Avoiding a "Nine-Headed Hydra": Intervention as a Matter of Right by Legislators in Federal Lawsuits After *Berger*

Heightened political polarization across the United States has resulted in the increased use of Rule 24(a) intervention as a matter of right by elected legislators in federal litigation concerning state law. Because states differ in their approaches to intervention, with only some states expressly granting intervention in state matters, lower federal courts have been tasked with evaluating motions to intervene by reconciling Rule 24(a)'s requirements with state statutes, which poses challenging questions concerning Rule 24. This Note aims to provide lower courts with a reimagined standard for evaluating motions to intervene from state legislators that considers the administrative, political, and legislative consequences that occur without such a standard. Under this standard, lower courts first determine whether Rule 24(a) trumps state law before utilizing a shareholder test to evaluate whether the existing party adequately represents the interest of the potential legislator intervenor. This standard ultimately seeks to prevent the overburdening of the courts and to protect their independence.

INTRODUCTION

The heightened political polarization that has spread across the United States has not spared its federal courts. In fact, this polarization is manifesting in the increased use of a procedural tool—intervention—by elected legislators in federal litigation concerning state law.[1] While these legislators seek to intervene for different reasons, they often aim to defend legislation they previously enacted from constitutional or administrative challenge.[2]

Among the states, there is significant variation in legislators' ability to intervene in litigation challenging legislation. Some states' laws expressly grant such intervention, while others are either silent on the matter or vest the power to represent the State's interest only with the State's Attorney General.[3] This variation across jurisdictions requires lower courts to reconcile state laws permitting intervention with Rule 24(a) of the Federal Rules of Civil Procedure, which governs intervention by outside parties in federal litigation.[4] Rule 24(a) requires that potential third-party intervenors show that their interest is not adequately represented by an existing party, posing challenging questions for federal courts: Does the standard require that the potential intervenors' interest be identical to that of the existing party? Or does this standard require, broadly, the same ultimate interest?[5]

1. *See, e.g.*, Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1949–50 (2019) (describing how the House attempted to displace Virginia's Attorney General by filing an appeal when the Commonwealth chose not to); Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S. Ct. 1002, 1007 (2022) (describing how the Kentucky Attorney General attempted to intervene by filing an appeal when "[t]he Kentucky official who had been defending the law decided not to seek any further review"); Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 2191, 2198, 2203 (2022) (describing how the Speaker of the North Carolina State House of Representatives and President Pro Tempore of the State Senate filed a motion to intervene in a lawsuit brought against the North Carolina Governor and the State Board of Elections).

2. Memorandum of Law in Support of Motion to Intervene by the Wisconsin Legislature, Planned Parenthood of Wis., Inc. v. Kaul, 384 F. Supp. 3d 982 (W.D. Wis. 2019) (No. 3:19-cv-00038), 2019 WL 11594363 (explaining that "the Legislature has a powerful interest in defending the constitutionality of its enactments").

3. For an example of a statute vesting this authority in the Attorney General, see VA. CODE ANN. § 2.2-507 (West 2023).

4. FED. R. CIV. P. 24.

5. *Id.*

Lower courts differ in how they address these questions; as reflected by Supreme Court opinions on the subject, this lack of uniformity has administrative, legislative, and political ramifications, all of which serve to undermine the legitimacy of the courts as independent adjudicators.[6] The most recent of these Supreme Court decisions, *Berger v. North Carolina State Conference of the NAACP*, both revealed and escalated these consequences by lowering the threshold for legislator intervention.[7]

This Note provides an approach to Rule 24(a) that addresses these concerns and assists courts in evaluating motions to intervene from state legislators. Part I sets forth the recent history of state legislators' attempts to intervene in federal courts, including three Supreme Court decisions balancing who properly represents the State's interests in federal litigation.[8] Part II discusses problems created by the *Berger* decision—including administrative, political, and federalism concerns—and explores different frameworks lower courts might use to administer Rule 24(a)'s prohibition of third-party intervention where the potential intervenor's interests are already "adequately represent[ed]" by an existing party.[9] Part III advocates for a reimagined standard, under which lower courts first determine whether Rule 24(a) trumps state law and then utilize the shareholder approach to evaluate whether an existing party adequately represents the potential intervenors' interests. This approach will help courts avoid what has been referred to as the post-*Berger* "nine-headed Hydra":[10] the overwhelming number of potential intervenors that inevitably results from applying a too-narrow definition of the relevant "interest" and ultimately "delay[s] the administration of justice."[11]

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6. *See Bethune-Hill*, 139 S. Ct. at 1956 (dismissing the Virginia House of Delegates' appeal since the House had no jurisdiction to intervene on the matter); *Cameron*, 142 S. Ct. at 1014 (reversing the U.S. Court of Appeals for the Sixth Circuit's denial of the Kentucky Attorney General's motion to intervene); *Berger*, 142 S. Ct. at 2206 (ruling that "North Carolina's legislative leaders are entitled to intervene in this litigation").

7. 142 S. Ct. at 2203–06.

8. *See Bethune-Hill*, 139 S. Ct. at 1956; *Cameron*, 142 S. Ct. at 1014; *Berger*, 142 S. Ct. at 2206.

9. FED. R. CIV. P. 24; *Berger*, 142 S. Ct. at 2206.

10. United States v. Idaho, 342 F.R.D. 144, 151 (D. Idaho 2022).

11. *Berger*, 142 S. Ct. at 2211 (Sotomayor, J., dissenting). Candidly, Kansas University School of Law Professor Lumen Mulligan describes the phenomenon as "allow[ing] all sorts of folks who didn't win statewide office to say, 'I deserve to be here, too.' " Mike Krings, *Law Professor Writes That Supreme Court Ruling Allowing 'Self-Intervention' Is in Error, Poses New Problems*, KU TODAY (June 22, 2023), https://today.ku.edu/2023/06/22/law-prof-argues-supreme-court-ruling-allowing-self-intervention-error-poses-new-problems [https://perma.cc/RBH6-ZBEA].

I. BACKGROUND

A. The Standard Under Rule 24(a)

Third-party intervention allows persons or entities to join an existing lawsuit despite not being one of the original parties. Rule 24(a) states that the potential intervenor must show "an interest relating to the subject matter of the action; potential impairment, as a practical matter, of that interest by the disposition of the action; and lack of adequate representation of the interest by the existing parties to the action."[12] The moving party must establish all elements before the court can grant the motion.[13] As part of this determination, some courts impose a "heightened presumption" in favor of finding adequate representation when an intervening party has the "same ultimate objective" as the existing party.[14] This presumption aims to prevent duplicate representation of the State's interest because, oftentimes, "[legislators] are seeking, as governmental parties, to represent precisely the same state interests as the state defendants already in the case."[15] Still, other courts interpret Rule 24(a)'s language to leave them "effectively 'powerless to control litigation involving states' " when express state statutes are involved, making it much easier for state legislators to intervene.[16]

B. When Politicians and Rule 24(a) Collide: Bethune-Hill *and* Cameron

Legislator intervention is a relatively new phenomenon.[17] As the following examples demonstrate, common themes emerge concerning legislators' attempts to intervene in litigation. First, and most apparent, are legislators' political motivations.[18] Potential legislator intervenors tend to file a motion to intervene when their interests are not identical to the existing party representing the State.[19] This often

12. Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 797 (7th Cir. 2019). There is an additional requirement that the showing must be "timely." *Id.*

13. *Id.* This Note does not consider permissive intervention under Rule 24(b).

14. N.C. State Conf. of the NAACP v. Berger, 999 F.3d 915, 932 (4th Cir. 2021), *rev'd*, 142 S. Ct. 2191 (2022); *Kaul*, 942 F.3d at 799, 801.

15. *Berger*, 999 F.3d at 933.

16. *Id.* at 934.

17. Some of the first salient cases involving state legislators attempting to intervene were decided in 2019. Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945 (2019); *Kaul*, 942 F.3d at 795.

18. *Bethune-Hill*, 139 S. Ct. at 1949–50; *Kaul*, 942 F.3d at 796. In both cases, state legislators hoped to intervene in order to defend the legislation they passed.

