No. 16-833

In the
Supreme Court of the United States

STATE OF NORTH CAROLINA, ET AL.,

Petitioners,

v.

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, ET AL.,

Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITIONERS' MOTION TO DISMISS UNDER RULE 46.2

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INTRODUCTION

All of the petitioners in this case have moved to withdraw the pending petition. Thus, under normal operation of this Court's rules, the petition should be dismissed. *See* S. Ct. R. 46.2(a).

Seeking to derail this ministerial process, the North Carolina General Assembly has fired a barrage of state-law arguments, seeking to create confusion about who controls state-related litigation in North Carolina. The very existence of these state-law issues confirms that the petition here should be dismissed. A state-law dispute over which branch of North Carolina government controls state-related litigation does not belong in this Court.

But even if this Court were to address the state-law arguments that the General Assembly is trying to raise here, those arguments lack merit. The statute that is the linchpin of the General Assembly's arguments—Section 120-32.6(b) of the North Carolina General Statutes—only allows "the General Assembly [to] hire[ ] outside counsel *to represent the General Assembly*." N.C. Gen. Stat. § 120-32.6(b) (emphasis added). It does not empower the General Assembly to step into the shoes of the Attorney General and control litigation on behalf of the State itself. In addition, Section 120-32.6(b) applies only to lawsuits in which the General Assembly is one of the "named parties." During the three and a half years of this litigation, the General Assembly has never been a party to it. Indeed, before this late juncture, it has never sought to make itself a named party.

Separately, the General Assembly's attempt to inject state-law-based professional responsibility issues into this case is as unpersuasive as it is

inappropriate. The General Assembly is not a party to this case, so it is not a client of the Attorney General here. The Attorney General is therefore under no professional or legal obligation to abide by the General Assembly's preferences on the conduct of this litigation. Nor has any conflict of interest arisen from Attorney General Stein's testimony as a trial witness when he was a State Senator. The Attorney General's testimony, which mainly involved matters of public record, did not give him a "personal interest" that limits his ability to fulfill his duty to represent the State. In addition, the bar on lawyers' acting as witnesses and advocates at trial does not extend to a lawyer's advocacy on appeal. In sum, the General Assembly's ethical arguments are not only irrelevant, but meritless.

For these reasons, the Attorney General of North Carolina, representing all Petitioners in this case as provided by law, respectfully requests that the Court withdraw the pending petition and dismiss this case.

STATEMENT

In 2013, the North Carolina General Assembly passed a series of measures that curtailed North Carolinians' ability to exercise their right to vote. These measures, known as Session Law 2013-381,[1] eliminated same-day voter registration, reduced the State's early-voting period, barred qualified voters from casting provisional ballots within their designated county, required in-person North Carolina voters to present certain forms of photo identification, and ended pre-registration of 16-year-olds who would reach qualified voting age before the next

[1] Some writers call this enactment House Bill 589, after the underlying bill in the North Carolina House of Representatives.

election. *See* Act of Aug. 12, 2013, ch. 381, sec. 1.1, § 163-166.13, sec. 12.1, § 163-82.4(d), sec. 16, § 163-82.6A, sec. 25, § 163-227.2, sec. 49, § 163-55, 2013 N.C. Sess. Laws 1505, 1506-07, 1531-32, 1535-37, 1540-42, 1554-55.

Within weeks of this enactment, the North Carolina State Conference of the NAACP and several individual North Carolina citizens filed suit, claiming that the law violated Section 2 of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment. *N.C. State Conf. of the NAACP v. McCrory*, No. 1:13-CV-658, ECF No. 1 (M.D.N.C. Aug. 12, 2013). Plaintiffs named as defendants then-Governor Patrick McCrory, who signed the bill into law, and the individual members and executive director of the North Carolina State Board of Elections in their official capacities. *Id.* ¶¶ 29-35. Shortly thereafter, the United States filed a separate lawsuit that challenged Session Law 2013-381 on substantially identical grounds. That lawsuit named the State of North Carolina and the Board of Elections as defendants. *United States v. North Carolina*, No. 1:13-CV-861, ECF No. 1 (M.D.N.C. Sept. 30, 2013). The U.S. District Court for the Middle District of North Carolina consolidated the two lawsuits.

The consolidated lawsuit proceeded through two years of motion practice and discovery, a two-week trial in which then-State Senator (now Attorney General) Josh Stein testified as a third-party witness on the circumstances surrounding the passage of Session Law 2013-381, and an appeal to the U.S. Court of Appeals for the Fourth Circuit.

