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 FEDERAL COURTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

KATHLEEN R. HARTNETT
COOLEY LLP
3 Embarcadero Center
20th Floor
San Francisco, CA 94111
(415) 693-2000

ADAM S. GERSHENSON
Counsel of Record
COOLEY LLP
500 Boylston Street
Boston, MA 02116
(617) 937-2300
agershenson@cooley.com

MATT K. NGUYEN
COOLEY LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 842-7800

PATRICK HAYDEN
KATELYN KANG
COOLEY LLP
55 Hudson Yards
New York, NY 10001
(212) 479-6000

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici listed in the Appendix are professors who teach and write in the fields of federal jurisdiction, civil procedure, and constitutional law. *Amici* have expertise in analyzing, and a strong interest in, a fair and coherent legal system. *Amici* believe this case involves an improper attempt by an existing party to duplicate its representation under the guise of mandatory intervention, in direct conflict with the text, history, and purpose of Federal Rule of Civil Procedure 24(a) ("Rule 24(a)"). *Amici* all agree that the Fourth Circuit's decision should be affirmed or the writ of certiorari should be dismissed as improvidently granted.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners assert an unfounded right to double representation of an existing party, which this Court should reject. Specifically, Petitioners seek to participate in this case as "additional agents of the State," Pet. Br. at 34, where the State's agents (defendants) are already defending the challenged law. Petitioners identify no daylight between defendants' identity or interests and their own. To the contrary, both Petitioners and defendants seek to defend the same law, in the same case, on behalf of the same real party in interest—the State of North Carolina. Yet Petitioners claim that Rule 24(a) grants them—or anyone else state law may designate—the

[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

power to intervene, as of right, as the State's "additional" representative. The courts below properly rejected this view as contrary to black letter law, the Federal Rules of Civil Procedure, and the very purpose of intervention. This Court should do the same.

To be clear, this case does not involve a state legislature (or legislator) seeking to participate in litigation based on a claimed *legislative* institutional interest separate from the interest of the State. Indeed, in seeking this Court's review, Petitioners explicitly disclaimed "the General Assembly's institutional interest" as a potential basis for intervention. Pet. at 18 n.4. Once again in their opening brief, Petitioners assiduously avoid invoking such an interest. Thus, whatever questions such an alleged "institutional interest" might raise in some other case—whether, for example, that interest might lend a state legislature standing or a right to intervene in cases challenging state law—this is not the vehicle to address such questions because they are not before the Court.

With respect to the question presented here—whether Rule 24(a) requires a federal court to permit two agents of the same party in interest to represent the same interest in the same case—text, history, and precedent all indicate that the answer is no. As a textual matter, Rule 24 distinguishes between a "movant" and "existing parties," recognizing from the outset a firm line between third parties who may be eligible for intervention ("movants") and "existing parties" who are not even contemplated as intervenors because they are already in the case. Fed. R. Civ. P. 24(a). The plain meaning of every relevant

term in Rule 24 confirms this textual interpretation—that "intervention" means to "interpose in, or become a party to, a proceeding already instituted." *Rocca v. Thompson*, 223 U.S. 317, 330 (1912). Rule 24's history and precedents accord with this text. From the equitable precedent the Rule codified in 1938 through a series of amendments, Rule 24 has consistently reflected that it provides intervention by right only to third parties—with "party" defined as a real party in interest, rather than some other agent of the existing party appearing under a different name or title.

Petitioners concede that, under basic principles of preemption, state law cannot supplant the Federal Rules or otherwise force a federal court to permit their intervention as of right. *See* Pet. Br. at 21. Yet Petitioners argue that N.C. General Statutes § 120-32.6 gives them the right to act "as agents of the State" when a plaintiff challenges the constitutionality of a state law. Pet. Br. at 1. Rule 24(a)(2), however, does not permit a party to intervene in a case where it is already represented. Thus, to the extent that the cited state statute is relevant at all, it simply confirms that Petitioners and the existing defendants seek, impermissibly, to represent the same party: "the State of North Carolina." N.C. Gen. Stat. § 120-32.6(b). Because the State of North Carolina is already an existing "real party in interest," represented by the existing defendants sued in their official capacities, *Karcher v. May*, 484 U.S. 72, 78 (1987), Petitioners may not misuse Rule 24 to join this case as an additional representative of the State.