19. *Bethune-Hill*, 139 S. Ct. at 1952.

occurs when legislators identify with a different political party than the state's current executive or Attorney General.[20] These political differences often lead to tensions over the choice of litigation strategy, creating more nuanced motivations for intervention.[21] When the existing party takes a particular approach to the litigation or declines to appeal, the potential intervenors flag their litigation strategy or opposition to ending the litigation with the court as an attempt to gain greater control over the proceedings and defend their (or the State's) interests.[22]

Second, subject matter may influence the types of cases with which legislators seek involvement.[23] Cases concerning state abortion access, electoral voting maps, and other divisive issues have seen motions for intervention by state legislators.[24] For example, Wisconsin state legislators filed a motion to intervene in a 2019 lawsuit concerning the constitutionality of the state's abortion regulations.[25] In this case, the legislators hoped to protect their "unique institutional interest in defending the constitutionality of [the Legislature's] enactments" and prevent the court from issuing a broad holding that would obstruct passage of additional abortion restrictions.[26] As shown in the Wisconsin case, state legislators responsible for passing the challenged legislation may seek to intervene to publicly signal their support for the legislation and ensure that it remains in effect.[27]

Recently, the Supreme Court dealt with a line of cases addressing legislators' ability to intervene in litigation.[28] The first of these cases, *Virginia House of Delegates v. Bethune-Hill*, specifically addressed legislator standing.[29] A group of Virginia voters sued four

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20. *Berger*, 999 F.3d at 934.

21. *See Bethune-Hill*, 139 S. Ct. at 1952–53.

22. *Id.*

23. *See, e.g.*, *Kaul*, 942 F.3d at 796 (involving a law restricting abortion).

24. *Id.*; United States v. Idaho, 342 F.R.D. 144, 146 (D. Idaho 2022).

25. *Kaul*, 942 F.3d at 793.

26. Memorandum of Law in Support of Motion to Intervene by the Wisconsin Legislature, Planned Parenthood of Wis., Inc. v. Kaul, 384 F. Supp. 3d 982 (W.D. Wis. 2019) (No. 3:19-cv-00038), 2019 WL 11594363.

27. *See* David Thompson, Berger v. North Carolina State Conference of the NAACP*: A Victory for Federalism and State Autonomy*, HARV. J.L. & PUB. POL'Y PER CURIAM 1, 4 (Aug. 11, 2022), https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2022/08/Thompson-Burger-vF1.pdf [https://perma.cc/KHC5-SRWK] (advocating for legislators to intervene since they "have their own perspective on how best to vindicate vital state interests in litigation").

28. Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945 (2019); Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S. Ct. 1002 (2022).

29. 139 S. Ct. at 1949–50. In this case, the state legislators were appellants. For intervenor-defendants, some jurisdictions require that potential intervenors meet Article III standing, but the Fourth Circuit has not imposed such a showing. N.C. State Conf. of the NAACP v. Cooper, 332 F.R.D. 161, 165 (M.D.N.C. 2019).

election officials and two state agencies, claiming that the 2010 redrawn legislative districts were "racially gerrymandered in violation of the Fourteenth [Amendment]."[30] Shortly after the litigation began, the Virginia House of Delegates and Speaker intervened to defend the redrawn districts.[31] The district court found that eleven out of twelve districts were illegally gerrymandered and ordered the State General Assembly to redraw the districts.[32] While the Attorney General declined to appeal this decision, the intervening House of Delegates attempted to do so.[33]

The Supreme Court determined that the House of Delegates lacked standing to intervene because state law expressly reserved the power to represent Virginia's interests with the Attorney General.[34] Furthermore, the Court reiterated that even if the express provision did not exist, the House and its Speaker still lacked authority to intervene on behalf of the State.[35] Specifically, the Court noted that the House originally intervened to represent its *own* interest in "actually [drawing] the redistricting plan at issue," which it claimed was "not adequately protect[ed]" by the Attorney General.[36] Because the House intervened on behalf of its own interests, rather than the State's, the Court determined that it could not then solely represent the State on appeal.[37]

In a subsequent decision, the Court considered whether a newly elected Attorney General from an opposing political party than the previous officeholder may intervene to defend a state law.[38] In *Cameron v. EMW Surgical Center*, the Kentucky Legislature passed House Bill 454 (HB 454) to regulate dilation and evacuation—a procedure performed at reproductive health offices, including EMW Surgical Center ("EMW").[39] In response, EMW sued four defendants, including then-Attorney General Andy Beshear and the Secretary of Health and Human Services ("HHS").[40] Before the district court ruled

30. *Bethune-Hill*, 139 S. Ct. at 1949–50.

31. *Id.* at 1950.

32. *Id.* at 1949–50.

33. *Id.* at 1950.

34. *Id.* at 1952; *see* VA. CODE ANN. § 2.2-507 (West 2023) ("All legal service in civil matters for the Commonwealth, the Governor, and every state department, institution, division, commission, board, bureau, agency, entity, official, court, or judge . . . shall be rendered and performed by the Attorney General, except as provided in this chapter . . . .").

35. *Bethune-Hill*, 139 S. Ct. at 1952–53.

36. *Id.*

37. *Id.*

38. Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S. Ct. 1002, 1007 (2022).

39. *Id.* For the complete text of the statute, see KY. REV. STAT. ANN. § 311.787 (West 2023).

40. *Cameron*, 142 S. Ct. at 1007.

on the statute's constitutionality, it dismissed Attorney General Beshear from the lawsuit but specified that "any final judgment in this action concerning the constitutionality of HB 454 [would] be binding on the Office of the Attorney General."[41] Though the district court later found this state law unconstitutional, the HHS Secretary appealed.[42] After the appeal was filed, however, statewide elections resulted in new leaders assuming office as both the Attorney General and HHS Secretary.[43] Replacing Attorney General Beshear, the newly elected Attorney General Daniel Cameron represented the HHS Secretary in the appeal.[44] When the Sixth Circuit Court of Appeals affirmed the district court's decision striking down the law, the HHS Secretary declined to appeal again, seemingly ending the litigation.[45] Despite this, Attorney General Cameron filed a motion to intervene on behalf of the State to defend the law on appeal.[46] The Sixth Circuit denied this motion, finding it untimely and lacking "substantial legal interest."[47]

Cameron then brought the issue of his attempted intervention to the Supreme Court, where he argued that his motion was timely because it occurred shortly after the Secretary declined to appeal.[48] The majority granted the Attorney General's request for intervention, finding that Cameron sought to "intervene not to defend a right to exercise enforcement powers under HB 454, but in his role as the Commonwealth's 'chief law officer' . . . who has the authority to defend Kentucky's interests in federal court when no other official is willing to do so."[49] The Court emphasized that Cameron's identity as a politician was distinct from his role as the "chief law officer," highlighting that his primary duty was to defend the State in litigation.[50] Ultimately, the Court granted Cameron's motion to intervene, but more importantly, the Court reiterated the significance of the Attorney General in defending state legislation.[51]

Both *Bethune-Hill* and *Cameron* laid the groundwork for a broader decision on legislator intervention.[52] While *Bethune-Hill*'s

41. *Id.*
42. *Id.* at 1008.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 1012.
49. *Id.* at 1012 n.5 (citation omitted).
50. *Id.* at 1010, 1014.
51. *Id.*
52. Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945 (2019); *Cameron*, 142 S. Ct. at 1002.

outcome did not favor the legislators, and *Cameron* dealt with intervention by a new State Attorney General, both cases provided basic guidance for state legislators wishing to intervene in federal litigation—principally, by showing that their intervention is necessary to defend the State's interests. [53]

C. The Berger *Decision Upends Legislator Intervention*

The Supreme Court's grant of certiorari of *Berger v. North Carolina State Conference of the NAACP* set the stage for the Court to determine the extent of legislator intervention in often-polarizing cases.[54] While previous cases examined the role of the State Attorney General or state legislators, *Berger* directly dealt with both types of intervention.[55] In particular, the case determined who may represent the State in federal litigation.[56]

1. The District Court Decision

In the 2018 midterm elections, the North Carolina electorate approved a ballot initiative that amended the state's constitution to include a voter photographic-identification requirement.[57] Within weeks, the North Carolina General Assembly passed Senate Bill 824, commonly known as the North Carolina Voter ID law, to implement this ballot initiative, as required by the initiative's language.[58] The bill's stated purpose emphasized the need "to confirm the person presenting to vote is the registered voter on the voter registration records" and proposed that matching voters' photographs to their names on the voting rolls was an efficient method for preventing voter fraud.[59] Furthermore, the bill specified types of acceptable identification cards,

53. *Bethune-Hill*, 139 S. Ct. at 1945; *Cameron*, 142 S. Ct. at 1002.

54. 142 S. Ct. 577 (2021) (granting certiorari). The Court's narrow opinions in *Bethune-Hill* and *Cameron* allowed the lower federal courts to continue to determine when legislators could intervene, resulting in different applications between jurisdictions. *Compare* Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 801 (7th Cir. 2019) (denying legislators' motion to intervene because they shared the "same ultimate objective" as the existing party and wanted to also represent the State), *with* Ne. Ohio Coal. for the Homeless v. Blackwell, 467 F.3d 999, 1008 (6th Cir. 2006) (declining to apply a presumption of adequate representation after determining that the existing party and intervenor did not share "the same ultimate objective").

55. Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 2191, 2197 (2022).

56. *Id.*

57. *NC Election Results: Voters Pass Voter ID Requirement, Victims' Rights; Reject Power Plays*, AP NEWS, https://www.citizen-times.com/story/news/local/2018/11/06/nc-election-results-constitutional-amendments/1902238002/ (last updated Nov. 7, 2018, 12:16 AM) [https://perma.cc/QK9H-KWG4].

58. S. 824, 2018 Gen. Assemb., Sess. 2017 (N.C. 2018); *Berger*, 142 S. Ct. at 2198.

59. S. 824, 2018 Gen. Assemb., Sess. 2017 (N.C. 2018).

including state driver's licenses, passports, and some forms of student IDs.[60]

Democratic Governor Roy Cooper vetoed the bill because he viewed it as a "trap . . . designed to suppress the rights of minority, poor and elderly voters."[61] Nevertheless, the Republican supermajority swiftly overrode the veto and the law took effect.[62] Shortly after its passage, a vast array of litigants challenged the law in both state and federal courts.[63] In state court, a three-judge trial panel quickly deemed the law unconstitutional, asserting that it "was motivated at least in part by an unconstitutional intent to target African American voters."[64] In a similar federal lawsuit filed the day after the bill's enactment, the National Association for the Advancement of Colored People sued both Governor Cooper and the members of the North Carolina State Board of Elections ("NCSBE"), arguing that the legislation implementing a voter ID requirement violated the Voting Rights Act, the Fourteenth Amendment, and the Fifteenth Amendment.[65] Specifically, the NAACP requested injunctive relief to prevent the law's enforcement, arguing that "[t]hese provisions, separately and together, will have a disproportionately negative impact on minority voters" and ultimately result in "the effective denial of the franchise and dilution of [Black and Latinx] voting strength."[66]

Under state law, the duty to represent the NCSBE and defend the law in both state and federal court fell to North Carolina's Attorney General, Josh Stein, a Democrat.[67] Still, two legislative leaders of the Republican-controlled General Assembly—Speaker of the State House of Representatives, Timothy Moore, and President Pro Tempore of the State Senate, Philip Berger—filed a motion to intervene in the federal

60. *Id.*

61. Press Release, Roy Cooper, North Carolina Governor, Governor Cooper Vetoes Voter ID Bill, Signs Two Additional Bills into Law (Dec. 14, 2018), https://governor.nc.gov/news/governor-cooper-vetoes-voter-id-bill-signs-two-additional-bills-law [https://perma.cc/228M-J3ZX].

62. Associated Press, *Federal Judge to Block Latest North Carolina Voter ID Mandate*, NBC NEWS (Dec. 27, 2019, 1:15 PM), https://www.nbcnews.com/politics/elections/federal-judge-block-latest-north-carolina-voter-id-mandate-n1107896 [https://perma.cc/342X-3Q8U].

63. For an example of state litigation involving S.B. 824, see North Carolina State Conference of the NAACP v. Moore, 876 S.E.2d 513 (N.C. 2022).

64. Associated Press, *N.C. Judges Strike Down a Voter ID Law They Say Discriminates Against Black Voters*, NPR (Sept. 17, 2021, 3:08 PM), https://www.npr.org/2021/09/17/1038354159/n-c-judges-strike-down-a-voter-id-law-they-say-discriminates-against-black-voter [https://perma.cc/5532-D7E4].

65. Complaint, N.C. State Conf. of the NAACP v. Cooper, No. 1:18-cv-01034 (M.D.N.C. Dec. 20, 2018).

66. *Id.* ¶¶ 7, 80.

67. N.C. GEN. STAT. ANN. § 114-2 (West 2023).

lawsuit.[68] In addition to intervening in the parallel state lawsuits, the leaders attempted to intervene in the federal litigation because the law was being challenged as unconstitutional under the Fourteenth Amendment, and they wanted the law to remain in effect.[69] They jointly claimed that Attorney General Stein's defense of the voter ID law was inadequate.[70] First, they argued that his defense of the law in the accompanying state litigation was "tepid" because he focused on administrative justifications rather than "on the merits" arguments.[71] Second, they pointed to Attorney General Stein's political record to support their need to intervene.[72] Namely, he previously voted against a similar measure while serving in the state senate years before, and he expressed concern over S.B. 824 both prior to and after its passage in the General Assembly.[73] Because of his personal qualms with voter ID requirements, Berger and Moore argued that Stein would not adequately represent the State in defending such a requirement.[74] Lastly, the two leaders questioned the political independence of the NCSBE, as its members were appointed by Governor Cooper, who had vetoed the bill.[75]

The district court denied Berger and Moore's motion to intervene after finding that, under Rule 24(a), their interests were already adequately represented by Attorney General Stein's office.[76] Here, the district court determined that the two Republican leaders failed to establish evidence of a lack of adequate representation by the Attorney General, suggesting that the leaders erroneously assumed that their entitlement to intervene extended to federal proceedings.[77] State law provided that the two leaders "shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding

68. Proposed Intervenors' Memorandum in Support of their Motion to Intervene, *Cooper*, No: 1:18-cv-01034 (M.D.N.C. Jan. 14, 2019).

69. *Id.*

70. *Id.*

71. Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 2191, 2199 (2022).

72. Proposed Intervenors' Memorandum in Support of their Motion to Intervene, *supra* note 68.

73. *Id.*

74. *Id.*

75. *Id.*

76. N.C. State Conf. of the NAACP v. Cooper, 332 F.R.D. 161, 164 (M.D.N.C. 2019); FED. R. CIV. P. 24(a):

> On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (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, unless existing parties adequately represent that interest.

77. *Cooper*, 332 F.R.D. at 164.

challenging a North Carolina statute or provision of the North Carolina Constitution."[78] But under federal law, the district court held that "legislators are not *automatically* entitled to intervene as of right in such a suit, particularly where the State is defending the challenged law."[79]

The district court agreed that the state law expressly granting intervention applied to the interest prong of Rule 24(a)(2), which requires potential intervenors to show that without granting the motion to intervene their interests will potentially be impaired.[80] Even so, the court concluded that state law did not apply to the adequacy prong, instead asserting that the federal court's independent inquiry determined the outcome of the "adequate representation" requirement.[81]

Moreover, the district court cited an important administrative reason for denying the motion. Because the leaders' interests were already represented by the Attorney General, allowing them to intervene would "hinder, rather than enhance, judicial economy."[82] And because the Attorney General was already defending the State's interest, the district court saw no reason to duplicate the State's representation.[83] Beyond these findings, the court emphasized the political consequences of allowing legislators to intervene in lawsuits "involving a constitutional challenge to a state statute," including the threat of the "courtroom" transforming into a "forum for political actors."[84]

Following the district court's denial of their motion to intervene, the two leaders authored an amicus brief instead, in which they

78. N.C. GEN. STAT. ANN. § 1-72.2(b) (West 2023); *cf.* WIS. STAT. ANN. § 803.09(2m) (West 2023) (when a party challenges the constitutionality or validity of a statute in court, the assembly, senate, and legislature have the right to intervene in the legal action at any time as a matter of right). The Seventh Circuit Court of Appeals found that the "language [in the Wisconsin statute]" did not control because it "implies that intervention should be automatic, without any input from the trial court, as long as the conditions for authorization under Wis. Stat. § 13.365 are met." Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 797 (7th Cir. 2019). This interpretation does not "control in federal court." *Id.*

79. *Cooper*, 332 F.R.D. at 167 (emphasis added).

80. *Id.* at 168–69.

81. *Id.* at 168–71.

82. *Id.* at 172.

83. *Id.*

84. *Id.* at 167–68:

> If a legislator's . . . support for a piece of challenged legislation gave rise to an interest sufficient to support intervention as a matter of right, then legislators would have the right to participate in every case involving a constitutional challenge to a state statute. But Rule 24 is not designed to turn the courtroom into a forum for political actors who claim ownership of the laws that they pass.

(quoting One Wis. Inst., Inc. v. Nichol, 310 F.R.D. 394, 397 (W.D. Wis. 2015)).

rearticulated similar claims regarding their inadequate representation.[85] Still, the district court did not consider the amicus brief for substantially the same reasons that it did not allow the intervention, reaffirming that the leaders' interests in preserving the law were already represented through the Attorney General.[86]

2. The Fourth Circuit Reversal

Berger and Moore appealed to the Fourth Circuit Court of Appeals, which initially remanded with instructions to grant their motion to intervene.[87] The three-judge panel relied on the state statute expressly providing the leaders with "standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution."[88] Finding that the district court erred in applying the state statute to only the interest prong of Rule 24(a), the court remanded the case to the district court to determine whether, under a minimal burden standard, the legislative intervenors could show a lack of adequate representation by the Attorney General.[89]

When the Fourth Circuit decided to rehear the case en banc, however, it denied the motion to intervene.[90] This time, the court concluded the leaders' interests were adequately represented by the Attorney General, particularly under the "heightened presumption" in favor of adequacy that federal courts often apply when analyzing Rule 24(a).[91] Additionally, the majority explained that the state statute's application was limited to the "interest requirement," meaning

85. Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 2191, 2199 (2022).

