No. 25-1095

IN THE
Supreme Court of the United States

DAVID W. SUNDAY, JR., ATTORNEY GENERAL OF PENNSYLVANIA, AND DARRYL A. LAWRENCE, PENNSYLVANIA CONSUMER ADVOCATE
Petitioners,

v.

TRANSOURCE PENNSYLVANIA, LLC, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMICUS CURIAE BRIEF OF THE COMMONWEALTH OF VIRGINIA, ARKANSAS, COLORADO, LOUISIANA, MAINE, MICHIGAN, MINNESOTA, NEVADA, AND NEW MEXICO IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

Other Authorities

TABLE OF AUTHORITIES (CONTINUED)

Rules

INTEREST OF THE STATE AMICI[1]

The following States submit this brief as amici curiae: Virginia, Arkansas, Colorado, Louisiana, Maine, Michigan, Minnesota, Nevada, and New Mexico. Amici States have sovereign and practical interests in ensuring their duly enacted laws are fully defended in court when challenged. 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.

The threats to state interests are clear in this case. The Third Circuit panel prevented Pennsylvania's Attorney General and the Consumer Advocate from intervening to defend the constitutionality of Section 1501 of the Public Utility Code in Pennsylvania and Section 57.76(a) of Pennsylvania's PUC regulations. And it did so without any explanation.

Amici States urge this Court to reverse the denial of intervention.

SUMMARY OF ARGUMENT

The Third Circuit encroached on the sovereignty of Pennsylvania by refusing to permit it to intervene to defend its own law. Far from routine motions practice, it raises an issue of enormous importance as this denial violated fundamental principles of federalism and threatens to upend the balance of power between States and the Federal Government. Absent correction, the Amici States are deeply

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[1] Under Supreme Court Rule 37.2, amici curiae notified counsel of record of their intent to file this brief at least 10 days before the due date for the brief.

concerned that they will also be silenced when defending their laws in federal courts.

The Constitution divided sovereignty, establishing a healthy balance of power between the States and Federal Government. The ability of States to defend their laws in federal court is an important feature of this dual sovereignty. This Court has long safeguarded this right, reaffirming that States are to be treated with "respect" and "dignity" when defending their laws. And when States seek to intervene in such cases, this Court has decisively held in two recent cases that federal courts should grant States' intervention motions. *Berger* v. *N. Carolina State Conference of the NAACP*, 597 U.S. 179 (2022); *Cameron* v. *EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267 (2022). This is for good reason—in addition to the residuary and inviolable sovereignty bestowed by the Constitution, there are significant practical interests at stake for States when the constitutionality of a state law is challenged in federal court.

But the Third Circuit disregarded all of this, not only denying intervention to Pennsylvania, but terminating the case after four years of litigation since there was no one else to proceed with a further appeal. And it did so without even explaining its reasoning or why it believed *Berger* and *Cameron* did not apply. Not only was this decision wrong by departing from directly controlling precedent, it contravened the constitutional mandate to respect the sovereignty of Pennsylvania.

The Third Circuit's panel decision unless reversed may have far-reaching negative repercussions. Amici States have a strong and indisputable interest in ensuring that their sovereignty rights are not cast

aside by federal courts. They should be able to have certainty that their voices will be heard when federal courts are reviewing the constitutionality of their laws. Federal appellate courts have struggled at times to apply a consistent standard on intervention, sowing confusion. As a result, States are caught in a perpetual Catch-22 where they are forced to guess when to move to intervene, which is untenable. Amici States respectfully ask this Court to seize this opportunity to reverse and send a clear message reaffirming that federal appellate courts must respect the Constitution and permit States to intervene to defend their law.

ARGUMENT

I. The States have a strong sovereign interest in defending their laws

A. Dual sovereignty between States and the federal government is a fundamental tenet of our Constitution

One of our nation's most important founding principles is the Constitution's establishment of "a system of dual sovereignty between the States and the Federal Government." *Gregory* v. *Ashcroft*, 501 U.S. 452, 457 (1991). It did not occur by accident; our Founders carefully conceived of and implemented this system. See, *e.g.*, The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments . . . ."). And it was an entirely new idea. No other nation had attempted to divide sovereignty before. It has been described as "a more revolutionary turn than the [Revolutionary War] had been" and "radically different from that of British tradition."

