a would-be intervenor generally bears a minimal burden of showing inadequacy of representation by an existing party citing *Trbovich v. United Mine Workers*, 404 U.S. 528 (1971). But the district court also applied a presumption of adequacy from *Commonwealth of Virginia v. Westinghouse* 542 F.2d 214, 216 (4th Cir. 1976) that arises when a party seeking intervention has the same ultimate objective as a party to the suit. Under that presumption, the proposed intervenor must establish one of three factors—adversity of interest, collusion or nonfeasance—to overcome this presumption and meet the inadequacy requirement. The district court identified those three factors and attempted to apply them in its order.

Yet the court concluded its adequacy analysis by holding "Proposed Intervenors have failed to sustain their burden of demonstrating the requisite '*strong showing of inadequacy*' to overcome the presumption of adequate representation by State Defendants and their counsel, the Attorney General." J.A. 386 (emphasis added). In using the phrase "strong showing of inadequacy," the district court added a heightened burden to overcome the *Westinghouse* presumption. In imposing that heightened burden, it cited our decision in *Stuart v. Huff*, 706 F.3d 345 (4th Cir. 2013), which requires intervenors to "mount a strong showing of inadequacy" where defendants are represented by a government agency. *Stuart*, 706 F.3d at 352.

Although it was appropriate for the district court to apply the *Westinghouse* presumption since the Proposed Intervenors and the State Defendants appear to seek the same ultimate objective—the defense of S.B. 824[8]—the district court erred in demanding that

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[8] The Proposed Intervenors also argue the *Westinghouse* presumption does not apply here due to the presence of N.C. Gen. Stat. § 1-72.2. It is true that neither *Westinghouse* nor other cases in our Circuit where this presumption has been applied involve a state statute like § 1-72.2. Through that statute, North Carolina, a separate sovereign—through the democratic process—has expressly provided that it is its public policy that the Proposed Intervenors represent it in litigation over the constitutionality of its laws. While the statute should not and does not automatically satisfy the Rule 24(a) intervention requirements, we find the Proposed Intervenors' contention that they should not have to show adversity of interest, collusion or nonfeasance to overcome a presumption of adequacy in its efforts to establish those requirements persuasive. Such a heightened burden makes sense in the traditional case of private parties seeking to intervene. But

the Proposed Intervenors overcome that presumption by the heightened standard of a "strong showing." *See cf. Trbovich v. United Mine Workers*, 404 U.S. 528 (1971). That heightened standard from *Stuart* does not apply here.

In *Stuart*, abortion-services providers sued state officials over a North Carolina statute restricting abortions. A group of pro-life medical professionals and others sought to intervene claiming the state defendants would not adequately protect their interests. Thus, we addressed whether "to permit private persons and entities to intervene in the government's defense of a statute. . . ." *Stuart*, 706 F.3d at 351. We held that, in such a situation, "the putative intervenor must mount a strong showing of inadequacy" in the context of those private persons and entities on the basis of government entities' duty to represent the people in public litigation matters. *Id.* at 352.

Importantly, we explained two primary reasons for requiring a "strong showing" of inadequacy. First, we noted that "[i]t is after all the government that, through the democratic process, gains familiarity with the matters of public concern that lead to the statute's passage in the first place." *Id.* at 351. And second, we noted that "to permit private persons and entities to intervene in the government's defense of a statute upon

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in this situation, imposing the presumption in the face of a statute like the one adopted by the State of North Carolina risks conflict in our federal system of government. Even so, our holding in *Westinghouse* is broad and, despite our concerns, we are constrained to follow it here.

only a nominal showing would greatly complicate the government's job." *Id.* These reasons make clear the strong showing standard imposed by *Stuart* was for situations where private litigants seek to intervene in the government's defense.

Of course, this is not a case where a member of the public is seeking to intervene in the government's defense. The Proposed Intervenors here, like the State Defendants, are representatives of the State of North Carolina. In fact, they have been designated by that State as its agents for purposes of defending the constitutionality of North Carolina's laws. As such, the reasons set forth in *Stuart* for requiring a strong showing of inadequacy are not present. Thus, we conclude the *Stuart* presumption does not apply where another governmental branch, at least where authorized to do so by state statute, seeks intervention. And for that reason, we remand the case to the district court to determine, pursuant to *Westinghouse*, whether the Proposed Intervenors are able to rebut the presumption of adequacy by establishing either adversity of interest,[9] collusion or nonfeasance. They are not required, however, to meet *Stuart's* heightened

[9] As we recognized in *Stuart*, 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*, 706 F.3d at 352. We followed that "[i]n such circumstances, it is perfectly sensible to require a more modest showing of inadequacy before granting intervention of right since an existing party is not likely to adequately represent the interests of another with whom it is at cross purposes in the first instance." *Id.*

standard of a "strong showing" to rebut the presumption.

The dissent, in concluding a heightened burden should apply, relies heavily on the Seventh Circuit's decision in *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793 (7th Cir. 2019). And *Kaul* does, in fact, impose a heightened burden—one requiring a proposed intervenor to establish gross negligence or bad faith—to overcome the presumption of adequacy that circuit applied when a state attorney general was defending the constitutionality of a law. *Id*. at 799. But with all due respect to the dissent and our sister circuit, we find the burden *Kaul* applied too far removed from the text of Rule 24 to be persuasive. After all, the Rule itself imposes no presumption. In our view, any judicially created presumption should be undertaken with care. And we respectfully disagree with our colleague's suggestion that *Kaul* aligns with our *Stuart* decision. In our view, following *Kaul* would extend *Stuart* beyond its context of a private citizen seeking to intervene to defend the constitutionality of a state law.

But if the Proposed Intervenors need not satisfy the heightened standard of a strong showing, what is the proper standard? To answer that question, we return to *Westinghouse*.

There, we indicated the standard for establishing inadequacy generally was the "minimal burden" set forth by the Supreme Court in *Trbovich*. As already noted, we then indicated that if the proposed intervenor seeks the same ultimate relief as an existing party, the proposed intervenor must show either

adversity of interest, collusion or malfeasance. But while our *Westinghouse* decision indicates that a proposed intervenor seeking the same ultimate relief as an existing party must show one of those three factors, it does not hold or even suggest any change from the minimal burden of establishing those factors. Thus, on remand, the district court should evaluate whether the Proposed Intervenors have established adversity of interest, collusion or malfeasance using the "minimal burden" standard of *Trbovich*. *Trbovich*, 404 U.S. at 538, n. 10 (noting that the requirement of Rule 24 is satisfied if the applicant shows that representation of his interest may be inadequate and noting that the burden of making that showing is minimal); *Westinghouse*, 542 F.2d at 216 ("appellant's burden of showing an inadequacy of representation is minimal").

Finally, the Proposed Intervenors point to certain facts and evidence to support their contention that the State Defendants may not adequately represent the Proposed Intervenors' interests. Particularly, they point to the State Defendants' defense of this suit and litigation decisions, as well as the State Defendants' actions in a parallel case in the state court—*Holmes v. Moore*, No 18-cv-15292 (N.C. Super. Ct.), and the history predating the litigation such as Governor and Attorney General's opposition to voter ID. We are careful to note that the district court is afforded discretion in the Rule 24(a) analysis. It is not our job as the appellate court to lightly second guess the manner in which the district court weighs the evidence in conducting an adequacy analysis. But, at a minimum, it is our job to ensure that the proper standard is applied. On remand, using the standard outlined

above, the district court should consider all of the evidence presented by the parties, as well as the North Carolina statutes cited above.[10] In enacting those statutes, the State of North Carolina has expressed its desire for the Proposed Intervenors to represent it in litigation like the case before us. Implicit in that expression is the state's belief that, without the involvement of the Proposed Intervenors, it will not be adequately represented.

The dissent concludes the North Carolina statutes should not be considered in the adequacy analysis. While we respect that differing opinion, we disagree with the view that the state law and policy cannot be considered as part of both the adequacy and interest elements of Rule 24(a)(2). There are countless examples in the law where the same fact or facts apply to multiple legal issues. That is all we have here. The fact

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[10] We note that the pertinent inquiry is whether the Proposed Intervenors can establish either collusion, nonfeasance or adversity of interest. To the extent not considered by the district court before, we think it would be appropriate for the district court to consider the public comments of the Governor and Attorney General about the prior and current voter ID laws, as well as the status of the related litigation and the parties' role therein. In addition, evidence related to the intervention question has developed since the issuance of the district court's order and may also be relevant. We, of course, do not have the full record of those developments but are aware of concerns about the State Defendants' alleged failure to name or call experts in connection with the preliminary injunction hearing, as well as the Governor's filing of an amicus brief in the related appeal (No. 20-1092) of the district court's preliminary injunction order. Without expressing any weight, we feel that these issues should be considered on remand.

that the policy expressed in the statutes is pertinent to the interest analysis should have no bearing on whether it should also be considered in the adequacy analysis.

Moreover, the dissent's analysis on the relevance of the North Carolina statutes to the adequacy analysis suggests that we have held that the statutes require that the Proposed Intervenors' motion be granted. Dissenting Op. *at 50* ("[I]f an aspiring legislative intervenor can meet both the interest element *and* the adequacy element whenever state law announces a policy preference for multiple representatives, then a district court may be subjected routinely to the 'intractable procedural mess that would result from the extraordinary step of allowing a single entity, even a state, to have two independent parties simultaneously representing it.'") To be clear, these statutes should not and do not automatically satisfy the Rule 24(a) intervention requirements. But they do bear on the adequacy analysis.

B.

Last, the district court also denied the Proposed Intervenors' alternative request for permissive intervention. "Permissive Intervention" contemplates intervention upon timely application "when an applicant's claim or defense and the main action have a question of law or fact in common." *See Newport News Shipbuilding & Drydock Co.*, 646 F.2d 117, 119 n.1. "If intervention of right is not warranted, a court may still allow an applicant to intervene permissively under Rule 24(b), although in that case the court must consider 'whether the intervention will unduly delay or

prejudice the adjudication of the original parties' rights.'" *Stuart*, 706 F.3d at 349 (quoting Fed.R.Civ.P 24(b)(3)).

Of note, the district court expressed concern with the potential for delays which could result with the addition of Proposed Intervenors as parties to the action, and that inclusion of the Proposed Intervenors would place additional burdens on the court and cause the NAACP prejudice. We do not disregard these concerns, and we acknowledge that our appellate review is deferential because "Rule 24's requirements are based on dynamics that develop in the trial court. . . ." *Stuart*, 706 F.3d at 350. The trial court, in its broad discretion, is thus in the best position to exercise its judgment in evaluating those requirements. We also recognize that district courts must make many trial management decisions in managing dockets. *See id.* We in no way question the district court in carrying out those important duties. But "[w]hile the efficient administration of justice is always an important consideration, fundamental fairness to every litigant is an even greater concern." *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 470 (4th Cir. 1992). And "liberal intervention is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Feller*, 802 F.2d 722, 729 (4th Cir. 1986) (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)).

In denying permissive intervention, the district court did not address N.C. Gen. Stat. §§ 1-72.2(a) and (b) and 120-32.6. Given the import of those statutes as

discussed above, it should have. Again, without suggesting an outcome or the weight the statutes should be afforded, we remand the case for consideration of the permissive intervention request in light of the above.

IV.

For the above-stated reasons, the district court's order denying the Proposed Intervenors' motion for intervention under Rule 24 is

VACATED AND REMANDED.

PAMELA HARRIS, Circuit Judge, dissenting:

North Carolina's Attorney General is charged by statute with representing the interests of the State of North Carolina in cases that challenge the validity and enforcement of state law. Consistent with that statutory duty, the Attorney General currently is in court – two courts, state and federal – defending the constitutionality of S.B. 824. Indeed, our own court soon will hear the Attorney General's appeal from the district court's decision to preliminarily enjoin the enforcement of S.B. 824.

Notwithstanding the Attorney General's persistent efforts, the Proposed Intervenors – out of respect for their positions in the General Assembly, I will refer to them as the Leaders – seek to intervene in ongoing district court proceedings. If the Leaders have standing to intervene in that litigation, it is, as the majority explains, as agents of the State of North Carolina, designated by state law to represent the State's interest in the validity and enforcement of state law.

But another designated agent of the State – the Attorney General – already is representing precisely that interest.

It follows that the Leaders have a right to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure only if a federal court first finds that the Attorney General is inadequately representing the State's interest, in contravention of his statutory duty. In a recent – and unmistakably similar – case, the Seventh Circuit explained that such a finding would be "extraordinary." *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 801 (2019). I agree. And the district court's careful review of the Attorney General's litigation conduct persuades me that there is no basis to make such an extraordinary finding here. Because that leaves the Leaders with no right to intervene under Rule 24(a), and because I believe the district court properly denied permissive intervention under Rule 24(b), I must respectfully dissent.

I.

A.

In my view, this is a straightforward case – or, at least, it should be. To understand why, it may be helpful to clarify up front what this case is and is not about.

Crucially, this is not a case like those to which the majority looks for guidance – *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), *Hollingsworth v. Perry*, 570 U.S. 693 (2013), and *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) – in which a state representative, typically an

attorney general, is no longer defending state law or has declined to appeal an adverse ruling. As the majority explains, those circumstances present difficult questions about the standing of other entities to intervene and continue a case in the state attorney general's stead. *See* Maj. Op. at 10–13. But at bottom, the issue in those cases is whether *any* state representative will be permitted to defend a state's interest in the validity of its laws when that state's "default representative" has declined to do so. *Kaul*, 942 F.3d at 800 (describing the mine run of cases where a legislature seeks to intervene "once the governmental defendant's default representative ha[s] dropped out of the case").

Here, by contrast, the State's "default representative" – the Attorney General – has *not* "dropped out of the case." *Id.* The Attorney General is charged, by North Carolina statute, with representing the State's interests in cases involving challenges to state law. *See* N.C. Gen. Stat. § 114-2(1) ("[I]t shall be the duty of the Attorney General . . . to appear for the State . . . in any cause or matter, civil or criminal, in which the State may be a party or interested."); *see also Martin v. Thornburg*, 359 S.E.2d 472, 479 (N.C. 1987) (Attorney General has the duty to defend the interests of the State and its agencies). Consistent with that statutory duty, the Attorney General is very much in this case, defending the constitutionality of S.B. 824 in state and federal courts, including our own.

