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 OF AMICI CURIAE ARIZONA, ALABAMA, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, SOUTH CAROLINA, TEXAS, AND UTAH IN SUPPORT OF PETITIONERS

MARK BRNOVICH
Attorney General

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

BRUNN W. ROYSDEN III
Solicitor General
Counsel of Record
DREW C. ENSIGN
MICHAEL S. CATLETT
Deputy Solicitors General

OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
beau.roysden@azag.gov

Counsel for Amici Curiae
(Additional Counsel listed at end of brief)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

INTEREST OF AMICI CURIAE

The following nine States submit this brief as *amici curiae*: Arizona, Alabama, Louisiana, Mississippi, Montana, Nebraska, South Carolina, Texas, and Utah ("Amici States").[1]

Amici States have sovereign and practical interests in ensuring their duly enacted laws are fully defended in court when challenged, including through federal courts liberally permitting duly authorized agents to intervene to defend state laws. Amici States also have a strong interest in the development of federal intervention law in a way that appropriately recognizes States' interests in certain federal court litigation. Subsets of Amici States are parties or amici in both of the other pending merits cases involving state intervention, *Cameron v. EMW Women's Surgical Center, P.S.C.*, No. 20-601, and *Arizona v. City and County of San Francisco*, No. 20-1775.

The threats to state interests are clear in this case. A narrow majority of the en banc Fourth Circuit prevented authorized agents under North Carolina law (the President Pro Tempore of Senate and the Speaker of the House of Representatives) from intervening to defend the constitutionality of S.B. 824, an election integrity law passed by North Carolina's General Assembly over the Governor's veto. And the Fourth Circuit did so on ostensibly procedural grounds, holding that the District Court did not abuse its discretion in concluding under Rule

---

[1] Pursuant to Rule 37.6, the undersigned certifies that no party's counsel authored this brief, and only Amici States through their Attorneys General made a monetary contribution to this brief's preparation and submission.

of Civil Procedure 24(a)(2) that existing parties—the members of the North Carolina State Board of Elections, who are appointed by and serve at the pleasure of the very Governor that vetoed S.B. 824—adequately represent North Carolina's interests in defending the law's constitutionality.

Amici States urge this Court to reverse the denial of intervention and establish a clear rule. When a state law is challenged in federal court, authorized state agents may intervene in addition to named state defendants if the existing parties "may be inadequate" to fully defend the State's interest in the validity of its laws and such intervention is timely sought.

SUMMARY OF ARGUMENT

As in the other intervention cases being considered this Term, the primary issue presented here is one of profound substantive importance to the States and to our democratic system of governance more generally.

North Carolina—like the federal government and other States—has a particular procedure for enacting laws. Both chambers of its General Assembly must approve the same bill, and it must be signed into law by the Governor (or a veto must be overridden). And the legislators and Governor are elected directly by the people. Repealing laws must follow the same process. These democratic processes are, by design, intentionally difficult to surmount. But they can be wrongfully circumvented when a named state official declines to fully defend state law in federal litigation, including through complete appellate review, and such law is thereby invalidated. In that instance, the strategic surrender of as little as one party/agency—often unelected—replaces the will of

the people, as expressed by their elected representatives.

These dangers have materialized far too often in the past—and present. *See, e.g., Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 141 S. Ct. 1734 (2021). Many States have therefore chosen to empower multiple agents to defend state law. And those agents may seek to intervene even when another state agent is named as a party. This helps ensure that the State's agents are able to offer and preserve all meritorious arguments both at the trial level and through appeal. While plaintiffs are the masters of the claims and legal theories they chose to pursue, they should not enjoy similar selective choice over which State official will defend against their suit and whether state law is fully defended through complete appellate review—especially where governmental defendants who may not have been inclined to defend the suit fully (or at all) can be named.

Amici States offer high-level points to assist the Court in establishing a legal test for the narrow question of when a duly authorized state agent seeks to intervene to defend a state law that is being challenged and where another state party is already named. First, consistent with their sovereignty under our system of dual sovereignty, the States may choose to structure their own governments in different ways to best protect their sovereign and practical interests in defending their laws, and federal intervention law should respect their choices. Second, the "may be inadequate" standard this Court has previously adopted (but the Fourth Circuit flouted below) best protects federal-state comity, harmony between authorized agents, and the

adversarial system. Third, concerns about case efficiency and manageability are better handled through case-management orders and individual rulings, rather than denying intervention outright. Fourth, although intervention is permitted at an early stage, the timeliness inquiry for intervention should not be triggered by the mere fact that a named defendant may cease defending in the future.

