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 REPUBLICAN NATIONAL COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF THE AMICUS CURIAE[1]

The Republican National Committee (RNC) is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The RNC manages the business of the Republican Party at the national level, including developing and promoting the Party's national platform; supporting Republican candidates for public office at all levels of government throughout the country; developing and implementing electoral strategies; educating, assisting, and mobilizing freedom-minded voters; and raising funds to support Party operations and candidates. The RNC is national in scope, including committee members from all 50 states, four territories, and the District of Columbia.

The RNC also routinely intervenes in litigation throughout the country to defend challenges to states' duly enacted election laws. In many of these cases, the interests of the RNC and its members, voters, candidates, and volunteers are unique and not the same as government official defendants who are nominally seeking the same outcome in a given action. Specifically, the RNC has clear and obvious interests in the rules under which it and those it represents and supports exercise their constitutional rights to vote and participate in elections. Disposition of cases such as

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[1] No counsel for any party authored this amicus brief in whole or in part, and no other entity or person, other than the RNC or its counsel, made any monetary contribution toward the preparation and submission of this brief. In compliance with Rule 37.2, the parties received timely notice of the RNC's intention to file this amicus brief and consented to the filing of this brief.

this "may as a practical matter impair or impede" the RNC's "ability to protect [its] interest[s]," including the ability of the RNC and its voters to participate in elections and disrupt the competitive electoral environment in North Carolina and elsewhere. Fed. R. Civ. P. 24(a)(2).

The RNC typically moves to intervene in similar cases to the present on the bases that it is entitled to intervention as a matter of right as well as under the permissive intervention standard. A court's standard for whether the existing governmental party adequately represents the interests of the RNC is relevant to its ability to successfully intervene in future cases as a matter of right.

The RNC submits this brief in support of the Petitioners because the standard set by the Court of Appeals for the Fourth Circuit unjustifiably limits the ability of interested parties to intervene in cases involving governmental parties and ignores the reality that state governmental defendants routinely fail to mount a vigorous defense when their laws are challenged. A ruling upholding the erroneous standard set by the Fourth Circuit could directly impact the ability of the RNC and other political party committees to intervene in similar cases as a matter of right. Moreover, the RNC and those it represents, are directly impacted by the ability of other parties, including state legislatures, to intervene and successfully defend laws that directly impact the elections process.

By applying a heightened presumption of adequacy of representation, the Fourth Circuit is out of step with the text and history of Rule 24, the practical realities of

the interests of governmental defendants and other interested parties, and the desire to promote judicial efficiency. Accordingly, the RNC respectfully asks this Court to find that a prospective intervenor need not overcome a heightened presumption of adequate representation to intervene as of right in a case in which a state official is a defendant, and, consequently, that Petitioners are entitled to intervene as a matter of right in this litigation.

INTRODUCTION

Quoting Aesop, the Court of Appeals for the District of Columbia advised "a doubtful friend is worse than a certain enemy." *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 314 (D.C. Cir. 2015). Unfortunately, its neighbor in the Court of Appeals for the Fourth Circuit has discounted this ancient wisdom, reasoning instead that because a government defendant has a "'basic duty to represent the public interest' . . . it is 'reasonable, fair and consistent with the practical inquiry required by Rule 24(a)(2) to start from a presumption of adequate representation and put the intervenor to a heightened burden' to overcome it." *N.C. State Conference of the NAACP v. Berger*, 999 F.3d 915, 932–933 (4th Cir. 2021) (en banc) (quoting *Planned Parenthood of Wisconsin v. Kaul*, 942 F.3d 792, 810 (7th Cir. 2019) (Sykes, J., concurring)). The RNC respectfully requests that this Court disagree.

SUMMARY OF THE ARGUMENT

Petitioners argue that they "need not overcome a presumption of adequate representation to intervene under Rule 24(a)" because such a presumption "fails to

give appropriate weight to the State's vital interest in defending the constitutionality of North Carolina's election laws." Pet. Br. at 15. The RNC agrees but offers the perspective of a frequent non-governmental intervenor in similar cases.

The heightened standard requiring a party to overcome a presumption of adequate representation imposed by the Fourth Circuit's ruling below is inconsistent with the text of Rule 24, the history of intervention, and is an invalid and unworkable standard that will waste judicial resources and create practical difficulties for intervenors, including non-governmental intervenors such as the RNC, as the interests of non-governmental parties are often different from, or in tension with, the interests of governmental parties.