The Leaders argue – and the majority agrees, *see* Maj. Op. at 11–14 – that they have standing to intervene because state law has designated them, along

with the Attorney General, to represent the interests of the State in federal court. *See* Reply Br. of Appellants at 10; *see also Bethune-Hill*, 139 S. Ct. at 1951 (where state law designates a legislative entity to "represent [the State's] interests," that entity may "stand in for the State"). But those are exactly the interests already represented by the Attorney General in this case. So, the unusual question presented here is whether a federal district court must allow not one but "*two* state entities . . . to speak on behalf of the State *at the same time*." *Kaul*, 942 F.3d at 800 (first emphasis added).

The answer to that question, all agree, is governed not by state law but by federal law: specifically, Rule 24(a)(2)'s criteria for intervention as of right. Though state law may "inform the Rule 24(a)(2) calculus," *id.* at 797, provisions like North Carolina's § 1-72.2 cannot "supplant the Federal Rules of Civil Procedure and make intervention automatic," *id.* And under Rule 24(a)(2) – again, this is not disputed – the Leaders have a right to intervene only if their "interest is not adequately represented by existing parties to the litigation." *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013) (quoting *Teague v. Bakker*, 931 F.2d 259, 260–61 (4th Cir. 1991)); *see also* Fed. R. Civ. P. 24(a)(2).

So this is what we are left with: Proposed legislative intervenors who seek to represent the interests of a client – the State of North Carolina – already represented by the Attorney General, and so must face the "unenviable task of convincing a court that the Attorney General inadequately represents [the State], despite his statutory duty." *Kaul*, 942 F.3d at 801. That would be, as the Seventh Circuit has instructed, an

"extraordinary finding." *Id.* Indeed, the Leaders have not identified a single case – and I have found none – in which a federal court has made such a finding, or otherwise held that a state legislative entity is entitled to intervene as of right under Rule 24(a)(2) to defend the state's interests where the state's executive branch is actively defending state law. Nothing about this case persuaded the district court that it should be the first, and I see no reason to disturb that good judgment.

B.

1.

Although there is a decided paucity of case law supporting the Leaders' efforts to intervene in this case, we do have one very relevant precedent that weighs heavily against the Leaders' position: *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793 (2019), a recent Seventh Circuit decision that explains why a state legislative entity is *not* entitled to intervene in the circumstances presented here. *Kaul* issued on the same day that the district court denied intervention, and so the court did not have the benefit of the Seventh Circuit's reasoning when it ruled. But as it turns out, *Kaul* provides substantial support for the district court's findings.

In *Kaul*, Planned Parenthood of Wisconsin and a number of its employees sued Wisconsin's Attorney General and other state officials in federal court, seeking to enjoin the enforcement of certain state abortion regulations. *See id.* at 796. Rather than move to dismiss the complaint, the Wisconsin Attorney General filed an answer on behalf of the state

defendants, denying the plaintiffs' allegation that the abortion regulations violated the Constitution. *See id.* Shortly after, the Wisconsin Legislature moved to intervene, hoping to have the complaint dismissed at the pleadings stage for failure to state a claim. *See id.* The district court in Wisconsin denied the motion. *See id.*

On appeal, in evaluating whether the Wisconsin Legislature was entitled to intervene as of right, the Seventh Circuit assumed that the Legislature had standing to intervene on the same theory that the Leaders advance here: as an agent of the State of Wisconsin, designated by state statute to represent Wisconsin's interest in the validity and enforcement of its laws. *See id.* at 798. The court questioned whether, as the majority suggests here, *see* Maj. Op. at 19–20, the Wisconsin Legislature could invoke that same state interest to satisfy the "interest" element of Rule 24(a)(2). *See Kaul*, 942 F.3d at 798. But ultimately, the court determined, it was unnecessary to decide that question. *See id.*

That was because the outcome in *Kaul* turned, as it does in this case, on whether the proposed legislative intervenors could satisfy the "adequacy" element of Rule 24(a)(2) – that is, whether the Wisconsin Legislature could show that no existing party to the litigation adequately represented the interest that it would seek to protect. *See id.* at 799. And in considering the adequacy of the state's representation, the Seventh Circuit emphasized the key feature of *Kaul* that distinguishes it from *Bethune-Hill* and that makes it so similar to this case: Consistent with his statutory

duty, the Wisconsin Attorney General was actively defending Wisconsin's abortion regulations in federal court, and so he was already representing the same state interest in the validity and enforcement of state law that had been invoked by the Wisconsin Legislature. *See id.* at 800–01. Under those circumstances, the court explained, any finding of inadequacy would be "extraordinary," *id.* at 801, and could not be justified by what amounted to "quibbles" between the Wisconsin Legislature and the Wisconsin Attorney General over "litigation strategy," *id.*(internal quotation marks omitted).

Key to the *Kaul* court's "adequacy" analysis was a well-established presumption: that the Wisconsin Attorney General – having been charged by law with protecting the state's interest in the validity and enforcement of its abortion regulations, and having appeared in court to do so – was providing adequate representation. *See id.* at 799–801. Just how strong that presumption should be was the subject of some debate: The *Kaul* majority held that it could be rebutted only by a showing of "bad faith or gross negligence," *id.* at 801, while Judge Sykes, concurring, would have set the bar somewhat lower, "start[ing] from a presumption of adequate representation and put[ting] the intervenor to a heightened burden to show a concrete, substantive conflict or an actual divergence of interests to overcome it," *id.* at 810.

But for our purposes, what the *Kaul* court agreed upon is more important than what divided it: A substantial presumption would govern, not the default rule applied in *Trbovich v. United Mine Workers of*

America, 404 U.S. 528, 538 n.10 (1972), under which showing inadequacy is described as a "minimal" burden. *See Kaul*, 942 F.3d at 799 (majority); *id.* at 810 (Sykes, J., concurring). And whatever the precise calibration of that presumption, it was strong enough, all agreed, that it could not be overcome by the Wisconsin Legislature's "political and policy differences with the Attorney General over abortion regulations," or by "disagreements about litigation strategy." *Id.* at 810 (Sykes, J., concurring); *see also id.* at 801 (majority opinion stating the same).

2.

Kaul is particularly instructive here because the Seventh Circuit's analysis aligns so substantially with our own approach to adequacy under Rule 24(a)(2). In *Stuart v. Huff*, 706 F.3d 345 (4th Cir. 2013), we considered a motion to intervene in a challenge to state abortion regulations – this time in North Carolina – where, as in *Kaul*, the state attorney general already was in court defending the regulations. *Id.* at 348. In *Stuart*, like the Seventh Circuit in *Kaul*, we applied a presumption of adequacy to the state attorney general's representation, though our presumption was based on our long-standing rule that "[w]hen the party seeking intervention has the same ultimate objective as a party to the suit," we will presume "that its interests are adequately represented" unless the party seeking intervention can show "adversity of interest, collusion, or non-feasance." *Id.* at 349 (alteration in original)

(quoting *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976)).[1]

The majority here emphasizes that the proposed intervenor in *Stuart* was a private party and not a state legislative entity. On that basis, it concludes that *Stuart*'s call for an especially "strong showing" of inadequacy, *id.* at 352, is inapplicable in this case. Maj. Op. at 25. Whether or not that is so – a question to which I will return in a moment – the majority's observation takes nothing away from the broader lesson that *Stuart* derived from *Westinghouse*: A presumption of adequacy arises *whenever* a proposed intervenor shares the same objective as an existing party, regardless of that existing party's identity. *See id.* at 351–54.

That, as the majority acknowledges, is precisely the situation here: The Leaders and the Attorney General share the objective of upholding the legality of S.B. 824. *See* Maj. Op. at 23. So under *Stuart*, as well as under

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[1] Nearly every circuit has adopted this rule, in one form or another. *See, e.g.*, *In re Thompson*, 965 F.2d 1136, 1142–43 (1st Cir. 1992), as amended (May 4, 1992); *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 180 (2d Cir. 2001); *Del. Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 970, 973 (3d Cir. 1982); *Baker v. Wade*, 743 F.2d 236, 240–41 (5th Cir. 1984); *United States v. Michigan*, 424 F.3d 438, 443–44 (6th Cir. 2005); *Kaul*, 942 F.3d at 799 (7th Cir. 2019); *FTC v. Johnson*, 800 F.3d 448, 452 (8th Cir. 2015); *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); *Clark v. Putnam Cty.*, 168 F.3d 458, 461 (11th Cir. 1999); *Envt'l Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979).

Kaul, *Trbovich*'s "minimal" burden standard cannot apply. Rather, we must start our adequacy inquiry with the presumption that the Attorney General is providing adequate representation for the State's interests. And, just as in *Kaul*, whatever the precise weight of that presumption, it cannot be rebutted by a showing of "stronger, more specific interests" on the part of the Leaders, or by a "disagreement over how to approach the conduct of the litigation." *Stuart*, 706 F.3d at 353.

"Nor could it be any other way," as we explained in *Stuart*. *Id.* at 354. Absent a meaningful presumption of adequacy, federal courts would be required under Rule 24(a)(2) to arbitrate, de novo, the inevitable strategic disagreements that will arise even among parties who share the same ultimate objective, deciding which trial tactics do and do not amount to "adequate" representation. "To have such unremarkable divergences of view sow the seeds for intervention as of right risks generating endless squabbles at every juncture over how best to proceed." *Id.* All of that is true – as this case so perfectly illustrates – whether the proposed intervenors are private parties or legislative entities. To the extent the majority calls into question the wisdom of our standard presumption of adequacy, *see* Maj. Op. at 24 n.8, I worry that it is opening the door to "intractable procedural mess[es]" that will hamstring our district courts in their efforts to responsibly manage the proceedings before them, *Kaul*, 942 F.3d at 801.

C.

In this case, the district court recognized that our precedent required it to presume that the Attorney General was an adequate representative of the State's interests in the validity and enforcement of S.B. 824. Having applied that presumption, the court found that the Leaders were not entitled to intervene under Rule 24(a)(2) because they had not shown the adversity of interest, collusion, or nonfeasance necessary for rebuttal. I see no reason to disturb that well-reasoned finding.

At this point, it is important to acknowledge our "necessarily limited" role in this appeal. *Stuart*, 706 F.3d at 350. We are not to decide whether, in our best view, the Leaders were entitled to intervene as a matter of right. That, our court has stressed, is an inquiry committed rightly to the broad discretion of the district courts. *See id.* 349–50. Instead, we may determine only whether the district court abused its discretion when it found that the Leaders were not so entitled. Previously, we have justified this deferential standard of review in light of the district court's "superior vantage point" for evaluating the conduct of the parties and the "profound implications" that intervention can have for trial-court proceedings. *Id.* at 350. With that deference to the district court's "on the scene" judgment layered atop the district court's thorough analysis, *id.*, it is apparent to me that there are no grounds to find an abuse of discretion here.

As the district court made clear at the outset of its opinion – and as I have emphasized already – this is a case in which the State's interests already are being

defended by the Attorney General, who is charged under North Carolina law with the duty to defend state law in federal court. And it was apparent, in the district court's view, that the Attorney General was taking active steps to defend the lawsuit: The State Board, represented by the Attorney General, had "consistently denied all substantive allegations of unconstitutionality," moved to stay the suit on federalism grounds, and – at the time that the district court was writing – "recently filed an expansive brief opposing [the NAACP's] motion for preliminary injunction on the merits." *N.C. State Conf. of the NAACP v. Cooper*, No. 1:18CV1034, 2019 WL 5840845, at *3 (M.D.N.C. Nov. 7, 2019). In short, there was "nothing in the record to suggest" that the Attorney General had "abdicated" his statutory duty to defend the State's interests in this case. *N.C. State Conf. of the NAACP v. Cooper*, 332 F.R.D. 161, 170 (M.D.N.C. 2019).

In arguing that the Attorney General is an inadequate representative of the State's interests in this case, the Leaders consistently have advanced two central arguments. First, they object to the way in which the Attorney General has chosen to defend S.B. 824, especially in a parallel state-court challenge, *Holmes v. Moore*, No. 18-cv-15292 (N.C. Super. Ct.). According to the Leaders, the Attorney General's conduct in this case and in *Holmes* demonstrates an "unwillingness to robustly defend S.B. 824," *Cooper*, 2019 WL 5840845, at *2, that amounts to "nonfeasance" sufficient to rebut the presumption of adequacy we first recognized in *Westinghouse*. In response to the Leaders' claims, the district court

undertook a careful review of the Attorney General's litigation conduct in both cases, but found that the Attorney General simply had made reasonable litigation decisions with which the Leaders disagreed. *See Cooper*, 2019 WL 5840845, at *2–4; *cf. Stuart*, 706 F.3d at 355 (same). In view of our precedents, I can find no abuse of discretion in that judgment. Indeed, I believe it is entirely correct.

As the district court noted, the Leaders identified only the kind of garden-variety disagreements over litigation strategy that we and other courts consistently have found *insufficient* to rebut the presumption of adequacy, no matter that presumption's precise strength. *See Stuart*, 706 F.3d at 349; *see also Kaul*, 942 F.3d at 810–11 (Sykes, J., concurring). Illustrative is the Leaders' objection to the Attorney General's decision to move for the dismissal of only five of the six counts leveled against S.B. 824 in *Holmes* and to reserve a dispositive challenge to the remaining intentional-discrimination claim for a later point in the proceedings. The district court found the Leaders' objection wanting, in part because the Attorney General's decision ultimately was vindicated by the state court's ruling, which dismissed all five claims challenged by the Attorney General but denied the Leaders' separate motion to dismiss the intentional-discrimination claim.[2] *See Stuart*, 706 F.3d

[2] Indeed, any attempt by the Attorney General to dismiss the intentional-discrimination claim at the pleadings stage seems sure to have been premature, given that the North Carolina Court of Appeals since has found that the plaintiffs are likely to succeed on that claim and has instructed the state trial court to enter a

at 354 (reasonableness of attorney general's litigation choices was shown in part by their success). If it had had the benefit of *Kaul* at the time that it ruled, the district court might also have noted that the Leaders' objection was exactly the same as that pressed by the Wisconsin Legislature – unsuccessfully – before the Seventh Circuit. *See Kaul*, 942 F.3d at 796, 801 (Legislature's objection to Wisconsin Attorney General's failure to move for dismissal and desire for "more aggressive litigation position" was insufficient to rebut presumption); *see also* Br. of Appellant Wisconsin Legislature at 33, *Kaul*, 942 F.3d 793 (No. 19-1835), 2019 WL 2317657 (arguing it was "inexplicable" that Wisconsin Attorney General had not moved to dismiss the complaint).