ARGUMENT

I. States May Choose To Structure Their Governments In Different Ways To Best Protect Their Sovereign And Practical Interests In Defending Their Laws.

"Our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Consistent with that residual sovereignty, States may structure themselves differently than the federal government. For example, nearly every State has multiple independently elected executive branch officials, rather than a unified executive. Similarly, States have the sovereign authority to decide how best to protect their interests in defending their laws from challenge—and federal courts should respect these choices. That fundamental principle applies across many different sub-issues relating to intervention, including whether there is a protectable interest that may be impaired, whether a named party is adequate, and whether permissive intervention should be granted. All of these inquiries should be informed by the important state interests discussed below.

The dissents below recognized the important substantive issues here. *See, e.g.*, Pet. App. 56

(Niemeyer, J., dissenting) ("The majority opinion fails to take proper account of this state law, which I suggest lies at the substantive root of this case."); *id.* at 59 (Quattlebaum, J., dissenting) ("Here, the district court excluded from its analysis the express policy of North Carolina as reflected in its democratically-enacted statutes."); *id.* at 81 (Quattlebaum, J., dissenting) ("North Carolina has expressed its desire for the Leaders to represent it in litigation like the case before us. … North Carolina, in enacting the statute, made the predictive judgment that there will be cases where the Executive Branch will not adequately represent its interests."). This Court should similarly recognize the important state interests presented by intervention here.

A. This Court's Recognition That States May Appoint "Agents" To Defend State Laws Is Consistent With The Sovereignty Retained By The States And Promotes The Benefits of Federalism.

1. This Court has recognized that States may appoint "agents" to defend their laws from challenge in court. "[A] State must be able to designate agents to represent it in federal court." *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013); *accord Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). And this Court recently reiterated that when a State makes the necessary designation, federal courts should respect it. In *Bethune-Hill*, this Court recognized that "if the State had designated the House to represent its interests, and if the House had in fact carried out that mission, we would agree that the House could stand in for the State." 139 S.

Ct. at 1951; *see also Karcher v. May*, 484 U.S. 72, 81–82 (1987) (General Assembly Speaker and Senate President properly intervened below to defend constitutionality of a law after Attorney General declined to do so); *Diamond v. Charles*, 476 U.S. 54, 62 (1986) ("[A] State has standing to defend the constitutionality of its statute.").

Bethune-Hill and *Hollingsworth* both expressly recognize that a State may authorize more than one agent (*i.e.*, "agents") to defend its laws. *Bethune-Hill*, 139 S. Ct. at 1951; *Hollingsworth*, 570 U.S. at 710. Such provisions help promote democratic values by ensuring meaningful defense of state laws when they are challenged as unconstitutional. That is particularly important to guard against the situation where a named state officer is sympathetic to the policy objectives of plaintiffs and is willing to capitulate (in whole or in part) based on the officer's own policy preferences and constituent demands. Such an official may avoid pursuing certain meritorious defenses. Nothing in federal law compels such a result. Federal courts are supposed to invalidate state laws as a *last* resort. *See Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944) ("State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared."). This Court's cases permitting intervention by all authorized state agents is consistent with presuming state laws constitutional and affording States a full opportunity to defend them.

2. Although none of this Court's intervention cases addressed a state agent seeking to intervene while another state agent was a party and defending the challenged law, they are nonetheless informative

because their language and reasoning supports intervention here.

Bethune-Hill phrased the issue in terms of sovereignty: "Virginia has … chosen to speak as a sovereign entity with a single voice." 139 S. Ct. at 1952. Virginia, "had it so chosen, could have authorized the House to litigate on the State's behalf, either generally or in a defined class of cases." *Id.* The Court summed it up: "the choice belongs to Virginia." *Id.* Given that the touchstone is sovereignty, there is no sufficient reason to limit that sovereignty artificially by overriding the State's choice to authorize multiple state agents to defend at the same time to ensure the full defense of state law.

That States retain full sovereign authority in this area follows from the proposition that the States retained sovereign powers independent of the federal government. "When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority 'to do all ... Acts and Things which Independent States may of right do.'" *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018) (quoting The Declaration of Independence para. 32 (U.S. 1776)). "The Constitution limited but did not abolish the sovereign powers of the States, which retained 'a residuary and inviolable sovereignty.'" *Id.* (quoting The Federalist No. 39, at 245 (James Madison) (C. Rossiter ed. 1961)); *see also Alden v. Maine*, 527 U.S. 706, 759 (1999) (The States exist "as a refutation" of the idea that the "National Government [is] the ultimate, preferred mechanism for expressing the people's will."); *Gregory*, 501 U.S. at 457 (Our system

of government is said to be one of "dual sovereignty.").