During discovery, Plaintiffs served subpoenas on several State legislators, including Senator Phil Berger and Representative Tim Moore. The legislators moved to quash the subpoenas. At no point did Senator Berger, Representative Moore, any other legislator, or the General Assembly itself seek to intervene as a defendant.

At the outset of the case, the General Assembly purported to retain outside counsel to represent the interests of the State defendants alongside then-Attorney General Roy Cooper. When Governor Cooper assumed his new office in 2017, he determined that outside counsel had not been "authorized by the Governor to represent the State," as North Carolina law requires. Objection to Motion to Dismiss Br. ("Obj."), Ex. D; *see* N.C. Gen. Stat. § 147-17(a). Governor Cooper therefore relieved outside counsel and directed the Attorney General to assume exclusive representation of the State defendants in this case.

On February 21, 2017, the Attorney General, acting on behalf of the State and the Governor, moved to dismiss the pending petition for certiorari in this Court.

The following day, the Board of Elections informed the Attorney General that it had "voted unanimously to communicate that it has not taken, and does not take, a position" in this case. The Board did not vote affirmatively to direct the Attorney General to withdraw the petition for certiorari on its behalf. Obj., Ex. F at 1. Even so, the Board stated that "it does not believe the agency is presently represented by private counsel in this matter, nor has the agency acted to retain private counsel in the past." Rule 12.6 Notice of Non-Interest, Ex. A.

Upon learning of the Board's actions, the Attorney General promptly appeared in this Court, through counsel of record, on behalf of the Board of Elections, and notified this Court, pursuant to Rule 12.6, of the Board defendants' expressed non-interest in the outcome of the case. *See* Rule 12.6 Notice of Non-Interest at 1-2. Because there was no longer any petitioner with an interest in pursuing the pending petition, the Attorney General moved on behalf of all Petitioners to withdraw the petition and dismiss the case. *See* Supplemental Motion to Dismiss; *see also* S. Ct. R. 46.2. Counsel for the private Respondents notified the Court that they did not oppose dismissal.

Outside counsel for the General Assembly, purporting to act on behalf of the State and the Board of Elections, filed an objection to the dismissal. In addition, through this same outside counsel, Tim Moore, Speaker of the North Carolina House of Representatives, and Phil Berger, President Pro Tempore of the North Carolina Senate, have filed a "conditional motion" to intervene on behalf of the North Carolina General Assembly.

ARGUMENT

I. THE GENERAL ASSEMBLY DOES NOT REPRESENT THE STATE OR THE BOARD OF ELECTIONS IN THIS CASE

The General Assembly's argument that it can hire outside counsel for the State of North Carolina and the State Board of Elections rests on a misreading of Section 120-32.6 of the North Carolina General Statutes. That statute provides only that "the General Assembly [may] hire[ ] outside counsel *to represent the General Assembly*." N.C. Gen. Stat. § 120-32.6(b). In contrast, the General

Assembly's claim that it can hire outside counsel to act on behalf of *the State itself* lacks any support in North Carolina law.

A. The General Assembly Is Not Authorized to Engage Outside Counsel On Behalf of the State

Citing Section 120-32.6(b) as its only authority, the General Assembly argues that "North Carolina law authorizes the North Carolina General Assembly to act on the State's behalf and hire outside counsel where 'the validity or constitutionality of an act of the General Assembly' is challenged." Obj. at 3 (quoting N.C. Gen. Stat. § 120-32.6(b)). This argument misreads Section 120-32.6(b). By quoting the statute selectively, the General Assembly has overlooked crucial limitations in the statute.

In fact, Section 120-32.6(b) allows the General Assembly to engage outside counsel to represent only *the General Assembly*'s interests—and even then, only when the General Assembly is a named party in litigation. Section 120-32.6(b) states, in full:

> 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 court, if the General Assembly hires outside counsel *to represent the General Assembly* in connection with that action, the General Assembly shall also be deemed to be a client of the Attorney General for purposes of that action as a matter of law. Nothing herein shall (i) impair or interfere with the rights of *other named parties* to appear in and to be represented by the Attorney General or outside counsel as authorized by law or (ii) impair *the right of the Governor to employ counsel on behalf of the State* pursuant to G.S. 147-17.

N.C. Gen. Stat. § 120-32.6(b) (emphasis added). Three aspects of this text show that the statute does not authorize the General Assembly to represent the State of North Carolina in this case.

