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

CONDITIONAL MOTION TO ADD THE NORTH CAROLINA GENERAL ASSEMBLY AS AN ADDITIONAL PETITIONER

THOMAS A. FARR
PHILIP J. STRACH
MICHAEL D. MCKNIGHT
OGLETREE DEAKINS NASH SMOAK & STEWART, PC
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609

S. KYLE DUNCAN
Counsel of Record
GENE C. SCHAERR
STEPHEN S. SCHWARTZ
SCHAERR|DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
Kduncan@Schaerr-Duncan.com

Counsel for Petitioner State of North Carolina and for the Speaker of the North Carolina House of Representatives, the President Pro Tempore of the North Carolina Senate, and the North Carolina General Assembly

Pursuant to Supreme Court Rule 21, the Speaker of the House of Representatives and the President Pro Tempore of the Senate hereby conditionally move on behalf of the North Carolina General Assembly that the General Assembly be added as an additional Petitioner in this matter. This motion is intended to ensure that North Carolina's 2013 election reform laws—including a photo ID requirement—receive their due defense in this Court, notwithstanding North Carolina Attorney General Josh Stein's unauthorized (and ethically questionable) effort to withdraw the State's pending petition for certiorari. See Feb. 27, 2017 State's Obj. to Mot. To Withdraw (No. 16-833) ("State's Obj.") (explaining that General Stein lacks authority under North Carolina law and the canons of professional ethics to override the General Assembly's designated lead counsel by withdrawing the petition).

In addition to the General Assembly's statutory authority to retain outside counsel to direct litigation on the State's behalf, see N.C. Gen. Stat. § 120-32.6, the Speaker of the House and the President Pro Tempore of the Senate have authority to jointly intervene "on behalf of the General Assembly … in any judicial proceeding challenging a North Carolina statute[.]" N.C. Gen. Stat. § 1-72.2. Both of those powers are available to the Assembly in this case, where Respondents have challenged a number of North Carolina voting reforms under the Voting Rights Act. To date, the General Assembly has defended the State's laws through the first method, retaining private counsel who represented the State for years up to and including the pending petition for certiorari. See State's Obj. at 4-6. But General

Stein's motion to withdraw the petition challenges at the eleventh hour the General Assembly's authority to represent the State's interests pursuant to that statutory authority. General Stein's motion should be denied for the reasons set forth in the State's Objection, which is simultaneously filed with this Motion. *Id.* Alternatively, the General Assembly should be added as a petitioner, under its own statutory authority to defend North Carolina law.

This Court unquestionably has authority to add additional parties to proceedings before it "'on such terms as are just.'" *Mullaney* v. *Anderson*, 342 U.S. 415, 417 (1952) (quoting Fed. R. Civ. P. 21). And this Court has used that authority where adding entities who participated in lower court proceedings, albeit not as parties, will ensure a live dispute on certiorari review. See, *e.g.*, STEPHEN M. SHAPIRO, KENNETH S. GELLER, ET AL., SUPREME COURT PRACTICE at 867 (10th ed. 2013) (discussing motion "to add additional petitioners or respondents").

In *Anderson*, for example, the standing of the respondent—a labor union, which had been plaintiff below—was questioned for the first time in this Court, and the respondent sought leave to cure any defect by adding two of its members as parties. 342 U.S. at 416–17. This Court granted the motion, explaining that doing so "merely puts the principal, the real party in interest, in the position of his avowed agent." *Id.* at 417. The Court further explained that adding the new parties (1) "can in no wise embarrass the defendant," (2) "their earlier joinder [would not] have in any way affected the course of the litigation," and (3) denying the motion "runs counter to effective judicial administration—the more so since, with the silent

concurrence of the defendant, the original plaintiffs were deemed proper parties below." *Id.*

A recent similar example is *NFIB* v. *Sebelius*, 132 S. Ct. 1133 (2012). In that case, the standing of one petitioner came into question after the petition was filed, and the remaining petitioners sought leave to add additional petitioners. See Motion, *NFIB* v. *Sebelius*, Nos. 11-393, 11-398, 11-400, at 1 (Jan 4, 2012) ("*NFIB* Motion"). The petitioners to be added had "actually participated in the litigation on standing in the district court, though not technically as parties"—specifically, by filing declarations in support of the associational standing of the NFIB, of which they were members. *Id.* at 3. Petitioners noted that adding the additional parties "will entail no new evidentiary submissions and no new arguments on the merits." *Id.* at 1. This Court granted the motion without explanation. *NFIB*, 132 S. Ct. 1133.