While Petitioners invoke principles of federalism throughout their opening brief, those principles would be undermined—not vindicated—by Petitioners' view of mandatory intervention. In Petitioners' view, a federal court must permit the intervention of *any* official designated to defend state law as an "agent" of the State, even while other officials are actively defending it. In that scenario, a federal court is necessarily forced to guess which official (if any) is, in fact, speaking authoritatively for a State—in essence, requiring a federal court to pronounce a State's "true" position in litigation. Under any sensible vision of federalism, that is the last thing a federal court should do.

Finally, even if Petitioners' attempt to duplicate the State's representation were viewed as potential intervention, the decision below would still be properly affirmed on the independent ground that Petitioners have failed to advance any "interest" distinct from those already represented, as Rule 24(a) requires. Courts have long held that a movant's intervention "must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit." *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985). Yet Petitioners' interest here is, by their own admission and interpretation of North Carolina law, that of an existing party. Petitioners are nothing more than additional "agents of the State," N.C. Gen. Stat. § 120-32.6(b)—a party already represented by other agents. Whether state law could theoretically grant a state official a distinct "interest" within the meaning of Rule 24(a) is not at issue in this case. North Carolina law indicates that Petitioners

possess exactly the same interest as the existing defendants—and Petitioners claim nothing more.

Ultimately, this case is not about a request for intervention, but for duplication. To allow one party to amplify its own voice through multiple representatives in the same case would inject needless complexity, cost, and inefficiency into a wealth of cases—precisely the opposite of what the Federal Rules are designed to accomplish. Because Rule 24(a) does not require federal courts to accept such a bid for double representation, this Court should affirm or dismiss the writ of *certiorari* as improvidently granted.

ARGUMENT

Rule 24 does not permit double representation of the party in interest. Yet Petitioners seek to appear in this case, alongside the Attorney General of North Carolina, as "additional agents of the State." Pet. Br. at 34. The State, which is already a represented party in the case, cannot now "intervene" in its own case. While Petitioners in the courts below referenced ostensibly unique interests "of the Legislature," J.A. 159 (emphasis omitted), they have now clarified that, even if such an interest exists, they do *not* seek to appear on the basis of "the General Assembly's institutional interest." Pet. at 18 n.4. They aim to intervene as the State in a case where the State is already a represented party.

As a result, this is not a case in which the Court must consider whether any unique institutional interests of a legislature might warrant intervention alongside executive actors. In other cases, this Court has weighed the interests of legislators in defending

the laws they helped enact, typically as a matter of Article III standing. *See Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951–53 (2019) (considering whether one house of Virginia legislature has standing to appeal adverse ruling); *cf. Raines v. Byrd*, 521 U.S. 811, 830 (1997) (holding that six Members of Congress lacked standing to challenge enactment of Line Item Veto Act); *Powell v. McCormack*, 395 U.S. 486, 496 (1969) (holding that Member of Congress may bring constitutional challenge to his exclusion from House of Representatives). Such issues regarding legislative institutional interests have sparked debate and disagreement, but here they are entirely absent. Rather, this case simply concerns whether one party in interest is entitled to double representation through multiple "agents." There is no basis in law for such duplication, and Petitioners' bid should be denied.

I. Petitioners' Attempted Joinder Is Not "Intervention" Per The Text, History, Or Purpose of Rule 24(a); Instead, It Is An Attempt At Double Representation

Only non-parties may seek intervention. In intervention cases, this Court must evaluate whether "existing parties adequately represent" a movant's "interest." Fed. R. Civ. P. 24(a)(2). This case presents a different and much simpler question: are "additional agents" of an existing party eligible at all for mandatory intervention under Rule 24(a)? The answer is no.

Rule 24(a) does not permit intervention in one's own case. Rather, its text and history illustrate that mandatory intervention is limited to third parties

distinct from existing parties to a case—not agents of the same parties who are already represented, asserting the same interest, and pursuing the same goal. This Court has never sanctioned double representation of the same party under Rule 24. Here, too, the Court should reject Petitioners' attempts to upend over eighty years of Rule 24 precedent.