86. *Id.* (citing N.C. State Conf. of the NAACP v. Cooper, 430 F. Supp. 3d 15, 54 (M.D.N.C. 2019)); N.C. GEN. STAT. ANN. § 1-72.2(b) (West 2023):

> The Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, by and through counsel of their choice, including private counsel, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution.

87. N.C. State Conf. of the NAACP v. Berger, 970 F.3d 489, 505–06 (4th Cir. 2020), *rev'd on reh'g en banc*, 999 F.3d 915, 923, 932 (4th Cir. 2021), *rev'd sub nom. Berger*, 142 S. Ct. 2191. This appellate panel noted that they did not agree with the Seventh Circuit's use of the *Kaul* interpretation for Rule 24(a), finding the presumption of adequate representation too expansive. *Id.* at 507 (citing Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 797 (7th Cir. 2019)).

88. *Id.* at 499, 505–06.

89. *Id.* at 507.

90. *Berger*, 999 F.3d at 939.

91. *Id.* at 932–34.

that it did not supplant a federal court's independent evaluation of the "adequacy of existing representation."[92]

Agreeing with the district court's decision that the state law applied only to the interest prong of Rule 24(a), the Fourth Circuit upheld the district court's independent finding that Attorney General Stein's representation of the State's interest was adequate.[93] The court emphasized that the leaders could intervene only in "extraordinary" circumstances, such as when the Attorney General's representation is so limited that it constitutes a "dereliction of his statutory duties."[94] Finding that "a proposed intervenor's governmental status makes a heightened presumption of adequacy more appropriate, not less," the Fourth Circuit reiterated that the leaders had shown no evidence of a lack of adequate representation by the Attorney General.[95]

3. Supreme Court Opinion

The leaders lastly appealed to the Supreme Court, which ultimately reversed the decision of the Fourth Circuit.[96] Here, the Court relied on both the state's express law and federalism principles to find the leaders could intervene in the federal lawsuit.[97] Writing for the Court, Justice Neil Gorsuch explained that "divided state governments sometimes warrant participation by multiple state officials in federal court."[98] Because the NCSBE's interests were not identical to the leaders' interests, given political disagreement, the Court held the leaders satisfied the Rule 24(a) standard and could intervene.[99] In this case, the Court reasoned the leaders sought "to give voice to a different perspective," one that focused on defending S.B. 824 "on the merits" rather than on administrative grounds.[100] The majority determined that although both parties sought to defend the constitutionality of the law, this distinction was enough to show that the leaders' interests in defending the law were not represented by the Attorney General.[101]

But the Court went further than deciding whether the leaders could intervene in this specific litigation. Dismissing the presumption

92. *Id.* at 919, 929 n.3 ("A state's policy judgment about the value of legislative intervention . . . does not override" federal courts' findings on adequate representation.).

93. *Id.* at 929.

94. *Id.* at 918.

95. *Id.* at 933–34.

96. Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 2191, 2206 (2022).

97. *Id.* at 2198–2204.

98. *Id.* at 2196.

99. *Id.*

100. *Id.* at 2205.

101. *Id.*

of adequate representation, the Court explained that where legislators are authorized to intervene under state law, the express statute is "dispositive," and lower courts should instead impose a "minimal" burden standard.[102] This move essentially shifted the burden away from potential intervenors and to the parties already in the lawsuit, forcing them to prove they are adequately—or near identically—representing an outside party's interests.[103] The Court firmly rejected both the district court's and the Fourth Circuit's reasoning that a government agent's existing representation of the State is precisely the type of case where the presumption of adequate representation best fits.[104] Reprimanding the Fourth Circuit for "get[ting] things backward," the Court explained that a presumption of adequacy is "*especially* inappropriate" in cases where a state's authorized representative seeks to intervene.[105] Ultimately, while the Court did not announce a test to determine adequacy, the majority's ruling made it significantly easier for legislators to intervene in litigation, finding an express statute to be "dispositive" of the matter and a lack of adequate representation if a "different perspective" in party interests exists.[106]

4. Justice Sotomayor's Dissent

In her dissent, Justice Sonya Sotomayor took issue with this new presumption and emphasized the decision's practical consequences.[107] First, she claimed the new presumption of inadequate representation improperly allowed state law to preempt federal law "to determine whether an existing party adequately represents a *particular* interest" in federal litigation.[108] While the majority relied on *Cameron* and *Bethune-Hill* to support the "novel" presumption of inadequate representation, Justice Sotomayor warned that neither of these cases

102. *Id.* at 2195, 2203–04. Previously, the district court emphasized that "a movant seeking intervention typically bears a 'minimal' burden of showing inadequacy by an existing party." N.C. State Conf. of the NAACP v. Cooper, 332 F.R.D. 161, 168 (M.D.N.C. 2019). When the government is one of the parties in litigation involving a statute, however, the Fourth Circuit requires a movant to make "a strong showing of inadequacy" since the government is presumably in the best position to represent such a law. *Id.*

103. *Berger*, 142 S. Ct. at 2199.

104. *Id.* at 2203–04; *cf.* N.C. State Conf. of the NAACP v. Berger, 999 F.3d 915, 929 n.3 (4th Cir. 2021) ("A state's policy judgment about the value of legislative intervention may bestow a protectable interest in certain court cases, but it does not override [a federal court's] normal standards for evaluating the adequacy of existing representation in those cases.").

105. *Berger*, 142 S. Ct. at 2204.

106. *Id.* at 2195, 2205.

107. *Id.* at 2206–07 (Sotomayor, J., dissenting).

108. *Id.* at 2207 (emphasis added).

alleviated the ultimate federalism concern.[109] There is no precedent, she argued, that gives state law control over federal court determinations regarding adequate representation or that "allow[s] additional state actors to intervene when another state actor is already ably and fully representing the State's interests in the litigation."[110] Instead, she agreed with the lower court's finding that federal courts must complete an independent inquiry into adequate representation of potential intervenor interests.[111] Further, she emphasized concerns that the majority's holding would lead to an influx of intervenors in federal court proceedings and, more importantly, politicize the federal judiciary's processes.[112]

Second, Justice Sotomayor argued that the majority incorrectly determined that Attorney General Stein's defense of the law was inadequate.[113] Justice Sotomayor referred to this finding as a "fiction" and concluded that, when viewed broadly, the leaders and the Attorney General had identical interests in enforcing S.B. 824.[114] She claimed that the majority's distinction in this interest was based on a difference in "litigation strategy," which did not imply that the leaders' interests were inadequately represented.[115] Instead, she viewed Attorney General Stein's defense, which focused on administrative arguments, as substantially aligned with the legislative leaders' preferred strategy of defending the law "vigorously on the merits."[116]

Importantly, Justice Sotomayor questioned the sweeping scope of the majority's determination, asserting that allowing every intervenor with a slightly different perspective to join a lawsuit could inundate federal courts.[117] She posited: "[i]f state law can require a federal court to allow a second state actor to intervene to represent a different 'perspective,' what is to stop a State from designating 3, 4, or 10 or more officials as necessary parties to suits challenging state law?"[118] She believed this would not only harm the administrability of the courts but would also create confusion among lower courts determining whether interests are "adequately represent[ed]."[119] Siding with the lower courts, Justice Sotomayor instead advocated that state

109. *Id.* at 2210.
110. *Id.*
111. *Id.*
112. *Id.* at 2211.
113. *Id.* at 2207.
114. *Id.* at 2212, 2214.
115. *Id.* at 2213.
116. *Id.* at 2212, 2213.
117. *Id.* at 2211.
118. *Id.*
119. *Id.*

law should not govern the adequacy prong of Rule 24(a).[120] Indeed, the potential for frivolous intervention and degradation of federalism remained key reasons to maintain the presumption of adequate representation.[121]

Justice Sotomayor's dissent warned about the imposition of heavy administrative burdens on the courts, fearing the majority prioritized the right of intervention and state law while disregarding the practical obstacles that would result.[122] But the majority dismissed this concern, conceding that although lowering the bar to intervention could overwhelm the courts if parties utilize the procedural tool too frequently, "federal courts routinely handle cases involving multiple officials sometimes represented by different attorneys taking different positions."[123] Therefore, "[w]hatever additional burdens adding the legislative leaders to this case may pose, those burdens fall well within the bounds of everyday case management."[124] By minimizing this concern, the majority did not dispute the impact of flipping the standard to what Justice Sotomayor deemed a "presumption of inadequacy."[125] Rather, they announced this new standard without guidance for lower courts, leaving judges to determine a path forward when considering legislators' attempts to intervene in federal litigation.[126]

II. ANALYSIS

As Justice Sotomayor forewarned, the *Berger* decision has only spurred further questions regarding legislators' ability to intervene in litigation, causing an administrative burden.[127] Specifically, given *Berger*'s application of a new presumption, which requires existing parties to demonstrate that they are already adequately representing outside parties' interests, a key question remains: what exactly

120. *Id.*

121. *See id.* (stating that the Court's holding "interpret[s] state law to hijack federal courts' ability to manage litigation involving states" and will "clog federal courts").

