Case Brief: *N.C. State Conference of NAACP v. Berger*[*]

INTRODUCTION

North Carolina is no stranger to partisan fights and fraught relations between its legislative and executive branches. The 2016 election of Democratic Governor Roy Cooper only added fuel to the fire, prompting an ongoing battle with the North Carolina General Assembly, where Republicans have controlled both houses since 2010. Recently, in *North Carolina State Conference of NAACP v. Berger*,[1] the Fourth Circuit vacated the Middle District of North Carolina's order denying North Carolina General Assembly leaders a renewed motion to intervene in an action brought by the NAACP challenging Senate Bill 824 (S.B. 824),[2] a recently enacted voter ID law.[3]

Core to the majority's reasoning was Section 1-72.2 of the North Carolina General Statutes, a statute "express[ing] the public policy of North Carolina that the President Pro Tempore of the Senate and the Speaker of the House represent the State in defense of its statutes."[4] Writing for the majority, Judge Quattlebaum found that the district court did not sufficiently consider Section 1-72.2 in its analysis of whether to permit intervention.[5] The majority also found that the district court applied the incorrect legal standard in its Rule 24 analysis, and held that the legislators faced only a minimal burden in showing inadequacy of representation by the Attorney General.[6] Notably, the majority declined to follow the Seventh Circuit's recent decision in *Planned Parenthood of Wisconsin, Inc. v. Kaul*,[7] a virtually identical case in the context of an anti-abortion law.[8] In doing so, the majority disregarded the Fourth Circuit's own precedent and invited federal courts to become referees of partisan battles in which both parties ultimately share the same objective.

FACTS OF THE CASE

On December 6, 2018, the North Carolina General Assembly ratified S.B. 824, implementing a photographic identification requirement in order to vote

1. 970 F.3d 489, *reh'g en banc granted*, 825 F. App'x 122, 123 (4th Cir. 2020).
2. S.B. 824, 2017 Gen. Assemb. Reg. Sess. (N.C. 2018).
3. *N.C. State Conf. of NAACP*, 970 F.3d. at 495.
4. *Id.* at 502–03.
5. *Id.* at 503.
6. *Id.* at 507 (explaining the appropriate legal standard for determining satisfaction of Federal Rule of Civil Procedure 24).
7. 942 F.3d 793 (7th Cir. 2019).
8. *See id.* at 796.

in North Carolina elections.[9] Governor Cooper subsequently vetoed the bill.[10] Both the House of Representatives and the Senate voted to override the Governor's veto, and S.B. 824 was enacted on December 19, 2018.[11] The NAACP sued Governor Cooper and officials from the North Carolina State Board of Elections, alleging that S.B. 824 violated the Fourteenth and Fifteenth Amendments, as well as the Voting Rights Act.[12] Governor Cooper publicly voiced his opposition to S.B. 824, as did Democratic Attorney General Josh Stein, the state official tasked with defending the bill in court.[13]

With parties historically opposed to the bill now forced to defend it, President Pro Tempore Phil Berger and Speaker of the House Tim Moore (the "Proposed Intervenors"), both champions of S.B. 824, moved to intervene in the suit as of right under Rule 24.[14] Per Rule 24(a)(2), a party seeking to intervene as of right must show: "(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."[15]

The Proposed Intervenors argued that Section 1-72.2 supported their standing as agents of the State and thus supported their intervention to adequately represent the North Carolina General Assembly's interest in defending S.B. 824.[16] Under Section 1-72.2(a), "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."[17] Moreover, the statute requests that "a federal court presiding over any such action where the State of North Carolina is a named party . . . allow both the legislative branch and the executive branch . . .to participate in any such action as a party."[18] And finally, Section 1-72.2(b) provides that "[t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State . . . shall jointly have standing to intervene on behalf of the General Assembly . . . in any judicial proceeding challenging a North Carolina statute . . . ."[19]

The district court denied the initial motion to intervene, finding no evidence indicating the Attorney General abandoned his statutory duty to

9. *N.C. State Conf. of NAACP*, 970 F.3d at 495.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 502 (quoting Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilders' Ass'n, 646 F.2d 117, 120 (4th Cir. 1981)).