A. State Law Cannot Require Federal Courts To Allow Petitioners' Intervention As Additional Agents Of An Existing Party

Under the Supremacy Clause and the Rules Enabling Act of 1934, federal law alone establishes who may intervene in federal court. "Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created, so long as those rules regulate matters rationally capable of classification as procedure." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 406 (2010) (internal quotation marks omitted). Accordingly, "[c]oncerning matters covered by the Federal Rules of Civil Procedure" as here, "[i]t is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law." *Gasperini v. Ctr. for Human., Inc.*, 518 U.S. 415, 427 n.7 (1996). As Petitioners now concede, Pet. Br. at 21, federal law thus preempts North Carolina law to the extent that state law purports to supplant or otherwise modify federal courts' independent assessment as to whether mandatory intervention is warranted under Rule 24.

North Carolina law is instructive, however, in confirming that Petitioners act here only as additional agents of the State of North Carolina—not as would-be intervenors with any distinct interest in this case. Petitioners contend that North Carolina law allows them, in cases like this one addressing "the validity or constitutionality of an act of the General Assembly," to "[a]ct[] on [b]ehalf of the State of North Carolina" "as agents of the State," and be "deemed to be the State of North Carolina." N.C. Gen. Stat. § 120-32.6(b). Under Petitioners' interpretation, the statute thus leaves no gap between Petitioners and the existing defendants already in this case. Petitioners, like defendants, serve as no more than "agents" of the State. *Id.* The statute does not identify or purport to create *any* independent interest that legislators may have in defending the constitutionality of their laws. Accordingly, even if federal courts were required to consider North Carolina law in evaluating Petitioners' request, the statute itself, as construed by Petitioners, forecloses any claim that Petitioners have any distinct identity justifying mandatory intervention in this case. *See, e.g.*, *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 801 (7th Cir. 2019) (denying intervention where "[t]he [l]egislature" not only "shar[es] a goal with the Attorney General," but also "intends to represent the same client—the State of Wisconsin"); *Arizonans for Fair Elections v. Hobbs*, 335 F.R.D. 269, 275 (D. Ariz. 2020) (denying intervention where proposed intervenors claimed an interest "in 'upholding the Arizona Constitution and the laws that implement it,'" while the "State, represented by the Attorney General, advanced an interest in 'defending the constitutionality of its laws' and 'structuring its

elections,'" as "[i]t is difficult to see how Proposed Intervenors' interest diverges from the State's, and the State is already a party to this case").[2]

B. Intervention Is Available Only To Non-Parties With Interests Distinct From The Existing Parties, Which Petitioners Are Not

In applying the Federal Rules of Civil Procedure, this Court looks to the "substance" of an underlying motion, even when a movant has "labeled" or "couched" its language in a particular rule. *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005). Here, what Petitioners have called "intervention" is, in fact, an unprecedented request to duplicate representation of an existing party. The text and history of Rule 24 make clear that intervention cannot be distorted or reinvented to accomplish this objective. Mandatory intervention is limited to third parties distinct from existing parties to a suit, not additional "agents" of an existing party. N.C. Gen. Stat. § 120-32.6(b).

i. Rule 24's Plain Meaning Makes Clear That Only Non-Parties Can Intervene

This Court "give[s] the Federal Rules of Civil Procedure their plain meaning." *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 123 (1989); *accord Bus. Guides, Inc. v. Chromatic Commc'ns Enters.,*

[2] The parties dispute whether North Carolina law does, in fact, authorize legislators to intervene on behalf of the State. *See* NAACP Resp. Br. at 45–46. For purposes of this analysis, *amici* address Petitioners' attempt to intervene based on Petitioners' own interpretation of North Carolina law and do not opine on whether that interpretation is correct.

Inc., 498 U.S. 533, 540–41 (1991). This Court also "generally seek[s] to respect [drafters'] decision to use different terms to describe different categories of people or things." *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 456 (2012).

Here, the text of Rule 24 expressly distinguishes between "movants" and "existing parties," and explains that mandatory intervention is not available where "existing parties adequately represent" a "movant's" interest. Fed. R. Civ. P. 24(a)(2). That text thus makes clear that intervention as of right is available only to non-party "movants," and not "existing parties" or their agents, such as Petitioners.

