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 MINNESOTA, WISCONSIN, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, ILLINOIS, MAINE, MARYLAND, MICHIGAN, NEVADA, NEW JERSEY, NEW YORK, OREGON, PENNSYLVANIA, AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF STATE RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

STATE CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTERESTS OF AMICI CURIAE AND SUMMARY OF ARGUMENT

The States of Minnesota, Wisconsin, Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Nevada, New Jersey, New York, Oregon, Pennsylvania, and Vermont and the District of Columbia (the "Amici States") have an interest in the procedural rules governing who represents state interests in cases involving the validity of state laws. Traditionally, state Attorneys General have had broad powers to conduct litigation for their states. These powers include representing the state and asserting the state interest in constitutional and other civil cases. The Amici States have a strong interest in ensuring that the federal rules of civil procedure on intervention are not applied in a way that interferes with these traditional powers or with the ability of state Attorneys General to effectively manage litigation on behalf of their states.

As the Amici States have learned through experience, district courts should retain extensive discretion to determine that intervention as of right is not appropriate when the proposed intervenor seeks to represent a state's interests, but that state's Attorney General is already adequately representing the state's interests. When a state Attorney General is already adequately defending a law, it would diminish the traditional powers retained by Attorneys General and upend the district court's ability to manage its own docket if a non-party, represented by private counsel, could easily intervene as of right and claim to assert the state's interests. This Court should not apply Rule

24 in a way that would diminish attorney general powers across the country and undermine the effective administration of often complex litigation.[1]

ARGUMENT

I. As a Matter of Tradition and Longstanding Practice, an Attorney General Has Broad Powers to Manage Litigation for the State and Represent the State Interest in Court.

For centuries, Attorneys General have managed litigation for the state and represented the state interest in court proceedings. Jurisdictions throughout the country recognize these broad and longstanding powers for the Attorney General. These powers include representing the state interest in defending state laws from constitutional challenges.

A. The Attorney General's Power to Represent Sovereign Interests Dates Back Many Centuries.

The concept of the Attorney General dates as far back as thirteenth century England, when the monarch appointed attorneys to represent royal interests. See William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2449–50

[1] This brief focuses on the intervention issue. It takes no position on the merits of the underlying substantive claims.

(2006). The Attorney General became the chief legal adviser to the crown, and, over the centuries, the powers of the Attorney General grew. *Id.* Throughout the sixteenth and seventeenth centuries, the Attorney General regularly advised the departments of state and represented them in court. *Id.* In exercising these functions, the Attorney General had considerable discretion. "As chief legal representative of the king, the common law attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion." *Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268 (5th Cir. 1976).

When the office of the Attorney General was introduced in the American colonies, it retained its discretionary powers and broad authority to represent the state interest in litigation. "Most, if not all, of the colonies appointed attorney-generals, and they were understood to be clothed, with nearly all the powers, of the attorney-generals in England." *People v. Miner*, 2 Lans. (N.Y.) 396, 398 (1868). *See also Com. ex rel. Minerd v. Margiotti*, 188 A. 524, 526 (Pa. 1936) ("The office of the Attorney General is an ancient one. It came into being as a necessary adjunct in the administration of the common law of England and was transported to America in the early days of the establishment of government in the colonies as part of their English derived common law.").

In the following centuries, state Attorneys General carried on this traditional function of representing the state in litigation. *See*, *e.g.*, *State ex rel. Cassill v.*

Peterson, 259 N.W. 696, 698 (Minn. 1935) ("The Attorney General represents the sovereign state and the people thereof.").

B. Jurisdictions throughout the Country Recognize the Attorney General Retains Broad Powers to Manage Litigation for the State and Represent the State Interest.

State Attorneys General are the chief legal officers for their states and are almost universally constitutional officers. *See* 7 Am. Jur.2d *Attorney General* § 1 (Nov. 2021 Update).[2] Jurisdictions throughout this country recognize that these officers retain broad powers to "control and manage all litigation on behalf of the state." *State v. Lead Industries, Ass'n, Inc.*, 951 A.2d 428, 473 n. 45 (R.I. 2008).[3]

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[2] In the majority of states, the Attorney General retains common law powers inherent with the office, in addition to any constitutional and statutory powers. *See State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 645 n. 47 (W. Va. 2013) (collecting cases); John Ben Shepperd, *Common Law Powers and Duties of the Attorney General*, 7 Baylor L. Rev. 1, 1 (1955).

