BERGER V. NORTH CAROLINA STATE CONFERENCE OF THE NAACP: A VICTORY FOR FEDERALISM AND STATE AUTONOMY

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In a term defined by landmark opinions and culture war fodder, an eight to one Supreme Court opinion concerning a state legislature's right to intervene may seem unremarkable. Indeed, in comparison to *Dobbs*,[2] *Bruen*,[3] and *West Virginia*,[4] the opinion in *Berger*[5] received little attention. The commentariat did not, this time, clutch their pearls and breathlessly wail about the demise of democracy. But for those who care about foundational principles of federalism, the *Berger* opinion is far from picayune or uninteresting. It is worthy of careful study and consideration.

The case stems from the decision of the people of North Carolina to require "[v]oters offering to vote in person" to "present photographic identification."[6] North Carolinians voted to add this language to the state constitution in November 2018, additionally providing that "[t]he General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions."[7] Acting in accordance with this charge, the General Assembly approved Senate Bill 824 (S.B. 824), effectuating the constitutional demand for a voter ID law.[8]

A pitched political battle ensued. The North Carolina Governor, Roy Cooper, a Democrat elected in 2016, vetoed the bill. The Republican-controlled General Assembly rebuffed him, overriding the veto and allowing the law to take effect on December 19, 2018. Not wasting any time, the North Carolina Chapter of the National Association for the Advancement of Colored People (NAACP) sued the very next day. The NAACP named the Governor and the members of the State Board of Elections (the Board) as defendants and alleged that S.B. 824 violated the Federal Constitution.[9]

The Attorney General, a former Democratic State Senator with a public history of opposing voter ID legislation and undermining a defense of the prior law, stepped in claiming an intent to defend the Board. The Board was, in turn, populated with appointees of the Governor. As this suit unfolded in the midst of a chaotic 2020 election cycle, the Board understandably had an

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[2] Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022).

[3] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S.Ct. 2111 (2022).

[4] W. Virginia v. Env't Prot. Agency, 142 S.Ct. 2587 (2022).

[5] Berger v. N. Carolina State Conf. of the NAACP, 142 S.Ct. 2191 (2022).

[6] N.C. CONST. art. VI., § 2(4).

[7] *Id.*; *Berger*, 142 S.Ct. at 2197.

[8] *Berger*, 142 S.Ct. at 2197.

[9] *Id.* at 2197–98.

overwhelming interest in seeking clarity about whether it should apply the state's voter ID law. Its stated interest was to lend stability and clarity to the Board's task of election administration rather than to vigorously defend the law itself.[10]

Seeking to defend their handiwork, the Speaker of the State House of Representatives and the President pro tempore of the State Senate (the legislative leaders) moved to intervene. Their primary interest was simple: they wanted to win. Despite this divergence of interests among state officials, applying a presumption that the Attorney General and the Board adequately represented the legislative leaders' interests, the District Court denied the legislative leaders' motion to intervene. As a result, the state's most important interest—vindicating its laws—went without representation.[11] All this, despite North Carolina law *explicitly* permitting the two legislative houses to participate in the State's defense.[12]

For those needing a refresher in civil procedure, the relevant language can be found in Federal Rule of Civil Procedure 24(a)(2). The district court "must permit anyone to intervene who" can show "an interest relating to . . . the subject of the action," and who "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*."[13] The question of adequate representation in this context had split the Circuit Courts. In *Berger*, the District Court and, later, the Fourth Circuit, applied a strong presumption that the Attorney General adequately represented the State's interests, thus keeping the legislative leaders out of the case. The Seventh Circuit applied an even stronger presumption of adequate representation when faced with a claim of intervention of right by state officials under similar circumstances, embracing a presumption that was only surmountable in instances of "gross negligence or bad faith."[14] Elsewhere, the Sixth Circuit applies no such presumption—instead requiring only a minimal showing of inadequacy for a state official to intervene in circumstances similar to those here.[15]

The District Court and the Fourth Circuit erred grievously in finding that the Attorney General, on behalf of the Board, adequately represented the legislative leaders' interests. These courts operated on the assumption that the Attorney General represented the State's interest and thus the interests that the legislative leaders sought to vindicate. They assumed, wrongly, that the Board and the legislative leaders' interests overlapped "fully."[16] But these two groups represented two *distinct* state interests: an interest in election administration and an interest in defending the law of the state, respectively.

North Carolina law recognizes that a tension often exists between legislative interests and administrative interests, the latter of which inherently rests with the Executive Branch. To ameliorate this tension, the State grants the legislative leaders "standing to intervene on behalf of

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[10] *Id*. at 5, 16.

[11] *Id*. at 5–8.

