No. 21-248

In the Supreme Court of the United States

PHILIP E. BERGER, ET AL.,

Petitioners,

v.

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

Respondents.

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

BRIEF FOR THE WISCONSIN LEGISLATURE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Wisconsin Legislature is the bicameral legislative branch of the Wisconsin state government. Wis. Const. art. IV, §1.[1] Currently, Wisconsin is 1 of 11 States with divided government, where one party controls the State's executive branch and another controls the State's legislative branch.[2] In Wisconsin, as in North Carolina (also with divided government), state law confers upon the Legislature a statutory right to intervene in cases challenging the constitutionality of state law. Wis. Stat. §803.09(2m) ("When a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense, the assembly, the senate, and the legislature may intervene…."); *accord* N.C. Gen. Stat. §1-72.2.

Even so, a federal district court, affirmed by the Seventh Circuit in *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793 (7th Cir. 2019), refused to allow the Legislature to intervene in a federal suit challenging the constitutionality of Wisconsin state law regulating abortion. The Legislature is well-suited to explain why *Kaul* is offensive to state policy and our federalist structure, and why the Fourth Circuit was

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[1] Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

[2] "State Partisan Composition - 2021" National Conference of State Legislatures, bit.ly/3ftsPSK.

wrong to follow *Kaul* in denying the North Carolina legislative leaders' motion to intervene in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, a federal court will ultimately decide whether a State's duly enacted law is invalid. Even though the State's legislative branch drafted the law, debated the law, passed the law (and then passed it again by a super-majority over the Governor's veto), can a federal court declare that all for naught and tell the State it has no power to enforce the law as written? For the State, most especially for the body that legislated, such a case is as high stakes as it gets.

Historically in such cases, the State would have a direct appeal to this Court to review any judgment by a federal court declaring state law invalid. 28 U.S.C. §1254(2) (1946 ed., Supp. II). Still today, federal law requires a federal court to alert a state attorney general if a suit calls into question the constitutionality of state law. 28 U.S.C. §2403(b). Section 2403 states that the court "shall permit the State to intervene for the presentation of evidence," if applicable, "and for argument on the question of constitutionality," with "all the rights of a party." *Id.*; *accord* Fed. R. Civ. P. 5.1(a)(2); S. Ct. R. 29.4(c).

All of this is to say that a suit seeking the invalidation of state law is not a run-of-the-mill lawsuit. Once a lower federal court declares a law invalid, the State has few choices other than to hope for reversal.

Despite those stakes, both here and in *Kaul*, the courts of appeals applied a super-presumption, leading both courts to conclude that a legislature could not intervene as of right or permissively to defend the

validity of state law. According to both courts, there is room for only the attorney general to participate, and so long as the attorney general is participating, the attorney general alone is presumed to "adequately represent th[e] interest" of the State. Fed. R. Civ. P. 24(a)(2). A legislature can overcome that presumption only if it could show "gross negligence or bad faith" by the attorney general in the Seventh Circuit or "adversity of interest, collusion, or nonfeasance" in the Fourth Circuit. *Kaul*, 942 F.3d at 799; Pet.App.31; *see also* Pet.App.42 n.7 (noting criticism). What the courts called "disagreement over litigation tactics" will not suffice. Pet.App.33; *see Kaul*, 942 F.3d at 801.

The adequacy presumption of the courts below transforms Rule 24 into an indominable bar for a legislature, even in States such as North Carolina and Wisconsin that affirmatively authorize legislative intervention by state law. Refusing to allow the legislature to intervene deals a serious blow to federalism by overriding a State's express policy judgment about how state laws should be defended in court. It is also contrary to Rule 24's text and history.

ARGUMENT

Federal Rule 24 states that a "court must permit anyone to intervene" who, "[o]n timely motion," "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing 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." Fed. R. Civ. P. 24(a)(2). Adopting an overly rigid reading of Rule 24's adequacy clause, some courts have made it all but impossible for a state

legislature to intervene in a suit regarding the validity of state law, even in States that have expressly authorized their legislatures to intervene in defense of their enactments. That is wrong as a function of our federalist structure, and unsupported by either the text or history of the rule itself.