122. *Id.* at 2206.

123. *Id.*

124. *Id.*

125. *Id.* at 2207.

126. *Id.* This administrability concern was echoed by articles published after the decision. One *Harvard Law Review* article warned that overburdening the courts was of particular concern to "cases involving the government," because allowing a multitude of intervenors would "hamstring the government's ability to effectively represent the careful balance of interests embodied in democratically enacted laws." Leading Case, *Civil Procedure — Intervention — Federal Rule of Civil Procedure 24(a)* — Berger v. North Carolina State Conference of the NAACP, 136 HARV. L. REV. 390, 399 (2022).

127. *See Berger*, 142 S. Ct. at 2211 (Sotomayor, J., dissenting).

constitutes "adequate representation?"[128] This question arises even in states with an express provision, as lower courts have continued to conduct independent inquiries into intervenors' interests.[129]

In the months since *Berger*, lower courts have already exhibited varying approaches to legislator intervention, and more approaches are imaginable.[130] For example, *United States v. Idaho* involved a federal lawsuit challenging Idaho's near-total abortion ban.[131] Like North Carolina, Idaho had a statute expressly granting the right of intervention. Despite this, the Idaho district court did not solely consider the state statute's express grant of intervention as called for in *Berger*; instead, the court independently reviewed whether the legislators' interests were adequately represented by the existing party, which was the Idaho Attorney General.[132] While noting that a state law expressly authorizing legislators' intervention may allow them to intervene in state court matters, the court focused its analysis not on state law but on whether the Idaho legislators met Rule 24(a)'s requirements.[133] And though the court did acknowledge the Supreme Court's recent decision in *Berger*, it emphasized that its decision here was narrow, fact-specific, and did not grapple with *Berger*'s implications. This was because, as the court listed, the legislators presented no evidence that the Attorney General's ultimate objective differed from their ultimate objective or that the Attorney General had previously denounced restrictions on abortion.[134] Therefore, as this district court illustrated, some lower courts still engage in an independent inquiry under Rule 24(a)'s adequacy prong but do so without applying the presumption of adequate representation.[135] This Part outlines other approaches that lower courts may use, accompanied by an analysis of the difficulties that each approach presents for lower courts.

128. *Id.*

129. The lower courts would follow the majority's view of an express statute in *Berger*. *See id.* at 2199. *But see* Doe v. Horne, No. CV-23-00185, 2023 WL 3956618, at *1 (D. Ariz. June 12, 2023) (where the district court conducted an independent inquiry to determine whether legislator intervenors met Rule 24(a)'s requirements).

130. *See, e.g.*, United States v. Idaho, 342 F.R.D. 144, 148–51 (D. Idaho 2022).

131. *Id.* at 146–47.

132. *Id.* at 151.

133. *Id.* at 151–53.

134. *Id.* at 150.

135. *See, e.g.*, *id.*

A. Applying a Nonuniform Approach

As modeled by the *Berger* majority, lower courts could adopt a nonuniform approach for determining whether a particular intervenor's interests are adequately represented, thereby evaluating each case's motion to intervene on an individualized basis.[136] This case-specific inquiry would place a heavier burden on lower courts, requiring them to manage the litigation more extensively as they assess whether each potential intervenor meets Rule 24(a). But rather than adopting a test that may create further questions or trying to broadly define "adequately represent[ed]" to fit most lawsuits, this individualized approach would allow a judge to determine the intervenor's interest (and whether it aligns with the existing party's interest), control the size and pace of the litigation, and utilize its fact-finding authority to determine whether to grant the motion.[137] This approach could also provide involved parties with reassurance that the judge is considering the specific facts of the case rather than mechanically applying the same test to all motions. It also ensures there is "an opportunity to have more views aired in federal litigation on key constitutional questions," which is particularly relevant to interventions by state legislators.[138]

Still, as forewarned by Sotomayor's *Berger* dissent, the lack of a uniform standard for lower courts introduces significant administrative concerns and generates greater uncertainty for litigation parties. As voiced by both the dissent and the NAACP, reversing the presumption of adequacy and failing to establish a uniform test "makes trial management impossible."[139] Indeed, relying on case-specific inquiries to determine whether intervention is permitted detracts from other proceedings, causing delay, clogging up courts, and increasing litigation costs for the parties.[140] In both district and appellate courts—where dockets are already overwhelmed—forcing judges to spend copious amounts of time identifying the line between mere differences in litigation strategy and truly inadequate representation of third-party interests only exacerbates the problem. This, in turn, diminishes the opportunity for more people to be heard in court.[141]

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136. *See* Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 2191, 2204–05, 2211 (2022).

137. FED. R. CIV. P. 24.

138. Thompson, *supra* note 27, at 5.

139. *Berger*, 142 S. Ct. at 2205 (quoting Brief for NAACP Respondents at 26, *Berger*, (No. 21-248)).

140. *See id.* at 2211 (Sotomayor, J., dissenting) (emphasizing the immense "burden" this decision places on the lower courts).

141. *See id.*

Further, without a standard, lower court judges may face allegations that their decisions were influenced by political bias rather than a proper evaluation of adequate representation. When handling cases related to abortion and immigration, lower courts have already encountered significant criticism regarding their ability to remain apolitical.[142] Leaving courts without guidance on how to handle legislator intervention would exacerbate these critiques due to the political affiliations of intervenors and judges. In other words, the lack of an objective standard, and hence the need to evaluate potential legislator intervention on the facts of the case, will likely increase criticisms of judicial bias when a judge denies a motion to intervene in politically fraught cases. Still, as the *Berger* majority explained, this phenomenon—like criticism from the public—could be considered part of lower courts' "everyday case management."[143]

B. The Shareholder Test

Instead of this fact-specific analytical approach to evaluating motions to intervene, lower courts could adopt a more concrete test. In fact, some courts adopted a test for determining whether the intervenor's interests are "adequately represented" by the existing plaintiff that analogizes to the relationship between shareholders and a corporation.[144] Under this test, "adequate representation exists: (1) if no collusion is shown between the representative and an opposing party, (2) if the representative does not have or represent an interest adverse to the proposed intervenor, and (3) if the representative does not fail in fulfillment of his duty."[145] This is similar to the test previously

142. *See* Carrie Johnson, *Legal Opinions or Political Commentary? A New Judge Exemplifies the Trump Era*, NPR (July 26, 2018, 5:01 AM), https://www.npr.org/2018/07/26/632005799/legal-opinions-or-political-commentary-a-new-judge-exemplifies-the-trump-era [https://perma.cc/5XTX-6Y8F]; Emma Platoff, *Trump-Appointed Judges Are Shifting the Country's Most Politically Conservative Circuit Court Further to the Right*, TEX. TRIB. (Aug. 30, 2018, 12:00 AM), https://www.texastribune.org/2018/08/30/under-trump-5th-circuit-becoming-even-more-conservative/ [https://perma.cc/62EQ-5DTN] (explaining how some litigants find the Fifth Circuit to be "the most conservative court . . . ever seen").

143. *Berger*, 142 S. Ct. at 2206.

144. *See* Eunice A. Eichelberger, Annotation, *When Is Interest of Proposed Intervenor Inadequately Represented by Existing Party So as to Satisfy That Requirement for Intervention as of Right Under Rule 24(a)(2) of Federal Rules of Civil Procedure*, 74 A.L.R. Fed. 327 § 9d (2023) (collecting cases in which federal courts have discussed or determined whether the interest of a proposed intervenor is adequately represented by an existing party).