Similarly, the Leaders have purported to identify deficiencies in the Attorney General's approach to discovery in *Holmes* and his opposition to the NAACP's preliminary-injunction motion in this case. Again, in their view, an adequate advocate would have assumed a more aggressive posture. But in making their case for nonfeasance, the Leaders again mistake differences over trial tactics for inadequacy. *Cf. Stuart*, 706 F.3d at 353 (intensity of proposed intervenor's interest in litigation does not establish inadequacy). And, in any case, as the district court explained, the Attorney General's brief in opposition to the NAACP's motion for a preliminary injunction was "expansive," *Cooper*, 2019 WL 5840845, at *3, and a ramped-up approach to discovery in *Holmes* would have been duplicative of the

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preliminary injunction. *See Holmes v. Moore*, 840 S.E.2d 244, 265–66 (N.C. Ct. App. 2020).

Leaders' own efforts in that case, where they are named as defendants.

As I have emphasized, and as the majority recognizes, we owe substantial deference to the district court's factual determinations here. But even if I were to review this record de novo, I would come to the same conclusion as the district court. I cannot view the record in this case – a record that reflects that the Attorney General has successfully moved to dismiss the Governor as a party, vigorously opposed a preliminary injunction, and filed appeals in state and federal court – and come away crediting the Leaders' claims of nonfeasance.

That brings us to the Leaders' second argument, and the central theme of their briefing: the suggestion that the Attorney General is not mounting a sufficiently vigorous defense of S.B. 824 because he is opposed to voter-ID laws as a matter of public policy. According to the Leaders, as a state senator, the current Attorney General opposed passage of a prior voter-ID law, arguing that it curtailed the right of North Carolina citizens to vote. And after he became Attorney General, the Leaders emphasize, he moved to dismiss a petition for certiorari review of a decision by this court holding that same voter-ID law unconstitutional, acting on behalf of the incoming Governor. *See North Carolina v. N.C. State Conf. of the NAACP*, 137 S. Ct. 1399 (2017). Whether framed as an argument for collusion or for adversity of interests, *cf. Stuart*, 706 F.3d at 349 (presumption of adequacy may be rebutted by showing of collusion or adversity of interest, as well as nonfeasance), the import of the

Leaders' claim is the same: The Attorney General cannot be trusted to defend S.B. 824.

This is a startling accusation. The Attorney General has a statutory duty to represent and defend the State and its interests in this litigation. *See* N.C. Gen. Stat. § 114-2. And that is to say nothing of his ethical obligations, which require zealous representation of his client, *see* Revised Rules of Professional Conduct of the North Carolina State Bar, Rule 0.1[2] (preamble), and prohibit him from falsely assuring the district court that he is "meeting [his] duty to defend this action," J.A. 662; *see also* Revised Rules of Professional Conduct of the North Carolina State Bar, Rule 3.3 (candor to court). That the Attorney General may have expressed policy views at odds with S.B. 824 in the past is no ground for a federal court to infer that he would abdicate his official duty to the State. And to suggest otherwise does 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 government and the general public. *See Kaul*, 942 F.3d at 810–11 (Sykes, J., concurring) ("political and policy differences" between proposed legislative intervenor and state attorney general regarding law being challenged are "not enough to rebut the presumption of adequate representation").[3]

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[3] In one particularly unfortunate moment at argument, the Leaders' counsel accused the Attorney General of "sabotage," referring to his decision, shortly after assuming office, to join the Governor in moving to dismiss a previously filed certiorari petition in a case involving a different voter-ID law. The majority, of course, has not endorsed this over-heated rhetoric, and its judicious treatment of this case should make clear that federal courts are not a forum for

In any event, the district court found that there was no evidence in the record to support the Leaders' "conclusory speculation" that the Attorney General's policy preferences have left him without the proper "level of interest" or "incentive" to robustly litigate in defense of S.B. 824. *Cooper*, 332 F.R.D. at 170. Again, I find no abuse of the district court's broad discretion in that judgment. As we have explained, and as the district court recognized, a proposed intervenor may have a "stronger" or more "intense" interest in the validity of a law than an existing party, but that will not rebut the presumption of adequacy that arises from a shared objective. *Id.* at 171 (quoting *Stuart*, 706 F.3d at 353). And the Attorney General's failure to seek certiorari review as to a different voter-ID law, without more, does not indicate nonfeasance, let alone collusion. *See Stuart*, 706 F.3d at 353 (even with respect to same law, government official's decision not to appeal adverse decision does not demonstrate "inadequacy" of representation); *see also Saldano v. Roach*, 363 F.3d 545, 555 (5th Cir. 2004) (same).

In short, our precedent is clear: A proposed intervenor's intensity of conviction, armchair quarterbacking, and political bluster do not warrant what the Seventh Circuit rightly called the "extraordinary finding" that a state attorney general has failed to adequately represent his state's interests,

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airing political grievances. Changes in executive leadership regularly entail legitimate shifts in priorities for government lawyers, and though there may be some occasion where it will be necessary to look behind the official acts of government litigators and probe for improper purposes, I am certain that this is not that case.

notwithstanding a statutory duty to do so. *Kaul*, 942 F.3d at 801; *see also Stuart*, 706 F.3d at 353. The Leaders have failed to show anything more on this record, so no matter the ultimate effect of a state law that purports to designate them as additional representatives of the State's interests in federal court – a question the majority does not resolve – the Leaders have not established a right to intervene. Accordingly, I would affirm the district court's exercise of its discretion to deny intervention under Rule 24(a)(2).

D.

My colleagues in the majority, of course, see this case differently. When it comes to the "adequacy" element of Rule 24(a)(2), the majority identifies two purported deficiencies in the district court's analysis that, in its view, necessitate a remand for the district court to consider anew whether the Attorney General is adequately representing the State. On both counts, I must disagree.

First, though the majority acknowledges that the Attorney General is entitled to a presumption of adequacy – and that the Leaders can overcome that presumption only by a showing of adversity of interest, collusion, or nonfeasance – it finds that the district court erred when, citing our decision in *Stuart*, it required the Leaders to make a "strong showing" of inadequacy. *See Cooper*, 332 F.R.D. at 169. In *Stuart*, we held that "a more exacting showing of inadequacy should be required where the proposed intervenor shares the same objective as a government party," like the Attorney General here, as opposed to a private

litigant. 706 F.3d at 351. But the Leaders argue, and the majority agrees, that *Stuart*'s "strong showing" rule should govern only where, as in *Stuart*, the proposed intervenor is a private party and not, as here, a legislative entity seeking to provide additional representation of the State's interests.

The Seventh Circuit considered that very argument in *Kaul* and roundly rejected it. There, the Wisconsin Legislature, like the Leaders here, acknowledged that the Seventh Circuit's prior cases had granted a heightened presumption of adequacy when a government party shared the same objective as a would-be intervenor, but it pointed out that those cases only involved *private* would-be intervenors. *See Kaul*, 942 F.3d at 799. Again like the Leaders here, the Wisconsin Legislature argued that because it was a *government* intervenor seeking to represent the state's interests pursuant to state law, it should not be put to a heightened showing in order to rebut the presumption of adequacy. *See id.*

The Seventh Circuit disagreed. If anything, the *Kaul* court explained, the Wisconsin Legislature's identity as a government party cut the other way, justifying an especially strong presumption of adequacy. *See id.* at 801. A private party seeking to intervene can argue that, although it seeks the same objective as the state's existing representative, the state's interests – informed, as they must be, by the concerns of the general public – are not perfectly aligned with his or her more individualized interests. *See id.* But the legislature in *Kaul* – like the Leaders here – could not make that argument, because it was a

governmental entity seeking to represent precisely the same state interest as the state attorney general already in the case: "The Legislature [went] further than sharing a goal with the Attorney General . . . and intend[ed] to represent the same client – the State of Wisconsin." *Id.* Under those circumstances, the Wisconsin Legislature would have a right to intervene only if the Wisconsin Attorney General – charged by state law with representing the same state interest the Legislature sought to advance – was inadequately representing his own state. Requiring a heightened showing of inadequacy to justify such an "extraordinary finding," the *Kaul* court concluded, was entirely appropriate. *Id.*

I agree. When the interest invoked by a proposed intervenor is represented already by a state executive-branch official designated for that purpose under state law, then it makes perfect sense to bring to bear an especially strong presumption of adequacy, putting the intervenor to a "heightened burden." *See id.* at 810 (Sykes, J., concurring). In all other contexts, we presume, under the longstanding and well-established presumption of regularity, that government officials properly discharge their official duties. *See United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926). Any would-be intervenor, even a state legislature, asking a federal court to find that a state attorney general has abdicated his statutory duty to defend his state's interests should be prepared to make a "strong

showing" of adversity of interest, collusion, or nonfeasance.[4]

Second, the majority faults the district court for failing to consider in its adequacy analysis the state's public-policy judgment, reflected in North Carolina General Statutes § 1-72.2, that the Attorney General should not be the exclusive representative of North Carolina's interests in federal-court litigation. *See* Maj. Op. at 27. I agree with the majority that this "public policy" bears on the interest element of our Rule 24(a)(2) inquiry. *See id.* at 20. But I cannot agree that the state's policy judgment should be double-counted and put toward satisfaction of Rule 24(a)(2)'s adequacy element as well as its interest element.

Again, the *Kaul* court considered and rejected precisely this approach. The problem, as the Seventh Circuit explained, is largely practical: Intervention under Rule 24(a)(2) is mandatory. *See Kaul*, 942 F.3d at 802. Thus, if an aspiring legislative intervenor can meet both the interest element *and* the adequacy element whenever state law announces a policy preference for multiple representatives, then a district

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[4] In any event, even if I agreed with the majority that the district court erred by applying *Stuart*'s "strong showing" standard, that error would not necessitate remand. As explained above, whatever the precise strength of the presumption of adequacy afforded to the Attorney General here, the Leaders have failed to rebut it. And in those circumstances – where a district court, applying the proper standard, will surely reach the same result – remand is unnecessary. *See Humphrey v. Humphrey*, 434 F.3d 243, 248 (4th Cir. 2006) (presumption in favor of remand is inapplicable "if the record permits only one resolution of the factual issue" (internal quotation marks omitted)).

court may be subjected routinely to the "intractable procedural mess that would result from the extraordinary step of allowing a single entity, even a state, to have two independent parties simultaneously representing it." *Id.* at 801. Even more, the *Kaul* court recognized, once opened, this Pandora's box promises to be difficult to cabin: If a state may tie the district court's hands under Rule 24(a)(2) by announcing a "public policy" to have two representatives in federal court, then why not three? Four? More? *See id.* at 802 (contemplating that "a state could even designate its individual legislators as agents and thereby flood a district court with a cacophony of voices all purporting to represent the state").[5]

I agree with the Seventh Circuit that we cannot allow our "respect [for] a state's autonomy as a sovereign" to render district courts "powerless to control litigation involving states." *Id.* To be clear, I do not question or otherwise diminish a sovereign state's authority to designate its preferred legal representative: If the General Assembly, in its

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[5] Indeed, the Leaders themselves appear to disavow the majority's approach, recognizing the problems it would create. Never have the Leaders argued before us that North Carolina law bears on the adequacy element, as opposed to the interest element, of Rule 24(a)(2). Instead, they assure us that we need not be concerned that state laws designating legislative agents as additional representatives in federal-court proceedings "will result in automatic intervention as of right by every legislative body in every case involving a challenge to a statute"; those laws may satisfy the interest prong, but the adequacy prong will remain an independent check and "foreclose intervention as of right in cases in which another party adequately represents the legislature's protectable interest." Br. of Appellants at 32 n.2.

considered judgment, believes that the Attorney General is not adequately representing the State in a given case, then it of course is free to remove the Attorney General from that case and substitute some other representative through the legislative process. But that state-law authority is distinct from the federal law – Rule 24(a)(2) – that governs the circumstances under which a federal court may be required to accommodate multiple representatives of a single state. Because I fear the "intractable procedural mess" that may result from the majority's decision, *id.* at 801, I must respectfully break from the majority on this point as well.

II.

For the reasons I have given, I would affirm the district court's denial of intervention as of right under Rule 24(a)(2). In my view, the Leaders have not shown that the Attorney General is an inadequate representative of the state interests that he is charged by statute with defending. And even if that conclusion were debatable, I would find no abuse of discretion in the district court's finding to that effect. Because the Leaders must satisfy each element of Rule 24(a)(2) to establish a right to intervene, that is enough to dispose of the Leader's appeal from the denial of their motion to intervene as of right.

The majority, of course, takes a different approach. And in order to reach its contrary conclusion, it must address and resolve several additional issues. I will address only two of the most difficult issues here.

A.

First is the question of the Leaders' Article III standing to intervene as of right.[6] Because I would affirm the district court's denial of intervention in any event, I may assume that the majority is correct, and that the Leaders have in fact established Article III standing. Even if they had not, in other words, I believe we still would be required to affirm the district court's denial of intervention, though on alternative grounds. Still, I have some doubts about the majority's analysis.

The majority's standing analysis turns on North Carolina General Statutes § 1-72.2, a recently enacted state-law provision that announces North Carolina's "public policy" in favor of the Leaders' participation in cases naming the State of North Carolina as a party.[7]

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[6] Whether or not the Leaders had Article III standing to intervene in the district court, there is no question that they have standing to bring this appeal: The denial of a motion to intervene as of right is immediately appealable, *see Alt v. U.S. Envt'l Prot. Agency*, 758 F.3d 588, 590 (4th Cir. 2014), and we have jurisdiction because the alleged injury suffered by a disappointed would-be intervenor flows from the denial of intervention, *cf. CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 475 (4th Cir. 2015) (final judgment does not moot pre-existing intervention appeal because appellate court may still offer remedy by ordering intervention).