This understanding echoes the relevant definitions of the terms "intervention" and "party," as embodied in Rule 24 and recognized in this Court's precedents. A year before Rule 24 was first promulgated, Black's Law Dictionary defined "intervention" as a "proceeding in a suit or action by which a third person is permitted by the court to make himself a party." *Intervention*, Black's Law Dictionary (3d. ed. 1933). Looking to Webster's and the Century Dictionary, this Court has similarly held that "[l]iterally, to intervene means, as the derivation of the word indicates, to come between," and "covers the right of one to interpose in, or become a party to, a proceeding already instituted." *Rocca*, 223 U.S. at 330; *see United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933–34 (2009) (holding that "intervention" is "[t]he legal procedure by which . . . a third party is allowed to become a party to the litigation" and "assume the rights and burdens attendant to full party status"). This Court's

precedents express the same view: "intervention as of right" is warranted only when "a *third party* asserts a right that would be lost absent intervention." *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 133–34 (1967) (emphasis added); *see also, e.g.*, *Reisman v. Caplin*, 375 U.S. 440, 449 (1964) ("[T]hird parties might intervene to protect their interests."); *Devlin v. Scardelletti*, 536 U.S. 1, 15 (2002) (Scalia, J., dissenting) ("[T]hose who intervene" do so "through third-party practice.").[3]

As this Court has explained in suits against government officers, "[t]he concept of 'legal personage' is a practical means of identifying the real interests at stake in a lawsuit," and "the real party in interest in an official-capacity suit is the entity represented." *Karcher*, 484 U.S. at 78; *see also Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985) (holding that suits against government officers in their official capacities "generally represent only another way of pleading an action against an entity of which an officer is an agent," and "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity"). The term "party" "does not refer to formal or paper parties, but to parties in interest." *Southmark Props. v. Charles Hous. Corp.*, 742 F.2d

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[3] *See also, e.g.*, *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (holding that, when a movant "share[s] the same ultimate objective [as an existing party], differences in litigation strategy do not normally justify intervention"). Authors of leading treatises have likewise agreed that intervention concerns whether "non-parties may come into a pending litigation to protect interests that are jeopardized thereby or to expedite the hearing of a claim or defense." James Wm. Moore & Edward H. Levi, *Federal Intervention I. The Right to Intervene and Reorganization*, 45 Yale L.J. 565, 565 (1936).

862, 869 (5th Cir. 1984) (internal quotation marks omitted). Therefore, to determine whether an individual or entity is an "existing party" under Rule 24, a court must necessarily examine whether the person or entity seeks to represent the same real party in interest already participating in the case.[4]

These definitions confirm that "intervention" under Rule 24 is simply not what Petitioners seek to do. Because the existing defendants are members of the State Board sued in their official capacities, the "real party in interest" is the State of North Carolina. *See Karcher*, 484 U.S. at 78. The State already has every "right to make defense, control the proceedings, or appeal from the judgment." *Party*, Black's Law Dictionary (3d. ed. 1933). And since Petitioners seek to appear only "as agents of the State," N.C. Gen. Stat. § 120-32.6(b), they are not third parties and cannot "interpose in" a case in which their principal—the State—is already a party, *Rocca*, 223 U.S. at 330. Rule 24(a) thus provides no basis for Petitioners to serve as additional representatives of an existing party.

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[4] Although Rule 17 uses the concept of a "real party in interest" to refer to plaintiffs, *see Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 90 (2005), nothing in Rule 17 (or the Rules in general) prohibits this concept from also applying to defendants, *see Eaton Corp. v. Westport Ins. Co.*, 332 F.R.D. 585, 587 (E.D. Wis. 2019) (explaining that "it does not follow that the concept of real party in interest . . . [can never] apply to defendants"). This official capacity suit is one of those instances. Indeed, the Rules advisory committee noted that "[f]ormer Rule 25(d)(2) is transferred to become Rule 17(d) because it deals with designation of a public officer, not substitution." Fed. R. Civ. P. 17, advisory committee's note to 2007 amendment.

This is not a case in which the State's primary legal representative has refused to defend a law or appeal an adverse ruling, such that the party-in-interest is effectively without representation to defend the intervenor's asserted interest. *Cf., e.g.*, *Hollingsworth v. Perry*, 570 U.S. 693 (2013); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Karcher*, 484 U.S. 72; *Priorities USA v. Nessel*, 978 F.3d 976, 978 (6th Cir. 2020). In that context, one might question whether an intervenor seeking to defend a law is, in fact, the same "real party in interest" as a governmental party who has refused to do so. In such suits, Rule 25(d) substitution—not Rule 24(a) intervention—is the better course precisely because there is a change in *representation* and not a change in a real *party* in interest. *See Lewis v. Clarke*, 137 S. Ct. 1285, 1291–92 (2017) ("In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. This is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation. The real party in interest is the government entity, not the named official." (citations omitted)).[5] But there is no dispute here that the existing defendants have defended S.B. 824 from the outset of this litigation, at both the district court and appellate levels, with vigor and success. Thus, there is no basis here to conclude anything other than

