No. 21-84

IN THE

Supreme Court of the United States

FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION ET AL.,

Petitioners,

V.

VICTIM RIGHTS LAW CENTER ET AL.,

Respondents.

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

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a movant who seeks to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) on the same side as a governmental litigant must overcome a presumption that the government adequately represents his or her interests.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, public-interest litigation firm that seeks to defend free speech, expand school choice, secure the rights of workers, and protect all Americans from government overreach. We are nonpartisan, do not accept government funding, and do not support or promote political campaigns. Our groundbreaking lawsuits stake out Americans' constitutional rights.

To support these goals, the Liberty Justice Center often intervenes on the same side as the government to defend a law that protects constitutional rights. We also oppose individuals or groups who wish to intervene on the government's side when that intervention is unnecessary. Liberty Justice Center's interest in this case is to stop the default presumption that the government represents the same interests as would-be intervenors in every case.

Our interest in this case is practical, not a mere academic exercise in civil procedure jurisprudence. In *Metropolitan Government of Nashville v. Tennessee Department of Education*, we intervened on behalf of non-public schools and parents to defend an education savings account statute because the institutional pressures on the attorney general meant that he could not vigorously advocate for the interests of the

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[1] No counsel for a party authored any part of this brief, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. *Amicus curiae* timely provided notice of intent to file this brief to all parties, and all parties have consented to the filing of this brief.

intervenors. No. 20-0143-II, 2020 Tenn. Ch. LEXIS 1 (May 4, 2020), Mot. to Intervene. On the other hand, in *Bishop of Charleston v. Adams*, we opposed intervention by the NAACP because they did not assert an individualized or particularized interest distinct from that of the government. No. 2:21-cv-1093-BHH, ECF No. 48 (June 25, 2021), Pls. Opp. to Mot. to Intervene.

These cases illustrate why a presumption of adequate representation of intervenors' interests cannot be the rule. Liberty Justice Center is interested in this case because it gives the Court an opportunity to demand that every time intervention is requested the would-be intervenor's interests must be fairly considered.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Some courts "have so confounded society with government, as to leave little or no distinction between them[.]" Thomas Paine, *Common Sense*. "It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm." Federalist No. 10 (James Madison). Rather, a would-be intervenor is usually the best judge as to whether his interests are being represented adequately.

This case presents the Court with an opportunity to resolve a well-developed circuit split over a procedural issue that has a substantive impact on the ability of harmed parties to defend their interests in the courts. The First Circuit, joined by several other

courts, requires a movant seeking to intervene on the same side of a governmental entity to overcome a strong presumption that the government will adequately represent the movant's interests. The Third and Ninth Circuits apply a slightly weaker, but similar, presumption that the government will adequately represent the movant's interests. The Sixth, Tenth, Eleventh, and D.C. Circuits have correctly rejected the presumption of adequacy all together. Instead, those circuits fairly assess the interests of the movant and the government's representation of those interests.

The presumption clearly conflicts with *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528 (1972), which held that movants who sought to intervene on the same side as a governmental litigant had only a "minimal burden" to establish inadequacy of the government's representation of their interests. In the almost fifty years since *Trbovich*, changes in the nation's political landscape strengthen the need for only a minimal burden for movants. The increasing politicization of the federal courts and polarization of all government offices means that a presumption that governmental litigants can and will adequately represent the interests of would-be intervenors cannot be supported. States' attorneys general have been shown increasingly to follow party lines in litigation—defending their own party's policies while staying silent or lawyering lackadaisically when tasked with defending the other party's policies. Forcing movants to overcome a strong presumption in favor of government adequacy contradicts the countless examples supporting an opposite presumption.

Liberty Justice Center's own experiences with intervention underscore that Petitioners are hardly alone in their concerns over this presumption. The Court should grant the writ in this case to provide guidance to the lower courts on an important question that impacts a wide range of interests, individuals, and issues.

REASON TO GRANT THE PETITION

I. The Court should abandon the presumption that the government adequately represents the interests of would-be intervenors because modern attorneys are both politicized and polarized.

Political polarization in the United States has reached new levels. The Democratic and Republican parties, according to some measures, are more polarized today than they have been in a century. *See, e.g.,* Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics,* 46 Polity 411, 411–13, (2014) (concluding, based on roll-call votes, that "polarization of the Democratic and Republican Parties is higher than at any time since the end of the Civil War"). Contemporary Congress is marked by high levels of partisan sorting: Members are more easily sorted into their party than they were in the past. Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 Colum. L. Rev. 1689, 1694 (2015). In other words, there are fewer conservative Democrats and fewer liberal Republicans. Hare & Poole, *supra*, at 416 fig.1 (showing ideological dispersion of the parties in Congress 1879–2013). A second measurement of

polarization is the notion of ideological divergence. This refers to the distance between the party medians. Farina, *supra*, at 1694. Today, that distance is greater than at any other time since the end of Reconstruction. Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 Tex. L. Rev. 43, 52 (2018).