A State thus "clearly has a legitimate interest in the continued enforceability of its own statutes." *Maine v. Taylor*, 477 U.S. 131, 137 (1986). "No one doubts" this. *Hollingsworth*, 570 U.S. at 709–10. This interest is so substantial that "[a]ny time a state is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *see also Abbot v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018).

Moreover, state sovereignty in and of itself is not the only relevant consideration. Closely related to this is that state sovereignty also promotes the key *federal* values of creating a counterbalance to national power and an ability for States to serve as laboratories of democracy—all of which ultimately promotes liberty and competition for a mobile citizenry. If laws are erroneously invalidated, then the power to enact local policies is directly undermined. For this reason, States' authority to vigorously defend their laws when challenged must be fully recognized to promote the healthy balance underlying federalism.

And this balance ultimately serves the purpose of promoting not just innovation but also individual liberty. *See Bond v. United States*, 564 U.S. 211, 221 (2011) ("Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. 'State

sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" … Federalism secures the freedom of the individual.") (citations omitted); *Alden*, 527 U.S. at 751 ("When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government.").

3. Given the important sovereign and federal values at stake, this Court should adhere closely to the framing in *Bethune-Hill*, 139 S. Ct. at 1952 ("the choice belongs to Virginia"), and not artificially create a limitation on state decisions to authorize more than one agent to defend state law, even at the same time. This conclusion applies across many different sub-issues of intervention, including whether there is a protectable interest that may be impaired, whether a named party is adequate, and whether permissive intervention should be granted.

B. States Also Have Significant Practical Interests At Stake When The Validity Of A State Law Is Challenged In Court.

Multiple practical considerations are also directly implicated when a state law is challenged, and these considerations strongly support permitting intervention by authorized state agents. These include: impairment of a State's ability to enact future legislation; practical legislative interests in the validity of the law being challenged; the State's interest in the orderly administration of its laws and separation of powers; and reliance by private citizens and residents on the validity of the State's laws.

Because of the precedential effect of court decisions, an adverse decision can have a lasting impact on a State's ability to legislate in the future. Legislatures are meaningfully impaired from legislating by existing court decisions on a particular subject. It is therefore appropriate for them to take steps to reduce the risk of existing laws being erroneously declared unconstitutional and setting a harmful precedent for the State. Intervention by authorized state agents serves that interest. Allowing a full defense also avoids re-litigation by parties that were excluded from the particular case, and garners respect for federal decisions by avoiding feelings of resentment that an interested party's voice was excluded.

There are also legislative expectations and opportunity costs. If a portion of a law is invalidated, it necessarily will change the enacted statutory scheme to some degree from what the Legislature expected and deprive the Legislature of the choice it attempted to make. Legislatures also necessarily allocate their limited resources to enact some legislation over other legislation. If legislation is improperly invalidated, the Legislature suffers the opportunity cost of legislation it could have otherwise enacted.

The State also has interests in the orderly administration of state law and the separation of powers. Separation of powers strongly supports that state officials who implement or execute laws should not have sole discretion not to defend a law when the State has authorized other agents to come in and defend the law's validity. This is because sue-and-settle strategies are antithetical to democratic values. But even in situations that are more subtle

than outright "sue and settle," the above interests still weigh heavily in favor of liberal intervention by authorized agents. For example, the vigorousness of an executive branch official's defense of a law could be influenced by the official's view of that law (*e.g.*, if it was enacted over his veto)—which could take the form of an almost infinite variety of less-than-fulsome-defense actions. For this reason, it is reasonable for a State to appoint multiple agents to defend its laws.

Liberal intervention also promotes the value of allowing voters to select executive and legislative officials separately by avoiding vesting a legislative power to repeal laws in executive officials. And most States employ a non-unitary executive, further insulating elected executive branch officials from the legislative process. *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2448 & n.3 (2006) (noting that forty-three States elect their Attorneys General). Allowing authorized agents to intervene helps prevent the situation where one member of the executive branch, who is not part of the legislative process, can impose his or her will on the entire State through litigation strategy.

Finally, state citizens and residents have a strong reliance interest in the validity of state laws. They order their affairs and activities presuming that laws are valid and have effect. The rule of law provides stability and certainty for citizens to order their affairs. When laws are erroneously declared invalid (or agreed to be invalid through settlement), those reliance interests are necessarily upset.