[5] Indeed, a focus on the real party in interest in official capacity suits was the explicit goal of the Rules drafters in their 1961 amendments to Rule 25(d). *See* Fed. R. Civ. P. 25, advisory committee note to 1961 amendment; Benjamin Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (i),* 77 Harv. L. Rev. 601, 608 (1964).

that Petitioners seek to represent the same real party in interest as the existing defendants. To do that would require *substitution*, not duplication.

ii. Rule 24's Historical Context Precludes Intervention By "Additional Agents" Asserting The Same Interest

The history of Rule 24 confirms that—unlike Petitioners—an intervenor must be distinct from an existing party. This Court's interpretation of any revised Federal Rule "must be guided, in part, by an understanding of the deficiencies in the original version of [the Rule] that led to its revision," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 392 (1990) (discussing Rule 11); *see also* Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 Minn. L. Rev. 2167, 2227–28 (2017) (noting that legislative history and purpose are especially germane in interpreting the Federal Rules). And because Rule 24 "codif[ied]" the "general doctrines of intervention," *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 508 (1941), this Court's pre-Rule 24 precedents are instructive in interpreting the Rule.

These precedents preclude Petitioners' attempted intervention. In *New York v. Consolidated Gas Co.*, 253 U.S. 219 (1920), for example, a private gas company challenged the constitutionality of a New York gas law, naming as defendants New York's Public Service Commission, a district attorney, and the New York Attorney General. *Id.* at 220. The City of New York attempted to intervene, but this Court affirmed the district court's denial of intervention because the existing governmental defendants

"properly represented" the City's asserted interests. *Id.* In *New York v. New York Telephone Co.*, 261 U.S. 312 (1923), the Court applied the same logic, holding that a district court properly denied the City of New York's motion to intervene in a constitutional challenge to state and municipal telephone rates, where the Attorney General and the New York Public Service Commission were already defending the suit. *Id.* at 316–17. The Court stressed that "[t]here is nothing in this case to show that the Public Service Commission will not fully and properly represent the subscribers resident in New York City," and that the City's "interests and those of its residents were fully represented under the law and protected by those who had been made defendants." *Id.* at 316. Thus, under the "general doctrines of intervention" that Rule 24 adopted, *Missouri-Kansas Pipe Line Co.*, 312 U.S. at 508, this Court has long held that governmental actors may not intervene as additional agents of an existing party defending state law.

From its inception, Rule 24 codified that understanding. In 1938, Rule 24(a) was adopted, providing for intervention as of right when "the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." Fed. R. Civ. P. 24(a)(2) (1938). Interpreting this version of Rule 24(a)(2) in *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961), this Court held that a would-be intervenor could not intervene as of right because, *inter alia*, it had "the same interests as [existing] appellants," whose representation was "entirely adequate." *Id.* at 692 & n.4. And when Rule 24(a)(2) was amended in 1966, the requirement that

an intervenor stand apart from existing parties became even stronger: the amendments required a movant to establish that its interest "is"—not "is *or* may be"—inadequately represented by existing parties. Fed. R. Civ. P. 24(a)(2)(1966).[6]

iii. Petitioners' Bid To Intervene Contravenes Rule 24's Purpose

The text, history, and interpretative heritage of Rule 24 all resonate with the Rule's purpose. Intervention as of right occurs only where the movant's exclusion would "impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). In other words, the purpose of the rule is to provide a mechanism to protect a movant's discrete interests from those of existing parties to a case.

From its codification over 80 years ago through decades of amendments, Rule 24 has provided that intervention as of right is available only to those who are, at a minimum, distinct from existing parties. This is so because only in such circumstances are a movant's discrete interests even potentially imperiled. By contrast, where, as here, a movant seeks to represent a real party in interest that is already represented in the case, then "as a practical matter" the failure to intervene cannot "impair or impede" any discrete interest held by the movant—both are agents of the same principal. Fed. R. Civ. P. 24(a)(2). In such a scenario, intervention solves no

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[6] In 1976, Congress enacted what is today 28 U.S.C. § 2403(b), which allows intervention as of right where a "State or any agency, officer, or employee thereof is not a party."

existing problem and offers no benefit to the court or the litigants. Instead, throwing open the doors to these multiple agents would only unduly amplify the voice of one side of the dispute. Rule 24's very purpose, like its text and history, affirms that Petitioners claiming to be additional agents of the State are not pursuing "intervention" in any true sense of the word. The district court properly denied Petitioners' motion to intervene.