[7] In full, North Carolina General Statutes § 1-72.2 provides:

> (a) It is the public policy of the State of North Carolina that in any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, the General Assembly, jointly

through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina and the Governor constitutes the executive branch of the State of North Carolina, and when the State of North Carolina is named as a defendant in such cases, both the General Assembly and the Governor constitute the State of North Carolina. It is the public policy of the State of North Carolina that in any action in any federal court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina; the Governor constitutes the executive branch of the State of North Carolina; that, when the State of North Carolina is named as a defendant in such cases, both the General Assembly and the Governor constitute the State of North Carolina; and that a federal court presiding over any such action where the State of North Carolina is a named party is requested to allow both the legislative branch and the executive branch of the State of North Carolina to participate in any such action as a party.

(b) The Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, by and through counsel of their choice, including private counsel, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution. Intervention pursuant to this section shall be effected upon the filing of a notice of intervention of right in the trial or appellate court in which the matter is pending regardless of the stage of the proceeding. Notwithstanding any other provision of law to the contrary, the participation of the Speaker of the House of Representatives and the President Pro Tempore of the Senate in any action, State or federal,

See N.C. Gen. Stat. § 1-72.2(a). In my view, that complex provision raises as many questions as it answers. First adopted in 2013, *see* 2013 N.C. Laws S.L. 2013-393, § 3, eff. Oct. 1, 2013, it has yet to be given an authoritative construction by North Carolina's courts on which we might rely. And given its repeated references to cases – unlike this one – in which "the State of North Carolina is a named party," it is not obvious to me that the state's public policy applies here. *Cf. Common Cause v. Lewis*, 956 F.3d 246, 250 n.2 (4th Cir. 2020) (noting that the State of North Carolina was named as a party when legislative defendants invoked authority under § 1-72.2).

Most important, while I have no doubt that state law reflects North Carolina's preference that both its executive and legislative branches be permitted to participate in certain federal-court litigation, I am less certain that § 1-72.2 effectuates the necessary designation of the Leaders as agents of the State. *See Bethune-Hill*, 139 S. Ct. at 1951–52. The Leaders argue, and the majority agrees, that they have standing to intervene because state law designates them as representatives of the interests of the State of North Carolina, thereby conferring on them the State's *own* standing to advance the *State*'s undisputed interest in defending the validity and enforcement of its laws. *See* Reply Br. of Appellants at 10; *see also Bethune-Hill*, 139 S. Ct. at 1951 (describing legislative

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as a party or otherwise, shall not constitute a waiver of legislative immunity or legislative privilege of any individual legislator or legislative officer or staff of the General Assembly.

entity authorized by state law to "stand in *for the State*" (emphasis added)); *Hollingsworth*, 570 U.S. at 710 (state law may provide for officials other than attorney general to "speak *for the State* in federal court" (emphasis added)). But the crucial subsection of § 1-72.2 – the one that expressly addresses the Leaders' "standing" to intervene – purports to bestow on the Leaders "standing to intervene *on behalf of the General Assembly*," not the State. N.C. Gen. Stat. § 1-72.2(b) (emphasis added). For purposes of the Leaders' theory of standing, that is a crucial distinction. *See Bethune-Hill*, 139 S. Ct. at 1951, 1953 (distinguishing legislative entity's standing to sue as representative of state from purported standing to sue in legislative capacity). And whatever the State's policy preferences, if it is unprepared to designate the Leaders to speak *on its behalf* in federal court, then the Leaders cannot invoke the State's own interest in the validity and enforcement of its laws to satisfy Article III's standing requirements. *Cf. id.* at 1952 (describing state that has granted its legislature authority to represent the *state*'s interest in redistricting cases).[8]

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[8] At an earlier stage of this litigation, and before the Supreme Court's decision in *Bethune-Hill*, the Leaders advanced a different theory, arguing that they had standing not as agents of the State but as representatives of the distinct institutional interests of North Carolina's legislature. As the case has progressed, the Leaders have relied on *Bethune-Hill* to focus on the argument they present to us now: that they have standing because the State has designated them to represent its interests and "stand in for the State" in this litigation. Reply Br. of Appellants at 10 (quoting *Bethune Hill*, 139 S. Ct. at 1951).

Despite what I view as a decided lack of clarity as to the purported "designation" in § 1-72.2, this is the sounder approach.

B.

I turn next to the majority's treatment of a second issue: the nature of the Leaders' interest under Rule 24(a)(2). Again, for my purposes, I may assume that the majority is correct, and that the Leaders have satisfied the interest element. And, indeed, I am inclined to agree with the majority on this point: Even if § 1-72.2 is insufficient to designate the Leaders as State agents for standing purposes, it reflects a state policy judgment about the value of legislative participation, and that may be enough to bestow a "significantly protectable interest" in this litigation for purposes of Rule 24(a)(2). *See Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991).[9]

The circumstances in which a "legislature as legislature" has Article III standing are few and far between. And in no case has the Supreme Court recognized such standing when a legislature asserts an institutional interest in "the constitutionality of a concededly enacted [statute]." *See Kaul*, 942 F.3d at 798 (alteration in original) (quoting *Bethune-Hill*, 139 S. Ct. at 1954); *cf. Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) (recognizing distinct legislative interest in legislating, implicated where state law deprived legislature of power to enact redistricting plans).

[9] I also agree with the majority's observation that the district court did not separately consider, at least at any meaningful length, the effect of § 1-72.2 on its "interest" analysis. Instead, the district court ran together two distinct questions: whether the Leaders have a protectable interest under § 1-72.2 for purposes of Rule 24(a)(2) and whether that interest entitles them to intervene if it is represented already by the Attorney General. But on my view of the case, the district court's shorthand is both understandable and harmless: The Attorney General's presumptively adequate representation of the same interest

But because it is a matter of our jurisdiction, I feel compelled to note that I have serious doubts about whether the interest question – along with some others addressed by the majority – is properly before us at all. The district court considered the nature of the Leaders' interest under Rule 24(a)(2) only in its *first* order denying intervention; the second order was expressly limited in scope to whether the Attorney General, in the time since the first order was entered, had declined to provide an adequate defense of S.B. 824. As the majority recounts, however, the Leaders took no appeal from the district court's first order. In my view, the Leaders' decision not to file a timely appeal from that order divests us of jurisdiction to consider the issues it resolved. *See Plain v. Murphy Family Farms*, 296 F.3d 975, 980 (10th Cir. 2002) ("If the district court denies [a] motion [to intervene], the proper procedure is to pursue an immediate appeal, and not to file repetitive motions pestering the district court.").

The Leaders argue, and the majority agrees, that because the district court's first order denying intervention was "without prejudice" – allowing for renewal of the motion if in the future the Attorney General "in fact declined to defend the instant lawsuit," 332 F.R.D. at 173 – it did not constitute a final order, so that the Leaders had neither the ability nor the obligation to take an immediate appeal. But as to the question of whether the Leaders had identified a protectable interest under Rule 24(a)(2), the district court's first order clearly "signaled that it was

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invoked by the Leaders is the central feature of this case, and is by itself grounds for denying the motion to intervene as of right.

finished," *Bing v. Brivo Sys., LLC*, 959 F.3d 605, 612 (4th Cir. 2020), and the court gave no "fresh evaluation" to that issue in its second order, *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 127 (D.C. Cir. 1972) (appeal of second order denying intervention was timely because the district court considered issues anew). Under those circumstances, I would apply the familiar rule that "once a conclusive resolution has been reached . . . a renewed motion for the same relief, or a belated request for reconsideration, does not reopen the time for appeal." *Fairley v. Fermaint*, 482 F.3d 897, 901 (7th Cir. 2007); *see also United States v. Boone*, 801 F. App'x 897, 904 (4th Cir. 2020) (Harris, J., concurring in the judgment) (same). And because the Leaders did not file this appeal until more than five months after the district court's first order denying intervention, I suspect we lack jurisdiction to review the issues conclusively resolved by that order.[10]

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[10] *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987), on which the majority relies, is not to the contrary. In that case, despite the general rule that an order denying intervention is immediately appealable, *see Alt*, 758 F.3d at 590, the Supreme Court held that an intervenor could not challenge immediately the limiting conditions placed on its intervention because the district court had granted intervention, thereby permitting it to become a party to the proceedings. *See Stringfellow*, 480 U.S. at 378–79. Thus, the intervenor would be able to raise its challenges to the intervention conditions in a post-trial appeal; in the meantime, like any other party, it would have to live with the district court's interlocutory orders. *See id.*

Exactly the opposite happened here. The district court denied intervention outright, while acknowledging that circumstances might later change and provide support for a renewed motion to intervene. Had the Leaders filed an appeal from that order, we

III.

That leaves the Leaders' request for permissive intervention pursuant to Rule 24(b). Our review of a court order denying permissive intervention under Rule 24(b) is "particularly deferential, and a challenge to the court's discretionary decision to deny leave to intervene must demonstrate a *clear* abuse of discretion in denying the motion." *McHenry v. Comm'r*, 677 F.3d 214, 219 (4th Cir. 2012) (internal quotation marks omitted). The discretion afforded to district courts under Rule 24(b) is "even broader" than that given under Rule 24(a)(2), *R&G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 11 (1st Cir. 2009), in other words, and in my view, the district court acted well within its broad discretion here.

The district court's decision to deny permissive intervention – while allowing the Leaders to participate as amici – turned on two findings regarding the proceedings before it. First, the district court found that the addition of the Leaders as parties would result in unnecessary complications and delay, both in pretrial proceedings and at trial itself, jeopardizing the court's ability to reach final judgment in a timely manner. Second, the court concluded that intervention by the Leaders was likely to prejudice the plaintiffs, who would be required to address "dueling defendants" with multiple litigation strategies, all purporting to

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surely would have concluded that the district court was "finished" with the question of intervention on the record before it and proceeded to consider their arguments on the merits. Given that they failed to do so, however, I do not think we can reach those arguments now.

represent the same interest – that of the State of North Carolina. *Cooper*, 332 F.R.D. at 172. Those twin assessments are "quintessentially the province of the district courts," *Stuart*, 706 F.3d at 350 (quoting *United States v. Smith*, 452 F.3d 323, 332 (4th Cir. 2006)), and I can see no ground for concluding that they represent a "*clear* abuse of discretion," *McHenry*, 677 F.3d at 216.

Moreover, those findings are all that is required to justify a denial of permissive intervention under Rule 24(b)(3), which mandates the consideration of two – and only two – factors: undue delay and prejudice to existing parties. *See* Fed. R. Civ. P. 24(b)(3). I have no quarrel with the idea that a district court also might consider federal-state comity, and a state's policy preference for having multiple representatives in federal court, when reviewing a motion for permissive intervention. *Cf. Kaul*, 942 F.3d at 803 ("Permissive intervention allows the district court to consider a wide variety of factors, including the needs of federal-state comity . . . ."). But unnecessary delay and prejudice are the "core considerations" under Rule 24(b)(3). *McHenry*, 677 F.3d at 225. Once the district court found that the Leaders' intervention was likely to cause undue delay and prejudice the plaintiffs, it did not abuse its discretion by denying permissive intervention on that basis alone.

* * *

Acting under statutory command, the Attorney General of North Carolina has represented the members of the State Board of Elections and defended their authority to enforce S.B. 824 from the outset of this case: He has moved to dismiss certain of the

plaintiffs' claims, sought to stay federal-court proceedings, and opposed a preliminary injunction. Even as we considered this appeal, district court proceedings have continued, and the district court docket reflects the Attorney General's clear intent to defend S.B. 824's constitutionality up to and including a post-election bench trial. And a quick review of our own docket shows that the Attorney General actively is defending the law's constitutionality on appeal before us.

To resolve the issue at the core of this case, we need only decide whether the district court abused its discretion when it determined – twice – that the Attorney General and the non-partisan attorneys of the North Carolina Department of Justice are discharging their statutory duty to defend the State of North Carolina's interest in the validity and enforcement of its laws. I see no abuse of discretion in that judgment; indeed, I agree with the district court that the Attorney General has not abdicated his statutory duties and continues to present a reasonable defense of S.B. 824. With respect for the majority's contrary view, I must dissent.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 19-2273
(1:18-cv-01034-LCB-LPA)

[Filed August 14, 2020]

NORTH CAROLINA STATE CONFERENCE OF THE NAACP; CHAPEL HILL-CARRBORO NAACP; GREENSBORO NAACP; HIGH POINT NAACP; MOORE COUNTY NAACP; STOKES COUNTY BRANCH OF THE NAACP; WINSTON SALEM-FORSYTH COUNTY NAACP,

Plaintiffs – Appellees,

v.

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Appellants,

and

KEN RAYMOND, in his official capacity as a member of the North Carolina State Board of

Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections; JEFFERSON CARMON III, in his official capacity as a member of the North Carolina State Board of Elections; DAVID C. BLACK, in his official capacity as a member of the North Carolina State Board of Elections,

Defendants – Appellees.

J U D G M E N T

In accordance with the decision of this court, the district court order entered November 7, 2019, is vacated. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

1:18CV1034

[Filed June 3, 2019]

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, CHAPEL HILL—CARRBORO NAACP, GREENSBORO NAACP, HIGH POINT NAACP, MOORE COUNTY NAACP, STOKES COUNTY BRANCH OF THE NAACP, WINSTON-SALEM—FORSYTH COUNTY NAACP,	)
Plaintiffs,	)
v.	)
ROY ASBERRY COOPER III, *in his official capacity as the Governor of North Carolina*; ROBERT CORDLE, *in his official capacity as Chair of the North Carolina State Board of Elections*; STELLA ANDERSON, *in her official capacity as Secretary of the North Carolina State Board of Elections*; KENNETH RAYMOND, JEFFERSON CARMON III, and DAVID C. BLACK, *in their*	)

official capacities as members of the North Carolina State Board of Elections,[1]

Defendants.

MEMORANDUM OPINION AND ORDER

LORETTA C. BIGGS, District Judge.

Plaintiffs initiated this action against the above-named Defendants challenging the constitutionality of specific provisions of Senate Bill 824 ("S.B. 824"), titled "An Act to Implement the Constitutional Amendment Requiring Photographic Identification to Vote." (*See* ECF No. 1; ECF No. 8-2 at 2.) S.B. 824 was passed by the North Carolina General Assembly ("General Assembly") on December 5, 2018, and enacted into law as Session Law 2018-144 on December 19, 2018. (ECF No. 1 ¶¶ 1, 79.) Before the Court is a Motion to Intervene by Hon. Philip E. Berger ("Senator Berger"), in his official capacity as President Pro Tempore of the North Carolina Senate, and Hon. Timothy K. Moore ("Representative Moore"), in his official capacity as Speaker of the North Carolina House of Representatives (collectively, "Proposed

[1] In addition to Roy Asberry Cooper III (the "Governor"), Plaintiffs' Complaint named nine members of the North Carolina State Board of Elections (the "State Board") as defendants. (*See* ECF No. 1.) Subsequent to the filing of Plaintiffs' Complaint, the State Board was reconstituted to consist of five members appointed by the Governor. (*See* ECF No. 27.) Accordingly, pursuant to Rule 25(d)of the Federal Rules of Civil Procedure, the above-named members of the State Board are hereby substituted as parties to this action. *See* Fed. R. Civ. P. 25(d).