[12] N.C. Gen. Stat. Ann. § 1-72.2 (2021).

[13] Fed. R. Civ. P. 24(a)(2) (emphasis added).

[14] Planned Parenthood of Wisconsin, Inc. v. Kaul, 942 F.3d 793, 799 (7th Cir. 2019).

[15] N.E. Ohio Coal. for Homeless v. Blackwell, 467 F.3d 999, 1007–08 (6th Cir. 2006); The Sixth Circuit is arguably closest to Supreme Court precedent in this area, as *Trbovich v. Mine Workers* established a minimal burden and promised intervention even where interests may overlap, but not fully. *See* Trbovich v. United Mine Workers of Am., 404 U.S. 528 (1972).

[16] *Berger*, 142 S.Ct. at 2197–98.

the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution."[17] The lower courts were wrong to ignore this directive of North Carolina law and assume that the Attorney General provided adequate representation of the legislative interest. North Carolina explicitly contemplates that the State's interests may be best represented by multiple branches of government. To reject this understanding evinces a limited respect for the virtues of federalism and system of government with co-equal branches attending to different state interests.

Fortunately, the Supreme Court stood as a bulwark against this infringement on North Carolina's ability to choose how it will be represented in court. The Court, in an 18-page opinion penned by Justice Gorsuch, agreed that the legislature "had claimed an interest" in the lawsuit "that may be practically impaired or impeded without their participation."[18] The majority held that "when a State chooses to allocate authority among different officials who do not answer to one another, different interests and perspectives, all important to the administration of state government, may emerge."[19] The Attorney General may, in circumstances like that here, represent an interest that diverges in some vital way from that of the legislature. As such, the Court recognized that, were it not allowed intervention of right, the legislature's interest in defending its law could be seriously impaired.

After dispensing with this question, the Court had only to determine that the legislature was not adequately represented in the action. Such a finding flowed easily from the holding that the legislators and the Attorney General may seek to vindicate competing interests. The Court noted that "a State's chosen representatives should be greeted in federal court with respect, not adverse presumptions."[20] The lower courts had improperly relied on a presumption that the Board adequately represented the legislative leaders' interests—and had found that the legislative leaders could not overcome this presumption. Setting aside this "adverse presumption," the Court held that, "when a duly authorized state agent seeks to intervene to defend a state law," the "presumption of adequate representation is inappropriate."[21]

This ruling, though unlikely to be the subject of any campaign ads, confirms a basic tenet of our federal constitutional system: "[w]ithin wide constitutional bounds, States are free to structure themselves as they wish."[22] Where state law, as here, clearly contemplates separate representation of the state's competing interests, the courts would "do much violence to our system of cooperative federalism" were they to override the state's selection of representatives.[23] The Court instead chose to give great deference to the choices a state has made in structuring its government. Here, each different state "agent" is expected to represent distinct interests that the State has: defense of the law and administration of the law. The Court, evincing the appropriate respect for federalism, agreed that the duly authorized agents should have their day in court.

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[17] N.C. Gen. Stat. Ann. § 1-72.2 (2021).
[18] *Berger*, 142 S.Ct at 2201.
[19] *Id*.
[20] *Id.* at 2205.
[21] *Id*. at 2204.
[22] *Id*. at 2197.
[23] *Id*. at 2214.

Berger was not the only time last term when the Court championed this principle of federalism in a case involving intervention by state officials. Earlier in the term, in *Cameron v. EMW Women's Surgical Center*,[24] the Court reversed a Sixth Circuit ruling that barred the Kentucky Attorney General from intervening in defense of an abortion law that the state Health Secretary had declined to defend on appeal. In the ruling, the Court acknowledged that a State may "empower multiple officials to defend its sovereign interests in federal court."[25] The Court further noted that a state "clearly has a legitimate interest in the continued enforceability of its own statutes . . . and a State's opportunity to defend its laws in federal court should not be lightly cut off."[26] Finding that the lower court's decision to keep the Attorney General from intervening improperly hampered the State's ability to defend its interests in the manner which it had designed for itself, the Court permitted the Attorney General to intervene

Viewed in this light, *Berger* and *Cameron* are birds of a feather. In both cases, the Supreme Court effectuated a desire to respect the governmental structure the respective states have chosen for themselves. These decisions represent not just an important victory for federalism, but also an opportunity to have more views aired in federal litigation on key constitutional questions. In an age of divided government and political polarization, these rulings have significant implications. Where state law permits it, we may see an increase in the number of Rule 24(a)(2) motions on the part of legislatures – which, in many cases, have their own perspective on how best to vindicate vital state interests in litigation.

[24] Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S.Ct. 1002 (2022).
[25] *Id.* at 1004.
[26] *Id*. at 1011.