Seminole Tribe v. *Florida,* 517 U.S. 44, 150 n.43 (1996) (Souter, J., dissenting) (internal quotation marks and citation omitted).

The logic behind dual sovereignty is not especially complex—power is "almost always the rival of power." The Federalist No. 28, pp. 181 (C. Rossiter ed. 1961) (A. Hamilton). By setting "two levels of government against each other," *Gamble* v. *United States*, 587 U.S. 678, 744 n.26 (2019) (Gorsuch, J., dissenting), "a healthy balance of power between the States and Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458. Indeed, the very existence of the States in our constitutional structure is "a refutation" of the notion that the "National Government [is] the ultimate, preferred mechanism for expressing the people's will." *Alden* v. *Maine*, 527 U.S. 706, 759 (1999). Our Founders envisioned States as "not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government." The Federalist No. 26, p. 172 (C. Rossiter ed. 1961) (A. Hamilton). "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond* v. *United States*, 564 U.S. 211, 222 (2011).

This Court has justifiably discussed the notion of dual sovereignty in near reverential terms: "[t]he Framers split the atom of sovereignty[,] . . . establishing two orders of government"—"one state and one federal"—"each with its own direct relationship" to the people. *Saenz* v. *Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J.,

concurring)). The comparison between nuclear fission and federalism is apt.

Just as it was long believed that atoms could not be "physically divided," 1 Samuel Johnson, A Dictionary of the English Language, p. 196 (1755), it was also "the received political wisdom" that government's sovereignty "must be indivisible." *Alden*, 527 U.S. at 799 n.31 (Souter, J., dissenting). The most relevant similarity in the comparison though is how both nuclear fission (when used as energy) and dual sovereignty are powerful forces that can be tremendously beneficial for humankind—but only if they are very carefully controlled. Without close monitoring, these forces can quickly spin out of control and become destructive. Both nuclear fission and dual sovereignty depend on a carefully calibrated balance.

This Court's jurisprudence is replete with references to the importance of preserving the "proper balance between the States and Federal Government." *Gregory*, 501 U.S. at 459; *Bond*, 564 U.S. at 222 ("laws that upset the constitutional balance between the National Government and the States").

To be sure, the exact lines of demarcation between States' sovereignty and the federal government's continue to be adjudicated. And the States' sovereignty is of course subject to the "limitations imposed by the Supremacy Clause." *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990). But what is undeniable is the "vital role reserved to the States by the constitutional design[,]" *Alden*, 527 U.S. at 713, and that States "retain[] a residuary and inviolable sovereignty." *Murphy* v. *Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 470 (2018) (internal quotation marks omitted).

This principle of dual sovereignty has stood for over two centuries and been reaffirmed again and again by this Court. See, *e.g.*, *Gamble*, 587 U.S. at 682 (upholding the dual sovereignty doctrine); *McCulloch* v. *Maryland*, 17 U.S. 316, 410 (1819) ("In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."). Thus, there is no debate that dual sovereignty continues to be one of the most important constitutional principles.

B. The ability of States to defend their laws in federal court is an important feature of dual sovereignty

One of the most frequent examples of dual sovereignty in practice is when a plaintiff challenges the constitutionality of a State's laws in federal court. This type of clash pits one sovereign versus the other, directly implicating the dual sovereignty principle. Needless to say, a federal court deciding the constitutionality of a state law "wields weighty authority over a State's most fundamental political processes." *Berger*, 597 U.S. at 192 (internal quotation marks omitted).

This Court has emphasized repeatedly that such proceedings must be handled carefully and with "respect" for the States. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 75 (1997); *Cameron*, 595 U.S. at 277. Accordingly, "States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts* v. *Environmental Protection Agency*, 549 U.S. 497, 518 (2007). They must be accorded "the dignity that is consistent with their

status as sovereign entities." *Federal Maritime Comm'n* v. *South Carolina State Ports Authority*, 535 U.S. 743, 760 (2002).