[3] *See also*, *e.g.*, *Slezak v. Ousdigian*, 110 N.W.2d 1, 5 (Minn. 1961) ("the courts will not control the discretionary power of the attorney general in conducting litigation for the state"); *Helgeland v. Wisconsin Municipalities*, 745 N.W.2d 1, 49 (Wis. 2008) ("The Attorney General of Wisconsin has the duty by statute to defend the constitutionality of state statutes."); *District of Columbia v. ExxonMobil Oil Corp.*, 172 A.3d 412, 428 (D.C. 2017) ("The Attorney General for the District of Columbia . . . shall be responsible for upholding the public interest. The Attorney General shall have the power to control litigation and appeals, as well as the

Vesting the power to control litigation for the state in a single officer promotes the public interest and accountability. By having a single officer oversee the many varieties of litigation involving the state, its agencies, and officials, it ensures "the adoption and assertion of legal policy and positions by the State . . . is made only after meaningful consideration of the potential effects of such legal policy and positions on the full range of State entities and interests." *State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 39-40 (W. Va. 2002). It also promotes uniformity and consistency on questions of state law. And, it generally ensures that an accountable officer acting in the public interest is in charge of expressing the state's legal views. *Id.*

Unlike private counsel, an Attorney General has the responsibility of a "minister of justice" who acts in the public interest. *Lead*, 951 A.2d at 472. The Attorney General must "see to it 'that justice shall be done' not only in the context of criminal prosecutions, but also while he or she carries out all the functions of that high office—including engagement in litigation in the civil arena." *Id.* at 473 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

The principle that the power over state litigation rests with the Attorney General, and not elsewhere, is

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power to intervene in legal proceedings on behalf of this public interest." (citing D.C. Code § 1-301.81(a)(1))); N.Y. Executive Law § 63(1) (Attorney General shall "[p]rosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state").

so strong that the Attorney General generally cannot delegate control of state litigation to outside counsel, without ensuring the counsel remains subordinate to the Attorney General. *Lead*, 951 A.2d at 476. This is because the advantage of a public officer overseeing state litigation would be lost if lawsuits against the state were managed by private counsel.

C. Attorneys General Have a Long Tradition of Defending the State in Constitutional Challenges to State Laws.

Attorneys General have a long tradition of defending the validity of state laws. Some of the most important early decisions by this Court involved a state Attorney General defending the constitutionality of a controversial state law. *See Gibbons v. Ogden*, 22 U.S. 1 (1824) (New York Attorney General defending the constitutionality of a state law affecting interstate commerce); *McCulloch v. Maryland*, 17 U.S. 316 (1819) (Maryland Attorney General defending the constitutionality of a state law taxing the national bank).

Attorneys General take their duty to defend solemnly and mount robust defenses, unless there are compelling circumstances that warrant nondefense, such as the law's patent illegality or unconstitutionality. *See* Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 Ind. L.J. 513, 541 (2015) (citing statements from past Attorneys General addressing the standards they used for determining when not to defend a law); *see also* Neal Devins & Saikrishna B. Prakash, *Fifty*

States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend, 124 Yale L.J. 2100 (2015) (arguing that the precise contours of the duty to defend depends on the traditions and laws in each state).

Over the centuries, legislatures have passed controversial laws. Even when an Attorney General may have held different preferences, they have defended those laws. *See*, *e.g.*, *Schroeder v. Simon*, 962 N.W.2d 471 (Minn. Ct. App. 2021) (Attorney General defended the constitutionality of a law on felon voting rights, even though he publicly supported legislation that would amend the law to expand voting rights). And, the federal courts have benefited from having a single state officer present the state interests implicated in the litigation.

II. Allowing Intervenors to Represent the State Interest as of Right Is Inconsistent with Rule 24 and Would Diminish the Traditional Powers of the Attorney General.

Rule 24(a) provides that, on a timely motion, a court must allow intervention by a party claiming an interest in the subject of the action, "unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). In assessing whether a party's interest is adequately represented, federal courts have long applied two rebuttable presumptions of adequacy: a presumption of adequate representation when parties share the same ultimate objective as an existing party, and a presumption of adequate representation when

the existing party is a government entity represented by the state Attorney General. *See*, *e.g.*, *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996).

When litigation involves the interests of a state, these well-founded presumptions represent and preserve deference to state sovereignty, including the traditional role of state Attorneys General in defending the laws of the state.