ARGUMENT

I. THE TEXT OF RULE 24 IS COUNTER TO THE FOURTH CIRCUIT'S INTERPRETATION

This Court has counseled "[t]he starting point in statutory interpretation is 'the language [of the statute] itself.'" *United States v. James*, 478 U.S. 597, 604 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535 (1947) ("Though we may not end with the words in construing a disputed statute, one certainly begins there."). While the Federal Rules of Civil Procedure are not "statutes," they are sufficiently

analogous to follow the traditional maxim *a verbis legis non est recedendum* ("do not depart from the words of the law"). *See* ANTONIN SCALIA & BRYAN A. GARNER, READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012) (quoting DIGEST 32.69 pr. (Marcellus)).

There is no mention of a heightened burden in the text of Rule 24. The text of Rule 24 does not suggest that the adequacy of existing parties' representation should establish a significant barrier to intervention, let alone the nearly insurmountable barrier the Fourth Circuit has adopted.

Likewise, the text of Rule 24 does not include a heightened burden for cases where the defendant is a state official. The text of Rule 24 makes it clear that the drafters of the Federal Rules of Civil Procedure knew how to distinguish governmental parties from others. Rule 24(b) specifically distinguishes "a government officer or agency" from other types of intervenors. *Compare* Fed. R. Civ. Pro. 24(b)(1) ("[T]he court may permit anyone to intervene who . . ."), *with* Rule 24(b)(2) ("[T]he court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on . . ."). The omission of this heighten burden demonstrates that whether a party or prospective intervenor is a government officer or agency is of no import in assessing intervention by right. By requiring prospective intervenors to meet a "heightened burden," the Fourth Circuit creates two classes of parties for purposes of assessing intervention by right. This dichotomy is a judicial invention that adds to the text, rather than interpreting what is there. The text of Rule 24(a) has no requirement that an

intervenor must overcome a heightened burden to intervene of right in a case where the defendant is a state official and the courts should not add one.

II. THE HISTORY OF INTERVENTION SUPPORTS A MORE ACCOMMODATING STANDARD

The preceding textual interpretation is bolstered by the history of intervention generally and Rule 24 more specifically. The practice of intervention reportedly traces its history back to Roman law, under which "intervention seems to have taken place only at the appeal stage and then on the theory that the losing party might refuse to appeal or might not be vigilant in prosecuting the appeal and the petitioners' interests thus be inadequately protected." James WM. Moore & Edward H. Levi, *Federal Right to Intervention: I. The Right to Intervene and Reorganization*, 45 YALE L. J. 565, 568 (Feb. 1936). Under such law, "[i]t was apparently not always necessary to show that one would be bound by the proceeding. Nor was it always necessary to show a legal interest; a humanitarian interest would suffice," such as a relative of a person sentenced to death intervening to appeal. *Id*. at 569 (footnotes omitted).

More recently, "[t]he potentially wide scope of the civil action is a recognized feature of modern procedure which is followed logically in the [Federal Rules of Civil Procedure]." Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 449 (Jul. 1936). Under common law pleadings in the 1930s, the conceit was that a "case was limited, theoretically at least, to supposedly a single issue, though even there

the possibility of combining diverse claims in one action, theoretically limited, was in practice fairly extensive." *Id*. at 449. In contrast, "[i]n the equity suit the idea was to settle all matters in the issue." *Id*. The Federal Rules of Civil Procedure were "substantially patterned on the existing rules of procedure . . . uniformly prevailing in *equity cases* in all districts," while making "radical changes in the existing procedures in *common law actions* in many of the Federal districts." W. Calvin Chestnut, *Analysis of Proposed New Federal Rules of Civil Procedure*, 22 A.B.A. J. 533, 533 (Aug. 1936). In other words, the Federal Rules of Civil Procedure started from a broad base that was informed by the idea of settling all matters in the issue in one proceeding.