These structural and practical concerns must inform the standard that the Court establishes for intervention by an authorized state agent when a state statute or constitutional provision is challenged in federal court. The Court should establish a liberal standard for intervention by authorized state agents that seeks to avoid unnecessary harm to state interests through the denial of intervention and resulting less vigorous or complete defense of state law in federal court.

C. States Have Experience With Having Multiple Agents Defend State Law, And They Know That It Is Practicable And Workable.

This Court can rely on the fact that States have experience with having multiple agents defend state law. This is because several States have adopted statutes for their state courts that allow additional state agents to intervene or be heard when a state law is challenged as unconstitutional. The existence of these laws shows that it is practicable and workable to allow intervention by authorized agents in this context.

Arizona law, for example, provides that when "a state statute, ordinance, franchise or rule is alleged to be [facially] unconstitutional," the Attorney General, Speaker of the House of Representatives, and President of the Senate "shall be entitled to be heard." Ariz. Rev. Stat. § 12-1841(A).

Indiana law similarly provides in the redistricting context that "[t]he House of Representatives and Senate … are hereby authorized and empowered to employ attorneys other than the Attorney General to defend any law enacted creating legislative or

congressional districts for the State of Indiana." Ind. Code Ann. § 2-3-8-1. This law was cited in *Bethune-Hill*, 139 S. Ct. at 1952.

Nevada law provides that in any action or proceeding that challenges any law, the Legislature may elect to intervene, and the Legislature has "an unconditional right and standing to intervene in the action or proceeding and to present its arguments." Nev. Rev. Stat. Ann. § 218F.720(2)-(3) (West). The federal District Court in Nevada granted the Legislature of-right intervention in a suit challenging laws related to the citizen initiative, even though the Nevada Secretary of State was already a party. *People's Legislature v. Miller*, No. 2:12-CV-00272-MMD, 2012 WL 3536767, at *5 (D. Nev. Aug. 15, 2012).

Oklahoma law provides that where the constitutionality of any statute affecting the public interest is drawn into question, the Speaker of the House of Representatives and President Pro Tempore of the Senate "may intervene on behalf of their respective house of the Legislature and … shall be entitled to be heard." Okla. Stat. Ann. tit. 12, § 2024(D)(2) (West).

Wisconsin law provides that "the assembly, the senate, and the legislature" may intervene "at any time in [an] action as a matter of right" if "a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied." Wis. Stat. § 803.09(2m). The Seventh Circuit denied intervention notwithstanding this statute in *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 797 (7th Cir. 2019).

II. The "May Be Inadequate" Standard Comports With Rule 24's Text And This Court's Existing Interpretation. It Also Best Promotes Federal-State Comity, Harmony Between Authorized State Agents, And The Adversarial System.

In the face of a sovereign determination that a particular state agent is authorized to defend state law, there should be a liberal standard for permitting intervention by those agents. Turning to the specific issue in this case, a liberal standard for adequacy of representation comports with the text of Rule 24 and this Court's prior discussion. Rule 24(a)(2)'s phrasing of the requirement is "unless existing parties adequately represent that interest." This presents the requirement as an exception and suggests the presumption is that intervention should be permitted if the first elements of Rule 24(a)(2) are met. And in *Trbovich v. United Mine Workers of America*, the 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*." 404 U.S. 528, 538 n.10 (1972) (emphasis added).

As discussed above, state sovereignty interests also strongly support a liberal interpretation of Rule 24(a)(2). The federal courts, as part of the federal government, should give weight to a State's determination to authorize a particular agent to defend its laws. *See* Part I, *supra*. The Sixth Circuit's test correctly captures this. It applies no presumption against intervention but instead imposes a minimal burden on state-designated agents to establish that representation of their

interests by an existing state-official party may be inadequate. *See Ne. Ohio Coal. for Homeless v. Blackwell*, 467 F.3d 999, 1007–08 (6th Cir. 2006).[2]

The "may be inadequate" standard also best avoids one state official having to accuse another state official of actual inadequacy or even sabotage. In contrast, a stricter standard for intervention forces potential intervenors to accuse the existing party of incompetence, lack of good faith, or collusion. When a state Attorney General is tasked with defending state law and may need to intervene in his official capacity or as the State to do so, a higher intervention standard creates a potential issue if the named official is a "client" of the Attorney General's Office. A "may be inadequate" standard likewise avoids courts having to find that a named state official is failing to carry out his or her duties to defend state law in order to grant of-right intervention.