Intervenors"). (ECF No. 7.) For the reasons that follow, the Court denies the Motion to Intervene without prejudice to the motion being renewed if Proposed Intervenors can demonstrate that the Defendants have, in fact, declined to defend the lawsuit and that all requirements for intervention have been satisfied pursuant to Rule 24 of the Federal Rules of Civil Procedure. Further, Proposed Intervenors are granted the right to participate in this action by filing *amicus curiae* briefs.

I. BACKGROUND

In November 2018, North Carolina voters approved a ballot measure amending the North Carolina State Constitution to require voters to provide photographic identification before voting in person.[2] (ECF No. 1 ¶¶ 62, 64; ECF No. 8 at 8.) On December 5, 2018, the General Assembly passed S.B. 824, which was thereafter vetoed by Roy Asberry Cooper III, Governor of North Carolina (the "Governor"), on December 14, 2018. (ECF No. 1 ¶¶ 1, 78; ECF No. 8 at 8; ECF No. 8-1 at 2–3; ECF No. 8-2.) The General Assembly nevertheless codified S.B. 824 into law by an override

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[2] As amended, the North Carolina State Constitution provides as follows:

> Voters offering to vote in person shall present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions.

N.C. Const. art. VI, § 3(2).

of the Governor's veto on December 19, 2018. (ECF No. 1 ¶¶ 1, 79; ECF No. 8-2 at 22.)

On December 21, 2018, Plaintiffs filed suit in this Court against the Governor and the members of the North Carolina State Board of Elections. (*See* ECF No. 1.) All Defendants have been sued in their official capacities and all are represented by the North Carolina Attorney General. (*See* ECF Nos. 1, 19, 27, 28.) In the Complaint, Plaintiffs challenge the provisions of S.B. 824 which impose voter photo identification requirements, as well as the provisions "that expand the number of poll observers and the number [ ] of people who can challenge ballots." (ECF No. 1 ¶¶ 106–07.) Plaintiffs allege that "[t]hese provisions, separately and together, will have a disproportionately negative impact on minority voters," (*id.* ¶ 80), ultimately resulting in "the effective denial of the franchise and dilution of [African American and Latino] voting strength," (*id.* ¶ 7). Plaintiffs' Complaint further alleges that the challenged provisions "impose discriminatory and unlawful burdens on the right to vote that are not justified by any legitimate or compelling state interest." (*Id.* ¶ 8.) In addition, Plaintiffs allege that the challenged provisions of S.B. 824 violate Section 2 of the Voting Rights Act of 1965, as well as the Fourteenth and Fifteenth Amendments to the United States Constitution. (*Id.* ¶¶ 105–46.) Plaintiffs seek injunctive and declaratory relief to prevent Defendants "from implementing, enforcing, or giving effect to the [challenged] provisions of S.B. 824." (*Id.* ¶ 147.)

On January 14, 2019, less than one month after Plaintiff filed suit, Senator Berger and Representative Moore, acting in their official capacities, filed the instant Motion to Intervene on behalf of the General Assembly seeking intervention as of right pursuant to Rule 24(a) or, alternatively, permissive intervention pursuant to Rule 24(b).[3] (ECF Nos. 7, 8.) In response, the Governor states that he "does not take a position on t he [M]otion to [I]ntervene." (ECF No. 34 at 1.) Likewise, Defendants Robert Cordle, in his official capacity as Chair of the North Carolina State Board of Elections, Stella Anderson, in her official capacity as Secretary of the North Carolina State Board of Elections, and Kenneth Raymond, Jefferson Carmon III, and David C. Black, in their official capacities as members of the North Carolina State Board of Elections (collectively, the "BOE Defendants") state in their response to the instant motion that they "neither consent nor object to the pending [M]otion to [I]ntervene." (ECF No. 36 at 1.) Plaintiffs, however, oppose Proposed Intervenors' request to intervene as of right or permissively. (ECF No. 38.)

II. DISCUSSION

A. Standing

As an initial matter, the Court notes that in their response to the Motion to Intervene, Plaintiffs raise the

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[3] In compliance with Rule 24 of the Federal Rules of Civil Procedure, Proposed Intervenors attached a proposed Answer to the Motion to Intervene. *See* Fed. R. Civ. P. 24(c) ("The motion [to intervene] must . . . be accompanied by a pleading that sets out the claim or defense for which intervention is sought.").

issue of Article III standing which "is a threshold jurisdictional question," *Pye v. United States*, 269 F. 3d 459, 466 (4th Cir. 2001). (*See* ECF No. 38 at 10–11, 22–25.) Specifically, Plaintiffs argue that Proposed Intervenors "may not intervene because [they] lack[ ] Article III standing, which is a requirement for intervention as a defendant in a federal court." (*Id.* at 10–11, 22–23.) In support of this argument, Plaintiffs cite a number of cases from other circuits stating that an intervenor-defendant must establish Article III standing. (*See id.* at 10, 22 (citing cases from the D.C. Circuit, as well as the Seventh, Eighth, and Tenth Circuit Courts of Appeals).) However, as noted by Proposed Intervenors, Plaintiffs fail to cite any Fourth Circuit case requiring that, in addition to satisfying the Rule 24 requirements, an intervenor-defendant must also establish Article III standing. (ECF No. 48 at 7.) Nor could this Court find a Fourth Circuit case setting forth such a requirement. Rather, it appears, that "[c]ourts remain divided . . . on the question of whether an intervenor must establish Article III standing." 13A Charles A. Wright et al., *Federal Practice & Procedure*, § 3531, at 51 (3d ed. 2008). *Compare City of Herriman v. Bell*, 590 F.3d 1176, 1183–84 (10th Cir. 2010) (stating that would-be intervenors need not establish constitutional standing to intervene), *and Perry v. Schwarzenegger,* 630 F.3d 898, 90 6 (9th Cir. 2011) (same), *with United States v. Metro. St. Louis Sewer Dist.,* 569 F.3d 829, 833 (8th Cir. 2009) (stating that "a party seeking to intervene must establish Article III standing in addition to the requirements of Rule 24"), *and United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1145 (D.C. Cir. 2009) (same). Thus, given the silence on the issue by the Fourth Circuit, this Court

declines to impose such a requirement on the Proposed Intervenor-Defendants in this action.

B. Intervention as of Right

Proposed Intervenors first seek intervention as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. (ECF No. 8 at 11–21.) The Fourth Circuit has "note[d] that liberal intervention is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). "Liberality does not, however, entail resolving every possible doubt in favor of intervention, and [Rule 24] sets standards for intervention that must be observed and applied thoughtfully by courts." *Ohio Valley Envtl. Coal., Inc. v. McCarthy*, 313 F.R.D. 10, 16 (S.D.W. Va. 2015). Rule 24(a) provides as follows:

> On timely motion, the court must permit anyone to intervene who:
>
> > . . . 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 mat ter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). The Fourth Circuit has interpreted Rule 24(a)(2) to entitle intervention as of

right if, in addition to timeliness,[4] the movant demonstrates: "(1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's interest is not adequately represented by existing parties to the litigation." *Teague v. Bakker*, 931 F.2d 259, 260–61 (4th Cir. 1991). "[A] would-be intervenor bears the burden of demonstrating tothe court a right to intervene." *Arista Records, LLC v. Doe No. 1*, 254 F.R.D. 480, 481 (E.D.N.C. 2008) (alteration in original) (quoting *In re Richman*, 104 F.3d 654, 658 (4th Cir. 1997)). "If the movant fails to satisfy any one of the requirements, then intervention as of right is defeated." *Students for Fair Admissions Inc. v. Univ. of N.C.*, 319 F.R.D. 490, 494 (M.D.N.C. 2017) (citing *Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999)). *See United Guar. Residential Ins. Co. of Iowa v. Phila. Sav. Fund Soc'y*, 819 F.2d 473, 474 (4th Cir. 1987) ("In order to successfully intervene, . . . [movant] must meet all three requirements [of Rule 24(a)].").

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[4] Here, there is no dispute that the instant motion is timely. Proposed Intervenors filed their motion on January 14, 2019, less than one month after Plaintiffs filed suit, and before the named Defendants made any filings in the case. *See, e.g., Students for Fair Admissions Inc. v. Univ. of N.C.*, 319 F.R.D. 490, 494 (M.D.N.C. 2017) (finding motion to intervene timely where "the case had not progressed beyond its early stag es when [p]roposed [i]ntervenors sought to intervene"); *United States v. Virginia*, 282 F.R.D. 403, 405 (E.D. Va. 2012) (finding proposed intervenors' motion timely where the case had not progressed beyond the pleadings stage).

1. Interest in the Subject Matter

"While Rule 24(a) does not specify the nature of the interest required for a party to intervene as a matter of right, the Supreme Court has recognized that '[w]hat is obviously meant . . . is a significantly protectable interest." *Teague*, 931 F.2d at 261 (alterations in original) (internal quotation marks omitted). Proposed Intervenors argue that they "have a significantly protectable interest in the validity of S.B. 824, which the North Carolina General Assembly enacted over the Governor's veto." (ECF No. 8 at 12.) Plaintiffs argue in opposition that "[t]he General Assembly's interest in protecting S.B. 824 from invalidation amounts to nothing but a generalized interest, shared by all North Carolinians, in having laws enforced." (ECF No. 38 at 16.)

"Courts have recognized that legislators have an interest in defending the constitutionality of legislation passed by the legislature *when the executive declines to do so*." *Fisher-Borne v. Smith*, 14 F. Supp. 3d 699, 703, 707, 710 (M.D.N.C. 2014) (emphasis added) (granting motion to intervene "but only for the purpose of lodging an objection and preserving that objection" for appeal where it appeared to the court that the Attorney General did not intend to appeal on behalf of the State). *See Revelis v. Napolitano*, 844 F. Supp. 2d 915, 924–25 (N.D. Ill. 2012) (finding that intervention of right was appropriate where "[t]he House [of Representatives] has an interest in defending the constitutionality of legislation which it passed when the executive branch declines to do so"); *see also I.N.S. v. Chadha*, 462 U.S. 919, 928, 939 (1983) (explaining

that "Congress is . . . a proper party to defend the constitutionality of [a federal law]" where an agency of the government agreed with, and joined in, the plaintiff's challenge to the constitutionality of an immigration statute).

Plaintiffs initiated this official-capacity suit against the Governor and the BOE Defendants (collectively, "State Defendants"), neither of whom have declined to defend the lawsuit. Nor have State Defendants expressed an intention to so decline. The Governor and the BOE Defendants are represented by the Attorney General, (*see* ECF Nos. 19, 27, 28), and although they take no position on the instant Motion to Intervene, they "dispute[ ] the contention raised by the [P]roposed [I]ntervenors that the Governor and/or the State Board members represented by the Attorney General's Office are not capable of defending this lawsuit." (ECF No. 34 at 2 (footnote omitted); *see* ECF No. 36 at 2 ("For the reasons discussed by Governor Cooper in his response, the State Board Defendants [likewise] disagree with the Proposed Intervenors' contention . . . that the State Board Defendants represented by the [Attorney General] are not capable of defending this lawsuit." (citation omitted).) The Governor further contends that the named defendants "and the Attorney General's Office are fully capable of performing their duties on behalf of the people of North Carolina." (ECF No. 34 at 2.) The Governor and the BOE Defendants have each separately moved to dismiss Plaintiffs' Complaint, (*see* ECF Nos. 42, 44), as more fully discussed below.

Proposed Intervenors argue that Supreme Court precedent "establishes that state legislative officials

have the authority to defend state enactments in federal court when State law 'authorize[s]' them 'to represent the [State] Legislature in litigation.'" (ECF No. 8 at 12–13 (alterations in original) (quoting *Karcher v. May*, 484 U.S. 72, 81 (1987)).) As Proponent Intervenors correctly state:

> Section 1-72.2 of the North Carolina General Statutes provides that "[i]t is the public policy of the State of North Carolina that in any action in any federal court in which the validity or constitutionality of an act of the General Assembly . . . is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch. N.C. Gen. Stat. § 1-72.2(a). That section . . . additionally provides that, "[t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, by and through counsel of their choice, including private counsel, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute." *Id.* § 1.72-2(b).

(ECF No. 8 at 13 (first, second, and fourth alterations in original).) Therefore, according to Proposed Intervenors, "[t]he North Carolina law establishing [their] interest easily qualifies them to defend S.B. 824 under *Karcher*." (ECF No. 8 at 13.) In response, Plaintiffs contend that "North Carolina law does not vest the General Assembly with a protectable

interest[;] [for] State law cannot confer an interest where none otherwise exists." (ECF No. 38 at 17.)

The Court finds Proposed Intervenors' reliance on *Karcher* misplaced. In *Karcher*, the issue before the Supreme Court was a different issue entirely: "whether public officials who have participated [as intervenor defendants] in a lawsuit [challenging the constitutionality of a statute] solely in their official capacities may appeal an adverse judgment after they have left office." *Karcher*, 484 U.S. at 74. The Court held that those public officials may not so appeal. *Id.* The Court also declined to vacate the lower court's judgments for lack of jurisdiction, in part, because while the state legislators were in office, their intervention as of right was allowable. *Id.* at 81–82. There, the state legislators were allowed to intervene on behalf of the State in proceedings before the district court and appellate court "[w]hen it became apparent that neither the Attorney General nor the named defendants would defend the statute." *Karcher*, 484 U.S. at 75. In contrast, here, as previously stated, State Defendants are represented by the Attorney General and are presently defending against Plaintiffs' challenge to the constitutionality of S.B. 824. Nor can *Karcher* be read to suggest that a state statute can supplant a federal court's obligation to determine whether the requirements for intervention as of right by a non-party have been satisfied under federal law. *See Virginia v. Westinghouse Elec. Co.*, 542 F.2d 214, 216 (4th Cir. 1976) ("The district court is entitled to the full range of reasonable discretion in determining whether the[ ] requirements [of Rule 24(a)(2)] have been met." (second alteration in original)); *see also* Fed.

