FEDERAL JURISDICTION AND PROCEDURE

Civil Procedure — Intervention — Federal Rule of Civil Procedure 24(a) — Berger v. North Carolina State Conference of the NAACP

The United States has an adversarial legal system, meaning the parties to a given lawsuit play a central role in shaping its outcome.[1] It is the parties, for instance, who investigate the facts[2] and frame the issues for resolution.[3] But the Federal Rules of Civil Procedure give some outsiders a "right" to do those things too.[4] Under Rule 24(a), outsiders are entitled to intervene as of right in ongoing litigation and become parties, so long as they satisfy specific requirements.[5] Yet the lower courts have received little guidance from the Supreme Court when it comes to those requirements.[6] Left to their own devices, the lower courts have by and large adopted an expansive understanding of intervention on the theory that anyone who may be affected by the outcome of a lawsuit should have a right to participate.[7] But that theory is at odds with the original understanding of Rule 24(a),[8] and the Supreme Court's most recent decision on intervention merely compounds the confusion. Last Term, the Court decided *Berger v. North Carolina State Conference of the NAACP*[9] and held that the legislative leaders of North Carolina's General Assembly had a right to intervene in the State Attorney General's defense of a voter-identification law.[10] Though *Berger* did not endorse an expansive understanding of intervention, some of its rhetoric could encourage lower courts to continue applying Rule 24(a) broadly and in a manner that is inconsistent with the more traditional view of litigation that Rule 24(a) was meant to reflect.

In December 2018, North Carolina's majority-Republican General Assembly passed S.B. 824, a bill requiring voters in North Carolina to

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1 *See* McNeil v. Wisconsin, 501 U.S. 171, 181 n.2 (1991).

2 *See* FED. R. CIV. P. 26(b)(1) (authorizing the "[p]arties" to "obtain discovery regarding any nonprivileged matter that is relevant").

3 *See* United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020).

4 FED. R. CIV. P. 24(a).

5 *Id.*

6 Caleb Nelson, *Intervention*, 106 VA. L. REV. 271, 338–51 (2020).

7 *See, e.g.*, Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967) (describing Rule 24(a) as embodying a policy of "involving as many apparently concerned persons as is compatible with efficiency and due process").

8 Nelson, *supra* note 6, at 301 (explaining that the text, purpose, and context of Rule 24(a) "all support a more restrained reading" of the provision).

9 142 S. Ct. 2191 (2022).

10 *Id.* at 2206.

present valid photo identification before casting their ballots.[11] Soon after, North Carolina's Democratic Governor vetoed the bill.[12] The North Carolina House of Representatives and Senate overrode the veto, and S.B. 824 was enacted into law.[13]

Almost immediately, the North Carolina chapter of the National Association for the Advancement of Colored People (NAACP) filed a lawsuit in federal court challenging the constitutionality of S.B. 824.[14] The complaint initially named both the Governor and the members of the State Board of Elections as defendants,[15] though the district court later dismissed the Governor from the suit.[16] Per North Carolina law, the State's Attorney General — who had publicly opposed S.B. 824 before its enactment — was tasked with defending the Board's members.[17]

In the meantime, the Speaker of the North Carolina House and the President Pro Tempore of the North Carolina Senate moved to intervene as defendants under Rule 24(a).[18] Rule 24(a) provides that a "court must permit anyone to intervene" who, (1) "[o]n timely motion," (2) "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," (3) "unless existing parties adequately represent that interest."[19]

The Speaker and President cited section 1-72.2, a state provision declaring it the "public policy of the State of North Carolina" that the Speaker and President represent the legislative branch any time a state statute is challenged in federal court.[20] That provision also requests that

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[11] N.C. State Conf. of the NAACP v. Berger, 999 F.3d 915, 918 (4th Cir. 2021) (en banc); *see also* Felicia Sonmez, *Judges Strike Down North Carolina Voter ID Law, Citing Its "Discriminatory Purpose" Against African Americans*, WASH. POST (Sept. 17, 2021, 4:46 PM), https://www.washingtonpost.com/politics/north-carolina-voter-id-law/2021/09/17/3c2a7892-17e3-11ec-a5e5-ceecb895922f_story.html [https://perma.cc/3Z6L-XTTN].