16. *Id.* at 496.

17. N.C. GEN. STAT. § 1-72.2(a) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

18. *Id.*

19. *Id.* § 1-72.2(b) (LEXIS).

defend the law.[20] Indeed, the Attorney General was—and still is—actively defending the law in the Fourth Circuit.[21] As such, the district court held that the Proposed Intervenors failed to make the requisite "strong showing of inadequacy" needed to overcome the presumption of adequate representation by the Attorney General.[22] The denial was without prejudice, leaving open the possibility of a renewed motion if the Proposed Intervenors showed the Attorney General no longer intended to defend S.B. 824 (providing the requirements for intervention were otherwise satisfied).[23]

On July 19, 2019, the Proposed Intervenors filed a renewed motion to intervene, arguing that the Attorney General's conduct made it clear that he would not robustly defend S.B. 824.[24] The district court denied the renewed motion with prejudice, finding its prior analysis undisturbed—no evidence showed the Attorney General would not fully defend S.B. 824.[25] On appeal, the Fourth Circuit majority agreed with the Proposed Intervenors' analysis and reversed the district court's denial of the motion to intervene.[26] The majority remanded the case and tasked the district court with repeating its analysis to thoroughly consider N.C. Gen. Stat. Section 1-72.2, and to employ "minimal burden" as the proper legal standard to satisfy the adequacy of representation requirement of Rule 24(a)(2).[27]

LEGAL ISSUES AND OUTCOMES

In reaching its decision, the majority first addressed the threshold issues of whether appellate jurisdiction existed in the first place and whether the Proposed Intervenors had standing.[28] The NAACP argued that because the Proposed Intervenors failed to appeal the denial of their first motion to intervene, the Fourth Circuit was divested of appellate jurisdiction.[29] However, the majority disagreed, finding that the first order "lacked the conclusiveness needed to trigger immediate review," for it was without prejudice and invited a renewed motion upon changed circumstances.[30] By contrast, the second order was an outright denial with prejudice.[31] In her dissent, Judge Harris expressed skepticism with the majority's reasoning, viewing the first order by the district

20. *N.C. State Conf. of NAACP*, 970 F.3d at 496.
21. *Id.* at 523 (Harris, J., dissenting).
22. *Id.* at 496 (majority opinion).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 509.
27. *Id.* at 507.
28. *See id.* at 497–500 (discussing the issues of jurisdiction and standing).
29. *Id.* at 497.
30. *Id.* at 497–98.
31. *Id.* at 498.

court as "signal[ing] that it was finished," given that the core issues were conclusively resolved and not revisited in the second order.[32] Thus, Judge Harris suspected the court lacked jurisdiction.[33]

As for standing, the majority found N.C. Gen. Stat. Section 1-72.2 "[c]ritical" to the inquiry, while also acknowledging that a state statute cannot definitively establish Article III standing.[34] While there is no dispute as to whether Section 1-72.2 outlines North Carolina's preference that both the executive and legislative branches participate in federal lawsuits where the State is a named party, Judge Harris's dissent expressed doubt regarding whether the statute designates the Proposed Intervenors "as agents of the State" in effect.[35] Judge Harris points to a key distinction: N.C. Gen. Stat. Section 1-72.2(b) purports to provide "standing to intervene *on behalf of the General Assembly*," as opposed to the State itself.[36] Accordingly, the dissent reasoned that—regardless of the State's preference—the Proposed Intervenors cannot use the State's "undisputed interest in defending the validity and enforcement of its laws" to authorize the General Assembly's intervention *on the State's behalf*.[37]