First, the statute explicitly limits its reach to situations in which "the General Assembly hires outside counsel to represent the General Assembly." The specificity of that wording contradicts the General Assembly's claim here that it can represent *the State itself*. *See Milwaukee v. Illinois*, 451 U.S. 304, 329 n.22 (1981) ("We prefer to read the statute as written.").

Under the North Carolina Constitution, the General Assembly is just one distinct branch of the State's government. N.C. Const. art. II, § 1 ("The legislative power of the State shall be vested in the General Assembly . . . ."). Given the obvious structural difference between a part and the whole, if Section 120-32.6(b) had been intended to allow the General Assembly to hire and direct outside counsel for the State itself, the statute would say so.[2] It does not.

What is more, the General Assembly's reading of Section 120-32.6(b) would require the Court to ascribe two different meanings to the term "General Assembly" within the same sentence: referring to the State's legislative branch in the first two uses, and to the State as a whole in the third. This Court has "forcefully rejected" as "dangerous" the proposition that "the same word, *in the same statutory provision*, can have different meanings." *United States v. Santos*, 553 U.S. 507, 522 (2008).

Second, the fact that Section 120-32.6(b) allows the General Assembly to hire counsel to represent itself alone, and not the State, becomes even clearer when one

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[2] The movants do not address here whether a statute purporting to authorize the General Assembly to hire and direct counsel for the State and its agencies would pass muster under the North Carolina Constitution. *See* N.C. Const. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.").

notes the Section's closing disclaimer that "[n]othing herein shall . . . impair *the right of the Governor* to employ counsel *on behalf of the State*[.]" N.C. Gen. Stat. § 120-32.6(b) (emphasis added); *see also* N.C. Gen. Stat. § 147-17(a) (giving the Governor this right). This language confirms that the drafters of Section 120-32.6(b) knew how to specify a state actor with the right to hire outside counsel to represent "the State." *See Milwaukee*, 451 U.S. at 329 n.22 ("Congress knows how to say 'nothing in this Act' when it means to.") (citing provision with that language).

In addition, any argument that the words "the General Assembly" mean "the State" would lead to an absurd result: authorizing *both* the Governor and the General Assembly to appoint counsel to represent the entire State. This Court does not lightly assume that a statutory text produces results of that kind. *See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.").

Finally, the statute also makes clear that it authorizes the General Assembly to hire outside counsel only when the General Assembly is a named party to a lawsuit. Section 120-32.6(b) provides that "[n]othing herein shall . . . impair or interfere with the rights of *other named parties* to appear in and to be represented by the Attorney General." N.C. Gen. Stat. § 120-32.6(b) (emphasis added). Under this Court's statutory-construction teachings, the use of "other" in this section means that the section applies only when the General Assembly, too, is a named

party in litigation. *See, e.g.*, *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (construing the statutory phrase "other legal process" "restrictively, for under the established interpretative canons of *noscitur a sociis* and *ejusdem generis,* 'where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words'") (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001)).[3]

For these reasons, the statute that the General Assembly relies on here contradicts any claim that the General Assembly has authority to hire outside counsel for the State of North Carolina, as opposed to the General Assembly itself.[4]

B. The General Assembly Is Not a Party to This Case

The General Assembly is not, and has never purported to be, a named party in this case.

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[3] Subsection (c) of section 120-32.6 likewise makes clear that the House Speaker and the Senate President Pro Tempore may designate lead counsel for the General Assembly alone, not for the State or its agencies. It states:

> 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 *for the General Assembly*.

N.C. Gen. Stat. § 120-32.6(c) (emphasis added).

[4] In contrast to the General Assembly, the Governor of North Carolina does have statutory authority to "employ special counsel as he may deem proper or necessary to represent the interest of the State." N.C. Gen. Stat. § 147-17(a). Although former Governor McCrory might have applied that authority here—or might have acquiesced in the arrogation of that authority by others—new Governor Cooper has explicitly rescinded those actions. *See* Obj., Ex. D.

The absence of the General Assembly from this lawsuit is no accident. From the outset of the case, the General Assembly and its leaders have been well aware of it. As just one example, Speaker Moore and President Pro Tempore Berger were served with subpoenas that demanded that they produce documents relevant to the case. They responded by trying to stay *out* of the case: they moved to quash the subpoenas. *N.C. State Conf. of the NAACP v. McCrory*, No:1:13-CV-658, ECF No. 56 (M.D.N.C. Jan. 20, 2016).