Consistent with this respect is the recognition that a State "clearly has a legitimate interest in the continued enforceability of its own statutes." *Maine* v. *Taylor*, 477 U.S. 131, 137 (1986); see also *Cameron*, 595 U.S. at 278 (noting "the weighty interest that a State has in protecting its own laws"); *Hollingsworth v. Perry*, 570 U.S. 693, 709-10 (2013) (holding that "[n]o one doubts" this interest). And any time a court interferes with the enactment of a State law, the State suffers an "irreparable injury." *Maryland* v. *King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (internal quotation marks omitted).

This interest applies with equal force to regulations in addition to statutes. For instance, Fed. R. Civ. P. 24 specifically authorizes State officials to intervene if a party's claim or defense is based on a statute or "any regulation [or] order . . . issued or made under the statute." Fed. R. Civ. P. 24(b)(2)(B). States typically also equate regulations to statutes. See, *e.g.*, *Commonwealth* v. *A.J. Wood Research Co. of Pa.*, 431 A.2d 367, 369 (Pa. Cmwlth. 1981) ("A regulation has the same legal force and effect as a statute.").

Thus, there is no question that States have an important sovereign interest in defending the constitutionality of their laws. This interest is fundamental to our dual-sovereign system of government and must be respected by all branches of the federal government, including the judiciary.

II. The Third Circuit's decision here threatens the balance of power in the dual sovereignty framework

The Third Circuit panel all but slammed the courthouse doors shut in the face of Pennsylvania's duly-elected chief legal officer, who was specifically empowered under state law to continue the defense of the agency action at issue. The motion to intervene was an exercise of real-party-in-interest Pennsylvania's sovereign authority to continue to defend its laws.

It is one thing to deny intervention when there are others still available to proceed with the appeal. It is quite another to deny intervention when doing so ends the case. Denying intervention for anyone under such circumstances should always be considered carefully given that a denial could eliminate someone's appellate rights. But this is especially true for States considering the dual sovereignty principle and this Court's repeated admonitions that States are to be treated with "respect" and "dignity" when litigating in federal court. The Third Circuit panel, however, disregarded these considerations.

Not allowing intervention here would have grave practical effects. It would leave intact a decision that touches on important issues related to the Tenth Amendment, the Supremacy Clause, and the Dormant Commerce Clause. In fact, one scholar called this case "the 21st century legal canary in the coal mine, signaling and determining who will now control U.S. power over power." Steven Ferrey, *Constitutional Cutting Edge: Where Federal Planning Implied Preempts State Power*, 27 VT. J. ENTL. L. 112, 153 (Fall 2025) (internal quotation marks omitted).

Not only would it bless federal appellate courts refusing to follow this Court's precedents, it would approve stripping a State of the ability to appeal an adverse decision related to the constitutionality of one of its laws.

Amici States are deeply concerned that their voices are being silenced by federal appellate courts. States must be able to intervene to defend their laws, and they must have certainty that they will be able to do so. Anything less is both an affront to the dual sovereignty that States enjoy as well as a recipe for "hobbled litigation rather than a full and fair adversarial testing of the State's interests and arguments." *Berger*, 597 U.S. at 192.

At bottom, this Court has repeatedly held that the scales should tip heavily in favor of allowing States to continue the defense of their laws. *See* Section IV, *post*. The Third Circuit panel instead put its thumb on the scale to tilt it in the opposite direction. To borrow Justice Kennedy's metaphor, the Third Circuit panel attempted to seize the split sovereignty for itself rather than share it with Pennsylvania as the Constitution requires. *U.S. Term Limits*, 514 U.S. at 838 (Kennedy, J., concurring). Doing so threatens to upend the delicate balance of power between States and the federal courts that has been forged since the founding of our nation.

It would be a mistake to view the Third Circuit panel decision in isolation. Every incursion, no matter how seemingly minor, against a bedrock constitutional principle matters. And just as it is with nuclear fission, losing focus on maintaining a proper balance for even a short period of time can result in serious injury.

III. States have significant practical interests at stake when the constitutionality of a state law is challenged in court

States indisputedly have an important interest in ensuring that their dual sovereignty rights given by the Constitution are vindicated. But even setting that aside, States have at least six other practical interests at stake when their laws are challenged in federal court. And these practical interests matter, because intervention decisions should be "guided primarily by practical considerations, not technical distinctions." *Sw. Ctr. for Biological Diversity* v. *Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (internal quotation marks omitted). The Third Circuit's panel decision did not acknowledge *any* of these practical interests.