145. *Id.* § 4. Regarding the second requirement, "adverse" is generally defined as "opposed to one's interests." *Adverse*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/adverse (last visited Jan. 17, 2024) [https://perma.cc/E8NP-BWAZ].

used by the Fourth Circuit when evaluating district court decisions of intervention in challenges to a statute.[146]

Had the *Berger* Court applied the shareholder test to the facts of the case, it may have resulted in the Court reaching the same outcome. Under the first prong, the majority alluded to Attorney General Stein's political views playing a role in his ability to adequately represent the legislators' interest.[147] Without going so far as to characterize this as "collusion" with the NAACP, the majority did point out his "allegiance to the voting public" as something that could sway his independence.[148] The second prong depends on how broadly a court interprets an "adverse" interest; in the *Berger* opinion, an "adverse" interest was a "different perspective" that the state legislators claimed in their motion to intervene, but it is unclear how broad the definition of adverse interest is.[149] Finally, in the third prong, the majority did not directly address if the Attorney General "fail[ed] in the fulfillment of his duty."[150] Still, if the Court had shared the same concerns about Attorney General Stein's "allegiance" with respect to his ability to "fulfill" his duty to defend the bill, these facts could have cut in favor of finding that he had not fulfilled his duty.[151]

While the shareholder test is arguably consonant with post-*Berger* jurisprudence, it is not without its weaknesses. Specifically, the test's second prong presents an interpretative challenge to courts regarding how narrowly to define an "adverse" interest.[152] Even though, broadly, both the legislators and existing representative could claim to

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146. "[T]o rebut the presumption of adequacy, Proposed Intervenors must show either collusion between the existing parties, adversity of interests between themselves and the State Defendants, or nonfeasance on the part of the State Defendants." N.C. State Conf. of the NAACP v. Cooper, 332 F.R.D. 161, 164 (M.D.N.C. 2019) (quoting United States v. North Carolina, No. 1:13CV861, 2014 WL 494911, at *3 (M.D.N.C. Feb. 6, 2014)). Here, the district court summarized the test found in Stuart v. Huff, 706 F.3d 345, 352–55 (4th Cir. 2013).

147. *Berger*, 142 S. Ct. at 2205.

148. *Id.*

149. *Id.* Justice Sotomayor characterized the interest as the same: "[E]nsuring the validity and enforcement of S. B. 824." *Id.* at 2212 (Sotomayor, J., dissenting).

150. Eichelberger, *supra* note 144, § 4. Justice Sotomayor discussed the argument regarding personal conflict affecting the State's representation in dissent:

> Finally, the Court alludes to petitioners' argument that state respondents' representation of petitioners' interests was inadequate because the Governor (who vetoed S. B. 824 and personally opposed the law) exercised appointment authority over state respondents. The [majority] is right not to fully embrace this argument, which implies that the attorney general and the career professionals in his office are incapable of executing their statutory duty to represent North Carolina in litigation and defend its interests.

Berger, 142 S. Ct. at 2213 (Sotomayor, J., dissenting) (internal citations omitted).

151. *Berger*, 142 S. Ct. at 2205.

152. *See* Eichelberger, *supra* note 144, § 2a (emphasizing the importance of determining if interests are "adverse" when courts evaluate motions to intervene).

represent the State's interest, thus satisfying this prong, the court might examine each party's interests more narrowly. *Berger* itself serves as an example of this analytical challenge. The majority evaluated the legislators' interests by determining that they were not identical to those of the Attorney General because they focused on "defending the law vigorously on the merits" rather than on procedural concerns.[153] In contrast, the dissent chose to view the interests more broadly, finding that the ultimate interest of both parties was to "ensur[e] the validity and enforcement of S. B. 824."[154]

Applying this debate to consider how broadly to evaluate a party's interests, lower courts could encounter similar issues. Courts defining "adverse" interest differently could lead to mismatched results, cutting against predictability.[155] On one hand, courts defining "adverse" with maximal broadness may only find inadequate representation where the Attorney General has actively spoken against the challenged law that he is now tasked to defend. On the other side of the spectrum, a judge may find adverse interest where there is even the smallest difference in litigation strategy, like whether to pursue administrative or merits-based defenses.[156]

The shareholder test's second prong fails to resolve the existing ambiguity for courts seeking to determine the precise definition of "adverse." Ultimately, however, this test encourages administrability and mimics a standard familiar to courts, promoting the legitimacy and predictability that the more flexible fact-specific approach lacks.

C. The Claim Preclusion Test

Another test for adequate representation borrows from the claim preclusion context. Specifically, the courts could adopt *Taylor v. Sturgell*'s procedural test for determining whether a claim is precluded.[157] Under this test, "a nonparty may be bound by a judgment because she was '*adequately represented* by someone with the same interests who [wa]s a party' to the suit."[158] Because this does not explain

153. *Berger*, 142 S. Ct. at 2212 (Sotomayor, J., dissenting).

154. *Id. Doe v. Horne* is a more recent example of a lower court viewing legislators' interests broadly. No. CV-23-00185, 2023 WL 3956618 (D. Ariz. June 12, 2023). In this case, the district court found that, overall, both the existing party and the legislator intervenors sought to defend the constitutionality of the state's statute. *Id.* at *2.

155. *See* Eichelberger, *supra* note 144, § 2a (providing examples of how different courts have defined "adverse" interests).

156. *Id.*; *see Berger*, 142 S. Ct. at 2213 (Sotomayor, J., dissenting) (arguing that a difference in "litigation strategy" is not a sufficient showing for inadequate representation).

157. *See* 553 U.S. 880, 900 (2008).

158. *Id.* at 894 (alteration in original) (emphasis added).

when a party is "adequately represented," the Court introduced the *Taylor* factors to help streamline preclusion determinations.[159] Generally, a party is "adequately represented" when the "interests of the nonparty and her representative are aligned" and "either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty."[160] Sometimes, it also requires "notice of the original suit to the persons alleged to have been represented."[161]

In the context of legislator intervention, the Attorney General or "representative['s]" interests would need to be aligned with the legislators or "nonparty."[162] This is a complicated inquiry, because the Attorney General would act in a "representative capacity" for the State's interests, but these interests may not be identical to a legislator's interest in the litigation under *Berger*'s narrow reading.[163] The test's second element, however, would be easily satisfied, as the Attorney General would be aware that she was acting in a "representative capacity," fulfilling that element's requirements.[164]

Ultimately, adopting this test would do little to alleviate lower courts' challenging task of defining "adequately represented" because it also requires judges to determine what level of alignment suffices for interests to be represented by an existing party.[165] Instead, this test would merely replicate a fact-specific inquiry into adequate representation with another fact-specific inquiry into proper alignment. This analysis would be redundant because courts would evaluate claim preclusion at an earlier stage of the litigation.

Further, the claim preclusion test would do little to resolve the *Berger* dissent's administrability concerns, as it would not prevent an influx of legislators and other outside parties from filing to intervene.[166] Lower courts would need to independently evaluate each inquiry and determine whether interests were aligned since each case would contain different facts. This test could quickly suffer from the same consequences as having no adequacy test at all. Therefore, the test for claim preclusion would not import well to legislator intervention or

159. *Id.* at 900.

160. *Id.*

161. *Id.*

162. *See id.*

163. *See id.*; Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 2191, 2205 (2022) (finding that the state legislators brought a "different perspective" than the existing representative).

164. *Taylor*, 553 U.S. at 900; *see Berger*, 142 S. Ct. at 2205.

165. *See* Eichelberger, *supra* note 144, § 2a (explaining how courts "have applied various tests and criteria" when determining whether "representation by the [existing] representative is adequate").

166. *See Berger*, 142 S. Ct. at 2211 (Sotomayor, J., dissenting).

guarantee uniform implementation of a Rule 24(a) standard across jurisdictions.

D. The Class Action Test

A related but more flexible approach—which may answer the questions left by the shareholder test—borrows the framework for class action certification. Under Rule 23(a), a member of the class may sue or be sued as the representative if the class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims or defenses of the representative parties are typical of the claims or defenses of the class; and *the representative parties will fairly and adequately protect the interests of the class*.[167]

Courts have used different approaches to this determination.[168] For instance, some courts have found that the "proposed intervenor's interest is presumed to be adequately represented in [a] class action when [the] existing party pursues [the] same ultimate objective as [the] party seeking intervention."[169] The "same ultimate objective" test is a broad standard, giving courts more leeway in determining whether legislator interests align with existing parties, and it defines the broad scope of interests, which the shareholder approach leaves undefined.[170] It mirrors the *Berger* dissent's finding that the "ultimate objective" of both parties rested with defending S.B. 824.[171]

Additionally, in assessing legislator intervention and adequate representation in lawsuits challenging a state law, a helpful framework could imagine the state as a class and apply Rule 23 accordingly.[172] The number of government representatives is numerous, so having one existing representative to act on behalf of the State's interest would be more practical and serve to alleviate concerns regarding administrability by the courts.[173] Moreover, limiting the number of representatives directly alleviates concerns that the current standard may allow every legislator to intervene in the litigation on behalf of the

167. FED. R. CIV. P. 23. This Note does not explore the requirements under Rule 23(b), which would also be necessary to maintain a class. *Id.*

168. *See* Eichelberger, *supra* note 144, § 9d.