Liberal intervention also promotes a robust adversarial system and state agents making all meritorious arguments in defense of state law. Because courts, generally speaking, are limited to the issues raised by the parties, if a named party fails to raise an argument in the defense of a state law, courts are unlikely to consider it, and may even be precluded from doing so. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) ("In

---

[2] For consistency in the law, the issue of intervention by an authorized state agent is properly addressed through of-right intervention under Rule 24(a). But this Court's Opinion should make clear that whatever test it adopts does not divest the lower courts of discretion to also allow permissive intervention under 24(b) even if the elements of 24(a) intervention are not met.

our adversarial system of adjudication, we follow the principle of party presentation."). And it is well established that courts are wary of considering new issues raised only in an amicus brief. Thus, allowing an authorized agent to intervene as a party preserves adversarial process. It further deters gamesmanship by removing the incentive to only name certain defendants.

The contrary rule opens up challenges of state law to gamesmanship by plaintiffs, who could choose to sue only the most sympathetic state official with a colorable basis to be a defendant and then pursue a "sue and settle" strategy with that sole defendant. As Judge Bush noted in another case, it would be a plaintiffs' "dream case" to file suit to declare a state law invalid, and have "no one in th[e] case to defend the challenged state law." *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 831 F. App'x 748, 753 (6th Cir. 2020) (Bush, J., dissenting) *cert. granted sub nom. Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 141 S. Ct. 1734 (2021).[3]

Other Circuits' tests, which apply a strong presumption of adequate representation when an executive-branch official is already defending, do not accord the proper respect to a State's determination of which agents may be necessary to the defense of its laws or the other concerns discussed above. *See e.g.*, Pet. App. 34–43 (discussing the Fourth Circuit's strong presumption of adequacy of representation);

---

[3] As in *Cameron*, intervention may occur to seek full appellate review after the named official actually stops defending. But intervening earlier, while not required, allows the intervenor to ensure that his or her arguments on behalf of the State's interest are developed and preserved in the record for appellate review.

Planned Parenthood of Wis., Inc., 942 F.3d at 799 (adopting an arguably even stronger presumption against intervention in this context). As will be discussed in the next section, the efficiency and parade-of-horribles concerns underlying these presumptions of adequacy are overblown and are better addressed through individual rulings on particular issues than by denying intervention to an authorized agent.

III. Concerns About Case Efficiency And Manageability Are Better Handled Through Case-Management Orders And Individual Rulings, Rather Than Denying Intervention.

Concerns about case efficiency and manageability should not overcome a State's legitimate interest in having its authorized agents participate as parties when a state law is challenged.

The better way to handle this is through case management orders and individualized rulings on issues rather than denying party status altogether. For example, in a recent case in Arizona, the District Court established a protocol that all state defendants must coordinate on briefs. *See Mi Familia Vota v. Hobbs*, No. 2:21-cv-1423, 2021 WL 5217875, at *2 (D. Ariz. Oct. 4, 2021). This is a much better way for a court to avoid duplicative filings than denying intervention. And it preserves the rights of multiple state agents to fully defend state law and raise their defenses. Similarly, courts can make clear the purpose for which intervention is granted, which is the defense of state law, and can rule on any discovery dispute in light of the reason for which intervention was granted.

The counter-argument that parties necessarily must narrow their arguments and therefore intervention frustrates the inherent narrowing of arguments fails given the important state interests at play here. First, there is no good way for courts to easily distinguish at the outset between the mere narrowing of arguments on the one hand and failing to raise potentially meritorious arguments on the other. Second, prohibiting an authorized state agent from having a seat at the table will only breed resentment as to arguments that are not raised. It is far preferable for all authorized agents who chose to intervene to be heard, and the court can simply give arguments the attention they deserve. Rather than a bright-line rule prohibiting party status, lower courts should allow authorized agents to become parties but then use practical limitations (such as reasonable page and time limits) to manage their cases.

The stated hypothetical concerns by certain circuits (*e.g.*, the Seventh Circuit) that multiple state agents are automatically going to make the case unmanageable are disrespectful of the professionalism of state attorneys and contrary to the actual demonstrated practice above. *See* Part I(C), *supra*. It presumes bad faith and incompetence by States that is insulting and contrary to the comity for state sovereignty that is extended by federal courts. Moreover, multiple state agents often are parties in a suit because they are named by the plaintiffs. The only difference in the intervention context is that these authorized agents were not named in the first instance. That difference hardly gives rise to the parade of horribles that some circuit courts have expressed. While intervention may add

some modest complexity, that burden is far outweighed by a State's sovereign interests.