First, States have already invested significant resources in any law that has been enacted. Members of the legislature drafted the statutory scheme at issue and then negotiated with each other to choose the specific language that is finally passed. Some laws are the culmination of years of work. For many such laws, the Attorney General's office would have reviewed and advised on their constitutionality. After passage, States spend resources implementing the law at issue and then create an enforcement structure. Simply put, States have an interest in protecting the investment of significant resources expended on such laws and making sure that they are not unnecessarily threatened.

Second, if some or all of a law is subsequently held unconstitutional, it necessarily changes how the law that was contemplated is enforced and deprives the legislature of the choice it attempted to make. States have an interest in ensuring that the will of the people

is not thwarted unless absolutely necessary. It diminishes the confidence citizens have in the legislative branch and can negatively impact a State's ability to legislate in the future. It tilts the balance of power between the legislative and judicial branches decisively toward the latter. Members of this Court have recognized 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." *Maryland* v. *King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). To be sure, doing so is sometimes appropriate, but it should only occur sparingly. Citizens should be able to trust that the legislators who represent them can pass laws without undue interference from courts.

Third, a court holding a law to be unconstitutional can create substantial uncertainty. In many instances, the law being challenged may have been in place for years. Laws set certain boundaries, and States, businesses, and citizens have all learned to navigate the lines drawn. Suddenly upending those lines, especially when no alternative exists to fill the void, can create enormous confusion. Indeed, if some or all of a law is held unconstitutional, there can be a lack of clarity as to whether the law continues to apply while appeals continue. Everyone—whether it is State officials, citizens, or businesses—craves certainty when it comes to the orderly administration of state law. States have an interest in maintaining that certainty and avoiding chaos as much as possible.

Fourth, States have an interest in efficiency. Permitting intervention by States "avoid[s] unnecessary duplication of proceedings." *International Union, United Auto, Aerospace & Agric. Implement Workers*

of Am. v. *Scofield*, 382 U.S. 205, 212 (1965) (internal quotation marks omitted). The guiding principle behind intervention has long been to "dispos[e] of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Smuck* v. *Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969). This Court has observed that "[t]o abandon the case at an advanced stage may prove more wasteful than frugal." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191-92 (2000). So too here.

This case dates to 2021. The issues are ripe now. States like Pennsylvania should not have to start over. Permitting intervention "adhere[s] to the goal of obtaining a just result with a minimum of technical requirements." *Scofield*, 382 U.S. at 212 (internal quotation marks omitted). Allowing intervention in situations like here conserves resources not just of States but also of the judiciary.

Fifth, intervention promotes informed federal court decision-making and a more complete understanding of relevant state interests. This Court in *Berger* said that courts should avoid "turning a deaf federal ear to voices the State has deemed crucial to understanding the full range of its interests." *Berger*, 597 U.S. at 191. Not permitting intervention by States "risk[s] a hobbled litigation rather than a full and fair adversarial testing of the State's interests and arguments." *Id.* at 192. At a general level, intervention "implements the basic jurisprudential assumption that . . . justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard." *Hodgson* v. *United Mine Workers*, 473 F.2d 118, 130 (D.C. Cir. 1972).

Scholars have recognized that "a liberal approach to intervention on appeal seems . . . equipped to enhance the quality of judicial decision[-]making, increase public confidence, and ensure that a range of interests are adequately vindicated." Jordan Thomas, *In the (Court)Room Where It Happens: The Case for a More Expansive Standard for Intervention in the Federal Courts of Appeals*, 43 YALE L. & POL'Y REV. 286, 309 (Fall 2024). States undoubtedly have an interest in ensuring that courts are able to do the best job possible, and allowing States to intervene in cases where their laws are challenged enables that.

Sixth, States have an interest in preventing gamesmanship as courts adjudicate the constitutionality of their laws. One federal court of appeals judge noted that it would be "a plaintiff's dream case" to file suit to declare a state law unconstitutional 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 Fed Appx. 748, 753 (6th Cir. 2020) (Bush, J., dissenting), *rev'd and remanded sub nom. Cameron*, 595 U.S. at 282. This Court in *Berger* also warned that overly restrictive intervention standards "would encourage plaintiffs to make strategic choices to control which state agents they will face across the aisle in federal court" and "tempt litigants to select as their defendants those individual officials they consider most sympathetic to their cause or most inclined to settle favorably and quickly." *Berger*, 597 U.S. at 191–192.