Equity Rule 37 provided "[a]ny one claiming an interest in the litigation may at any time be permitted to intervene to assert his right by intervention, but the intervention shall be in subordination to and in recognition of the main proceedings." Moore & Levi, *supra* 3–4, at 578. While Equity Rule 37 did not distinguish between an absolute right to intervention and a discretionary intervention, contemporary "courts [did] make the distinction, although they [were] more apt to talk in terms of abuse of discretion than in terms of absolute right." *Id*. at 581. Accordingly, prior to the adoption of the Federal Rules of Civil Procedure, "[t]he right to intervene seems to be of two types: absolute, and discretionary," where [t]he absolute right exists when the petitioner claims an interest in property in the hands of the court, or when the petitioner is inadequately represented in an action controlled by the

court and in which a decision will be binding upon the petitioner." *Id.*

The test for adequacy of representation under the equity rules prior to the adoption of the Federal Rules of Civil Procedure was similar to that applied by the Fourth Circuit. In general, "[i]nadequacy of representation [was] shown if there is proof of collusion between the representative and an opposing party, if the representative has or represents some interest adverse to that of the petitioner, or fails because of non-feasance in his duty of representation." *Id.* at 591–592. Similarly, "[r]epresentation by the governmental authorities [was] considered adequate in the absence of gross negligence or bad faith on their part." *Id.* at 594. Even then, however, "in many cases where intervention might be denied as an absolute right, it would seem desirable that the trial court exercise its discretion and allow intervention." *Id.* at 595.

Against this backdrop, "rule [24] liberalize[d] Rule 37." Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 273 n.36 (Jan. 1939); *see also* Fed R. Civ. P. 24, Notes of Advisory Committee on Rules – 1937 ("This rule amplifies and restates the present federal practice at law and in equity."). Rule 24 is, and was intended to be, more permissive than Equity Rule 37, which itself allowed greater intervention than under the common law. For example, the 1938 version of Rule 24 granted intervention of right in part when existing representation "is or may be inadequate." *See* REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE 61 (April

1937), https://www.uscourts.gov/sites/default/files/fr_import/ CV04-1937.pdf.

The liberalizing nature of Rule 24 was confirmed by subsequent amendments. The Notes of the Advisory Committee on the 1946 Amendments state that the addition of special provisions for government intervenors "avoids exclusionary constructions of the rule." Fed. R. Civ. P. 24, Notes of Advisory Committee on Rules – 1946 Amendment. Further, the Notes of the Advisory Committee on the 1966 Amendments states that "Rule 24(a)(3) was unduly restricted" and clarified that "[t]he representation whose adequacy comes into question under the amended rule is not confined to formal representation" while removing requirements under Rule 24(a)(2) that an applicant "is or may be bound by a judgement in the action." Fed. R. Civ. P. 24, Notes of Advisory Committee on Rules – 1966 Amendment; *see also Nuesse v. Camp*, 385 F.2d 694, 701 (D.C. Cir. 1967) (The 1966 Amendments were "obviously designed to liberalize the right to intervene in federal actions.").

It is in this context — a Rule that was intended to and did liberalize intervention — that this Court stated "[t]he requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of America, Inc.*, 400 U.S. 528, 538 n.10 (1972). The Fourth Circuit disregards the seventy years of liberalization and the clear statement of this Court in *Trbovich* to bring the state of the law back to where it was before adoption of the Federal

Rules of Civil Procedure. The history of Rule 24 supports a more accommodating interpretation.

III. THE PRESUMPTION OF ADEQUACY OF GOVERNMENT REPRESENTATION IS INVALID

Courts have "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors," *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003). Rather the appropriate bar is set low. "The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich*, 404 U.S. at 538.

Petitioners have demonstrated in convincing ways how their interests "may not align precisely" with Respondents. *Brumfield v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014). The divergence of interests certainly amounts to more than "garden-variety disagreements over litigation strategy." *Berger*, 999 F.3d at 935. In support of its heightened presumption of adequacy, the Fourth Circuit takes a highly idealistic view of government agency representation and gives short shrift to the manner in which Respondents have defended the law.

The Fourth Circuit's approach ignores the political realities of controversial legal disputes where the state is the defendant. In these cases, the interests of government defendants may be contrary to those of prospective intervenors. Consistent with principles of democratic accountability, governmental parties are

ultimately responsible to elected officials. Elected officials by their very nature are creatures of politics and have interests that could sharply contrast from a prospective intervenor. *See Meek v. Metropolitan Dade Cty.*, 985 F.2d 1471, 1478 (11th Cir. 1993) (Government defendants "were likely to be influenced by their own desires to remain politically popular and effective leaders.").