II. Even If The Court Views Petitioners' Motion As Cognizable Under Rule 24, The District Court Properly Denied Intervention

A. Petitioners Lack A Sufficiently Distinct Interest To Intervene As Of Right Under Rule 24

Even if Petitioners' request were viewed as a *bona fide* attempt to "intervene," it would still fail because Petitioners lack a sufficient asserted "interest" to establish a right to intervene under Rule 24(a)(2). As courts and leading treatises have explained, a would-be intervenor with an interest identical to that of an existing party generally cannot intervene under Rule 24(a). 7C Wright & Miller, *Federal Practice and Procedure* § 1909 (3d ed. 2021). Rather, to intervene as of right, a proposed intervenor's interest "must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit." *Keith*, 764 F.2d at 1268; *see also, e.g.*, *Great Atl. & Pac. Tea Co. v. Town of E. Hampton*, 178 F.R.D. 39, 43 (E.D.N.Y. 1998) (finding that proposed intervenor needed to demonstrate a legal interest that differed from existing party's interest). This is because intervention is designed to protect interests which are "of such a direct and

immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Smith v. Gale*, 144 U.S. 509, 518 (1892) (quoting *Horn v. Volcano Water Co.*, 13 Cal. 62, 69 (1859)).

Here, by contrast, Petitioners assert only the same interest as the existing defendants—that of defending S.B. 824 as "agents of the State." *See supra* § I. As such, there is no interest that Petitioners are "losing" by being denied intervention. *See Del. Valley Citizens' Council for Clean Air v. Com. of Pa.*, 674 F.2d 970, 974 (3d Cir. 1982) (denying intervention even though legislators had direct interest in litigation, where court could "find no divergence between their position and the position of the Commonwealth on the primary issue involved in the litigation").

Indeed, courts have repeatedly denied intervention where an existing party and a proposed intervenor share the same interest and ultimate objective. *See, e.g.*, *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872 (10th Cir. 1986) (noting that intervention is commonly denied "when the objective of the applicant for intervention is identical to that of one of the parties"); *In re Gen. Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1087 (6th Cir. 1984) (denying intervention in derivative action under similar reasoning).[7] Nothing in this case warrants a departure from such precedent.

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[7] *See also, e.g.*, *Resol. Tr. Corp. v. City of Bos.*, 150 F.R.D. 449, 452 (D. Mass. 1993) (denying Massachusetts's motion to intervene in action against city even though city represented "only a fraction of Commonwealth citizenry" because "ultimate

Though Petitioners concede their interest is identical to that of the existing defendants, they nevertheless assert that intervention must be allowed because these defendants' "incentives may not necessarily be aligned with Petitioners'." Pet. Br. at 18. As an initial matter, the suggestion that the Attorney General lacks sufficient "incentives" to adequately defend state law is a "startling accusation," Pet. App. at 46–47—in effect, it asks the Court to assume that the Attorney General will not fulfill his statutory mandate to defend state law. Such a claim is particularly misplaced here where the Attorney General has *already* been defending the law successfully. But even assuming such a difference in "incentives" did exist, courts across the country have consistently held that such a gap would be insufficient to permit intervention, because their ultimate interests are aligned. *See Great Atl. & Pac. Tea Co.*, 178 F.R.D. at 43 (denying intervention even though proposed intervenor had "different motives" than defendant "behind their joint interest in defending the statute"); *cf. Haspel & Davis Milling & Planting Co. v. Bd. of Levee Comm'rs of Orleans Levee Dist.*, 493 F.3d 570, 579 (5th Cir. 2007) (finding that proposed intervenor's "ultimate objective" was identical to existing party's even though proposed

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objective" of proposed intervenor was the same as existing party's); *Leher v. Consol. Papers, Inc.*, 786 F. Supp. 1480, 1483 (W.D. Wis. 1992) (denying intervention where existing party was "pursuing the same goal" as proposed intervenor); *Sidberry v. Koch*, 539 F. Supp. 413, 418 (S.D.N.Y. 1982) (denying intervention where proposed intervenor's interests were "identical" to existing party's).

intervenor asserted that its objective was more expansive than existing party's).