I. Federal Courts Must Give Due Respect for State Policy

A. A State has the power to decide who its representatives will be in court. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1952 (2019). And while that representative is often the State's attorney general, it need not always or only be. *See Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013). While some States might make the policy decision "to speak as a sovereign entity with a single voice" through the attorney general, States have every right to authorize other branches "to litigate on the State's behalf, either generally or in a defined class of cases." *Bethune-Hill*, 139 S. Ct. at 1952; *see also Hollingsworth*, 570 U.S. at 710 (noting a State "may provide for other officials to speak for the State in federal court").

Such is the case in North Carolina, where it is the State's "public policy … 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," "*both* the General Assembly and the Governor constitute the State of North Carolina" and "a federal court presiding over any such action … 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." N.C. Gen. Stat. §1-72.2 (emphasis

added); *see also, e.g.*, Ind. Code §2-3-8-1 (permitting state house or senate "to employ attorneys other than the Attorney General to defend" redistricting laws).

Likewise in Wisconsin, the Attorney General's power to litigate on behalf of the State is not "exclusive." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 946 N.W.2d 35, 54 (Wis. 2020). The Wisconsin Legislature shares that power "in cases that implicate an institutional interest of the legislature." *Id.* Chief among those interests is defending the constitutionality of state law. *See Democratic Nat'l Comm. v. Bostelmann*, 949 N.W.2d 423, 428 (Wis. 2020). By statute, the Wisconsin Legislature has a "right to participate as a party, with all the rights and privileges of any other party, in litigation defending the state's interest in the validity of its laws." *Id.* Wisconsin law provides that the Legislature may intervene "at any time" and "as a matter of right" when a party challenges the constitutionality of a statute. Wis. Stat. §803.09(2m).

A federal court cannot ignore these state laws when assessing whether a legislature, as a proposed-intervenor, has a sufficient "interest" in the suit and whether that interest is "adequately represented." Fed. R. Civ. P. 24(a)(2). The state laws discussed above all but answer those questions for the federal court. The legislature has a statutorily prescribed "interest" in defending the validity of state law in court. And any presumption that the attorney general adequately represents that interest for every branch of the state government is rebutted by the fact that his representation of the state is not exclusive; rather, state law anticipates *both* the attorney general and the legislature will speak for the State. A federal court

need not (and cannot) second-guess such state policy. In such circumstances, it is never appropriate for a federal court to speculate about which branch "better represents" the State, Pet.App.39, or whether the legislature ought to have the privilege of intervening.

To be sure, the federal court may balance the remaining intervention factors, such as timeliness of intervention, but it cannot rebalance the State's decision by statute about who its representatives will be. Just as a federal court would take state law as it found it in deciding who a proper defendant in an action ought to be, *see, e.g.*, *Moore v. Urquhart*, 899 F.3d 1094, 1103 (9th Cir. 2018); *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011), or whether a state defendant has an interest under state law sufficient for standing, *see, e.g.*, *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020), a federal court must take the state laws above as it finds it in deciding who a proper intervenor may be.[3]

Such state laws reflect the reality that the interests of the attorney general can be different than those of the legislature, the body that wrote a law and saw through its passage. Most attorneys general are elected politicians who are not necessarily "long-term

[3] There might still be other circumstances where legislative intervention is appropriate, either because of the nature of the legislature's interest in the suit or because of the inadequacy of the existing state defendant or both, even in a State without a statute expressly permitting intervention. *See, e.g.*, *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187 (1972) (permitting legislative intervention in redistricting dispute). The existence of state law expressly affirming the legislature's interest is *sufficient* condition for the interest and adequacy prongs of intervention; it is not a *necessary* one.

players before the courts," making them "less likely to genuflect before them" and more likely to "curry favor with those who might back their aspirations for higher elected office." Devins & Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 Yale L. J. 2100, 2104 (2015). As Judge Wilkinson put it in his dissent, "Every attorney general who looks in the mirror sees a governor." Pet.App.51 (Wilkinson, J., dissenting).

This divergence of interests is especially pronounced in States with divided government, including North Carolina and Wisconsin. In this dispute, for example, the North Carolina Governor—who initially vetoed the voting law at issue—told the Fourth Circuit *not* to apply the law to upcoming elections. *See id.* at 60 (Niemeyer, J., dissenting). Years earlier, the North Carolina Attorney General applauded himself for seeking the dismissal of the State's appeal regarding a predecessor voting law in this Court. *Id.* at 61-62 (Niemeyer, J., dissenting).