For example, elected officials are sometimes put in the position of defending controversial laws that they opposed and even actively campaigned against. *See e.g.,* Pet. Br. at 2-4 (explaining Governor Cooper actively campaigned against North Carolina's prior voter ID law, declined to participate in the petition for certiorari, and later celebrated the denial of certiorari as "good news"). Under these circumstances, it does not require much imagination to worry that government defendants will not adequately represent the interests of parties who actively support these laws, even when their conduct does not rise to the level of collusion or malfeasance. *See Clark v. Putnam Cty.*, 168 F.3d 458, 461 n.3 (11th Cir. 1999) ("Because elected officials in a majority-rule democracy may represent only part of the electorate (for instance, members of their party), 'it is normal practice in reapportionment controversies to allow intervention of voters . . . supporting a position that could theoretically be adequately represented by public officials.'").

There are good reasons for believing that government defendants have structural incentives that counsel against a presumption of adequacy. *See generally League of Women Voters of Virginia v.*

Virginia State Board of Elections, Civ. No. 6:20-cv-00024, 2020 WL 2090678, at *4 (W.D. Va. Apr. 30, 2020) (noting a "stark divide between Defendants' and the [Republican Party of Virginia's] current posture in this litigation," even as the government defendant claimed it was actively defending the case and that its interests closely overlapped with the prospective intervenor). Under the best-case scenario, government defendants are acting in the public interest. "[T]he government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.'" *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) (quoting *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009)). Attempting to protect both the myriad of public interests and the particular interests of potential intervenors is "a task which is on its face impossible." *Nat'l Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977).

Government defendants also "have a duty to consider the expense of defending [a challenged action] out of [government] coffers." *Clark*, 168 F.3d at 461–462; *see also Meek*, 985 F.2d at 1478 (government defendant "was required to balance a range of interests likely to diverge from those of the intervenors," including "the expense of litigation"). Because government defendants do not necessarily share the same interests as potential intervenors, it is entirely foreseeable that they will prioritize resources in litigation differently, and in ways that harm the interests of would-be intervenors.

Further, government defendants are bureaucratic institutions with their own institutional interests, including the desire to maintain consistent litigation positions over time. *See* Kimberly Strawman Robinson, *Biden on Pace to Flip Positions at Supreme Court More Than Trump*, BLOOMBERG LAW, Mar. 18, 2021, https://news.bloomberglaw.com/business-and-practice/biden-on-pace-to-flip-positions-at-supreme-court-more-than-trump (noting "it's important for the [Solicitor General's] office to maintain some consistency between administrations").

For example, amid policy change, changes in the federal government's legal positions historically have been "relatively rare," in part because of concerns that doing so can "undercut the credibility" of Department of Justice officials in court. *Id.* During oral arguments, Justices on this Court have alluded to this point. *See* Transcript of Oral Argument at 44–45, *Kiobel v. Royal Dutch Petroleum Co., et al.*, No. 10-1491 (Oct. 1, 2012) (in questioning the Solicitor General, the Chief Justice stated "Your successors may adopt a different view. And I think -- I don't want to put words in his mouth, but Justice Scalia's point means whatever deference you are entitled to is compromised by the fact that your predecessors took a different position.").

Accordingly, the Department of Justice and other government defendants have an interest in maintaining consistent legal positions, even as the underlying policies change. This is a very different interest from that of a prospective intervenor.

Maintaining a consistent litigation position is not the only place where the interests of governmental

parties and prospective intervenors diverge—politics often drive the interests of governmental institutions because of changes in administrations or the political differences between governmental branches or institutions. Lamentably, through its experience as an intervenor or prospective intervenor in dozens of cases involving disputes over election laws, the RNC is aware of numerous challenges of state voting procedures where the initial governmental defendant, whether that be a Secretary of State, State Board of Elections, or other entity, refused to mount a vigorous defense of their state's duly enacted laws by providing a nominal defense, entering into consent decrees and settlements, or refusing to appeal an adverse ruling, particularly when the officials charged with defending a given law opposed its enactment. In some instances, other intervenors such as state legislatures, state attorneys general and political parties such as the RNC, engaged to successfully defend all or parts of the challenged laws. In other instances, courts denied intervention and the challenged law was enjoined either on a temporary or permanent basis. In many of these cases, the lack of an additional intervening defendant proved to be determinative in the final outcome of the litigation.