[12] Sonmez, *supra* note 11.

[13] *Berger*, 999 F.3d at 918.

[14] Complaint, N.C. State Conf. of the NAACP v. Berger, No. 18-cv-01034 (M.D.N.C. Dec. 20, 2018).

[15] *Id.* ¶¶ 20–23. Under the Eleventh Amendment, states are generally immune from lawsuits brought by private citizens. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996). Accordingly, when private citizens wish to challenge the constitutionality of state policies, they must bring an action for injunctive relief against the state official directly in charge of implementing that policy. *Ex parte* Young, 209 U.S. 123, 159–60 (1908).

[16] N.C. State Conf. of the NAACP v. Cooper, 397 F. Supp. 3d 786, 802 (M.D.N.C. 2019). The district court held that it was the members of the Board, and not the Governor, who were directly in charge of implementing and enforcing S.B. 824. *Id.* at 801.

[17] *Berger*, 142 S. Ct. at 2198 (citing N.C. GEN. STAT. § 114-2 (2017)).

[18] Proposed Intervenors' Memorandum in Support of Their Motion to Intervene at 6, N.C. State Conf. of the NAACP v. Cooper, 332 F.R.D. 161 (M.D.N.C. 2019) (No. 18-cv-01034).

[19] *Berger*, 142 S. Ct. at 2200–01 (alteration in original) (quoting FED. R. CIV. P. 24(a)(2)).

[20] Proposed Intervenors' Memorandum in Support of Their Motion to Intervene, *supra* note 18, at 8 (quoting N.C. GEN. STAT. § 1-72.2(a) (2017)).

"a federal court presiding over any such action . . . allow both the legislative branch and the executive branch . . . to participate."[21] The Speaker and President further argued that, given the Attorney General's opposition to S.B. 824, the Attorney General could not be trusted to adequately represent the State's interest in upholding the law.[22]

The district court initially denied the motion to intervene without prejudice,[23] then with prejudice after the Speaker and President renewed the motion six weeks later.[24] The renewed motion expressed concern over parallel litigation in state court and the Attorney General's failure to dismiss the claim that S.B. 824 was racially discriminatory.[25] But according to the court, the Attorney General's actions fell within the range of permissible "litigation choices."[26]

Though a Fourth Circuit panel initially vacated and remanded,[27] a majority of the full Fourth Circuit voted to rehear the case en banc.[28] Writing for the majority, Judge Harris affirmed the district court's denial of the intervention motion.[29] She started by explaining that the Speaker and President had no right to intervene under Rule 24(a) unless they could demonstrate that the Attorney General was not adequately representing the State's interest.[30] In evaluating the adequacy of the Attorney General's representation, Judge Harris applied two presumptions. First, she presumed adequate representation because "the party seeking intervention ha[d] the same ultimate objective as a party to the suit."[31] Second, she presumed adequate representation because the prospective intervenor was attempting to enter litigation on the side of the government.[32] According to the majority, the Speaker and President failed to overcome the two presumptions.[33]

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[21] N.C. GEN. STAT. § 1-72.2(a) (2017).

[22] Proposed Intervenors' Memorandum in Support of Their Motion to Intervene, *supra* note 18, at 11–12.

[23] *Cooper*, 332 F.R.D. at 163.

[24] N.C. State Conf. of the NAACP v. Cooper, No. 18CV1034, 2019 WL 5840845, at *4 (M.D.N.C. Nov. 7, 2019).

[25] Proposed Intervenors' Memorandum in Support of Their Renewed Motion to Intervene at 7, *Cooper*, No. 18CV1034.

[26] *Cooper*, 2019 WL 5840845, at *3.

[27] N.C. State Conf. of the NAACP v. Berger, 970 F.3d 489, 495 (4th Cir. 2020). Judge Quattlebaum, joined by Judge Richardson, wrote for the majority. Judge Harris dissented.