A. Rule 24(a) Requires a Rebuttable Presumption of Adequacy.

Federal courts have long recognized that, when "the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the petitioner must demonstrate adversity of interest, collusion, or nonfeasance." *Virginia. v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976). Strategic or tactical disagreements are insufficient to demonstrate inadequacy under Rule 24. *See United States v. Yonkers Bd. of Educ.*, 902 F.2d 213, 218 (2d Cir. 1990).

If the rule allowed for a finding of inadequacy based on strategic disagreements, intervention as of right would become almost automatic, and the rule would have no meaning. *See Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 181 (2d Cir. 2001) ("If disagreement with an existing party over trial strategy qualified as inadequate representation, the requirement of Rule 24 would have no meaning."). Such

intervention would also risk "generating endless squabbles at every juncture over how best to proceed." *Stuart v. Huff*, 706 F.3d 345, 354 (4th Cir. 2013).

B. While the Widely Held Presumption of Adequate Representation by the State Attorney General Is Consistent with Federal Deference to State Sovereignty, Petitioners' Proposed Standard Would Undermine State Sovereignty.

The presumption of adequacy is particularly strong when the existing party is a state entity or official represented by the state Attorney General, because the Attorney General is responsible for vindicating the sovereign interests of the state and acting in the public interest. *See*, *e.g.*, *Env't Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979) ("a state that is party to a suit involving a matter of sovereign interest is presumed to represent the interests of all its citizens"); *Com. of Pa. v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976) ("a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee"). The presumption applies even when a subdivision of the state attempts to intervene in such suits. *See Del. Valley Citizens' Council for Clean Air v. Com. of Pa.*, 674 F.2d 970, 973-74 (3d Cir. 1982) (recognizing the interest of state legislators in defending a statutorily-created program, but finding they had not overcome the presumption

that the Pennsylvania Attorney General was adequately representing the same interest).

Petitioners ask the Court to flip this long-established presumption on its head. Petitioners argue that, if they merely assert that representation by the Attorney General may be inadequate, that should be sufficient to intervene as of right. Petitioners' proposed standard asks federal courts to presume, without evidence, that the state Attorney General is *not* adequately representing the sovereign interests. Such a presumption would fundamentally be at odds with state sovereignty and the states' traditional role in courts.

Unsurprisingly, given these federalism concerns, federal judges have long declined to either presume inadequacy or to wade into the morass of weighing the adequacy of the litigation strategy of state officials. *See*, *e.g.*, *Del. Valley Citizens' Council for Clean Air*, 674 F.2d at 973 (concluding that legislators' intervention on side of Pennsylvania Attorney General was properly denied); *Higginson*, 631 F.2d at 740 (affirming denial of intervention for water districts represented by their states); *see also United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985 (2d Cir. 1984) ("to intervene in a suit in district court in which a state is already a party, a citizen or subdivision of that state must overcome this presumption of adequate representation").

The cases cited by the Arizona Amici, purportedly in support of a presumption of inadequacy, do not hold

up under scrutiny. The *Blackwell* case they cite actually supports a deferential approach to representation by the Attorney General. Arizona Br. 15 (citing *Ne. Ohio Coal. for Homeless v. Blackwell*, 467 F.3d 999 (6th Cir. 2006)). In that case, the Ohio Attorney General moved to intervene, on behalf of the state, to appeal a decision, after the secretary of state had declined to appeal an injunction. Noting the authority of the Attorney General, as the "chief law officer for the state and all its departments," the court found reliance on the presumption of adequate representation "misplaced," because the secretary of state had indicated he would not appeal, and the Attorney General had the authority to carry the torch for the state. *Blackwell*, 467 F.3d at 1008-09.

By contrast, when a state Attorney General is representing the interests of the state and defending a law, courts have consistently recognized a presumption of adequate representation should apply. *See*, *e.g.*, Wright & Miller, 7C Fed. Prac. & Proc. Civ. § 1909 (3d ed.) (collecting cases).

In this case, Petitioners have argued that the existence of state statutes allowing Petitioners to participate in litigation on behalf of the North Carolina General Assembly is entitled to some consideration. *See* N.C. Gen. Stat. § 1-72.2, § 120-32.6. However, the statutes do not authorize Petitioners to represent the state as a whole, and the statutes do not empower them to override the requirements of federal Rule 24 and automatically intervene as a matter of right. *See* State Resp. Br. 28-30, 36. Even if this Court were to

give the statutes some weight, the statutes apply only to motions to intervene in North Carolina and should not affect the longstanding presumption that an Attorney General is adequately representing the state. For the vast majority of states that do not have such unusual statutory provisions, a strong presumption of adequate representation by the Attorney General should continue to apply and to prevent other actors from intervening to represent the state interest in lawsuits challenging state laws. Otherwise, frequent intervention as of right by non-parties would inject delay and enormous complications into both state Attorneys General's effective management of litigation on behalf of their states and district courts' efficient management of their own dockets. See *infra* Part III.