Ultimately, though, the decision hinged on the majority's Rule 24(a)(2) analysis. For the interest requirement, the majority again drew on Section 1-72.2 and explained that the Rule 24(a)(2) analysis "should not disregard the statute of a separate sovereign that expresses the state's and the Legislature's interest and role in the litigation."[38] Contrary to the district court's reasoning, the majority held that the General Assembly's role and interest in such litigation is not confined to situations where the Attorney General has declined to defend the challenged legislation.[39] And because the district court's analysis as to the second requirement—whether disposition of the case would practically impair the Proposed Intervenors' interests—relied on the finding that the Proposed Intervenors lacked a significantly protectable interest, the majority remanded for further consideration on this issue as well.[40]

The outcome here turned on whether the Proposed Intervenors could satisfy the "adequacy" element of Rule 24(a)(2) by showing that no existing party to the litigation adequately represented the interest they would seek to

32. *Id.* at 522 (Harris, J., dissenting) (quoting Bing v. Brivo Sys., LLC, 959 F.3d 605, 612 (4th Cir. 2020)).

33. *Id.*

34. *Id.* at 499 (majority opinion).

35. *Id.* at 520 (Harris, J., dissenting).

36. *Id.* (emphasis added) (quoting N.C. GEN. STAT. § 1-72.2(b) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.)).

37. *Id.*

38. *Id.* at 503 (majority opinion).

39. *Id.*

40. *Id.* at 504.

protect. The majority agreed that under *Virginia v. Westinghouse Electric Corp.*,[41] a presumption of adequacy applies when the intervening party shares the same objective as a party already present in the suit and that the presumption must be overcome by showing either adversity of interest, collusion, or nonfeasance.[42] Nevertheless, the majority argued that the district court improperly required a "strong showing of inadequacy" in overcoming the presumption.[43] In the majority's view, *Trbovich v. United Mine Workers of America*[44] requires that a "minimal burden" standard apply;[45] the heightened burden the Fourth Circuit applied in *Stuart v. Huff*[46] did not pertain to the facts here.[47] In *Stuart*, a private party sought to intervene in a challenge to state abortion regulations, and the court held that the presumption of adequacy afforded to the North Carolina Attorney General's representation could only be rebutted by a *strong* showing of inadequacy.[48] The majority took issue with importing this standard from *Stuart*, explaining that the intervenor in *Stuart* was a private party, not a state legislative entity.[49]

The dissent argued that, by focusing on this distinction, the majority missed the "broader lesson that *Stuart* derived from *Westinghouse*," that "[a] presumption of adequacy arises *whenever* a proposed intervenor shares the same objective as an existing party, regardless of that existing party's identity."[50] Noting the lack of precedent supporting the majority's position, the dissent turned to the Seventh Circuit's decision in *Kaul*.[51] In *Kaul*, the Seventh Circuit upheld the denial of a motion to intervene by the Wisconsin Legislature in a suit by Planned Parenthood challenging a restrictive abortion law.[52] A familiar situation followed: the Wisconsin State Legislature sought to leverage a recently enacted statute purporting to give the legislature power to intervene in federal lawsuits challenging the constitutionality of Wisconsin statutes.[53] That same statute designated the leaders as agents of the State of Wisconsin.[54] The

41. 542 F.2d 214 (4th Cir. 1976).

42. *N.C. State Conf. of NAACP*, 970 F.3d at 505; *see also Westinghouse Elec. Corp.*, 542 F.2d at 215 (denying intervention by the Commonwealth of Virginia because its interests were adequately represented by plaintiffs involved).

43. *N.C. State Conf. of NAACP*, 970 F.3d at 505.

44. 404 U.S. 528 (1972)f.

45. *N.C. State Conf. of NAACP*, 970 F.3d at 505; *see also Trbovich*, 404 U.S. at 538 (finding that the union member seeking to intervene in a suit brought by the Secretary of Labor faced a minimal burden in establishing inadequacy of representation).

46. 706 F.3d 345 (4th Cir. 2013).

47. *N.C. State Conf. of NAACP*, 970 F.3d at 506.

48. *Id.* at 512–13 (Harris, J., dissenting).

49. *Id.*

50. *Id.* at 513 (citing *Stuart*, 706 F.3d at 351–54).

51. 942 F.3d 793 (7th Cir. 2019); *see N.C. State Conf. of NAACP*, 970 F.3d at 511.