The liberal intervention rule could ultimately *reduce* the number and scope of intervention controversies that lower courts will have to adjudicate. This is because it will drain the incentive to sue only the most sympathetic state official. Stripped of this potential for gamesmanship, plaintiffs will be more likely to simply name the relevant state officials. And where an authorized state agent does not have enforcement or implementation power (*e.g.*, legislative leadership), it still allows them to vindicate the State's interests when authorized as an agent by state law. And when controversies arise, the courts will have an easier analysis on intervention: rather than having to speculate about subjective intent or whether a named defendant will necessarily fully defend the law, the court simply will consider whether the existing parties "may be inadequate."

Finally, a liberal intervention rule can also be squared with the traditional role of Attorneys General to defend state laws in court. While the particularities may differ, most if not all States vest their Attorneys General with the primary duty to defend state law in court. *See, e.g.*, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2336 (2021) (discussing that Arizona Attorney General "fits the bill").[4] In many cases the Attorney General will also be statutorily required to represent the named state official. Intervention by other authorized state agents (whether the Attorney

[4] Sources of state law can be the state constitution; statutes; or judicial decisions, including the common law.

General in his/her official capacity, the State itself, another executive official such as the Governor, or the Legislature or legislative leadership) should be viewed in light of the interests at stake, which is the full defense of state law and the presentation of potentially meritorious defenses that the named official may forego.[5] The best way to balance those critical interests with the practicalities of managing efficient litigation is not to deny intervention but rather to order all defendants to coordinate as much as possible and limit intervention to the issue of the validity of the state law being challenged.

IV. The Timeliness Prong For Intervention Should Not Be Triggered By The Mere Fact That A Named Defendant May Cease Defending In The Future.

The question of intervention by an authorized state agent to defend state law raises two distinct timing questions: when can the agent first intervene, and if the agent waits until the named parties actually stop defending state law, is the intervention still timely. The Court should make clear that an authorized state agent can intervene as soon as they can establish the existing parties "may be inadequate." That will frequently be at the outset of the case. However, the Court should also make clear that for the timeliness requirement of Rule 24, a request for

---

[5] All of these points apply equally, if not more forcefully, when a State's Attorney General seeks to intervene in his or her own name or on behalf of the State for the defense of state law. Federal law already recognizes under Rule of Civil Procedure 5.1 automatic intervention by the Attorney General when no State agent is named. But state Attorney General intervention should also be a low bar under 24(a) and (b), even if another state agent is named.

intervention is not untimely if brought within a reasonable time after the named parties actually stop defending state law. This could occur much later in the case (even on appeal).

In *United Airlines, Inc. v. McDonald*, the Court held that "post-judgment intervention for the purpose of appeal" is proper so long as the intervenor, "in view of all the circumstances … acted promptly." 432 U.S. 385, 395–96 (1977). Ordinarily, that means a non-party may intervene even after a final judgment so long as he or she does so "as soon as it [becomes] clear … that [his or her interests] … would no longer be protected by" the parties in the case. *Id.* at 394. *McDonald* makes very clear that timeliness is determined based on when a party abandons its defense of the law.

Compelling state officials to intervene at the outset, even where the named defendants are (then) committed to defending the law, impairs the discretion that should be afforded authorized state agents. And it is precisely what *McDonald* sought to avoid by recognizing that non-parties may rely on existing parties to defend the challenged law and seek to intervene only when exiting parties stop doing so. It also promotes harmony among state officials to permit even an authorized state representative to wait—if they choose—to intervene until it is clear the named party stops defending state law.

CONCLUSION

The Court should reverse the denial of intervention.

Respectfully submitted,

MARK BRNOVICH
Attorney General

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

BRUNN W. ROYSDEN III
Solicitor General
Counsel of Record
DREW C. ENSIGN
MICHAEL S. CATLETT
Deputy Solicitors General

OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
beau.roysden@azag.gov

Additional Counsel

STEVE MARSHALL
Attorney General of Alabama

DOUGLAS J. PETERSON
Attorney General of Nebraska

JEFF LANDRY
Attorney General of Louisiana

ALAN WILSON
Attorney General of South Carolina

LYNN FITCH
Attorney General of Mississippi

KEN PAXTON
Attorney General of Texas

AUSTIN KNUDSEN
Attorney General of Montana

SEAN D. REYES
Attorney General of Utah