C. Intervention as of Right Based on Allegations that the Attorney General Is Not Adequately Defending the Law Would Undermine Attorney General Powers.

As the Arizona Amici acknowledge, "most if not all States vest their Attorneys General with the primary duty to defend state law in court." Arizona Br. 9 (citing *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2336 (2021)). An Attorney General may consider many legitimate factors in determining how to exercise discretion in defending the state. *See*, *e.g.*, *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 801 (7th Cir. 2019) ("Wisconsin's interest may be a complicated question, as a state is a fundamentally

corporate body that includes many competing constituencies, . . . "). Of course, various state officials may occasionally disagree with the litigation strategy chosen by the state Attorney General. But, if disagreement with the litigation strategy were sufficient to allow intervention as of right to assert state interests, it would undermine the powers long vested in the office of the Attorney General.

Without the appropriate deference to representation by an Attorney General, in case after case, litigation over the validity of state laws would consist of discordant voices, each claiming to speak for the state, and each simultaneously advancing down different litigation paths.

It is not uncommon for various state officials to disagree with litigation strategy by an Attorney General. *See*, *e.g.*, *Planned Parenthood of Mid-Missouri & E. Kansas, Inc. v. Ehlmann*, 137 F.3d 573, 578 (8th Cir. 1998) (state legislators); *Miracle v. Hobbs*, 333 F.R.D. 151, 156 (D. Ariz. 2019) (speaker of house and president of senate); *One Wisconsin Institute, Inc. v. Nichol*, 310 F.R.D. 394 (W.D. Wis. 2015) (state legislators); *American Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236 (D.N.M. 2008) (state legislators).

It is also not uncommon for proposed intervenors to argue that an Attorney General is not providing adequate representation based on disagreements with litigation strategy. *See*, *e.g.*, *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 659 (7th Cir. 2013) (attacking the adequacy of the Attorney General's

representation because of a disagreement over litigation strategy); *Stuart*, 706 F.3d at 352 (same); *Ehlmann*, 137 F.3d at 578 (same); *Hairr v. First Jud. Dist. Ct.*, 368 P.3d 1198, 1202 (Nev. 2016) (same); *Doe v. State*, No. A20-0273, 2020 WL 6011443 (Minn. Ct. App. Oct. 12, 2020) (same).

In addition, because of the nature of the office of Attorney General, it is often held by public servants who have served in office before or otherwise taken public positions on a range of issues. Potential intervenors will often be able to point to some statement an Attorney General made on an issue, possibly years ago, and use it to suggest the Attorney General is not fully supportive of the state law or policy being attacked and thus may provide an inadequate defense, even though the office is in fact defending the state law.

When the Attorney General is defending a law, public statements on various policy issues and mere disagreement with discretionary decisions on litigation strategy cannot and should not be enough to warrant intervention as of right to assert state interests in that same litigation. State Attorneys General are imbued with the authority and discretion to make litigation strategy decisions for the state, and they are answerable to the citizens of their respective sovereigns through democratic processes. If disagreements on defense strategy were enough, it would become routine for other state actors, represented by private counsel, to intervene and insist that they were the proper voice for the state interest, despite centuries of an Attorney General providing that voice in court. The power of the

Attorney General would be diminished, as an assortment of lawyers would offer competing strategies, while claiming to represent the same state interests.

While the Arizona Amici express concern about a parade of horribles and suggest that adherence to the text of Rule 24 will result in an insufficient defense of state laws,[4] history has not borne out these concerns. Indeed, denial of intervention as of right does not even foreclose state officials from participation in the case, as the opportunities for permissive intervention and participation as *amicus curiae* routinely let such officials present their preferred arguments. *See*, *e.g.*, *N.J. Dep't of Envtl. Prot. v. Exxon Mobile Corp.*, 183 A.3d 289 (N.J. Super. 2015) (where the New Jersey Department of Environmental Protection was the plaintiff, the court denied intervention by a state senator with a coalition of environmental groups but invited them to participate as amicus).