R. Civ. P. 24(a)(2). Further, the state statute cited by Proposed Intervenors specifically provides that, in actions where the State of North Carolina is a named party, "a federal court . . . is *requested* to allow both the legislative branch and executive branch" of the State to participate. N.C. Gen. Stat. § 1-72.2(a) (emphasis added). Thus, in considering any such request to participate through intervention as of right, the Court must ensure that the requirements of Rule 24(a)(2) are satisfied. *Virginia*, 542 F.2d at 216; Fed. R. Civ. P. 24(a)(2).

Proposed Intervenors also argue "that they are often *named defendants* in state court litigation challenging state laws, including litigation challenging S.B. 824." (ECF No. 8 at 14.) This argument is likewise unpersuasive. As Plaintiffs point out, (*see* ECF No. 38 at 20–21), in North Carolina state courts, pursuant to Rule 19(d) of the North Carolina Rules of Civil Procedure, "[t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, *must* be joined as defendants in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law." N.C.R. Civ. P. 19(d) (emphasis added). By contrast, in federal court, while a party challenging the constitutionality of a law may elect to name the state legislature as a defendant, legislators are not automatically entitled to intervene as of right in such a suit, particularly where the State is defending the challenged law. As explained by another district court,

> If a legislator's . . . support for a piece of challenged legislation gave rise to an interest sufficient to support intervention as a matter of right, then legislators would have the right to participate in every case involving a constitutional challenge to a state statute. But Rule 24 is not designed to turn the courtroom into a forum for political actors who claim ownership of the laws that they pass. The legislators' interest in defending laws that they supported does not entitle them to intervene as of right.

One Wis. Inst., Inc. v. Nichol, 310 F.R.D. 394, 397 (W.D. Wis. 2015).

The Court finds that, because State Defendants in this action are presently defending the challenged legislation and have expressed no intention to do otherwise, Proposed Intervenors have failed to demonstrate that they have a significantly protectable interest in likewise defending the constitutionality of S.B. 824 sufficient to warrant a right to intervene under Rule 24(a)(2). *See Fisher-Borne*, 14 F. Supp. 3d at 703. *See also Wayne Land & Mineral Grp., LLC v. Del. River Basin Comm'n*, No. 3:16-CV-00897, 2017 WL 63918, at *4 (M.D. Pa. Jan. 5, 2017) ("Once legislation is enacted, legislators… do not have a significantly protectable interest in its implementation to entitle them to intervene as of right."); *Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 251–52 (D.N.M. 2008) (concluding that a state senator's "interest as a legislator who voted for the [challenged] statute does not give him a protectable interest under

[R]ule 24(a)); *Roe v. Casey*, 464 F. Supp. 483, 486 (E.D. Pa. 1978) (finding that a legislator could not intervene because his interest as a member of the General Assembly and co-sponsor of the challenged legislation was insufficient as the court was not addressing whether the legislation was "duly and lawfully enacted," but rather, whether it was constitutional).

2. Risk of Impairment of Interest Absent Intervention

Proposed Intervenors next contend that disposition of this case could impair their interests in ensuring that S.B. 824 "actually takes effect," and could burden the General Assembly's "continuing authority to enact voting laws." (ECF No. 8 at 15.) However, because, as stated above, the Court finds that Proposed Intervenors have failed to demonstrate that they have a significantly protectable interest sufficient to warrant intervention as of right, it necessarily follows that Proposed Intervenors "cannot s how that this case threatens to impair any such interests." *One Wisconsin Inst.*, 310 F.R.D. at 397.[5] "Where no protectable interest is present, there can be no impairment of the

[5] To the extent, however, that Proposed Intervenors' absence from this action would impose any conceivable practical disadvantage on their ability to protect the purported interests of the General Assembly, this impairment can be significantly alleviated by Proposed Intervenors' participation in this action as *amicus curiae*. *See Ohio Valley Envtl. Coal.*, 313 F.R.D. at 26 ("[T]he impairment prong is not met if the would-be intervenor could adequately protect its interests in the action by participating as amicus curiae." (citing *McHenry v. Comm'r,* 677 F.3d 214, 227 (4th Cir. 2012)).

ability to protect it." *Herrera*, 257 F.R.D. at 252. Although the Court's finding s with respect to the first and second prongs of Rule 24(a)(2) are dispositive,[6] even assuming otherwise, the Court finds that Proposed Intervenors have likewise failed to demonstrate that any interests they may have are not adequately represented by State Defendants.

3. Adequacy of Representation by Existing Parties

A movant seeking intervention typically bears a "minimal" burden of showing inadequacy of representation by an existing party. *United Guar. Residential Ins. Co.*, 819 F.2d at 475 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). However, "[w]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the [movant] must demonstrate adversity of interest, collusion, or nonfeasance." *Virginia*, 542 F.2d 214 at 216. The Fourth Circuit has clarified that where defendants are represented by a government agency, "the putative intervenor must mount a strong showing of inadequacy." *Stuart v. Huff*, 706 F.3d 345, 352 (4th Cir. 2013). As explained by the Fourth Circuit, "when a statute comes under attack, it is difficult to conceive of an entity better situated to defend it than the government." *Id.* at 351. Therefore, "[t]o rebut the

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[6] *See United Guar. Residential Ins. Co.*, 819 F.2d at 474 ("[I]n order to successfully intervene, . . . [movant] must meet all three requirements [of Rule 24(a)].").

presumption of adequacy, Proposed Intervenors must show either collusion between the existing parties, adversity of interests between themselves and the State Defendants, or nonfeasance on the part of the State Defendants." *United States v. North Carolina*, No. 1:13CV861, 2014 WL 494911, at *3 (M.D.N.C. Feb. 6, 2014) (citing *Stuart*, 706 F.3d at 350, 352–55). *See also Boothe v. Northstar Realty Fin. Corp.*, Civil No. JKB -16-3742, 2019 WL 587419, at *5 (D. Md. Feb. 13, 2019) ("Where the presumption of adequate representation applies, intervenors have the 'onerous' burden of making a compelling showing of the circumstances in the underlying suit that render the representation inadequate." (quoting *In re Richman*, 104 F.3d at 660)).

Here, where the State, represented by the Attorney General, is defending this lawsuit, Proposed Intervenors must "mount a strong showing of inadequacy" to overcome the presumption of adequate representation. *See Stuart*, 706 F.3d at 352. Proposed Intervenors, however, present no evidence showing collusion between State Defendants and Plaintiffs. Nor does the record before the Court reflect nonfeasance on the part of State Defendants who, in defense of the lawsuit, have filed separate motions to dismiss or stay the case. (*See* ECF Nos. 42, 44.) Thus, it appears that the gravamen of Proposed Intervenors' argument is that there is adversity of interests between State Defendants and Proposed Intervenors. According to Proposed Intervenors, "Defendants have made quite clear that they cannot be trusted to defend S.B. 824 in the same, rigorous manner as Proposed Intervenors—and very well might not defend the law at

all." (ECF No. 8 at 16.) Specifically, Proposed Intervenors contend that: (1) the Governor and Attorney General's public statements and litigation strategy with respect to prior litigation regarding the constitutionality of a previous voter identification law shows that they "should not be entrusted with defense of [S.B. 824"]; (2) the Governor's veto of S.B. 824 as well as the accompanying veto message prove the Governor's animus towards S.B. 824; (3) State Defendants will not employ the same litigation strategy as would Proposed Intervenors; and (4) because the BOE Defendants were appointed by the Governor, their interests are automatically adverse to the interests of Proposed Intervenors. (*Id.* at 16–20.)

None of these contentions, however, is supported by sufficient evidence in the record to carry Proposed Intervenors' "onerous burden" of rebutting the presumption that State Defendants will adequately represent Proposed Intervenors' interests. *See Boothe*, 2019 WL 587419, at *5; *North Carolina*, 2014 WL 494911, at *3. First, Proposed Intervenors' reliance on the actions of, and statements by, the Governor and the Attorney General regarding House Bill 589—a *previous* voter identification bill which was ultimately found unconstitutional by the Fourth Circuit[7]—is neither helpful nor relevant to the Court's determination whether there is adversity of interests in the *present* challenge to the constitutionality of S.B. 824. A review of the record reflects that, in this matter, State Defendants are represented by the Attorney General

[7] *See N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

who, under North Carolina law, is charged with the duty to represent the State in defense of its existing laws, including S.B. 824. *See* N.C. Gen. Stat. § 114-2(1) ("[I]t shall be the duty of the Attorney General . . . to appear for the State in any . . . court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested."); *Gen. Synod of the United Church of Christ v. Resinger*, No. 3:14-cv-00213-MOC-DLH, 2014 WL 5094093, at *3 (W.D.N.C. Oct. 10, 2014) ("North Carolina law makes it clear that it is the Attorney General who is charged with 'shoulder[ing] the responsibility of defending the fruits of the democratic process.'" (alteration in original) (quoting *Stuart*, 706 F.3d at 351)); *Martin v. Thornburg*, 359 S.E.2d 472, 479 (N.C. 1987) (concluding that "the duties of the Attorney General in North Carolina as prescribed by statutory and common law include the duty to appear for and to defend the State or its agencies in all actions in which the State may be a party or interested"). There is nothing in the record to suggest that, as to S.B. 824, the Governor or the Attorney General have abdicated their responsibility to defend the instant lawsuit. *See North Carolina*, 2014 WL 494911, at *3 n.1 (explaining that despite the Attorney General's public statements which "openly opposed and criticized" a law prior to being signed by the Governor, "the [p]roposed [i]ntervenors have not demonstrated that the Attorney General will not fulfill his obligation to aggressively defend laws duly enacted by the General Assembly"). Rather, State Defendants dispute Proposed Intervenors' contention that neither they nor their counsel—the Attorney General—are capable of defending this suit, and they argue that they are "fully capable of performing their

duties on behalf of the people of North Carolina." (ECF No. 34 at 2; ECF No. 36 at 2.) State Defendants have also filed separate motions to dismiss Plaintiffs' Complaint on several grounds.

Second, although Proposed Intervenors point to the Governor's written veto message accompanying his veto of S.B. 824, there is no evidence before the Court that, since the inception of the instant action, the Governor has declined to defend the existing law, nor has the Governor indicated an intention to do so. As highlighted above, in addition to asserting that he is capable of defending this lawsuit and performing his duties on behalf of the State, the Governor has moved for dismissal of Plaintiffs' Complaint or, in the alternative, a stay of the action.

Third, the Court is unpersuaded by Proposed Intervenors' contention that there is adversity of interests because State Defendants will not employ the same approach to the litigation as would the General Assembly. It is clear that Proposed Intervenors' ultimate objective is upholding the constitutionality of S.B. 824, (*see generally* ECF Nos. 8, 48), and, as previously stated, the Attorney General is obligated, under state law, to defend the constitutionality of the State's laws. Therefore, despite their arguments to the contrary, Proposed Intervenors share the same objective as State Defendants, namely, defending the constitutionality of the existing law —S.B. 824. In such cases where, as here, the ultimate objective is the same, "disagreement over how to approach the conduct of the litigation is not enough to rebut the presumption of adequacy." *Stuart*, 706 F.3d at 353 (citing *Perry v.*

Proposition 8 Official Proponents, 587 F.3d 947, 954 (9th Cir. 2009) ("Mere differences in litigation strategy are not enough to justify intervention as a matter of right.")); *Boothe*, 2019 WL 587419, at *5 ("The fact that [i]ntervenors may disagree with the existing party's litigation strategy does not rebut the presumption of the existing party's adequate representation."); *see also* 7C Charles A. Wright et al., *Federal Practice & Procedure,* § 1909, at 431–35 (3d ed. 2007) ("A mere difference of opinion concerning the tactics with which the litigation should be handled does not make inadequate the representation of those whose interests are identical with that of an existing party.").

The Court is further unpersuaded by Proposed Intervenors' conclusory speculation that State Defendants "have neither the same level of interest in this case nor the same ability and incentive to litigate it that Proposed Intervenors do," (ECF No. 8 at 21). In fact, the Court notes that two of the four affirmative defenses[8] set forth in Proposed Intervenors' proposed Answer, (ECF No. 7-1 at 32–33), are invoked by State Defendants as the grounds upon which they are seeking dismissal or stay of the action, (ECF Nos. 42, 44.) Specifically, among the affirmative defenses set forth in their proposed Answer, Proposed Intervenors assert that: (1) "Plaintiffs' complaint, in whole or in part, fails to state a claim upon which relief can be granted and should be dismissed"; and (2) "[t]he Court

[8] Proposed Intervenors' affirmative defenses also include the following: (1) "Plaintiffs lack standing to assert the claims in their Complaint"; and (2) "Plaintiffs' claims are not ripe." (ECF No. 7-1 at 32–33.)

should abstain from considering Plaintiffs' claims regarding voter identification pending resolution of state-court litigation." (ECF No. 7-1 at 32–33.) Similarly, the BOE Defendants are seeking dismissal of Plaintiffs' Complaint, in part, pursuant to Rule 12(b)(6) for failure to state a claim, and they are also requesting that the Court "exercise[ ] its discretion to abstain [from exercising] federal jurisdiction over Plaintiffs' claims. In the alternative, the [BOE] Defendants . . . request that the Court stay this case while the parallel state [court] proceedings continue." (ECF No. 43 at 13.) The Governor likewise moves for dismissal of Plaintiffs' Complaint, in part, pursuant to Rule 12(b)(6) for failure to state a claim and, in the alternative, he requests that the Court stay this case based on abstention grounds pending resolution of state -court litigation. (ECF No. 45 at 1, 6–21.) Such similarity in the defenses of Proposed Intervenors and State Defendants further undermines Proposed Intervenors' attempt to rebut the presumption of adequate representation by showing adverse interests. *See Virginia*, 542 F.2d at 216 (explaining that where the pleadings filed by the proposed intervenor-plaintiff "have been nearly identical" to those submitted by the named plaintiff, "[i]t is difficult in light of this fact, to consider the representation of [the proposed intervenor-plaintiff's] interests by [the named plaintiffs] inadequate"). Thus, without more, Proposed Intervenors' subjective belief in their "ability and incentive to litigate" this action, is insufficient to satisfy their burden.