The same divergence of interests has come between Wisconsin's executive and legislative branches in the defense of state law. For example, in his first months in office, Wisconsin Attorney General Josh Kaul asked this Court to dismiss a petition for writ of certiorari, previously filed by the State in a dispute over the State's right-to-work law. *See Allen v. Int'l Assoc. of Machinists*, No. 18-855; Walsh, *Attorney General Josh Kaul Plays Politics with 'Right-to-Work' Law*, AP News (Apr. 25, 2019), bit.ly/3eWagq5.

With respect to the ongoing challenge to Wisconsin's abortion regulations in *Kaul*, plaintiffs filed their suit to invalidate those longstanding laws only *nine*

days after Kaul took over as Attorney General, after a campaign where he was strongly endorsed by the political arm of Planned Parenthood of Wisconsin, the lead plaintiff. *See Planned Parenthood of Wis., Inc. v. Kaul*, No. 3:19-cv-38 (W.D. Wis.); *Vote Josh Kaul for Attorney General on November 6th*, Planned Parenthood Advocates of Wisconsin (Mar. 23, 2019) perma.cc/9YB5-MR45 ("Josh will fight against the unconstitutional laws that block women from the care they need."). Meanwhile, shortly after taking office, Wisconsin's attorney general withdrew from two multi-state amicus briefs defending other state abortion regulations while joining a lawsuit challenging restrictions on the use of taxpayer funds to benefit abortion providers. *See AG Josh Kaul Withdraws Wisconsin from Two Cases Challenging Abortion Access*, The Cap Times (Mar. 19, 2019), perma.cc/TT49-JHC6; *Wisconsin Joins 20 AG's Challenging New Title X Restrictions on Women's Reproductive Healthcare*, Wis. Dep't of Justice (Mar. 23, 2019), perma.cc/9UBK-PRXW. And only a month ago, the same attorney general publicly announced he would not enforce another Wisconsin abortion law, whatever this Court's decision in *Dobbs v. Jackson Women's Health Org.* (No. 19-1392). *See Wisconsin Attorney General Won't Enforce Any Abortion Ban*, AP News (Dec. 15, 2021), bit.ly/3G4l7Kd.

As these examples begin to show, a State's coequal branches of government can and will take differing approaches to the defense of state law. In anticipation of these possible differences, Wisconsin and other States have taken affirmative steps to ensure state law will be vigorously defended from the beginning to the end of a case, regardless of the

executive's political objectives at the moment. The legislative branch, with just as much of a right to participate under state law as the executive branch, need not wait until the executive branch decides it will no longer participate in the suit, leaving the legislature unable to raise its own defenses or arguments in support of the law's validity. If there is any presumption relevant under Rule 24 in such circumstances, it is that the legislature should be presumptively able to intervene from the outset.

And as all parties to this case appear to acknowledge, the attorney general could ultimately decline to defend state law altogether. As the examples above show, not every state attorney general has an unflagging obligation to defend state law. Federal law imposes no such obligation. *See* Devins & Prakash, *supra*, at 2107, 2116-17; Pryor, *The Separation of Powers and the Federal and State Executive Duty to Review the Law*, 65 Case W. Res. L. Rev. 279, 282-83 (2014). And any such duty under state law varies by State (or by actor). Devins & Prakash, *supra*, at 2105-06, 2117-18, 2125. But while all appear to agree that the legislature may step in to defend state law once the executive declines to defend state law, *see* Pet.App.26, the court below concluded that the legislature must remain on the sidelines for any litigation conduct short of an attorney general's all-out refusal to defend. There is no basis for waiting until the last possible moment for allowing the legislature, the executive's co-equal branch with an equally empowered role in defending state law, to intervene, *infra.*

B. None of the stated policy concerns by the court below justifies ignoring state law to permit both the

executive and legislative branches to participate in a suit challenging the validity of state law.

For example, the court below refused to allow the legislative leaders to intervene in part because doing so would require courts "to take sides" in "political battles" between state branches of government "on a regular basis." Pet.App.39. The court failed to realize that the very thing it was doing in rejecting the intervention motion was taking sides in an inter-branch conflict. It ignored state law, picked the attorney general as the winner, and the legislative leaders as the loser. The court ignored that a feature of state laws like North Carolina's and Wisconsin's is to keep the court out of that mess of politics. Rather than wait for an eleventh-hour substitution of the legislature for the executive branch, the State has decided *ex ante* that its co-equal branches may both speak for the State. Such statutes relieve the federal court from "taking sides."