169. *Id.* § 2(a).

170. *Id.*

171. Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 2191, 2212 (2022) (Sotomayor, J., dissenting).

172. FED. R. CIV. P. 23. This paragraph again focuses more on Rule 23(a)(4) than the other three prongs of Rule 23(a).

173. *Id.*; *cf. Berger*, 142 S. Ct. at 2211 (Sotomayor, J., dissenting) (predicting the effect of allowing multiple state officials to intervene on lower courts' time management).

State.[174] Arguably, such an influx of legislator intervention would be "impracticable," further supporting the appointment of a representative to advocate for the State's interest.[175] Because lower courts are used to applying the class action test, and the "same ultimate objective" standard allows courts to view both parties' interests broadly, this approach would be easier to administer and protect courts from being inundated by intervening legislators.[176] At the same time, the requirement that the representative "fairly and adequately protects the interest of the class" would ensure that intervening legislators had some degree of influence in the litigation. Still, the class action test suffers from the same practical issue as claim preclusion, as it burdens judges with determining how broadly to view an interest and whether the existing party does in fact represent that interest.

III. SOLUTION: A REIMAGINED SHAREHOLDER TEST

Of all the tests described above, the shareholder test offers the greatest guidance to courts because it best dispels concerns about administrability, federalism, and the politicization of the courts. Yet, this test still has certain downsides, including that it leaves unresolved questions about how broadly to define "adverse" interests.[177] This Part offers a reimagined version of the shareholder test that maximizes the benefits and addresses the costs.

The analysis for legislator intervention contains three steps. First, the threshold inquiry requires deciding whether the relevant state law permits intervention by legislators. Next, as courts have largely done post-*Berger*, they should continue to apply Rule 24's requirements for intervention, as the Federal Rules of Civil Procedure govern federal litigation, even when confronted with an express state statute addressing intervention by other state officials.[178] Finally, as part of Rule 24's inquiry into adequate representation, courts should import the three prongs of the shareholder test. The following Sections

174. *Berger*, 142 S. Ct. at 2211 (Sotomayor, J., dissenting) ("If state law can require a federal court to allow a second state actor to intervene to represent a different 'perspective,' what is to stop a State from designating 3, 4, or 10 or more officials as necessary parties to suits challenging state law?").

175. FED. R. CIV. P. 23; *see Berger*, 142 S. Ct. at 2211 (Sotomayor, J., dissenting).

176. Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 797 (7th Cir. 2019).

177. *See* Eichelberger, *supra* note 144, § 2a (providing examples of how different courts have defined "adverse" interests).

178. *Kaul*, 942 F.3d at 797. Here, the lower court decided that even though the State had an express statute regarding intervention by state legislators, this law was only a consideration in determining whether the legislative intervenors satisfied Rule 24(a)'s requirements for intervention as a matter of right. *Id.*

analyze the strengths of this approach with regard to concerns about administrability, federalism, and courts' political independence.

A. Administrability

By providing a uniform standard for evaluating legislator motions to intervene, the shareholder test addresses the administrability concerns expressed in the *Berger* dissent and subsequent district court rulings.[179] Again, the shareholder test assumes "adequate representation exists if (1) no collusion is shown between the representative and an opposing party, (2) if the representative does not have or represent an interest adverse to the proposed intervenor, and (3) if the representative does not fail in fulfillment of his duty."[180] This test is similar to the one used by the Fourth Circuit in evaluating motions to intervene in litigation challenging a statute, so it is a relatively familiar test to courts. [181] While critics may argue this test is too rigid and invades court discretion over Rule 24(a) motions, it would maintain some degree of discretion for courts evaluating whether the potential intervenor's interest is "adverse" to the existing party's interest and thus inadequately represented.[182] Additionally, the shareholder test would inject more predictability into this type of litigation, allowing potential intervenors to better anticipate whether motions will be granted. This additional predictability and structure, in turn, alleviates burdens on courts.

While both the test's first and third prongs are relatively straightforward judicial determinations, the second prong presents an interpretive challenge to courts and may lead to contentious litigation.[183] The second prong asks whether the party represents an "interest" adverse to the potential intervenor—a question that naturally hinges on how different judges and courts may define "interest." If the court views the relevant interests broadly, Rule 24's requirements will be more easily met, and the motion will likely be

179. *See Berger*, 142 S. Ct. at 2211 (Sotomayor, J., dissenting) ("If state law can require a federal court to allow a second state actor to intervene to represent a different 'perspective,' what is to stop a State from designating 3, 4, or 10 or more officials as necessary parties to suits challenging state law?"); United States v. Idaho, 342 F.R.D. 144, 151 (D. Idaho 2022) (emphasizing the consequences of allowing unlimited intervention by state legislators).

180. Eichelberger, *supra* note 144, § 4.

181. For the full test, see *supra* note 146.

182. Eichelberger, *supra* note 144, § 2a (providing examples of how different courts have defined "adverse" interests).

183. *Id.*

denied.[184] If, however, the judge narrowly views the interests of the existing party and the potential intervenor, defining the interests with a greater degree of specificity, there is greater room for parties' interests to clash, as demonstrated in *Berger*.[185] Accordingly, if left unmodified, the second prong of the shareholder test may undermine the very purpose of adopting a test in the first place, as it reintroduces interpretive unpredictability.

A modified shareholder test would recognize that a broad view of the relevant interests affords the most predictability and, for this reason, incorporate this standard. As previously discussed, concerns about the administrability of *Berger*'s unpredictable approach—which modeled a granular analysis of differences in litigation strategy—cannot be overstated.[186] Although the *Berger* majority downplayed these concerns, lower courts tend to demonstrate that Justice Sotomayor's dissent had the better view.[187] Specifically mentioning her dissent and the challenge of managing the court's bandwidth after *Berger*, an Idaho district court cautioned that "to allow a legislature the right to intervene in every federal case whenever it says it should be allowed to do so . . . would allow a state to turn into a nine-headed Hydra whenever it so chooses."[188] In other words, by allowing too many intervenors into the litigation because they each represent a distinct "perspective," an excessively narrow approach to defining the relevant interest "clog[s] federal courts and delay[s] the administration of justice."[189]

The reimagined shareholder test would serve as a tool for lower courts to *broadly* evaluate whether a potential intervenor's interests are "adverse," and in turn determine whether they are entitled to intervene in the litigation.[190] This test would focus more on the parties' objective

184. *See Berger*, 142 S. Ct. at 2212 (Sotomayor, J., dissenting) (arguing that parties with the same ultimate goal in representation are adequately represented and not entitled to intervene as a matter of right); *Kaul*, 942 F.3d at 796 (stating the legislature's "motion to intervene as of right was appropriately denied because the Legislature did not demonstrate that the Attorney General is an inadequate representative of the State's interest absent a showing he is acting in bad faith or with gross negligence").

185. While the dissent explained that both the Attorney General and legislative leaders sought to defend S.B. 824, the majority found that the legislative leaders brought a "different perspective" to the litigation. *Berger*, 142 S. Ct. at 2196.

186. The overburdening of lower courts is of utmost concern, especially in cases involving the federal government. *See* Leading Case, *supra* note 126, at 399.

187. *Berger*, 142 S. Ct. at 2206; Doe v. Horne, No. CV-23-00185, 2023 WL 3956618, at *1 (D. Ariz. June 12, 2023).

188. United States v. Idaho, 342 F.R.D. 144, 151 (D. Idaho 2022).

189. *Berger*, 142 S. Ct. at 2211 (Sotomayor, J., dissenting). For additional reactions, see Krings, *supra* note 11.

190. *See* Eichelberger, *supra* note 144, § 2a (discussing how courts examine whether interests are "adverse" when evaluating motions to intervene).

in the outcome of the litigation, rather than whether interests like litigation strategy are identical, a clarification of *Berger's* "different perspective" analysis;[191] additionally, it would weed out many legislators motivated by their own interests or attempting to dispute the existing party's litigation strategy through intervention.[192] Moreover, it would regulate the number of representatives involved and prevent the state from becoming a "nine-headed Hydra" with different legislators expressing duplicative interests.[193] To control the docket and prevent an overburdening of the court system, it remains critical for lower courts to use a streamlined, uniform standard for determining whether interests are "adequately represented."[194] The modified shareholder test provides just that.