The longstanding presumptions for Rule 24(a)(2) intervention have served to adequately ensure the enforcement and defense of state laws and interests. By contrast, the new standard advocated by Petitioners would undermine the traditional attorney general powers to represent the interests of the sovereign.

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[4] Arizona Amici also express concern that, without a "may be inadequate" standard, state officials will resort to accusing each other "of actual inadequacy or even sabotage." Arizona Br. 15. However, they provide no real-world basis for those allegations. And, if sabotage or collusion actually were to occur, the presumption applied by the Fourth Circuit would be overcome. Furthermore, state officials must still answer publicly for their actions.

III. Allowing an Intervenor to Represent the State Interest as of Right Is Impracticable.

Petitioners' position also poses serious practical problems, as the federal courts have recognized. Courts faced with the issue point to delay, confusion, and disruption, unmanageable cases, and "endless squabble." Pet. App. 34. There are innumerable judgment calls made during litigation, and having the state's litigation overseen by multiple, separate sets of lawyers is not realistic.

First, Petitioners' approach would create untenable complications at every stage. As amici in support of Petitioners recognize, litigation comes with "an almost infinite" number of judgment calls. Arizona Br. 11. It certainly does—from pleadings to scheduling, from discovery to briefing. This reality cuts strongly against any rule that would allow multiple lawyers to simultaneously speak for a state on the countless decisions that make up litigation.

To illustrate, in *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 384 F. Supp. 3d 982 (W.D. Wis. 2019), the Wisconsin Legislature moved to intervene after career state attorneys representing the various state defendants answered the complaint rather than moving to dismiss. The Legislature stated as its concern that the Attorney General's office would not litigate the case "ardently," and asserted it would have moved to dismiss instead of answering. *Id.* at 989. The Legislature did not, however, allege that the state's attorneys had failed to raise a critical affirmative defense in the

answer; rather, the Legislature submitted a proposed answer that "largely mirror[ed]" what the attorneys for the state defendants already had submitted. *Id.*

In other words, the alleged basis to intervene was a disagreement about timing—one of the many judgment calls that is part of litigation and on which two sets of attorneys may disagree. Attorneys will disagree about whether to move quickly to have a case dismissed as a matter of law, or to hold fire until a factual record is developed, which may be useful both for the district-court-level decision and to provide context for an appeal. *See also*, *e.g.*, Pet. App. 44; State Resp. Br. 9 (explaining that proposed intervenor criticized state's attorneys for seeking dismissal of only five of the complaint's six counts, where the sixth claim was a "fact-intensive claim of intentional discrimination," and where the applicable pleading standards meant dismissal was unlikely). Notably, both paths preserved the state's defenses. And, as with any other litigant, the state's attorney must pick one.

What Petitioners propose is incompatible with that reality. If allowed to intervene as of right, an intervenor traditionally will have all the rights of an original party. *See* Wright & Miller, 7C Fed. Prac. & Proc. Civ. § 1922 (3d ed.). And allowing two sets of lawyers to litigate a case as "the State" on two paths is unheard of for a reason. It leads to strategic conflicts and would produce a series of conundrums for the courts. For example, one set of the state's attorneys may want to litigate based on a bare record, while the other set works to build a robust record for summary

judgment. The first approach may tend to undermine the second and vice versa. Meanwhile, how are the courts and parties to manage the case and their resources?

In turn, embedded in each step of litigation are everyday judgment calls—from how to frame issues and conduct discovery, to where to place emphasis and basic tone. Especially where the proposed intervenor harbors a belief that the state's attorneys will not litigate "ardently" or with sufficient "vigor," there is little chance that the state's attorneys and the proposed intervenor will be able to harmonize their professional judgments in any given filing, much less across a case. *See* Pet. App. 43. It thus is no answer that a district court has authority to manage a case, *see* Arizona Br. 17, because a court cannot effectively manage what is an "intractable procedural mess," when a single entity has "two independent parties simultaneously representing it." *Kaul*, 942 F.3d at 801. Petitioners do not begin to address the complications that their proposal presents.

Second, Petitioners and supporting amici base their arguments on incorrect assumptions about how litigation against state officials works, both as to *Ex parte Young* and as to the fact that litigation often involves both facial and as-applied challenges.

The amici supporting Petitioners suggest that adding another set of attorneys representing a state introduces no new complications because lawsuits often include multiple state defendants. Amici propose

that the "only difference in the intervention context is that these authorized agents were not named in the first instance." Arizona Br. 18. But this conflates two very different things.