Relatedly, the court fretted that courts would have to "'divin[e] the true position' and interests" of the State to determine who "better represents it." *Id.* The court failed to see that its heightened presumption will require parties to litigate those very questions, again and again. The Fourth and Seventh Circuits require the legislature to make out a case for "nonfeasance" or "gross negligence" by the executive branch to overcome the courts' super-presumption. *See* Pet.App.31; *Kaul*, 942 F.3d at 799. Contrary to that acerbic approach, a federal court need not adjudicate anew who best represents the State. State law already answers that question.

C. Nor is the court's concern about one versus two representatives speaking for the State a reason to presumptively deny a legislature's motion to intervene. The court below acknowledged that the State "is free to remove the Attorney General and *substitute* some other representative," but refused to allow the State the right "to designate not one but two representatives … all purporting to speak for the state." Pet.App.39 (emphasis added). That rationale reduces the State to a regular litigant in regular litigation, ignoring that a State comprises co-equal branches of government and that the State has designated multiple branches to represent its interest where the validity of state law is at stake.

As an initial matter, nothing in Rule 24 limits an intervenor's participation to substituting for a defaulting party, versus simultaneously participating. Historically, a proposed-intervenor in privity with a party could intervene precisely because their relationship to a party risked his being bound by the judgment. *See* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 731-32 (1968).

With respect to the state or federal government in particular, this Court has not hesitated to allow multiple voices to speak on behalf of a government. For example, in *Buckley v. Valeo*, the U.S. Attorney General and the Federal Elections Commission, both appellees, diverged on the question of the scope of the Commission's powers over federal campaign finance rules. The Commission retained special counsel on that question, while the Attorney General—in a brief authored by then-Solicitor General Robert Bork and

Assistant Frank Easterbrook—argued that the Commission could not exercise executive power.[4] Similarly in *Karcher v. May*, 484 U.S. 72 (1987), multiple New Jersey government officials were involved in the dispute over a New Jersey school prayer law. The named defendants remained in the suit, but did not defend the law. *Id.* at 75. The Speaker of the New Jersey General Assembly and President of the New Jersey Senate intervened and "carried the entire burden of defending the statute." *Id.*

More recently in *United States v. Windsor*, 570 U.S. 744 (2013), the U.S. Attorney General declined to defend the federal Defense of Marriage Act. *Id.* at 753. The executive branch remained in the suit, including as the nominal appellant, while the Bipartisan Legal Advisory Group of the U.S. House of Representatives intervened to defend the law on the merits. *Id.* at 754-55. None of these cases permitted only a singular representative for the government. And none suggests that involvement by one government official was dependent upon the absence of another.

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[4] *See* Brief for the Attorney General and the Federal Elections Commission 2 n.4, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437) ("This brief does not address any of the issues arising out of the law enforcement powers of the Commission. With respect to those questions, the Commission is separately represented by Special Counsel, who have filed a further brief on behalf of the Federal Election Commission. The Attorney General has filed a separate brief, which is combined with the amicus brief of the United States … discussing those questions."); Brief for the Attorney General as Appellee and for the United States as Amicus Curiae, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

More fundamentally, the State is not merely its attorney general. The State comprises co-equal branches of government, and each State has the last word on what function each of those branches of government may serve—even when it affects federal court proceedings. *See Bethune-Hill*, 139 S. Ct. at 1952; *see, e.g.*, *Bostelmann*, 949 N.W.2d at 425; *Bostelmann*, 977 F.3d at 641 (certifying question of Legislature's interest in suit challenging the legality of Wisconsin state elections law and, in light of the state supreme court's opinion, concluding that the Legislature had standing to appeal); *see also* Devins & Prakash, *supra*, at 2116 ("states may grant whatever powers and impose whatever obligations on an attorney general that they wish, assuming they choose to have one in the first place"). Here, the State has authorized both the executive and legislative branches to speak on behalf of the State.[5] Federal intervention rules do not empower federal courts to second-guess these powers given to the executive and legislative branches under state law.