As Petitioners note, in *Brnovich v. Democratic Nat'l Comm.*, a case recently decided by this Court, Arizona Secretary of State Katie Hobbs and Arizona Attorney General Brnovich were on opposite sides of the case. Pet'r's. Br. at 32. "Hobbs inherited th[e] lawsuit from her predecessor," "never defended" one of the challenged provisions, and later switched sides on both claims. Br. of Resp't Hobbs (U.S. July 1, 2020) Case

Nos. 19-1257, 19-1258 at 5. Absent intervention from the state Attorney General and Arizona Republican Party, Secretary Hobbs would have left both laws undefended and almost certainly invalidated. There are other instances in Arizona when intervenors such as the Attorney General and Republican Party committees intervened when Secretary Hobbs refused to defend or actively supported striking down laws with which she disagreed. *See e.g. Arizona Democratic Party v. Hobbs,* Civ. No. 2:20-cv-01143-DLR, 2020 WL 6537015 (D.Ariz. June 17, 2020) ("[T]he lead Defendant, the Secretary, has repeatedly refused to defend Arizona law against legal challenges or abandoned defense of Arizona law on appeal despite prevailing below.").

Minnesota provides another example of this all-to-common scenario. In *League of Women Voters of Minnesota Education Fund v. Simon*, Secretary of State Steve Simon was sued in a challenge to the state's witness signature requirement for absentee ballots. After initially defending the law, Secretary Simon sharply reversed course and attempted to enter into a consent decree with plaintiffs. Intervenor-defendants, including the RNC, objected and the court rejected the consent decree between plaintiffs and Simon. Although the RNC ultimately prevailed in the challenge, without the RNC's intervention and objection it is likely the law would have gone undefended and the attempted consent decree would have been successful. *See League of Women Voters of Minnesota Educ. Fund v. Simon*, Civ. No. 20-cv-1205-ECT-TNL, 2021 WL 1175234 (D. Minn. Mar. 29, 2021); *see also* Proposed Consent Decree to Judge; Mem. of Law in Supp. of Mot. to Intervene as

Defs. by Donald J. Trump for President, Inc., the Republican National Committee, and the Republican Party of Minnesota; Order on Mot. for Prelim. Inj., *Simon*, 2021 WL 1175234 (Civ. No. 0:20-cv-01205-ECT-TNL). As the court noted, the government defendant "did not respond or appear in connection with Intervenors' motion [to dismiss]." *Simon*, 2021 WL 1175234, at *1 n.1.

Likewise, *Pavek v. Simon*, a lawsuit challenging a Minnesota election statute, demonstrates that courts should not presume government defendants adequately represent prospective intervenors' interests despite sharing the same posture in a legal dispute. *Pavek v. Simon*, 467 F. Supp. 3d 718 (D. Minn. 2020). After the district court granted a preliminary injunction and it became clear that the government defendants would not appeal the decision, the RNC and other parties moved to intervene to appeal the preliminary injunction. The intervention was granted and, on appeal, the Eighth Circuit ordered a stay of the district court's preliminary injunction. *Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 909 (8th Cir. 2020) ("[W]hile the state no longer challenges the preliminary injunction, it is in the public interest to uphold the will of the people . . . ."). After the stay was granted, the plaintiffs and the State attempted to moot the litigation by voluntarily dismissing the underlying case. *See* Notice of Dismiss., *Simon*, 2021 WL 1175234 (Civ. No. 0:20-cv-01205-ECT-TNL) No. 19-cv-3000 SRN/DTS (D. Minn. August 26, 2020). Ultimately, Eighth Circuit went on to vacate the district court's decision on the preliminary injunction. *See* J., *Pavek v. Simon*, No. 20-2410 (8th Cir. Sept. 21, 2020). This

outcome would not have occurred had the RNC and others not able to intervene.

These examples and others cited herein demonstrate that courts should not make automatic assumptions that executive branch official defendants adequately represent the same interests with other intervenors, including other governmental intervenors.

In sum, particularly in controversial cases, government defendants are not frequently Platonic guardians of the public interest or the interests of other prospective intervenors. Their interests that are at best indifferent and at worst hostile to the interests of prospective intervenors, even when they are actively defending the litigation. Assessing these competing interests should be done on a case-by-case basis, without a heightened presumption of adequacy that functions as a thumb on the scale blocking other parties from defending their own interests once the government is involved.

IV. THE FOURTH CIRCUIT'S STANDARD IS CONTRARY TO JUDICIAL EFFICIENCY AND CREATES PRACTICAL DIFFICULTIES FOR INTERVENORS

The Fourth Circuit's standard is contrary to the goal of judicial efficiency and places prospective intervenors in a Catch-22. In effect, the Fourth Circuit's ruling forces potential intervenors to wait to intervene until a government defendant has abdicated their duty to defend a law in court by taking steps such as "failing to file an appeal or petition for certiorari in the appropriate circumstance or otherwise litigate on

a law's behalf." *Berger*, 999 F.3d at 938. In the absence of such abandonment, the motion to intervene as of right is "premature." *Id*.