B. Rule 24's Correspondence To Rule 19 Concerning Joinder Confirms That Intervention As Of Right Is Not Warranted

Rule 19 practice also illustrates that Petitioners are not proper Rule 24(a) intervenors. Courts must apply the Federal Rules "in pari materia." *Hamling v. United States*, 418 U.S. 87, 134–35 (1974); *see also, e.g.*, *Burns v. Lawther*, 53 F.3d 1237, 1241 (11th Cir. 1995) (per curiam) (noting that interpretation of Federal Rules requires "looking to the provisions of the whole law" (quoting *John Hancock Mut. v. Harris Trust & Sav. Bank,* 510 U.S. 86, 94 (1993))). This rule of construction has special force when two rules—here, Rules 19(a) and 24(a)—were intentionally designed to mirror each other.

The Rules' drafters substantially revised Rule 24(a) for the last time in 1966. *See* Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271, 329–36 (2020) (providing complete history of intervention practice).[8] At that time, the drafters of Rule 24(a) sought to harmonize intervention by right with Rule 19 necessary joinder. Specifically, Rule 24(a) was amended to clarify that a person "is entitled to intervene in an action when his position is

[8] The drafters have revised Rule 24 since, such as the inclusion of Rule 5.1 in 2006, which had the effect of removing language from Rule 24(c). *See* 1 Steven S. Gensler & Lumen N. Mulligan, *Federal Rules of Civil Procedure Rules and Commentary* 113 (2021 ed.). The relevant provision, however, Rule 24(a)(2), has not been substantially altered since 1966.

comparable to that of a person under Rule 19(a)(2)(i) [mandatory joinder]." Fed. R. Civ. P. 24, advisory committee note (1966). Accordingly, "[i]ntervention of right is . . . a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion." *Id.* (citing Louisell & Hazard, *Pleading and Procedure: State and Federal* 749–50 (1962)). Rule 19, of course, applies only to "persons . . . [who] must be joined as a party," Fed. R. Civ. P. 19(a)(1). That is to say, Rule 19 applies to join "absent persons" only. Gensler & Mulligan, *supra*, at 540 (2021 ed.). Likewise here, given that Rule 24(a) was drafted to correspond to Rule 19(a), Rule 24(a) applies only to "absent persons," not to existing parties.[9]

Here, disposing of this action without Petitioners' intervention as a party would not "as a practical matter impair or impede [Petitioners'] ability to protect [their] interest," Fed. R. Civ. P. 19(a)(1)(B), because that interest is already represented by the existing defendants, *supra* § I.[10]

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[9] While Rule 19 often applies, in practice, to join third parties against their will, its construction applies equally to voluntary intervention, as the Rules' drafters' expressly intended that the "interest" element of Rule 19(a)(1)(B) and Rule 24(a) be consistent.

[10] *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Flanders-Borden*, 11 F.4th 12, 17 (1st Cir. 2021) ("We have explained that where the interests of an absent party are aligned closely enough with the interests of an existing party, and where

Since Petitioners do not satisfy the criteria for required parties under Rule 19, any ruling that they are nonetheless entitled to intervene as of right would necessarily break the link between the two Rules that their drafters deliberately created. That interpretation cannot be squared with the history or purpose of the two Rules, which must be read in harmony.

C. Granting An Intervention Right Here Would Lead To Aberrant Results

As a practical matter, interpreting Rule 24 to require intervention where a proposed intervenor and an existing party are asserting the same interest would have negative real-world consequences. For example, in litigation involving governmental parties, mandatory intervention such as that proposed by Petitioners would create an "intractable procedural mess." *Kaul*, 942 F.3d at 801. There is no reason, under Petitioners' logic, why a State could not require federal courts to accept the intervention of any number of other governmental actors who might wish to defend a law—ranging from any individual legislator who voted for the law to any individual county that supports it. "[A]llowing a single entity, even a state, to have [multiple] independent parties simultaneously representing it" could (and likely would) create a scenario where Petitioners and the Attorney General would "take inconsistent positions on any number of issues," including "briefing