Finally, it is no response to assure a legislature that it can always substitute itself for the executive branch at the eleventh hour, should the executive branch ultimately fail to defend the law. In North Carolina and Wisconsin, for instance, where the States' incoming attorneys general sought the dismissal of appeals or certiorari petitions pending before this Court,

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[5] The Fourth Circuit's concern that there was no limiting principle to the Legislature's request to intervene is puzzling. *See* Pet.App.39. Here, as in *Kaul*, the co-equal branch that authored the law has moved to intervene. Legislative intervention, by the body itself or by its designated representatives, is by definition only one party, not "three" or "four." *Id.*

there was little that a legislature could do to salvage those cases. Similarly, if the executive branch declines to appeal after losing before a trial court, a legislature might scramble to intervene to appeal but is left with the record and the arguments of the executive branch below. (It turns out, "disagreements over litigation tactics" can affect the trajectory of an appeal, despite the Fourth and Seventh Circuits' rejection of such disagreements as a reason for intervention. Pet.App.33; *Kaul*, 942 F.3d at 810 (Sykes, J., concurring)). Imagine, for example, that a State had multiple defenses to a challenge to state law. The attorney general advances only one of the defenses, based on concerns that raising other factual defenses will upset supporters. The State has now forever lost its other defenses even if the legislature takes over a later appeal.

In sum, there is a strangeness to the assumption that a State—comprising co-equal branches of government—must speak with a singular voice, whereby the co-equal branches can substitute in and out for one another but cannot simultaneously participate. Surely involvement by the co-equal executive and legislative branches to defend the validity of state law is no stranger than involvement by only the executive branch where, as here, the Attorney General simultaneously defends the law while the Governor asks for it to be permanently enjoined. Or worse, take the example of *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014). There, the Ohio Attorney General simultaneously defended a state elections law and called into question its constitutionality. *Id.* at 165. The Attorney General submitted his own amicus brief, authored by outside counsel, to argue that his State's law had an unconstitutional chilling effect. He assured that his

position was "independent of his representation of the Ohio Elections Commission Defendants" in the suit.[6] Understandably, States including Wisconsin and North Carolina have taken steps to avoid another *Driehaus*. By making it state policy to allow both the executive and the legislative branches to participate *ex ante*, the State avoids any doubt that the adequacy of a State's zealous defense of the law throughout the lifecycle of a suit.

The only way a federal court ends up picking winners and losers between the State's co-equal branches of government is by taking a crabbed reading of Rule 24 that wrongly presumes only one government official may defend state law, even when state law says otherwise. Rule 24 imposes no such limitation.

II. Rule 24's Text and History Do Not Support a Heightened Presumption Against Legislative Intervention.

Federal Rule 24 expanded upon historical intervention practices. For example, intervention was well-developed for *in rem* proceedings in admiralty, given that "a decree of the court *in rem* is binding on all the world." Moore & Levi, *Federal Intervention and the Right to Intervene and Reorganization*, 45 Yale L.J. 565, 569-70 (1936) (quoting *The Mary Ann*, 16 F. Cas. 953 (D. Me. 1826)). Similarly, under the rules of equity, "[a]ny one claiming an interest in the litigation" could "at any time be permitted to intervene to assert his right by intervention, but the intervention shall be

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[6] Brief of Amicus Curiae Ohio Attorney General Michael Dewine in Support of Neither Party at 1, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) (No. 13-193).

in subordination to and in recognition of the main proceedings." *Id.* at 578 (quoting Equity Rule 37). Federal Rule 24 was meant to "amplif[y] and restat[e]" that historical practice, while injecting "some elasticity." *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 133-34 (1967) (discussing advisory committee notes).

Originally, Rule 24 contained three paths for intervention as of right: "(1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." *El Paso*, 386 U.S. at 143-44 (Stewart, J., dissenting) (quoting rule). In 1966, the rule was amended and streamlined. Importantly, the 1966 amendment was in response to an overly "rigorous reading" of the pre-amended rule "under which it literally would never have been possible to intervene under former Rule 24(a)(2)." 7C Wright & Miller, Fed. Prac. & Proc. §1903 (3d ed.).[7]

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[7] Specifically, "[i]f the representation of an absent party was inadequate," as required by then-Rule 24(a)(2), then the proposed intervenor "could not be bound by the judgment in the action" under traditional claim preclusion rules, and thus "could not intervene." 7C Wright & Miller, Fed. Prac. & Proc. §1903 (3d ed.). But if the proposed intervenor "were adequately represented," then he also flunked the requirements of then-Rule 24(a)(2) and still "could not intervene." *Id.*

The intervention rule has not been materially amended since 1966. Today, intervention as of right is available to anyone (1) "given an unconditional right to intervene by federal statute" or (2) 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 matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(1)-(2). The courts below have wrongly taken the last clause of Rule 24—"unless existing parties adequately represent that interest"—and added a super-presumption of adequacy. The rule applied below might as well say that intervention shall be permitted "unless the State's attorney general is already participating in the case."