It is true that a plaintiff often sues multiple state officials when challenging state law. But it also is true that those defendants typically are represented as a group by career state attorneys, who serve as, for example, Assistant or Deputy Attorneys General. That was the case in *Planned Parenthood of Wisconsin v. Kaul*, and it is reflected in any number of cases throughout the country. This is a product of the legal fiction underlying the *Ex parte Young* doctrine. It often makes little practical difference how many officials are named as defendants, or which ones, if at least one defendant is proper for purposes of that fiction. *See Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 378 n. 14 (2006) (discussing *Ex parte Young* as "an expedient 'fiction' "); *Ex parte Young*, 209 U.S. 123, 157 (1908) (holding that "such officer must have some connection with the enforcement of the act"). Thus, the multiple-state-defendants phenomenon poses none of the problems that having multiple sets of *attorneys* representing the same state interest presents.

Similarly inapt is amici's assertion that Petitioners' approach "will drain the incentive to sue only the most sympathetic state official." Arizona Br. 19. Again, that misunderstands *Ex parte Young*'s role. For *Ex parte Young*'s fiction to operate, what matters is that a proper official is named in a case challenging state law. The defense of that state law will not rise and fall on

that official's private feelings; the official is named as a defendant because of her office and its enforcement role under state law. To the extent the state attorneys representing that official refuse to defend the law, the presumption of adequate representation would be overcome.

Even further afield is the Wisconsin Legislature's assertion that the political identity of the Attorney General justifies additional sets of attorneys to represent the state. Wis. Legislature Br. 6–8, 14. That misunderstands not only *Ex parte Young* but also state litigation more generally. Again, when a proper state official is named in a challenge to state law, the state's attorneys then appear to defend it. That duty does not turn on the identity of a particular Attorney General. To illustrate, in the litigation cited by the Wisconsin Legislature, the Assistant Attorneys General representing the state officials were experienced defense-side litigators of abortion regulations who did nothing to suggest they would not fulfill their ethical obligations. *See Planned Parenthood of Wisconsin*, 384 F. Supp. 3d at 989–90. Indeed, the career state attorneys went on to defend the case through trial, from which a ruling is pending.

Further, cases involving the defense of state law often come with additional complications, beyond the need to speak with one voice for the state. Namely, facial challenges to state law also often challenge a particular official's or agency's application of that law. In those instances, not only do the state's attorneys defend the law facially under *Ex parte Young*, but they

also defend those officials' particular actions or implementation of the law. For those claims, the state attorneys' relationship with their clients is no different than any other attorney's relationship: it is subject to the rules of professional conduct, including the attorney-client privilege. Petitioners do not account for this further complication—that challenges to state law often are intertwined with the defendant officials' conduct—and what it means given attorneys' professional duties. In these circumstances, the state's counsel cannot simply coordinate with additional counsel to represent "the State."

Third, instead of forwarding a pro-state agenda, Petitioners' approach threatens to undermine the states' interest in focusing on a defense of their laws.

Petitioners and supporting amici suggest that their more lenient standard to intervention would prevent acrimony by making a showing of inadequate representation easier and, their theory goes, less pointed. But there is little reason to think that is correct. They propose that intervention should often happen at the outset. Pet. Br. 42; Arizona Br. 20. But, at the outset, there would be no factual basis to believe that the attorneys defending the case lack ardor or "vigor," as little would have occurred at that early stage. *See* Pet. App. 43. Abstractions about "vigor" are not administrable legal standards, and they certainly are not views that promote coordination, as the amici suggest. *See* Arizona Br. 15. In effect, Petitioners' approach would

act as an automatic right for the legislature to intervene if mere speculation about ardor and vigor at the beginning of a case were sufficient.

Petitioners' approach ultimately would work to the detriment of the states and their role in federal courts. If there is going to be a "squabble," it is better to deal with it and be done. *See* Pet. App. 34. Petitioners' alternative is to make infighting a part of every stage of the case. That is not something the states or the federal courts will benefit from. Rather, states benefit from having their career specialists do their jobs. In the hypothetical case where a critical defense is abandoned, then the rule applied by the Fourth Circuit will provide the appropriate backstop, instead of undermining the process from the start.

CONCLUSION

When a state Attorney General is defending the validity of a state law, it would diminish the traditional powers of the Attorney General and needlessly create administrative problems if a non-party, represented by private counsel, could intervene as of right and claim to assert the state interest. For this reason, and all the

reasons in this brief, the Amici States support the State Respondents.

Respectfully submitted,

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