Nor has the General Assembly (until its recent Conditional Motion to this Court) ever moved to intervene in this lawsuit—not at any point during three-and-a-half years of litigation, including a full trial on the merits. The lack of such a motion, again, is no accident. In several other recent cases, the General Assembly *has* sought to intervene to defend its enactments. *See, e.g.*, *ACLU of N.C. v. Tata*, No. 13-1030, ECF No. 43 (4th Cir. May 12, 2014) (granting motion by Speaker of the House and Senate President Pro Tempore to intervene on behalf of General Assembly to defend a North Carolina law on specialty license plates); *Raleigh Wake Citizens Ass'n v. Wake County Bd. of Elections*, No. 16-1270, ECF No. 64 (4th Cir. Aug. 3, 2016) (denying similar motion in a racial-gerrymandering challenge to redistricting litigation). Indeed, in one recent case, the General Assembly moved to intervene as a party a mere eight days after the lawsuit was filed. *See United States v. North Carolina*, No. 1:16-CV-425, ECF No. 8 (M.D.N.C. May 17, 2016).

The fact that the General Assembly moves to intervene when it wants to litigate as a party—and that it has refrained from doing so until the end of this

case—confirms that Section 120-32.6 does not apply here.

C. The Attorney General Represents the Board of Elections and Its Members

Finally, the General Assembly's claim to represent the Board of Elections and its officers fares no better than its claim to represent the State itself. This claim, too, rests solely on Section 120-32.6. As shown above, that statute allows the General Assembly to appoint outside counsel only for itself, and then only when it is a named party to a lawsuit. Representing the Board of Elections and its officers, in a case in which the General Assembly is a nonparty, fails these tests.

Instead, North Carolina law makes clear that the Attorney General generally serves as "counsel for all departments, officers, agencies, institutions, commissions, bureaus or other organized activities of the State." N.C. Gen. Stat. § 147-17(b). Here, the record does not show any exception to this general rule. On February 22, 2017, the Board of Elections stated that "it does not believe the agency is presently represented by private counsel in this matter, nor has the agency acted to retain private counsel in the past." Rule 12.6 Notice of Non-Interest, Ex. A. As a result, under North Carolina law, the Board and its officers are represented by the Attorney General, not by private counsel.

II. THE GENERAL ASSEMBLY'S STATE-LAW ETHICS ARGUMENTS ARE MERITLESS

The General Assembly also claims that the Attorney General of North Carolina cannot ethically fulfill the duties of his office in this case. As shown below, these ethics claims lack merit. They also err by trying to turn this Court into a forum for unseemly political attacks.

A. The Attorney General and the General Assembly Do Not Have an Attorney-Client Relationship in This Case

The first of the General Assembly's ethics claims—that it is "the Attorney General's client" in this case—rests entirely on the General Assembly's erroneous interpretation of Section 120-32.6(b). Obj. at 10-11. As section I(A) above shows, the claim that the General Assembly can "hire[] private counsel to direct the defense of challenged State laws," *id.*, overlooks the text of Section 120-32.6(b).

Moreover, the General Assembly is not a named party in this case, so in no sense is it the Attorney General's "client" under Section 120-32.6(b). N.C. R. Prof. Conduct 1.15-1(b) ("'Client' denotes a person, firm, or other entity for whom a lawyer performs, or is engaged to perform, any legal services."). Instead, the Attorney General's clients are the actual defendants: the Governor, the Board of Elections and its officers, and the State of North Carolina. Accordingly, the Attorney General is under no professional obligation to abide by the General Assembly's preferences on the conduct of this litigation. *See* N.C. R. Prof Conduct 1.2(a) ("a lawyer shall abide by a *client's* decisions concerning the objectives of representation") (emphasis added).

B. The Attorney General Does Not Have a Conflict of Interest

The Attorney General's representation of the State and the Board does not pose a conflict of interest in the circumstances of this case. Contrary to the General Assembly's arguments to this Court, the North Carolina Rules of Professional Conduct do not bar the Attorney General from representing the State in this Court merely because he testified as a third-party fact witness in the trial below.