[28] N.C. State Conf. of the NAACP v. Berger, 825 Fed. App'x 122 (4th Cir. 2020) (mem.).

[29] N.C. State Conf. of the NAACP v. Berger, 999 F.3d 915, 918 (4th Cir. 2021) (en banc). Judge Harris was joined by Chief Judge Gregory and Judges Motz, King, Keenan, Wynn, Diaz, Floyd, and Thacker.

[30] *Id.*

[31] *Id.* at 930 (quoting N.C. State Conf. of the NAACP v. Cooper, 332 F.R.D. 161, 168 (M.D.N.C. 2019)).

[32] *Id.*

[33] *Id.* at 934.

Judges Wilkinson, Niemeyer, and Quattlebaum each wrote a separate dissent.[34] They maintained that the en banc majority failed to place proper weight on section 1.72-2, the North Carolina statute requesting that the Speaker and President be allowed to intervene in federal litigation challenging state law.[35] Judge Quattlebaum also took issue with the two presumptions that the majority applied, asserting that those presumptions set the bar too high for prospective intervenors to clear Rule 24(a)'s adequacy prong.[36]

The Supreme Court granted certiorari and reversed the Fourth Circuit's en banc decision.[37] Writing for an 8–1 majority, Justice Gorsuch held that the Speaker and President were entitled to intervene in the defense of S.B. 824.[38] Justice Gorsuch started by noting everyone's agreement that the prospective intervenor's motion was timely.[39] He then moved to Rule 24(a)'s contested prongs: the requirement that prospective intervenors have an "interest" that will be practically impaired absent intervention and the requirement that existing parties do not already "adequately represent" that interest.[40]

Before assessing the "interest" requirement, Justice Gorsuch alluded to the unique posture of the case: the NAACP's lawsuit named the members of the Board of Elections — rather than the State of North Carolina — as defendants.[41] Even so, no one doubted that the State itself retained an interest in defending its own law.[42] Justice Gorsuch next stressed that, under federalism principles, states are free to structure their governments "in a variety of ways."[43] And with section 1.72-2, North Carolina had empowered both the Governor *and* the legislative leaders to defend state law.[44] Both sets of state officials, then, were entitled to represent the state's interest.[45]

On the issue of adequacy, Justice Gorsuch expressed skepticism toward the Fourth Circuit's presumptions. Justice Gorsuch suggested that

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[34] *See id.* at 939 (Wilkinson, J., dissenting); *id.* at 941 (Niemeyer, J., dissenting); *id.* at 942 (Quattlebaum, J., dissenting). Judges Niemeyer, Agee, Richardson, and Rushing joined Judge Quattlebaum's opinion. *Id.*

[35] *Id.* at 940 (Wilkinson, J., dissenting); *id.* at 941 (Niemeyer, J., dissenting); *id.* at 949 (Quattlebaum, J., dissenting).

[36] *Id.* at 945 (Quattlebaum, J., dissenting).

[37] *Berger*, 142 S. Ct. at 2206.

[38] *Id.* Justice Gorsuch was joined by Chief Justice Roberts and Justices Thomas, Breyer, Alito, Kagan, Kavanaugh, and Barrett. *Id.* at 2196.

[39] *Id.* at 2201.

[40] FED. R. CIV. P. 24(a)(2).

[41] *See Berger*, 142 S. Ct. at 2197; *see also Ex parte* Young, 209 U.S. 123, 159–60 (1908) (authorizing private citizens to seek injunctive relief against state officials in charge of implementing unconstitutional laws).

[42] *Berger*, 142 S. Ct. at 2201.

[43] *Id.*

[44] *See id.* at 2202.