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the existing party pursues those interests in the course of the litigation, the absent party is not required under Rule 19."); *Fed. Ins. Co. v. Singing River Health Sys.*, 850 F.3d 187, 201 (5th Cir. 2017) (denying Rule 19 joinder where interests were the same).

schedules, to discovery issues, to the ultimate merits of the case." *Id.* at 801. In such a scenario, "[t]he district court would . . . have no basis for divining the true position of the State . . . on issues like the meaning of state law, or even for purposes of doctrines like judicial estoppel." *Id.* at 801–02. In short, transforming a State party into a hydra undermines the federal courts' ability to manage important cases and the State's own sovereign interests.[11]

Petitioners' proposed intervention, if permitted, would also invite problematic outcomes in other contexts beyond suits against States. *See* Fed. R. Civ. P. 1 (Federal Rules "govern the procedure in all civil actions and proceedings in the United States district courts"); *accord Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009). In the corporate context, for example, Petitioners' reasoning could require courts to allow multiple corporate employees to intervene in suits brought against a company, with all of them claiming to represent a single "Company" defendant and interest. Such an outcome would upend well-established principles of corporate litigation, including those established in derivative lawsuits. In derivative lawsuits, before shareholders are

[11] Discussing a similar issue of multiple actors claiming to be the state for *amici* purposes in recent ACA litigation before this Court, one scholar concluded: "The Court's policing of this rule, in a way that ensures that attorneys general alone are able to speak for the states as such, would . . . [enhance] accountability in the Court's opinions. It may also matter in the states, by clarifying for voters who does and does not have the power to set the state's litigation agenda in these high-profile cases." Anthony Johnstone, *A State Is A "They," Not an "It": Intrastate Conflicts in Multistate Challenges to the Affordable Care Act*, 2019 B.Y.U. L. Rev. 1471, 1507 (2019).

permitted to step into the shoes of the Company and represent that Company's interests, they must satisfy an extremely high burden: they must show that the Company's board—*i.e.*, the designated representative of the Company—has failed to act. *See, e.g.*, *Ross v. Bernhard*, 396 U.S. 531, 534 (1970) (noting that in derivative lawsuits, equity courts have established that a "precondition for the suit" is that the shareholder demonstrate that "the corporation itself had refused to proceed after suitable demand"). In contrast, Petitioners' position could give shareholders (not to mention board members, executives, and employees) an end-run around the demanding standard they have long faced, requiring federal courts to instead permit their intervention, by right, as a Company's additional "agents."

The Court should decline Petitioners' request to rewrite the Rules and, in so doing, invite a welter of unintended consequences. Instead, the Court should embrace the text, history, and purpose of Rule 24, and ensure that intervention by right applies as intended—to *non*-parties needing to protect their own discrete, imperiled interests.

CONCLUSION

For the foregoing reasons, this Court should affirm or dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

Kathleen R. Hartnett
COOLEY LLP
3 Embarcadero Center

Adam S. Gershenson
Counsel of Record
COOLEY LLP

San Francisco, CA 94111
(415) 693-2000
khartnett@cooley.com

500 Boylston Street
Boston, MA 02116
(617) 937-2300
agershenson@cooley.com

Matt K. Nguyen
COOLEY LLP
1299 Pennsylvania Ave.
Washington, DC 20004
(202) 842-7800
mnguyen@cooley.com

Patrick Hayden
Katelyn Kang
COOLEY LLP
55 Hudson Yards
New York, NY 10001
(212) 479-6000
phayden@cooley.com

Counsel for Amici Curiae

Date: February 16, 2022

APPENDIX

APPENDIX

List of *Amici Curiae* Law Professors[1]

ERWIN CHEMERINSKY
Dean and Jesse H. Choper Distinguished Professor of Law
University of California Berkeley School of Law

KATHERINE FLOREY
Martin Luther King Jr. Professor of Law
University of California, Davis, School of Law

LAURA HINES
Centennial Teaching Professor
University of Kansas School of Law

LUMEN N. MULLIGAN
Earl B. Shurtz Research Professor
University of Kansas School of Law

DAVID C. VLADECK
A.B. Chettle, Jr. Chair in Civil Procedure
Georgetown University Law Center

STEPHEN I. VLADECK
Charles Alan Wright Chair in Federal Courts
University of Texas School of Law

[1] Affiliations of *amici* are listed for identification purposes only.