When Attorney General Stein was a State Senator, he testified at the trial of this case on the circumstances surrounding the passage of Session Law 2013-381. *See* Obj., Ex. G. His testimony mainly covered matters of public record. *See, e.g.*, Obj., Ex. G at 179: 5-6 ("Court: You can limit your comments to what occurred on the floor of the Senate. Witness: I can do that."); *id.* at 189: 17-19 (same); *id.* at 204: 20-23 ("Q: . . . the legislative history of the bill is on the General Assembly's website and would speak for itself? A: Absolutely, it is, yes; and if I'm wrong, I am happy to be corrected.").

This type of testimony does not create a "personal interest" that "materially limit[s]" the Attorney General's ability to represent the State in this case. N.C. R. Prof. Conduct 1.7(a). Instead, "personal interests" of the sort targeted by Rule 1.7(a) arise when, for example, an attorney personally has a professional or pecuniary interest in a case. *Id.* r. 1.7, cmt. 10 (a conflict may arise when the "probity of a lawyer's own conduct in a transaction is in serious question" or a lawyer has "an undisclosed financial interest" in the outcome of a case); *see In re Pace*, No. 15-31016, 2015 WL 6728007, at *2 (Bankr. W.D.N.C. Nov. 2, 2015) (noting conflict might arise where an attorney takes a lien on his client's property). Then-Senator Stein's trial testimony did not create a "personal interest" of this sort.

Nor did then-Senator Stein's trial testimony amount to "personal[ ] and substantial[ ]" participation "as a public officer" within the meaning of N.C. R. Prof. Conduct 1.11(a)(2). This rule does not apply on its face because then-Senator Stein was not acting in his official capacity "as a public officer" when he testified, but as a

third-party fact witness. Moreover, the rule "restate[s] the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client," and is "designed to prevent a lawyer from exploiting public office for the advantage of another client." *Id.* r. 1.11, cmt. 1, 3. However, since then-Senator Stein appeared as a fact witness, not a lawyer, in the trial below, he has no "former government or private client" in this situation. Nor is he "exploiting" either his previous position as state Senator or his current position as Attorney General in any way. Accordingly, this case falls far outside the ambit of Rule 1.11(a)(2).

Finally, the lawyer-as-witness rule that the General Assembly cites bars a lawyer only from serving as *trial counsel*. *Id.* r. 3.7(a) (stating that a lawyer generally may not generally act "as advocate *at a trial* in which the lawyer is likely to be a necessary witness") (emphasis added). This rule does not bar a lawyer from acting as an advocate on appeal, even if the lawyer testified in the underlying trial. In *United States v. Berger*, for example, the U.S. Court of Appeals for the Tenth Circuit held, under an identically worded rule, that "it was appropriate for attorneys who had testified as witnesses in the district court to argue the case on appeal." 251 F.3d 894, 906 (10th Cir. 2001).

This result makes perfect sense when one remembers that the purpose of Rule 3.7 is to prevent "the trier of fact [from] be[ing] confused or misled" because a lawyer has played two different roles in the same trial. N.C. R. Prof. Conduct 3.7 cmt. 2. Here, the Attorney General has not acted as a witness before this Court, so

it would be impossible for his trial testimony to confuse this tribunal. Nor is there any chance that any advocacy by the Attorney General in this Court could reach back eighteen months and confuse the trier of fact in this case. This point becomes even clearer when one recalls that this case was tried to the bench.

C. The Attorney General Has Not Violated Any Obligation to the Board

Finally, the General Assembly implies that the Attorney General, by moving to dismiss the petition, acted contrary to the wishes of the Board of Elections. Even in the unlikely event that the General Assembly had standing to make this argument, the argument would fail.

The Board has explicitly informed the Attorney General that it "does not take a position" in this case. Rule 12.6 Notice of Non-Interest, Ex. A. After studying this letter and consulting with his client, the Attorney General is satisfied that dismissal of the petition for certiorari is the proper means to accomplish the Board's stated intent not to "take a position" in this case.

The Board's letter also clarifies that private counsel have not represented the Board or its officers in this lawsuit at any time. *Id.* As a result, private counsel are in no position to make statements about those clients' directions to the Attorney General, who is their actual lawyer under North Carolina law.

CONCLUSION

The Attorney General of North Carolina, on behalf of all Petitioners in this case, respectfully requests that the Court dismiss the case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Grayson G. Kelley, a member of the Supreme Court Bar, hereby certify that a copy of the attached Reply Brief in Support of Petitioners' Motion to Dismiss under Rule 46.2 was served on counsel of record for Respondents:

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I further certify that service was made on counsel for objectors

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March 9, 2017

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