[45] *Id.* at 2203. Additionally, the Court disagreed with the NAACP's assertion that the legislative leaders were not "new" parties under Rule 24(a)(2). *Id.*

those presumptions were hard to square with the Supreme Court's prior decision in *Trbovich v. United Mine Workers*.[46] In that case, the Court considered a motion to intervene as of right in the Secretary of Labor's challenge to the results of a union election.[47] The Court described the movant as bearing only a "minimal" burden for demonstrating the inadequacy of the Secretary's existing representation under Rule 24(a).[48] Even setting aside *Trbovich*, Justice Gorsuch explained that a presumption would *certainly* not apply in cases where "a duly authorized state agent seeks to intervene to defend a state law."[49]

Justice Sotomayor dissented.[50] She argued that, generally, Rule 24(a) does not entitle multiple parties to represent one interest in federal court. An outsider who shares an interest with an existing party is entitled to intervene only after showing that the existing representation is inadequate.[51] As a result, North Carolina was not automatically entitled to have *both* the Attorney General *and* its legislative leaders represent its interest — even though section 1.72-2 expressed a preference that the legislative leaders be allowed to intervene.[52] Instead, Justice Sotomayor would have allowed intervention only upon a showing that the Attorney General's representation was inadequate.[53] But in her view, the "difference in perspective" between the Attorney General and the prospective intervenors "boil[ed] down only to a disagreement over trial strategy," rather than inadequate representation.[54]

The Court's decision in *Berger* did little to resolve the confusion surrounding intervention of right. That confusion arises from the disconnect between Rule 24(a)'s text and history and Rule 24(a)'s application in the courts of appeals. The text and history of Rule 24(a) support a narrow understanding of the right to intervene,[55] but many courts of appeals have adopted a broad interpretation of the "interest" requirement — one that encourages all potential stakeholders to join a lawsuit.[56] Still, the lower courts have kept the right to intervene from becoming too expansive by applying an adequacy presumption in certain classes of cases.[57] *Berger* did not endorse an expansive understanding of the "interest" requirement, but it did express skepticism toward

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46 404 U.S. 528 (1972); *see Berger*, 142 S. Ct. at 2203 (citing *Trbovich*, 404 U.S. 528).

47 *Trbovich*, 404 U.S. at 529–30.

48 *Id.* at 538 n.10.

49 *Berger*, 142 S. Ct. at 2204. The Court also rejected the NAACP's argument that "allowing the legislative leaders to intervene could 'make trial management impossible.'" *Id.* at 2205 (quoting Brief for NAACP Respondents at 26, *Berger* (No. 24-248)).

50 *Id.* at 2206 (Sotomayor, J., dissenting).

51 *Id.* at 2210.

52 *Id.* at 2210–11.

53 *Id.* at 2210.

54 *Id.* at 2212.

55 Nelson, *supra* note 6, at 301.

56 *See, e.g.*, Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967).

57 *See Berger*, 142 S. Ct. at 2203–04 (describing different presumptions of adequate representation).

the adequacy presumption.[58] That skepticism could discourage lower courts from applying such a presumption in the future, especially in cases involving the government. The Supreme Court's decision will therefore have the unintended effect of exacerbating the lower courts' liberal approach to intervention — even in cases that do not present the same unique fact pattern at issue in *Berger*.

The text and history of Rule 24(a) support a narrow interpretation of the right to intervene. Rule 24(a) specifies that a prospective intervenor has no right to enter a lawsuit unless she "claims an *interest* relating to the property or transaction that is the subject of the action."[59] Much ink has been spilled over the meaning of the word "interest" as it is used in Rule 24(a).[60] But, as Professor Caleb Nelson convincingly argues in a recent article, the "interest" requirement had a very specific meaning at common law prior to Rule 24(a)'s adoption in the 1930s.[61] Under the common law, there were only two paths to intervention of right: first, "where the intervenor claims an interest in property subject to the control of a court,"[62] and second, "where a petitioner is represented in a proceeding" and "will be bound by a decree of the court" but "the representation is shown to be inadequate."[63] Under the first path, the claimed interest had to fall within the narrow category of interests "known and protected by the law," such as "a claim of ownership, or a lesser interest, sufficient and of the type to be denominated a lien, equitable or legal."[64]

Rule 24(a) restated the common law understanding of the right to intervene. As relevant here, the initial version of the Rule allowed two paths to intervention of right: first, "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," and second, "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof."[65] With respect to the first path, the Rule incorporated the common law's narrow definition of "interest" as one that is "known and protected by law." The Advisory Committee in charge of drafting the Rule noted as much, describing its purpose as "amplif[ying] and restat[ing] the present federal practice at law and in equity."[66]

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[58] *Id.*

[59] FED. R. CIV. P. 24(a)(2) (emphasis added).