The "tactic of rulemaking-by-collective-acquiescence" is equally undesirable. *Arizona* v. *San Francisco*, 596 U.S. 763, 766 (2022) (Roberts, C. J., concurring) (internal quotation marks omitted). Not

only do such gambits waste resources for both States and the judiciary, they also often result in a less than fulsome review of the law at issue. Instead, in suits challenging the constitutionality of their laws, States want the opportunity to defend the law at issue and receive a comprehensive review—as is their right under the Constitution.

All of these interests support a broad right of intervention for States.

IV. This Court has repeatedly held that intervention should be generously granted when the constitutionality of a state's law is implicated

A. This Court's recent decisions in *Berger* and *Cameron* establish that States should be permitted to intervene

States typically are able to defend the constitutionality of their laws without complications. But occasionally circumstances require States to move to intervene so that they can defend their laws, such as here when one State official declines to appeal an adverse decision. Such motions are properly viewed not just as another garden-variety motion, but as an exercise of a sovereign state's authority to defend its laws.

This Court has frequently settled questions related to proposed intervention by States in cases challenging the constitutionality of laws. Petitioner discusses at length the two most recent such cases: *Cameron*, 595 U.S. at 277, and *Berger*, 597 U.S. at 193. Petitioner's Br. 13–21. Both *Cameron* and *Berger* permitted intervention by States or their

representatives to defend the constitutionality of their laws.

Just as important as the result in those cases was the reasoning. This Court did not narrowly determine whether intervention was appropriate on the specific facts of the cases. In both cases, this Court connected the decision on intervention to the broader constitutional principle of dual sovereignty and reiterated the importance of allowing States to defend their laws.

In *Cameron*, this Court specifically referenced "respect for state sovereignty" in concluding that State officials should be allowed to intervene on appeal "to defend its sovereign interests in federal court." 595 U.S. at 277. In holding that "a State's opportunity to defend its laws in federal court should not be lightly cut off," this Court emphasized "the weighty interest that a State has in protecting its own laws" and "the importance of ensuring that States have a fair opportunity to defend their laws in federal court." *Id*. at 277-278.

Berger also embraced the importance of the Founders' constitutional imperative of dual sovereignty. It warned that courts would "do much violence to our system of cooperative federalism" if they ignored States in the intervention context. *Berger*, 597 U.S. at 197. It also urged courts to avoid "turning a deaf federal ear" to States. *Id*. at 191. *Berger* further highlighted that this cooperative federalism "better enables the States to serve as a balance to federal authority . . . and allows States to serve as laboratories of innovation and experimentation." *Id*. at 192 (internal quotation marks omitted).

This Court in *Berger* underscored that a "presumption against intervention is *especially* inappropriate" when applied against States and that "[n]ormally, a State's chosen representatives should be greeted in federal court with respect, not adverse presumptions." *Berger*, 597 U.S. at 197. If States are excluded from participating in cases challenging the constitutionality of their laws, their "interests will be practically impaired or impeded." *Id.* at 191. Moreover, doing so would "evince disrespect for a State's . . . sovereign powers." *Ibid.*

The repeated emphasis on "respect" in *Cameron* and *Berger* is not mere happenstance. It is a mandate that federal courts must treat States fairly when determining whether a law is unconstitutional. *Cameron* and *Berger* both stand for the proposition that at an absolute minimum, the respect that must be afforded States requires that federal appellate courts actually allow States' voices to be heard.

B. Even before *Cameron* and *Berger*, there is a long history of federal courts broadly permitting intervention

Cameron and *Berger* are far from the only examples of this Court's jurisprudence on intervention by States. There are many other examples dating back over sixty years. And even before that, federal courts have long championed generous intervention policies.