B. Federalism

Not only does a modified shareholder test provide an answer to post-*Berger* administrability concerns, but it also protects key tenets of federalism—a chief concern of the *Berger* dissent and likeminded lower courts.[195] Specifically, it provides a framework that resolves the tension between application of Rule 24(a) and contrary state laws. In some cases, Rule 24(a) does not conflict with state laws that expressly designate a representative on behalf of the State.[196] Still, as shown in *Berger*, express provisions that provide certain legislators with a right to intervene in litigation concerning the state may conflict with Rule 24 in federal court if legislators do not satisfy 24(a)(2).[197] As the *Berger* dissent warned, no court had previously found that "state law can supplant a federal court's responsibility to decide adequacy of representation in an individual case."[198] In fact, "[i]t is wholly clear that the right to intervene in a civil action pending in a United States District Court is governed by Rule 24 and not by state law."[199]

At the close of the *Berger* litigation, counsel for the two legislative leaders released an article referring to the decision as "an

191. *Berger*, 142 S. Ct. at 2196.

192. Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 801 (7th Cir. 2019) ("If the Legislature were allowed to intervene as right, then it and the Attorney General could take inconsistent positions on any number of issues beyond the decision whether to move to dismiss, from briefing schedules, to discovery issues, to the ultimate merits of the case.").

193. *Idaho*, 342 F.R.D. at 151; *Berger*, 142 S. Ct. at 2211 (Sotomayor, J., dissenting).

194. FED. R. CIV. P. 24; *see Berger*, 142 S. Ct. at 2211 (Sotomayor, J., dissenting).

195. *Berger*, 142 S. Ct. at 2210–11 (Sotomayor, J., dissenting).

196. *Id.* at 2197 (majority opinion).

197. *Id.* at 2200–01, 2206.

198. *Id.* at 2211 (Sotomayor, J., dissenting).

199. *Id.* at 2210–11.

important victory for federalism" and championing the Court's deference to state law, and consequently, to legislators.[200] Continuing, counsel noted that the Court "evince[ed] the appropriate respect for federalism, [and] agreed that the duly authorized agents should have their day in court."[201] This description glosses over the serious consequences of the decision for lower courts, as *Berger* leaves them with deficient guidance for evaluating adequacy of representation under Rule 24.[202]

By contrast, the modified shareholder test would actually serve to provide an "important victory" for federalism concerns.[203] Unlike the characterization by the Petitioners' counsel in *Berger*, federal constitutional questions best show "[t]he supremacy of federal procedure" and the need to prevent state law from overtaking federal litigation.[204] In using this approach, lower courts could use express state laws to inform the State's intentions regarding who should represent its interests, but state laws would not control federal courts.[205] Instead, these express laws would be one part of the court's calculus regarding whether the interest of the existing party is adverse to that of the potential intervenor.[206] After deciding whether interests are adverse, the court would then ensure that Rule 24(a) was met entirely.[207]

Similarly, this approach prevents the inundation of federal courts with motions to intervene by state legislators because it requires more than a state statute attempting to "make intervention automatic."[208] Utilizing an evaluation of interests more closely aligned with Justice Sotomayor's interpretation, lower courts will look to whether the existing party represented the State in a manner adverse to the legislators.[209] Because it is likely that both parties will potentially represent the State's interest, it will be more difficult to find that the intervenors' interests are not adequately represented in any given case before the court. This will promote the application of federal law in federal courts and prevent states from attempting to legislate how federal courts should operate by passing express statutes that may conflict with Rule 24(a).

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200. Thompson, *supra* note 27, at 5.

201. *Id.* at 3.

202. Berger, 142 S. Ct. at 2196.

203. Thompson, *supra* note 27, at 5.

204. *Id.*; Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 797 (7th Cir. 2019).

205. Thompson, *supra* note 27, at 4.

206. *Id.*

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

208. *Kaul*, 942 F.3d at 797.

209. Berger v. N.C. State Conference of the NAACP, 142 S. Ct. 2191, 2213 (2022) (Sotomayor, J., dissenting).

C. Political Independence

Lastly, and most consequentially, the modified shareholder test also protects federal courts' legitimacy and political independence. Without an applicable standard, courts are left with case-specific determinations as to whether legislators are adequately represented. This individualized analysis is vulnerable to allegations of political influence, which is fatal to a lower court's ability to "administer justice fairly and impartially."[210] The politicization of courts is a long-standing debate that has been exacerbated by the Roberts Court, as well as by increasingly polarizing federal and state court actions.[211] In cases involving motions for intervention by state legislators, which inherently carry political weight, lower courts must be protected from allegations that their grant or denial of a motion was solely based on personal preferences rather than Rule 24's requirements.[212]

A modified shareholder test provides lower courts with a standard that better protects them from allegations of improper, politically influenced decisionmaking. The shareholder test would be uniform across jurisdictions, allowing judges to distance themselves from the political aspects of the litigation and apply the test as required, while still maintaining discretion to interpret party interests. This consistency and depoliticization, in turn, lends legitimacy to the adjudicatory process. Furthermore, it is consistent with the creed of lower courts to act in a fair and impartial manner.[213] Ultimately, this test would reinforce the legitimacy of lower courts and lessen skepticism that courts' political preferences permeate their decisions.

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210. *About Federal Courts*, U.S. CTS., https://www.uscourts.gov/about-federal-courts (last visited Jan. 17, 2024) [https://perma.cc/A6EK-BKKJ].

211. *See, e.g.*, Meg Kinnard, Curt Anderson & Eric Tucker, *Florida Judge Faces Criticism Following Order in Trump Case*, AP NEWS (Sept. 6, 2022, 7:44 PM), https://apnews.com/article/donald-trump-document-search-judge-c9d93a3a90e5ab35fed7f4eb00e94edb [https://perma.cc/WZ8W-E2XC] (explaining how a Trump-appointed judge has garnered criticism for allegedly weighing political ramifications above the law); PEW RSCH. CTR., PUBLIC'S VIEWS OF SUPREME COURT TURNED MORE NEGATIVE BEFORE NEWS OF BREYER'S RETIREMENT (2022), https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/ [https://perma.cc/94S5-B2MK]; Karen Treverton & Gregory F. Treverton, *The Supreme Court Gone Rogue*, HILL (Dec. 13, 2022, 3:00 PM), https://thehill.com/opinion/judiciary/3773386-the-supreme-court-gone-rogue/ [https://perma.cc/3BLA-8Q9S] ("The Supreme Court is abetting a constitutional crisis by emitting purely political opinions that open war among the states.").

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

213. *See* U.S. CTS., *supra* note 210.

CONCLUSION

The *Berger* decision has created more questions than answers over how lower courts should handle motions to intervene by state legislators.[214] Although the Court had previously decided related questions—in *Bethune-Hill*, whether state legislators had standing to intervene to represent their own interests, and in *Cameron*, whether a newly elected Attorney General could intervene to represent the State when the previous Attorney General refused to appeal—*Berger* was the first time the Court grappled with how lower courts should proceed in reconciling a legislator's motion for intervention as a matter of right with Rule 24(a). In this opinion, the majority reversed the lower courts' conclusion that the legislative leaders of the North Carolina General Assembly were adequately represented by the State Attorney General.[215] Finding that state law governing intervention by state legislators trumped the lower court's independent inquiry under Rule 24(a) and that the legislators brought a "different perspective" to the litigation not already endorsed by the existing representative, the Court determined that the legislators were entitled to intervene as a matter of right.[216] Ultimately, though *Berger* upended the assumptions that lower courts had previously relied on when adjudicating such cases, the decision provided courts with minimal guidance and left open questions as to how to proceed going forward.

As an answer to *Berger*'s open questions, this Note proposes a reimagined framework that borrows from how lower courts evaluate the representation of shareholders. To alleviate administrative concerns, this modified shareholder test prevents legislative intervenors from enjoying near-automatic intervention into federal litigation concerning state law. Instead, it provides a predictable standard that lower courts can employ to ensure greater control over an ever-growing docket and to save copious amounts of time now spent parsing whether party interests are adequately represented. Addressing federalism concerns, as emphasized by the *Berger* dissent, this test encourages the independence of federal courts from state interference.[217] Instead of allowing state law alone to govern who has the right to intervene in federal court, this modified shareholder test supports an independent inquiry by the lower courts as to whether Rule 24(a) is satisfied and

214. *Berger*, 142 S. Ct. at 2196.

215. *Berger*, 142 S. Ct. at 2199.

216. *Id.* at 2205–06.

217. *Id.* at 2213 (Sotomayor, J., dissenting).

legislators are entitled to intervene.[218] Finally, this approach protects lower courts from further politicization by the public and, in addition, lends legitimacy that protects against critics' *claims* of politicization, since it stands as a uniform standard applied across jurisdictions. The issue of intervention by state legislators has been hotly contested and is unlikely to abate, but a modified test will go some distance toward standardizing the application of Rule 24(a) in a way that assists both lower courts and litigants moving forward.

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218. For an example of this independent inquiry, see Doe v. Horne, No. CV-23-00185, 2023 WL 3956618, at *1 (D. Ariz. June 12, 2023).

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