This standard places potential intervenors in a Catch-22. Under Rule 24(a)(2), motions to intervene must be "timely." In general, motions to intervene are considered timely when they are filed early in the litigation process. "As soon as a prospective intervenor knows or has reason to know that his interests might be adversely affected by the outcome of the litigation he must move promptly to intervene." *U.S. v. South Bend Cmty. School Corp.*, 710 F.2d 394, 396 (7th Cir. 1983). "To determine whether an application for intervention is timely, we examine the following factors: how far the suit has progressed, the prejudice that delay might cause other parties, and the reason for the tardiness in moving to intervene." *Scardelletti v. Debarr*, 265 F.3d 195, 203 (4th Cir. 2001); *see generally United States v. Virginia*, 282 F.R.D. 403, 405 (E.D. Va. 2012) ("Where a case has not progressed beyond the initial pleading stage, a motion to intervene is timely."); *RLI Ins. Co. v. Nexus Servs., Inc.*, Civ. No. 5:18-CV-00066, 2018 WL 5621982, at *2 (W.D. Va. Oct. 30, 2018) (noting that a "case is still in its early stages, with only the initial pleadings filed and discovery recently commencing per the Joint Discovery Plan" for purposes of assessing a timely intervention). "Although entry of final judgment is not an absolute bar to filing a motion to intervene, the authorities note that: 'There is considerable reluctance on the part of the courts to allow intervention after the action has gone to judgment and a strong showing will be required of the applicant.'" *Houston General Ins. Co. v. Moore*, 193 F.3d 838, 840

(4th Cir. 1999) (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1916, at 444–45 (2d ed. 1970)). This is because "[t]he purpose of the requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." *South Bend Cmty. School Corp.*, 710 F.2d at 396.

The Fourth Circuit's standard discourages, if not outright blocks, early intervention, especially in fast-moving cases involving voting laws. Instead, it requires potential intervenors to wait and see how litigation plays out before being able to successfully intervene. Many of the actions potential intervenors are concerned about, such as a lackluster defense or a settlement or consent decree that is detrimental to the prospective intervenor's interests will not be readily apparent until a lawsuit is "within sight of the terminal," the very situation that Rule 24 seeks to prevent. To wit, the district court in Rhode Island previously criticized the RNC for taking just over forty-eight hours to file a motion to intervene after being informed that the parties were *negotiating* a consent decree. *Common Cause v. Gorbea*, Civ. No. 1:20-CV-00318-MSM-LDA, 2020 WL 4365608 (D.R.I. July 30, 2020) ("On that same Friday, counsel for the Secretary of State informed counsel for the Rhode Island Republican Party that the parties were going to negotiate a consent decree and that if the Republican Party was going to attempt to intervene, it should do so quickly. Yet, it was not until more than 48 hours later, at approximately midnight on Sunday, July 26, that the Republican National Committee ('RNC') and the Rhode Island Republican Party filed a Motion to

Intervene."). The Fourth Circuit's heightened standard places potential intervenors in the unenviable position of moving early and risking being "premature" or waiting until inadequacy is manifest and risking being untimely.

Even when prospective intervenors are able to make a "strong showing" that they should be allowed in a case at the eleventh hour or on appeal, they will have already sacrificed much of their ability to adequately protect their interests. As the Court of Appeals for the Fifth Circuit explained, intervention in an appeal "cannot adequately substitute for intervention at the district court level, as many more issues are at stake in the district court" than the limited issues on appeal. *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994); *see also generally Common Cause v. Gorbea*, 970 F.3d 11, 14 (1st Cir. 2020) (granting the RNC's motion to intervene "for the purposes of appeal only" after the district court denied a motion to intervene and entered a consent judgement and decree). And once a consent decree or settlement is in place, it is more difficult for prospective intervenors to dislodge it. *See Mi Familia Vota v. Hobbs*, 977 F.3d 948, 954 (9th Cir. 2020) ("When state parties subject to a court order accede to that order, there is little cause for the court to disturb such an arrangement."); *see also Republican Nat'l Comm. v. Common Cause*, 141 S. Ct. 206 (2020) (mem.) (denying a stay application from intervenors because "here the state election officials support the challenged decree, and no state official has expressed opposition").