The principles applied in those cases call for permitting the General Assembly to join as a petitioner here. Whatever authority General Stein believes he has to override the General Assembly's designated lead counsel in representing the State (but see State's Obj. at 3–4, 9–13), North Carolina law is plain that the General Assembly has the authority to litigate this case even if the State itself (represented by General Stein) chooses not to. See N.C. Gen. Stat. § 1-72.2. In every other respect, this case is on all fours with *Anderson* and *NFIB.*

First, this is another case where a lower-court participant seeks to become a party on Supreme Court review when the litigation authority of the aligned parties comes into question. Indeed, this is a stronger case for intervention on that basis

than either *Anderson* or *NFIB*. The General Assembly is not just a member of an association, *Anderson*, 342 U.S. at 416–17, or a lower court declarant, *NFIB* Motion at 3, but the undisputed leader of the litigation defense from its inception until literally last week. As such it "actually participated in the litigation … in the district court, though not technically as [a] part[y.]" *Id.* Having taken that role before, it may become a formal party now that General Stein has attempted to withdraw the State just one week before this Court is scheduled to consider the State's petition at its upcoming March 3 conference.

Second, as in *Anderson* and *NFIB*, there is no possible risk of unfair prejudice to Respondents or others. Like in *NFIB*, adding the General Assembly will not change the arguments before the Court or require new evidence. *NFIB* Motion at 1. Indeed, the notion is absurd, considering that the arguments and evidence presented in defense of the State's statutes so far, including in the pending petition, were directed by the General Assembly *itself* through its own designated counsel. For precisely the same reason, adding the General Assembly as a party earlier would not have affected the course of litigation. *Anderson*, 342 U.S. at 417. *Preventing* the General Assembly from intervening, on the other hand, would serve no purpose at all, and would irreparably harm the General Assembly's interest in defending the laws it enacts.

Third, as in *Anderson*, the failure of either Respondents, General Stein, or now-Governor Roy Cooper to object to General Assembly's thoroughgoing participation below weighs strongly in favor of allowing the General Assembly to

join as a petitioner. *Id.* Their acquiescence was not just "silent concurrence," *id.*, but *express* agreement that the General Assembly had authority to hire private attorneys as lead counsel. See State's Obj. at 4–6. Even if General Stein's eleventh-hour objection had merit, it is obviously an effort to deprive the General Assembly of its final day in court, and it deserves to be rejected by all available procedural means—including addition of the General Assembly as a party.

CONCLUSION

For the foregoing reasons, the Court should add the General Assembly to this case as an additional Petitioner.

Respectfully submitted,

Thomas A. Farr
Philip J. Strach
Michael D. McKnight
OGLETREE DEAKINS NASH
SMOAK & STEWART, PC
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609

S. Kyle Duncan
Counsel of Record
Gene C. Schaerr
Stephen S. Schwartz
SCHAERR|DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
Kduncan@Schaerr-Duncan.com

Counsel for Petitioner State of North Carolina and for the Speaker of the North Carolina House of Representatives, the President Pro Tempore of the North Carolina Senate, and the North Carolina General Assembly

February 27, 2017

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.

CERTIFICATE OF SERVICE

I, S. Kyle Duncan, a member of the Supreme Court Bar, hereby certify that:

(1) this Motion was filed by delivering an original and 10 copies on February 27, 2017 to a third-party commercial carrier for next-day delivery to the Clerk; and

(2) one copy of the same Motion was served by delivering it on February 27, 2017 to a third-party commercial carrier for next-day delivery on the following:

Daniel T. Donovan
Kirkland & Ellis, LLP
655 15th Street, NW, Suite 1200
Washington, DC 20004
(202) 879-5000
ddonovan@kirkland.com

Noel J. Francisco
Acting Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
Noel.Francisco@usdoj.gov

Grayson Kelly
Chief Deputy Attorney General
North Carolina Department of Justice
P.O. Box 629 Raleigh, NC 27602-0629
(919) 716-6400
gkelley@ncdoj.gov

S. Kyle Duncan
Counsel of Record for the North Carolina General Assembly et al.