[60] *See* Nelson, *supra* note 6, at 275 n.10 (noting the many scholars who have commented on Rule 24(a)'s "interest" requirement).

[61] *Id.* at 313–14.

[62] James Wm. Moore & Edward H. Levi, *Federal Intervention: I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565, 582 (1936).

[63] *Id.* at 591.

[64] *Id.* at 582–83.

[65] FED. R. CIV. P. 24(a), 308 U.S. 690–91 (1938).

[66] FED. R. CIV. P. 24 advisory committee's note to 1937 adoption.

Admittedly, Rule 24(a) underwent significant revisions in 1966, but those revisions did not significantly change the "interest" requirement. The 1966 amendment's most notable change was combining the two paths to intervention of right into one.[67] The amended rule also removed two requirements: first, that a prospective intervenor be "bound by a judgment in the action," and second, that a prospective intervenor's property be "in the custody" of the court prior to intervention.[68] Though those changes broadened the scope of Rule 24(a), they did not do so by modifying the "interest" requirement. Instead, the Reporter for the Advisory Committee in charge of the amendment explained that the "interest" requirement "finds its own limits in the historic continuity of the subject of intervention."[69]

Nonetheless, many courts in the 1960s understood the amendment to significantly change Rule 24(a)'s "interest" requirement. The D.C. Circuit, for instance, wrote: "We know from the recent amendments to the civil rules that . . . the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."[70] Several circuits went on to adopt the D.C. Circuit's approach to intervention, along with its broad understanding of the "interest" requirement.[71]

Two important developments explain the lower courts' misinterpretation of the 1966 amendment. First, after the 1966 amendment, the Supreme Court offered very little guidance on the right to intervene. In the period between 1966 and last Term, the Court decided only three intervention cases.[72] Each involved a unique set of factual circumstances, limiting their precedential value.[73] None of those cases, then, were particularly helpful for lower courts attempting to interpret Rule 24(a)'s "interest" prong.

Second, in the 1970s, many federal judges began taking a more active role in public policy–related litigation.[74] One particularly influential commentator, Professor Abram Chayes, welcomed and fueled that

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[67] *See* FED. R. CIV. P. 24(a), 383 U.S. 1051 (1966).

[68] *Compare* FED. R. CIV. P. 24(a), 308 U.S. 690–91 (1938), *with* FED. R. CIV. P. 24(a), 383 U.S. 1051 (1966).

[69] Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 405 (1967); *see also* Nelson, *supra* note 6, at 333.

[70] Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967).

[71] *See, e.g.*, Coal. of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep't of Interior, 100 F.3d 837, 839 (10th Cir. 1996); Ceres Gulf v. Cooper, 957 F.2d 1199, 1203 n.10 (5th Cir. 1992); Worlds v. Dep't of Health & Rehab. Servs., 929 F.2d 591, 594 & n.11 (11th Cir. 1991); Feller v. Brock, 802 F.2d 722, 729 (4th Cir. 1986); SEC v. Flight Transp. Corp., 699 F.2d 943, 949 (8th Cir. 1983); County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980).

[72] *See* Trbovich v. United Mine Workers, 404 U.S. 528 (1972); Donaldson v. United States, 400 U.S. 517 (1971); Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co., 386 U.S. 129 (1967).

[73] Nelson, *supra* note 6, at 337.