This Court has acknowledged that there is no statute or rule that relates to whether intervention on appeal should be permitted. *Cameron*, 595 U.S. at 276. This lack of a rule has no doubt contributed to confusion. But the Court has recognized that Federal

Rule of Civil Procedure 24 that governs intervention in trial courts is a "helpful analog[y]" when considering appellate intervention. *Scofield*, 382 U.S. at 216, 217 n.10.

Fed. R. Civ. P. 24 was introduced in 1938, replacing Equity Rule 37. Thomas, 43 YALE L. & POL'Y REV. at 296. It incorporated "a more inclusive and flexible standard for intervention . . . rather than returning to the narrow scope of intervention under common law." *Ibid.* Fed. R. Civ. P. 24 was amended again in 1966. Many believed "the 1966 amendments to Fed. R. Civ. P. 24 represented a significant liberalization of intervention procedure in favor of a more permissive, interest-balancing standard." *Id.* at 297. Federal courts of appeal agreed—the D.C. Circuit soon after the new rule was adopted remarked that "[t]his alteration [wa]s obviously designed to liberalize the right to intervene in federal actions." *Nuesse* v. *Camp*, 385 F.2d 694, 701 (D.C. Cir. 1967). Since the 1966 amendment, the consensus has been that "Rule 24 should be liberally construed with all doubts resolved in favor of the proposed intervenor." *South Dakota ex. rel. Barnett* v. *U.S. Dep't of Interior*, 317 F.3d 783, 785 (8th Cir. 2003).

This Court has long adhered to a broad intervention standard. The first such case was *Scofield* in 1965. There, the Court first advised that appellate courts should look to "the policies underlying intervention" in Fed. R. Civ. P. 24 when determining appellate intervention. 382 U.S. at 217 n.10. Notably, this case did not involve States, and thus federalism concerns were not implicated.

Nonetheless, the Court permitted intervention of the petitioner unions for practical reasons. It said

that allowing intervention would "avoid unnecessary duplication of proceedings" and would "adhere to the goal of obtaining a just result with a minimum of technical requirements." *Scofield*, 382 U.S. at 212 (internal quotation marks omitted). Moreover, the Court specifically noted the importance of allowing an intervenor to "petition for rehearing in the appellate court or to this Court for certiorari" and dismissed any concerns that doing so would produce delays or cause complications. *Id.* at 215. Indeed, *Scofield* explained that the reverse was true: "petitioning for certiorari at this time has the salutary effect of insuring prompt adjudication." *Ibid.*

Since *Scofield*, the Court has repeatedly recognized a broad right to intervene. It has permitted intervention even when the proposed intervenor did not have a cause of action. See, *e.g.*, *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 530-31, 537 (1972). It authorized intervention for a State based on its interest in healthy economic competition within its borders, which is particularly pertinent here. See, *e.g.*, *Cascade Nat. Gas Corp.,* v. *El Paso Nat. Gas Co.*, 386 U.S. 129, 135-36 (1967).

Indeed, this Court has approved "post-judgment intervention for the purpose of appeal" as long as the intervenor "in view of all the circumstances . . . acted promptly." *United Airlines* v. *McDonald*, 432 U.S. 385, 395-96 (1977). Notably, this Court has practiced what it preaches. It granted a motion to intervene, simultaneously with granting certiorari, within the last year. *Natl. Republican Senatorial Comm.* v. *Fed. Election Comm'n*, No. 24-621, 2025 U.S. LEXIS 2643, at *1 (U.S. June 30, 2025).

What makes the Third Circuit's decision here even more egregious is that the panel refused to offer even a scintilla of reasoning to explain its rulings. There was no attempt to explain why *Cameron* and *Berger* do not apply. Prior to *Cameron* and *Berger*, perhaps there was some ambiguity that would justify denial. But after *Cameron* and *Berger*, no such ambiguity exists. To not even acknowledge their existence is perplexing. It is not even clear what standard if any the panel utilized to reach its decision. Under the circumstances, Pennsylvania deserved at least an explanation, especially since the panel's ruling ended over four years of litigation. In short, the Third Circuit panel's treatment of Pennsylvania was the exact opposite of "respect" and "dignity," and it gave the shortest shrift possible—none—to the concept of dual sovereignty and the balance of power between States and the federal government.