This Court has already rejected such an overly rigid reading of the rule's adequacy requirement—in a case where the Secretary of Labor was already a defendant, no less. In *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528 (1972), a union member moved to intervene on the side of the Secretary of Labor. *Id.* at 529-30. The proposed-intervenor had the same overlapping interest as one of the Secretary's interests in the suit. *Id.* at 538. There, much like here, the Secretary argued that the proposed-intervenor's interest must be deemed "adequately represented" by the Secretary "unless the court is prepared to find that the Secretary has failed to perform his statutory duty." *Id.* This Court disagreed. "Even if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of '*his lawyer*'" such that the union member had sufficient cause to intervene.

Id. at 539 (emphasis added). In other words, disagreement about the Secretary's litigation tactics—even where the Secretary and the proposed-intervenor shared the same goal—were very much a reason to permit intervention. Rather than require "bad faith" or "nonfeasance" or any other conspiracy theory, all that this Court required was that the union member "show[] that representation of his interest 'may be' inadequate" by the Secretary "and the burden of making that showing should be treated as minimal." *Id.* at 538 n.10.

The heightened presumption of adequacy applied by the courts of appeals bears no resemblance to the "minimal" showing required by this Court in *Trbovich*.[8] This Court's approach in *Trbovich* is consistent with Rule 24's origins to expand opportunities for intervention, rather than the more inflexible right to intervene historically. *El Paso*, 386 U.S. at 133-34; *see also* Moore & Levi, *supra*, at 607 ("the grant of intervention in many of the discretionary cases facilitates the disposal in one action of claims involving common questions of law or fact, and thus avoids both court congestion and undue delay and expense to all parties"). The lower courts' approach, by comparison, returns to an overly rigid Rule 24 that presumes intervention will be disallowed, even for a co-equal branch

[8] As the Secretary's arguments in *Trbovich* suggest, when the Court decided *Trbovich*, the presumption of adequacy was not unknown. It was already percolating in the lower courts and agencies. *See* Shapiro, *supra*, , at 743-46 (describing "the tendency, particularly in antitrust cases, has been to deny intervention by private parties"). Nevertheless, the *Trbovich* Court declined to apply it.

of state government statutorily empowered to speak on behalf of the State in defense of state law.

The "minimal" showing required in *Trbovich* is all that is required here. Whatever can be said about the merits of a heightened adequacy presumption as applied to private parties seeking to intervene on behalf of a state or federal party, *see, e.g.*, *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 659 (7th Cir. 2013) ("*WEAC*"), it is inapplicable here. There is no basis for applying such a presumption to a co-equal branch of state government. And there is absolutely no basis for applying such a presumption when state law presumes the opposite—that an attorney general will not necessarily defend state law, especially in instances of divided government and suits challenging statutes involving politically sensitive matters. The Fourth Circuit got it exactly wrong when it declared that "a proposed intervenor's governmental status makes a heightened presumption of adequacy *more appropriate*, not less." Pet.App.37 (emphasis added).

The adequacy presumption appears to be rooted in respect for the state or federal defendant, assuming that he who is charged with defending the suit under state law will adequately do so. *See, e.g.*, *WEAC*, 705 F.3d at 658-59; *see* Shapiro, *supra*, at 743-44. To then apply that presumption to a co-equal branch of state government makes no sense (at best) and is an affront to state law (at worst). In North Carolina, Wisconsin, and elsewhere, the state attorney general does *not* always have the "exclusive" authority to defend state law in federal court. *See, e.g.*, *Vos*, 946 N.W.2d at 54; *see Bethune-Hill*, 139 S. Ct. at 1952. Applying a super-presumption of adequacy in such circumstances flips

the presumption on its head by telling the State that it cannot manage its litigation to defend state law as the State has prescribed.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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