[74] *See id.* at 356–57.

trend.[75] For those types of cases, Chayes recommended that judges ensure "adequate representation in the proceedings of the range of interests that will be affected."[76] He thus advocated that courts continue interpreting Rule 24(a)'s "interest" requirement liberally, so as to allow broad participation from all potentially interested parties.[77] And the courts did just that, repeatedly construing the interest requirement as broadly as possible.[78]

Still, lower courts have creatively avoided making Rule 24(a) too broad. They have done so by shifting their attention away from Rule 24(a)'s "interest" requirement and focusing instead on the Rule's "adequacy" inquiry. In conducting that inquiry, they routinely presume adequate representation when a prospective intervenor asserts the same interest as an existing party.[79] Many circuits have even extended that presumption, requiring prospective intervenors who assert the same interest as a government party to make a strong showing of inadequacy.[80] The presumption has served as an important safety valve that prevents lower courts from construing the right to intervene too broadly — despite those same courts' liberal reading of Rule 24(a)'s "interest" requirement.[81]

In *Berger*, the Court did not provide a precise definition of Rule 24(a)'s "interest" requirement. The Court did not need to, given

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[75] Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1307–09 (1976) (listing the judiciary's "institutional advantages," *id.* at 1307, for making public policy).

[76] *Id.* at 1310.

[77] *Id.*

[78] *See, e.g.*, cases cited *supra* note 71; *see also* Nelson, *supra* note 6, at 362–63 (linking Chayes's conception of public law litigation with the broad approach to Rule 24(a)'s "interest" requirement).

[79] *See, e.g.*, T-Mobile Ne. LLC v. Town of Barnstable, 969 F.3d 33, 39 (1st Cir. 2020); Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 799 (7th Cir. 2019); FTC v. Johnson, 800 F.3d 448, 452 (8th Cir. 2015); Tri-State Generation & Transmission Ass'n v. N.M. Pub. Regul. Comm'n, 787 F.3d 1068, 1072–73 (10th Cir. 2015); Stuart v. Huff, 706 F.3d 345, 349 (4th Cir. 2013); Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fishermen's Ass'ns, 695 F.3d 1310, 1316 (Fed. Cir. 2012); *In re* Cmty. Bank of N. Va., 418 F.3d 277, 315 (3d Cir. 2005); United States v. Michigan, 424 F.3d 438, 443–44 (6th Cir. 2005); Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003); Butler, Fitzgerald & Potter v. Sequa Corp., 250 F.3d 171, 179–80 (2d Cir. 2001); Clark v. Putnam County, 168 F.3d 458, 461 (11th Cir. 1999); Bush v. Viterna, 740 F.2d 350, 355 (5th Cir. 1984).

[80] *See, e.g.*, *Kaul*, 942 F.3d at 799; North Dakota *ex rel.* Stenehjem v. United States, 787 F.3d 918, 921–22 (8th Cir. 2015); *Stuart*, 706 F.3d at 351; *Wolfsen*, 695 F.3d at 1316; *Arakaki*, 324 F.3d at 1086; United States v. City of New York, 198 F.3d 360, 367 (2d Cir. 1999). At least two circuits have rejected application of a presumption of adequate representation when the government is the existing party. *See* Crossroads Grassroots Pol'y Strategies v. FEC, 788 F.3d 312, 321 (D.C. Cir. 2015); Utah Ass'n of Cntys. v. Clinton, 255 F.3d 1246, 1255–56 (10th Cir. 2001). But neither of those cases was ones in which the prospective intervenor and the government party shared an interest. *See Crossroads Grassroots*, 788 F.3d at 321; *Utah Ass'n of Cntys.*, 255 F.3d at 1255–56.

[81] *See, e.g.*, *Stuart*, 706 F.3d at 352 (presuming that the government adequately represented antiabortion activists' asserted interest in "ensur[ing] that 'a pregnant woman understands the potential risk and harms to the child so that she can make the decision for the child'"); *see also* Feller v. Brock, 802 F.2d 722, 729 (4th Cir. 1986) (explaining that "liberal intervention is desirable").

the State of North Carolina's obvious interest in upholding the constitutionality of its law — an interest that even the dissent did not contest.[82] The Court mostly focused on explaining why North Carolina was permitted to authorize multiple state agents to represent its interests.[83] Nor did the Court provide clear guidance when it came to the adequacy presumption. In fact, the Court maintained that it "need not decide whether a presumption of adequate representation might sometimes be appropriate."[84] It merely explained that a presumption held "no purchase" in cases where "a duly authorized state agent seeks to intervene to defend a state law."[85]