52. *Kaul*, 942 F.3d at 797.

53. *Id.* at 796.

54. *See id.* at 798.

Republican-controlled legislature argued that Attorney General Kaul—a Democrat—would not defend the statutes vigorously and that lack of vigorous defense, in conjunction with the statute, should allow their intervention.[55]

The Seventh Circuit disagreed, concentrating on the adequacy requirement of Rule 24(a)(2).[56] Just like *Berger*, the Wisconsin Attorney General was actively defending the abortion law in federal court and, thus, representing the same interest advanced by the legislature.[57] According to the Seventh Circuit, finding that the Attorney General was inadequately representing the State's interest, in contravention of his statutory duty to do so, would be "extraordinary."[58] The court embraced the idea that "[a] *substantial* presumption would govern, not the default rule applied in *Trbovich*."[59] Even more importantly, the Seventh Circuit noted that neither "political and policy differences" nor "disagreements about litigation strategy" could overcome this presumption.[60]

Such reasoning comports with the Fourth Circuit's own precedent in *Stuart*. Namely, that regardless of the exact strength of the presumption of adequacy, "it cannot be rebutted by a showing of 'stronger, more specific interests' on the part of the [Proposed Intervenors], or by a 'disagreement over how to approach the conduct of the litigation.'"[61]

POTENTIAL IMPACT

Who speaks for the State of North Carolina in court? Until recently, the answer was the Attorney General, whose job as the state's top legal officer is to both enforce the law when it is violated and defend the law when it is challenged.[62] In this respect, the Attorney General's work is nonpartisan. By lowering the bar for intervention by a state legislature, a majority of the Fourth Circuit invited future meddling in federal court litigation on the basis of furthering a party's political agenda. This raises broader implications for separation of powers in North Carolina, as the General Assembly seeks to expand its power and undermine Attorney General Stein and Governor Cooper, who happen to be of a different political party.

55. *See id.* at 799.

56. *See id.* at 801.

57. *Id.*

58. *Id.*

59. N.C. State Conf. of NAACP v. Berger, 970 F.3d 489, 512 (Harris, J., dissenting), *reh'g en banc granted*, 825 F. App'x 122, 123 (4th Cir. 2020).

59. S.B. 824, 2017 Gen. Assemb. Reg. Sess. (N.C. 2018).

60. *Kaul*, 942 F.3d at 810–11 (Sykes, J., concurring).

61. *N.C. State Conf. of NAACP*, 970 F.3d at 513 (Harris, J., dissenting) (quoting Stuart v. Huff, 706 F.3d 345, 353 (4th Cir. 2013)).

62. *See* N.C. GEN. STAT. § 114-2(1) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

While the majority did not plainly green light intervention by the General Assembly in this particular case, *North Carolina State Conference of NAACP* leaves open the door for the infusion of *even more* political friction into legal challenges concerning already politically contentious areas of the law. The Fourth Circuit's failure to embrace a more rigorous burden in overcoming the presumption of adequacy followed by the Seventh Circuit in *Kaul*—and demanded by the Fourth Circuit's own precedent in *Stuart*—invites the North Carolina General Assembly to continue pulling district courts into partisan "quibbles" in future, heavily politicized case such as this one. As such, the door is now wide open to "'intractable procedural mess[es]' that will hamstring our district courts in their efforts to responsibly manage the proceedings before them."[63]

Since this Case Brief was written, the Fourth Circuit reheard *NAACP v. Berger* en banc.[64] A majority of judges thus believed that the case presented a question of exception importance or conflicted with Supreme Court or Fourth Circuit precedent, warranting consideration by the full court.[65]

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63. *N.C. State Conf. of NAACP*, 970 F.3d at 512–13 (Harris, J., dissenting) (quoting *Kaul*, 942 F.3d at 801).

64. N.C. State Conf. of NAACP v. Berger, 825 F. App'x 122, 123 (4th Cir. 2020).

65. *See* Fed. R. App. P. 35.

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