The long history of broad intervention rights provides critical context for the pending petition for certiorari in this case and demonstrates the error of the lower court's decision. The Third Circuit's decision flies directly in the face of this Court's crystal-clear and recent holdings in *Cameron* and *Berger* to permit intervention by States in cases challenging the constitutionality of laws. "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto* v. *Davis*, 454 U.S. 370, 375 (1982).

V. Inconsistent intervention standards undermine the right of each State to ensure its laws are defended in federal court

Despite this Court's long history of permitting appellate intervention, federal appellate courts have struggled at times to apply a consistent standard. This is no doubt due in part to the lack of a federal appellate rule on this issue. Some federal appellate courts have had little trouble, granting motions to intervene even after the panel issued its decision. See, *e.g.*, *Peruta* v. *Cnty. of San Diego*, 824 F.3d 919, 940-41 (9th Cir. 2016) (en banc); *Day* v. *Apoliona*, 505 F.3d 963, 964-66 (9th Cir. 2007). In fact, the en banc Ninth Circuit granted the State of Arizona's motion to intervene after the en banc decision when the Arizona Secretary of State indicated she would not petition for certiorari. *DNC* v. *Hobbs*, No. 18-15845, 2020 U.S. App. LEXIS 11257, at *2 (9th Cir. Apr. 9, 2020).

But other federal courts of appeal have "deviate[d] from the broader district court standard." Thomas, 43 YALE L. & POL'Y REV. at 301. A number of them have adopted a heightened standard, "frequently necessitating 'exceptional' circumstances for granting intervention when it was not previously sought at the district court level." *Ibid.* (citations omitted). In fact, this Court stepped in to decide *Cameron* because the Sixth Circuit employed a heightened standard—"[w]e rarely grant motions to intervene filed on appeal." *EMW Women's Surgical Ctr., P.S.C.* v. *Friedlander*, 831 Fed. Appx. 748, 750 (6th Cir. 2020), *rev'd and remanded sub nom. Cameron*, 595 U.S. at 277.

The Third Circuit has employed a heightened standard as well. See, *e.g.*, *In re Grand Jury Investigation*, 587 F.2d 598, 601 (3d Cir. 1978). So has

the D.C. Circuit. See *Amalgamated Transit Union Int'l* v. *Donovan*, 771 F.2d 1551, 1552 (D.C. Cir. 1985) (holding that "[a] court of appeals may allow intervention at the appellate stage where none was sought in the district court only in an exceptional case for imperative reasons") (internal quotation marks omitted). One scholar has reflected that some appellate judges "seem to be missing the mark by relying on pre-1966, unduly cursory opinions that set a heightened standard rather than being fairly permissive in the spirit of the 1966 FRCP 24 amendments." Thomas, 43 YALE L. & POL'Y REV. at 304.

Still other federal courts of appeals, like the lower court here, have denied intervention motions and failed to offer any reasoning whatsoever. See, *e.g.*, *Cook County* v. *Wolf*, No. 20-3150, Dkt. 26 (7th Cir. Mar. 15, 2021); *CASA de Md., Inc.* v. *Biden*, No. 19-2222, Dkt 216 (4th Cir. Mar. 18, 2021). This is the worst of all worlds, leaving litigants without any understanding of whether the court ignored this Court's prior precedents or had some other justification for its ruling.

The current landscape is unworkable. Intervention is routinely granted for States in some courts but routinely denied in others. Federal appellate courts apply wildly different standards. States are caught in a perpetual Catch-22 where they are forced to guess as to whether their intervention attempts will be deemed too early (like the Fourth Circuit ruled in *Berger*) or too late (like the Sixth Circuit ruled in *Cameron*). States should not be forced to divine what the exact Goldilocks moment is for successfully obtaining intervention. States deserve to have a

predictable ex ante rule on intervention that is simple and workable.

This case presents another opportunity to provide additional clarity to the federal appellate courts that continue to depart from this Court's prior precedents. This Court should either grant certiorari to take up this issue once and for all, or it should grant a summary reversal of the Third Circuit's panel decision. It should not turn away this case. The injury here is to the sovereignty of the States, and ultimately, to our constitutional framework. This Court warned *exactly* of this in *Berger*: improper denials of intervention to States "do much violence to our system of cooperative federalism." *Berger*, 597 U.S. at 197.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below in intervention should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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