Finally, Proposed Intervenors' assertion that, solely because the BOE Defendants were appointed by the

Governor, they are unable to defend this action lacks support in the record. Nowhere in the record have BOE Defendants indicated an intention not to defend this action. Rather, they dispute Proposed Intervenors' contention that they are incapable of defending the lawsuit, (ECF No. 36 at 2), and, as stated above, the BOE Defendants have moved for dismissal, or in the alternative, a stay of the instant action pending completion of parallel state court litigation, (ECF No. 42). Proposed Intervenors have therefore failed to show adversity of interests between State Defendants and Proposed Intervenors.

For these reasons, the Court finds that, in addition to their failure to show collusion between the existing parties and nonfeasance by State Defendants, Proposed Intervenors have also failed to show adversity of interests between themselves and State Defendants. Accordingly, Proposed Intervenors have failed to sustain their burden of demonstrating the requisite "strong showing of inadequacy" to overcome the presumption of adequate representation by State Defendants and their counsel, the Attorney General. *Stuart*, 706 F.3d at 352. *See Virginia*, 542 F.2d at 216 (affirming district court's denial of motion to intervene where movant failed to "show[ ] adversity of interest and ha[d] not even attempted to show collusion between [the parties to the suit;] [n]or [was] there any indication of nonfeasance").

The Court recognizes that, having passed S.B. 824, Proposed Intervenors harbor strong feelings regarding its constitutionality. However, "not all parties with strong feelings about or an interest in a case are

entitled, as a matter of law, to intervene." *North Carolina*, 2014 WL 494911, at *4. As explained by the Fourth Circuit,

> stronger, more specific interests do not adverse interests make— and they surely cannot be enough to establish inadequacy of representation since would-be intervenors will nearly always have intense desires that are more particular than the state's (or else why seek party status at all). Allowing such interests to rebut the presumption of adequacy would simply open the door to a complicating host of intervening parties with hardly a corresponding benefit.

Stuart, 706 F.3d at 353.

In sum, the Court concludes that Proposed Intervenors have failed to satisfy the ir burden of demonstrating a right to intervene pursuant to Rule 24(a)(2). As a result, the motion to intervene as of right will be denied.

C. Permissive Intervention

Alternatively, Proposed Intervenors seek permissive intervention under Rule 24(b). The decision to grant or deny permissive intervention "lies within the sound discretion of the trial court." *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003) (quoting *Hill v. W. Elec. Co.*, 672 F.2d 381, 386 (4th Cir. 1982)). The Fourth Circuit has recognized that trial courts are "in the best position to evaluate" the effect of intervention on the management of a case. *Stuart*, 706 F.3d at 349–50. Accordingly, the Fourth Circuit has instructed that its

"review of any court's order denying permissive intervention under . . . Rule 24(b) is particularly deferential, and a challenge to the court's discretionary decision to deny leave to intervene must demonstrate *clear* abuse of discretion in denying the motion." *McHenry v. Comm'r*, 677 F.3d 214, 219 (4th Cir. 2012) (internal quotations and citations omitted). Rule 24(b) provides that permissive intervention may be allowed upon timely motion by anyone who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Rule 24(b) notes that "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Here, the Court has determined that Proposed Intervenors' motion is timely and the Court agrees that their Proposed Answer reflects defenses which present common issues of fact and law. While the satisfaction of these threshold requirements is necessary to grant permissive intervention, it does not compel such an outcome. *See* Fed. R. Civ. P. 24(b)(3); *Carcano v. McCrory*, 315 F.R.D. 176, 178 (M.D.N.C. 2016) (explaining that a movant seeking permissive intervention "must satisfy three requirements: (1) the motion is timely; (2) the defenses or counterclaims have a question of law or fact in common with the main action; *and* (3) intervention will not result in undue delay or prejudice to the existing parties" (emphasis added)); *Diagnostic Devices, Inc. v. Taidoc Tech. Corp.*, 257 F.R.D. 96, 100 (W.D.N.C. 2009) ("In exercising its discretion regarding permissive intervention, the court

must consider any delay and prejudice to the original parties.").

As stated above, Plaintiffs in this action challenge the constitutionality of North Carolina's voter identification requirements which could have direct impact on the upcoming election cycle, beginning with primary elections scheduled in early 2020. The nature of the claims at issue and the imminence of the election require a swift resolution on the merits to bring certainty and confidence to the voting process. The Court concludes that the addition of Proposed Intervenors as a party in this action "will hinder, rather than enhance, judicial economy," and will "unnecessarily complicate and delay" the various stages of this case, to include discovery, dispositive motions, and trial. *One Wis. Inst.*, 310 F.R.D. at 399, 400. Such delays could therefore jeopardize the Court's ability to reach final judgment in advance of the impending election cycle.

In addition, the Court has significant concern that the inclusion of Proposed Intervenors would likely detract from, rather than enhance, the timely resolution, clarity, and focus on, solely the weighty and substantive issues to be addressed in this case. Proposed Intervenors state as their primary reasons for intervention their belief that: (1) State Defendants "cannot be trusted to defend [the constitutionality of] S.B. 824 in the same, rigorous manner as Proposed Intervenors"; and (2) State Defendants represented by the Attorney General "have neither the same level of interest in this case nor the same ability and incentive to litigate it that Proposed Intervenors do." (*See* ECF

No. 8 at 16, 21.) As earlier found by this Court, neither contention is supported by evidence in the record. Thus, the Court concludes that allowing this requested intervention could place additional burden on the Court in expending unnecessary judicial resources on such contentions. Further, Plaintiffs will likely suffer prejudice in having to address dueling defendants, purporting to all represent the interest of the State, along with their multiple litigation strategies. To the extent that Proposed Intervenors have special expertise they believe that they bring to the defense of S.B. 824, such expertise can be provided through the submission of *amicus* briefs.

Given these circumstances and the fact that, at this stage, the Court has no reason to believe that State Defendants will refrain from its defense of this lawsuit, "[t]he Court sees no benefit [in] allowing additional government actors represented by outside counsel to intervene in the case [to] defend the constitutionality of [S.B. 824]." *Ansley v. Warren*, No. 1:16cv54, 2016 WL 3647979, at *3 (W.D.N.C. July 7, 2016). Accordingly, the Court will, in its discretion, deny Proposed Intervenors' motion for permissive intervention under Rule 24(b).

III. CONCLUSION

Although, for the reasons discussed above, the Court will deny Proposed Intervenors' Motion to Intervene, "[i]n the event [Proposed Intervenors] conclude that they have a unique contention to make, or that the State Defendants have not raised an appropriate argument," they may participate by filing an *amicus curiae* brief. *North Carolina*, 2014 WL

494911, at *5; *see also Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974) ("[I]t is solely within the discretion of the court to determine the fact, extent, and manner of participation by the *amicus*." (citing *N. Sec. Co. v. United States*, 191 U.S. 555 (1903))). "While a would-be intervenor may prefer party status to that of friend-of-court, the fact remains that amici often make useful contributions to litigation." *Stuart*, 706 F.3d at 355. In addition, should it become apparent during the litigation that State Defendants no longer intend to defend this lawsuit, the Court will entertain a renewed Motion to Intervene by Proposed Intervenors.

For the reasons outlined herein, the Court enters the following:

ORDER

IT IS THEREFORE ORDERED that the Motion to Intervene by Hon. Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Hon. Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, (ECF No. 7), is DENIED without prejudice to the motion being renewed if it can be demonstrated that State Defendants have in fact declined to defend the instant lawsuit, and that all requirements for intervention have been satisfied pursuant to Rule 24 of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that Proposed Intervenors are permitted to participate in this action by filing *amicus curiae* briefs.

This, the 3rd day of June, 2019.

/s/ Loretta C. Biggs
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

1:18CV1034

[Filed November 7, 2019]

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, CHAPEL HILL—CARRBORO NAACP, GREENSBORO NAACP, HIGH POINT NAACP, MOORE COUNTY NAACP, STOKES COUNTY BRANCH OF THE NAACP, WINSTON-SALEM—FORSYTH COUNTY NAACP,	)
Plaintiffs,	)
v.	)
ROY ASBERRY COOPER III, *in his official capacity as the Governor of North Carolina*; ROBERT CORDLE, *in his official capacity as Chair of the North Carolina State Board of Elections*; STELLA ANDERSON, *in her official capacity as Secretary of the North Carolina State Board of Elections*; KENNETH RAYMOND, JEFFERSON CARMON III, and DAVID C. BLACK, *in their*	)

official capacities as members of the North Carolina State Board of Elections,	)
	)
Defendants.	)
	)

MEMORANDUM OPINION AND ORDER

LORETTA C. BIGGS, District Judge.

Before the Court is a motion captioned "Renewed Motion to Intervene," (ECF No. 60), by Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (collectively, "Proposed Intervenors"). For the reasons that follow, the motion will be denied.

I. BACKGROUND

Plaintiffs initiated this action on December 20, 2018, challenging the constitutionality of specific provisions of Senate Bill 824 ("S.B. 824"), "An Act to Implement the Constitutional Amendment Requiring Photographic Identification to Vote."[1] (*See* ECF Nos. 1; 8-2 at 2.) On January 14, 2019, Proposed Intervenors filed a motion to intervene on behalf of the General Assembly, seeking intervention as of right pursuant to Federal Rule of Civil Procedure 24(a) or, alternatively,

[1] The legislative origins of S.B. 824 and the early procedural history of the instant suit are adequately set out in this Court's June 3, 2019 order (the "June 3rd order") denying Proposed Intervenors' motion to intervene. (*See* ECF No. 56 at 2–4.)

permissive intervention pursuant to Rule 24(b). (*See* ECF Nos. 7; 8 at 2.) In its June 3rd order, this Court denied that motion, but did so without prejudice to the motion being renewed "if it [could] be demonstrated that State Defendants have in fact declined to defend the instant lawsuit."[2] (ECF No. 56 at 23). The June 3rd order was not appealed within the time required and, therefore, remains the law of this case. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815–16 (1988); *Smith v. SEECO, Inc.*, 922 F.3d 398, 404 (8th Cir. 2019).

On July 19—just six weeks after the Court denied their motion to intervene—Proposed Intervenors filed the instant motion, contending that the Defendant State Board of Election's (the "State Board") conduct in this case and a related state-court case, *Holmes v. Moore*, No. 18-cv-15292 (N.C. Super. Ct.), had made it "apparent that the State Board will decline to defend adequately, if at all, the key claim in this lawsuit." (ECF Nos. 60; 61 at 6–7, 9.) On September 17, Proposed Intervenors informed this Court that, in the event their renewed motion was not decided by September 20, they would treat the Court's silence as a "de facto denial of their motion." (ECF No. 71 at 4.) No decision was issued, and on September 23 Proposed Intervenors filed a notice of appeal from the

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[2] Proposed Intervenors were granted the right to participate as *amici curiae*. (ECF No. 56 at 23.) Determination of the extent and manner of that participation is solely within the Court's discretion. *See Smith v. Pinion*, No. 1:10-CV-29, 2013 WL 3895035, at *1 (M.D.N.C. July 29, 2013) (citing *United States v. Michigan*, 940 F.2d 143, 164–65 (6th Cir. 1991)).

self-declared "de facto denial of their Renewed Motion to Intervene." (ECF No. 74 at 2.) On September 26, Proposed Intervenors further filed a petition for writ of mandamus, asking the Fourth Circuit to order this Court to allow intervention. (ECF No. 81 at 2.) The Fourth Circuit summarily dismissed both the interlocutory appeal and the mandamus petition on October 8. (ECF Nos. 88, 90.)

The State Board of Elections neither consents nor objects to the instant motion, but remains adamant that it is "ready to defend the constitutionality of [S.B. 824]." (ECF No. 65 at 2.) Plaintiffs, on the other hand, oppose the instant motion on the grounds that "no [newly] relevant facts or circumstances" have arisen in the time since the earlier denial, and that the Court's reasons for denying permissive intervention "apply with even greater force now." (ECF No. 66 at 14–15, 20.)

II. DISCUSSION

In support of this motion, Proposed Intervenors state that they "continue to believe that they were entitled to intervene as of right based on the arguments made in their prior briefing to the Court." (ECF No. 61 at 16 n.1.) They further argue that they "reserve the right to challenge the Court's rejection of those arguments on appeal." (*Id.*) It is clear that Proposed Intervenors misapprehend the status and posture of this case. This Court's Rule 24(a) analysis, set out extensively in its June 3rd order denying Proposed Intervenors' motion to intervene, remains undisturbed. Proposed Intervenors had the opportunity to appeal the Court's denial order; they failed to do so.

This Court has ruled, and the arguments addressed in its June 3rd denial order will not again be addressed here.[3] *See SEECO*, 922 F.3d at 404 (explaining that "[t]he denial of a second motion to intervene covering the same grounds as the first . . . does not restart the clock for purposes of an appeal"). Rather this Court will only consider whether Proposed Intervenors have presented evidence, newly available, that speaks to the narrow exception outlined in its prior order: that which "demonstrate[s] that [the State Board] ha[s] in fact declined to defend the instant lawsuit." (ECF No. 56 at 23.)

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[3] Nor does Supreme Court's recent decision in *Virginia House of Delegates v. Bethune-Hill*, which reaffirmed states' prerogative to "designate agents to represent them in federal court," change the calculus. 139 S. Ct. 1945, 1951 (2019). Proposed Intervenors argue that North Carolina law "undoubtedly" assigns them as the State's agents in this case. (*See* ECF No. 61 at 17–18.) However, it is far from clear whether Proposed Intervenors are authorized to intervene when the State Board and Attorney General are already defending a suit in federal court. *Compare* N.C. Gen. Stat. § 1-72.2(a) ("a federal court . . . is *requested* to allow both the legislative branch and executive branch" to participate) (emphasis added) *and* § 120-32.6(b) ("Whenever the validity or constitutionality of an act of the General Assembly" is the subject of an action in federal court, "[Proposed Intervenors] shall be necessary parties . . . .") *with* § 114-2 (it is the Attorney General's duty "to appear for the State [and] represent all State departments" and organizations). Ultimately, it is this Court's obligation to determine whether each of the requirements for intervention as of right have been satisfied under federal law. *See Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976). So long as the State Board and Attorney General are defending this suit, this Court's intervention-as-of-right analysis remains unchanged. (*See* ECF No. 56 at 9–11.)