Even so, the Court made a point of expressing its skepticism toward the presumption of adequate representation. Specifically, the Court suggested that its prior decision in *Trbovich* was inconsistent with presuming adequacy when the existing party to a lawsuit is a government entity.[86] To be sure, *Trbovich* held that a movant who sought to enter litigation on the side of the government faced only a "minimal" barrier to intervention.[87]

But *Trbovich* is also distinguishable from most cases involving government parties where the lower courts have applied a presumption of adequate representation. Usually, the lower courts apply a presumption of adequate representation to government parties only after determining that the government party and the prospective intervenor share an interest.[88] By contrast, *Trbovich* was a case where the Court found that the interests of the prospective intervenor and the government meaningfully diverged.[89]

It was possible, then, for the Court in *Berger* to presume that the Attorney General was adequately defending S.B. 824 without contradicting *Trbovich*. Alternatively, it was possible for the Court to forgo discussing *Trbovich* altogether, given its insistence that it "need not decide" whether a presumption of adequate representation is ever appropriate.[90] But the Court did indeed discuss *Trbovich*, suggesting that it was inconsistent with the adequacy presumption.[91]

That reading of *Trbovich* could discourage lower courts from applying a presumption of adequate representation whenever the government

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[82] *Berger*, 142 S. Ct. at 2209 (Sotomayor, J., dissenting).

[83] *See id.* at 2201–03 (majority opinion).

[84] *Id.* at 2204.

[85] *Id.*

[86] *Id.* at 2203–04.

[87] Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972).

[88] *See* cases cited *supra* note 80 and accompanying text.

[89] In *Trbovich*, the Court concluded that the existing government defendant — the Secretary of Labor — had the broad objective of "protect[ing] the vital public interest" in fair union elections. *Trbovich*, 404 U.S. at 538–39. But the Court also found that the prospective intervenor claimed only a narrow interest in asserting his rights under a federal labor statute. *Id.*

[90] *Berger*, 142 S. Ct. at 2204.

[91] *Id.* at 2203–04.

is an existing party to a lawsuit. Admittedly, the Court technically left the door open for lower courts to continue applying the presumption. Indeed, it declined to decide whether application of an adequacy presumption was ever appropriate.[92] Still, lower courts may be hesitant to apply an adequacy presumption in future cases. A future court seeking to apply an adequacy presumption will face the difficult task of explaining how that presumption is consistent with *Berger*'s reading of *Trbovich*.

Yet it is in precisely those cases involving the government that an adequacy presumption is most useful. It is usually the government that takes on the responsibility of defending generally applicable rules and statutes.[93] Under the lower courts' broad interpretation of the "interest" requirement, almost anyone would have a right to intervene in the government's defense of such rules and statutes. After all, most people can claim some kind of plausible interest in litigation over a public law.[94] But allowing anyone who can plausibly claim an interest to intervene would hamstring the government's ability to effectively represent the careful balance of interests embodied in democratically enacted laws.

The presumption of adequate representation, then, has done important work in preventing the right to intervene from expanding too far beyond its original meaning. Yet the Supreme Court's decision in *Berger* casts doubt on the appropriateness of an adequacy presumption. Future courts may be reluctant to apply the presumption, given *Berger*'s suggestion that doing so would be inconsistent with Supreme Court precedent. The decision could therefore have the unintended effect of broadening the right to intervene, even in cases that do not fit within the Court's narrow holding.

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[92] *Id.* at 2204.

[93] *See* Stuart v. Huff, 706 F.3d 345, 351 (4th Cir. 2013) ("[T]he government is simply the most natural party to shoulder the responsibility of defending the fruits of the democratic process.").

[94] *See, e.g.*, *id.* at 352 (discussing antiabortion activists who sought to intervene in abortion-related litigation after claiming an interest in "ensur[ing] that 'a pregnant woman understands the potential risk and harms to the child so that she can make the decision for the child'").