The Fourth Circuit's overly restrictive standard also runs counter to the principles of judicial efficiency more

generally. The danger to judicial efficiency of excluding relevant prospective intervenors is illustrated by the winding path of litigation in *Democracy N.C. v. N.C. State Board of Elections*, Civ. No. 1:20CV457, 2020 WL 6591397 (M.D.N.C. June 24, 2020). In *Democracy N.C.*, the court denied the RNC, the National Republican Senatorial Committee, and the National Republican Congressional Committee's joint motion to intervene, ruling that the applicants' interests were adequately represented by the government parties already in the case. Subsequently, the court entered a preliminary injunction that no party appealed and that was used to justifying unilateral changes to state election law. *Democracy N.C. v. N.C. State Bd. of Elections*, Civ. No. 1:20CV457, 2020 WL 6058048 (M.D.N.C. Oct. 14, 2020); *see also Wise v. North Carolina State Bd. of Elections,* No. 5:20-cv-00505 (E.D.N.C.). In response, the RNC and others filed a separate lawsuit, which was then transferred to the *Democracy N.C.* court. Order, *Wise v. North Carolina State Bd. of Elections,* No. 5:20-cv-00505 (E.D.N.C. Oct. 3, 2020); *see also Democracy N.C.*, 2020 WL 6591367 (M.D.N.C. Oct. 5, 2020). In short, by denying intervention in the first instance, the district court set off a chain of events resulting in the proposed intervenors seeking relief in a second lawsuit that ultimately boomeranged back to the original court anyway. In between, all the relevant parties had to expend time and money pursuing parallel tracks, which could have been avoided if the court had granted the motion to intervene in the first instance. This is hardly a model of judicial efficiency, yet it is precisely the sort of round about resolution the Fourth Circuit's standard incentivizes, if not outright requires.

There is a different way. In *Democratic National Committee v. Bostelmann*, Civ. No. 20-cv-249-wmc, 2020 WL 1505640 (W.D. Wis. Mar. 28, 2020), the district court granted the RNC's motion to intervene. The Court of Appeals for the Seventh Circuit also granted the Wisconsin Legislature's motion to intervene. *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538, 20-1546, 20-1539, & 20-1545, 2020 WL 3619499 (7th Cir. Apr. 3, 2020). The district court "ordered that Wisconsin voters can continue to vote absentee after election day, even though no party asked the court to grant such extraordinary relief, nor submitted any evidence justifying that remedy," and the Court of Appeals declined to issue a stay. Emergency Application for Stay, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, No. 19A1016 (U.S. 2020); *see Democratic National Committee v. Bostelmann*, 451 F.Supp.3d 952 (W.D. Wis. 2020); *Democratic National Committee v. Bostelmann*, Nos. 20-1538, 20-1546, 20-1539, & 20-1545, 2020 WL 3619499 (7th Cir. Apr. 3, 2020). The government defendant declined to seek an emergency stay from this Court; the intervenor-defendants did and did so successfully. *See* Emergency App. for Stay, *Republican Nat'l Comm.* No. 19A1016 (U.S. 2020); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020). The intervenors were able to protect their interests, which, as subsequent events made clear, were different from those of the government defendants. This would have been much more difficult if the RNC and Wisconsin legislature had not been allowed to intervene.

As Petitioners note, Rule 24's factors for intervention as of right and Court precedent do not take judicial efficiency into account, the RNC recognizes courts' desire to avoid the potential complications and delay associated with litigation involving multiple parties. Fortunately, a federal court has multiple tools at its disposal to minimize those complications by requiring consolidated briefing, limiting discovery, and taking other steps within the courts' broad discretion to manage its cases in an efficient manner. And in any event, recent cases involving challenges to voting laws demonstrate attempts to keep potential intervenors out of cases has had the opposite effect.

CONCLUSION

The heightened standard required by the Fourth Circuit is contrary to the text and history of Rule 24, underestimates the actual divergence of interests between governmental parties and would-be intervenors, and is counter to the goal of judicial efficiency. For the foregoing reasons, amicus curiae respectfully requests that this Court find that there is no heightened presumption of adequacy for government defendants under Rule 24(a)(2) and, consequently, that Petitioners are entitled to intervene as a matter of right in this litigation.

Respectfully submitted,

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*Application for admission forthcoming