This Court previously explained that Proposed Intervenors' "subjective belief in [the State Board's] ability and incentive to litigate this action" is insufficient to support their claim to intervention as of right. (*Id.* at 18.) However, Proposed Intervenors now argue that the State Board's recent conduct in both this case and *Holmes* amounts to something more—hard evidence of an "unwillingness to robustly defend S.B. 824." (ECF No. 61 at 20.) As detailed below, it is abundantly clear that the State Board is actively and adequately defending this lawsuit. Nevertheless, the Court will evaluate Proposed Intervenors' new allegations.

A. The Executive Branch Is Defending This Lawsuit

Proposed Intervenors contend that "the executive branch has declined to robustly and fully defend S.B. 824 in this suit." (*Id.* at 19.) A review of the proceedings suggests otherwise. From the outset, the State Board has consistently "denied all substantive allegations of unconstitutionality" in this case. (*See* ECF Nos. 59; 65 at 6–7.) As one of its first actions, the Board moved to dismiss the suit on federalism grounds; had it succeeded, that motion would have brought this case to a temporary or complete halt. (ECF No. 57 at 6–11.) Further, the Board recently filed an expansive brief opposing Plaintiffs' motion for preliminary injunction on the merits. (*See* ECF No. 97 at 18–43.) In sum, it is clear to this Court that, at present, the State Board and Attorney General are "meeting [their] duty to defend this action." (ECF No. 65 at 10.) Proposed

Intervenors have offered no real evidence to the contrary.

B. The Litigation Choices in *Holmes* Do Not Indicate a Failure to Defend

Proposed Intervenors urge the Court to look *outside* of this suit, arguing that the Board's litigation choices in *Holmes* are predictive of how its defense strategy will ultimately develop here. (*See* ECF No. 61 at 20.) Proposed Intervenors do not point to a single case suggesting that a defendant's performance—whether adequate, inadequate, or otherwise—in one lawsuit invites intervention in another. Further, the Court finds no merit in Proposed Intervenors' argument that it should draw inferences about how the State Board will act when, as here, the parties, claims, and forums in the two cases are all distinct.[4] (*See* ECF No. 65-3.) Even so, Proposed Intervenors highlight three litigation choices in *Holmes* which, they contend, demonstrate the State Board's refusal to adequately defend S.B. 824. The Court will address each in turn.

First, Proposed Intervenors note that the State Board only moved to dismiss five of the six claims brought by the plaintiffs in *Holmes*. (ECF Nos. 61 at 20; 65 at 7.) They argue that this effort was inadequate because the remaining claim—that the General

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[4] In *Holmes*, Proposed Intervenors are original named defendants alongside the State Board; the plaintiffs' claims allege violations of the North Carolina Constitution; and the case is being heard by a three-judge, superior-court panel specifically constituted to adjudicate facial challenges to state laws. (*See* ECF No. 65-3); *see generally* N.C. Gen. Stat. § 1-267.1(b1).

Assembly enacted an intentionally discriminatory law in S.B. 824—is "the key claim in both *Holmes* and the instant suit." (ECF No. 61 at 20.) However, the decision not to file a motion to dismiss the intentional discrimination claim fell well within the range of reasonable litigation strategies. As explained in this Court's June 3rd order, mere strategic disagreements are "not enough to rebut the presumption of adequacy." (ECF No. 56 at 16–17 (citing *Stuart v. Huff*, 706 F.3d 345, 353 (4th Cir. 2013)).) Further, as it turns out, of the two dismissal strategies adopted in *Holmes*, the State Board's approach seems to have been the wiser: The three-judge panel agreed to dismiss every claim *except* the intentional discrimination claim, despite Proposed Intervenors having so moved.[5] (*See* ECF No. 65-3 at 6.)

Second, Proposed Intervenors assert that the State Board "failed to mount *any* substantive defense to the plaintiffs' preliminary injunction motion" in *Holmes*. (ECF No. 61 at 6.) The three-judge panel ultimately denied the *Holmes* plaintiffs' request; an outcome that

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[5] Proposed Intervenors further argue that the State Board's failure to move for dismissal of the intentional-discrimination claim is "especially problematic" because "it is the claim that prevailed against the State's prior voter ID law." (*See* ECF No. 61 at 20 (citing *North Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016)).) However, by that same logic, the State Board could have reasonably understood that a motion to dismiss the intentional-discrimination claim in *Holmes* was unlikely to succeed (and, ultimately, did not succeed). Under these circumstances, it would be wrong to draw any negative inferences from the State Board choosing to conserve resources and stay its hand.

Proposed Intervenors attribute to their own vigorous advocacy. (*Id.* at 13; ECF No. 65-3 at 7.) However, the State Board also filed a written brief and participated in oral argument in opposition to the plaintiffs' motion for a preliminary injunction. (*See* ECF Nos. 61-14 at 10–14; 65 at 7.) Proposed Intervenors present no compelling evidence that their advocacy alone was responsible for the outcome; the panel's one-sentence explanation of its reasoning simply stated that "Plaintiffs have failed to demonstrate a likelihood of success on the merits." (ECF No. 65-3 at 7.) Furthermore, while a "primary objective" of the State Board in opposing the preliminary injunction was to "expediently obtain clear guidance on what law, if any, will need to be enforced," (ECF No. 61-14 at 14), there is simply no evidence that it abandoned the goal of "defend[ing] the constitutionality" of S.B. 824, (ECF No. 65 at 2). *See also Stuart*, 706 F.3d at 354 ("It was eminently reasonable for the Attorney General to believe that the interests of North Carolina's citizens would best be served by an expeditious final ruling . . . .").

Last, according to Proposed Intervenors, the State Board's approach to discovery in *Holmes* was sorely deficient. (ECF Nos. 61 at 21; 61-8 at 4.) While it does not indicate the extent of its participation, the State Board has stated that it "participated in extensive fact discovery." (ECF No. 65 at 7.) Given Proposed Intervenors' active role in the *Holmes* discovery, it was entirely reasonable for the State Board to focus its energies elsewhere. Further, there is no indication that the State Board will take a hands-off approach in the instant case. Rather, the parties recently submitted

their Joint Report pursuant to Federal Rule of Civil Procedure 26(f) and discovery appears to be proceeding normally. (ECF No. 77.)

In sum, Proposed Intervenors have failed to present evidence sufficient to warrant reconsideration of this Court's prior order. Having reviewed the State Board's chosen course of defense in *Holmes*, this Court cannot conclude that it was inadequate, unreasonable, or in any way relevant to how *this* case is likely to proceed. Accordingly, *Holmes* provides no sound basis on which to speculate—and it would be speculation only—that the State Board and Attorney General will abandon their duty to defend S.B. 824 in this case.

C. Permissive Intervention

The decision to grant or deny permissive intervention "lies within the sound discretion of the trial court," which is "in the best position to evaluate" the effect of intervention on the management of a case. *See Stuart*, 706 F.3d at 349–50; *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003).

In its June 3rd order denying the motion to intervene, this Court concluded that the addition of Proposed Intervenors as defendants would "hinder, rather than enhance, judicial economy" and "unnecessarily complicate and delay" the progression of this case. (*See* ECF No. 56 at 21 (citing *One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 399–400 (W.D. Wis. 2015)).) Far from relieving those concerns, Proposed Intervenors' actions—prematurely filing the instant motion which, as before, is based on the subjective belief that their litigation strategy is superior to that of

the State Board; deciding for themselves, without any basis in law or fact, that a "de facto denial" of this motion had occurred; initiating an appeal on that improper basis; and seeking the extraordinary remedy of mandamus—has further convinced this Court that intervention would only distract from the pressing issues in this case. Accordingly, the Court sees no basis to likewise revisit its denial of permissive intervention, and Proposed Intervenors' request for it to do so will be denied.

For the reasons outlined herein, the Court enters the following:

ORDER

IT IS THEREFORE ORDERED that the motion captioned "Renewed Motion to Intervene" by Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, (ECF No. 60), is DENIED WITH PREJUDICE.

IT IS FURTHER ORDERED that, as outlined in its June 3rd order, Proposed Intervenors are permitted to participate in this action by filing *amicus curiae* briefs.

This, the 7th day of November 2019.

/s/ Loretta C. Biggs
United States District Judge

APPENDIX G

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure Rule 24

Rule 24. Intervention

Currentness

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) 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.

(b) Permissive Intervention.

(1) ***In General.*** On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or

state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

N.C.G.S.A. § 1-72.2

§ 1-72.2. Standing of legislative officers

Effective: June 28, 2017
Currentness

(a) It is the public policy of the State of North Carolina that in any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina and the Governor constitutes the executive branch of the State of North Carolina, and when the State of North Carolina is named as a defendant in such cases, both the General Assembly and the Governor constitute the State of North Carolina. It is the public policy of the State of North Carolina that in any action in any federal court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina; the Governor constitutes the executive branch of the State of North Carolina; that, when the State of North Carolina is named as a defendant in such cases, both the General Assembly and the Governor constitute the State of North Carolina; and that a federal court presiding over any such action where the State of North Carolina is a

named party is requested to allow both the legislative branch and the executive branch of the State of North Carolina to participate in any such action as a party.

(b) The Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, by and through counsel of their choice, including private counsel, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution. Intervention pursuant to this section shall be effected upon the filing of a notice of intervention of right in the trial or appellate court in which the matter is pending regardless of the stage of the proceeding. Notwithstanding any other provision of law to the contrary, the participation of the Speaker of the House of Representatives and the President Pro Tempore of the Senate in any action, State or federal, as a party or otherwise, shall not constitute a waiver of legislative immunity or legislative privilege of any individual legislator or legislative officer or staff of the General Assembly.

N.C.G.S.A. § 114-2

§ 114-2. Duties

Effective: July 1, 2017
Currentness

Pursuant to Section 7(2) of Article III of the North Carolina Constitution, it shall be the duty of the Attorney General:

(1) To defend all actions in the appellate division in which the State shall be interested, or a party, and to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested. The duty to represent the State in criminal appeals shall not be delegated to any district attorney's office or any other entity.

(2) To represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State. Where the Attorney General represents a State department, agency, institution, commission, bureau, or other organized activity of the State which receives support in whole or in part from the State, the Attorney General shall act in conformance with Rule 1.2 of the Rules of Professional Conduct of the North Carolina State Bar.

(3) Repealed by Laws 1973, c. 702, § 2.

(4) To consult with and advise the prosecutors, when requested by them, in all matters pertaining to the duties of their office.

(5) To give, when required, his opinion upon all questions of law submitted to him by the General Assembly, or by either branch thereof, or by the Governor, Auditor, Treasurer, or any other State officer.

(6) To pay all moneys received for debts due or penalties to the State immediately after the receipt thereof into the treasury.

(7) To compare the warrants drawn on the State treasury with the laws under which they purport to be drawn.

(8) Subject to the provisions of G.S. 62-20:

a. To intervene, when he deems it to be advisable in the public interest, in proceedings before any courts, regulatory officers, agencies and bodies, both State and federal, in a representative capacity for and on behalf of the using and consuming public of this State. He shall also have the authority to institute and originate proceedings before such courts, officers, agencies or bodies and shall have authority to appear before agencies on behalf of the State and its agencies and citizens in all matters affecting the public interest.

b. Upon the institution of any proceeding before any State agency by application, petition or

> other pleading, formal or informal, the outcome of which will affect a substantial number of residents of North Carolina, such agency or agencies shall furnish the Attorney General with copies of all such applications, petitions and pleadings so filed, and, when the Attorney General deems it advisable in the public interest to intervene in such proceedings, he is authorized to file responsive pleadings and to appear before such agency either in a representative capacity in behalf of the using and consuming public of this State or in behalf of the State or any of its agencies.

(9) To notify the Speaker of the House of Representatives and the President Pro Tempore of the Senate whenever an action is filed in State or federal court that challenges the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law.

(10) Pursuant to G.S. 120-32.6, to represent upon request and otherwise abide by and defer to the final decision-making authority exercised by the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, in defending any State or federal action challenging the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution. If for any reason the Attorney General cannot perform the duty specified herein, the Attorney General may recuse personally

from such defense but shall appoint another attorney employed by the Department of Justice to act at the direction of the Speaker of the House of Representatives and the President Pro Tempore of the Senate.

N.C.G.S.A. § 120-32.6

§ 120-32.6. Certain employment authority

Effective: July 1, 2017
Currentness

(a) Use of Private Counsel.--G.S. 114-2.3, 143C-6-9(b), and 147-17 (a) through (c1) shall not apply to the General Assembly.

(b) General Assembly Acting on Behalf of the State of North Carolina in Certain Actions.-- Whenever the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action in any State or federal court, the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, shall be necessary parties and shall be deemed to be a client of the Attorney General for purposes of that action as a matter of law and pursuant to Section 7(2) of Article III of the North Carolina Constitution. In such cases, the General Assembly shall be deemed to be the State of North Carolina to the extent provided in G.S. 1-72.2(a) unless waived pursuant to this subsection. Additionally, in such cases, the General Assembly through the Speaker of the House of Representatives and President Pro Tempore of the Senate jointly shall possess final decision-making authority with respect to the defense of the challenged act of the General Assembly or provision of the North Carolina Constitution. In any such action, the General Assembly, through the Speaker of the House of Representatives and the

President Pro Tempore of the Senate, may waive such representation and decline to participate in the action by written notice to the Attorney General.

(c) General Assembly Counsel Shall Be Lead Counsel.--In those instances when the General Assembly employs counsel in addition to or other than the Attorney General, the Speaker of the House of Representatives and the President Pro Tempore of the Senate may jointly designate the counsel employed by the General Assembly as lead counsel in the defense of the challenged act of the General Assembly or provision of the North Carolina Constitution. The lead counsel so designated shall possess final decision-making authority with respect to the representation, counsel, or service for the General Assembly. Other counsel for the General Assembly shall, consistent with the Rules of Professional Conduct, cooperate with such designated lead counsel.

(d) The rights provided by this section shall be supplemental to those provided by any other provision of law.

(e) Notwithstanding any other provision of law, the participation of the Speaker of the House of Representatives and the President Pro Tempore of the Senate in any action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law, as a party or otherwise, shall not constitute a waiver of legislative immunity or legislative privilege of any individual legislator or legislative officer or staff of the General Assembly.