State attorneys general are not immune from the increased polarization. But this has not always been the case. Prior to the 1980s, state attorneys general offices could be described as "placid and reactive." Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 Rev. Pol. 525, 538 (1994); *see* Thomas R. Morris, *States Before the U.S. Supreme Court: State Attorneys General as Amicus Curiae*, 70 Judicature 298, 299 (1987) (observing that "state attorneys general tended to look upon their role as being merely ministerial functionaries of the state administration"). The Reagan Administration's New Federalism "devolved countless regulatory and administrative responsibilities from the federal government to the states." Lemos & Young, *supra*, at 66; *see also* Eric N. Waltenburg & Bill Swinford, *Litigating Federalism: The States Before the U.S. Supreme Court* 45 (1999).

States, recognizing the growing responsibilities of their attorneys general, allocated more resources to them.[2] Lemos & Young, *supra*, at 66. Bigger budgets

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[2] During the 1970s and early 1980s, budgets for attorneys general expanded at rates that "outpaced the growth of general government spending in every state." Cornell W. Clayton & Jack McGuire, *State Litigation Strategies and Policymaking in the*

and greater responsibilities drew a new kind of attorney to the office. *Id.* Increasingly, state attorneys general offices were staffed by "a younger, better educated, and more ambitious caliber of attorney." *Id.* (quoting Clayton, *New Federalism*, *supra*, at 538). While institutional capacity expanded, so did opportunities to use it. Lemos & Young, *supra*, at 66. Federal agencies were decreasing their enforcement activities in the 1980s, and the state-level enforcers rushed in to fill the void. *Id.*; *see* William L. Webster, *The Emerging Role of State Attorneys General and the New Federalism*, 30 Washburn L.J. 1, 5 (1990) ("In short order the states asserted themselves in dramatic fashion . . .. Attorneys general were called 'fifty regulatory Rambos' by one individual.").

In the 1990s, the newly powerful state attorneys general banned together for an assault on Big Tobacco. Prior to this, countless private plaintiffs had sued, without success, under different tort and warranty theories seeking to hold the industry accountable for the health concerns associated with their dangerous product. Lemos & Young, *supra*, at 68. Many were outspent by the defendants; others failed on the ground that they had assumed the risk of smoking; and lots were stopped by courts' refusal to permit large numbers of smokers to sue together as a class. Anthony J. Sebok*, Pretext, Transparency and Motive in Mass Restitution Litigation*, 57 Vand. L. Rev. 2177, 2184–88 (2004) (describing the history of tobacco litigation). Unlike the private plaintiffs, states

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U.S. Supreme Court, 11 Kan. J.L. & Pub. Pol'y 17, 18 (2001). Between 1970 and 1989 the mean number of attorneys increased from 51 to 148, and the median budget from $ 612,089 to $ 9.9 million. Waltenburg & Swinford, *supra*, at 45.

were able to avoid such pitfalls by shifting the focus from individual smokers to the states' own losses—restitution for Medicaid expenses incurred from treating smoking-related illnesses. *Id.* at 2189. The tobacco suits made clear the power of cooperation among attorneys general: ultimately forty-six states joined the settlement agreement which required tobacco companies to pay the states more than $200 billion. Lemos & Young, *supra*, at 69.

Unsurprisingly, the visibility and the volume of state litigation has increased markedly. Spurred in part by the 1982 creation of the National Association of Attorneys General's Supreme Court Project, the number of Supreme Court cases in which states are parties has "shot up." *Id.* at 72. Today, states' participation in Supreme Court cases as either direct parties or as *amici* is second only to the federal government. Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. Rev. 1229, 1235 (2015).

The increase in budget and visibility has made the office of state attorney general a powerful and influential one—and increasingly political. Today, forty-three states select their attorneys general through a direct election. *Meet the State AGs*, The State AG Report, https://bit.ly/2XAZrEo (last visited Aug. 17, 2021). The other seven are appointed by elected officials. *Id.* While the Republican Attorneys General Association (RAGA) and the Democratic Attorneys General Association (DAGA) had a "handshake agreement" not to target seats held by incumbents from the other party, that policy was ended by the Republicans in March 2017. Alan Greenblatt, *State AGs Used to Play Nice in Elections,*

Not Anymore, Governing.com (Nov. 14, 2017), https://bit.ly/3yUUOCF (last visited Aug. 17, 2021). With an increase in power and pressure to follow the party platform on which they were elected, state attorneys general have become just as polarized as the rest of the nation's political figures and its electorate.

Then-Texas Attorney General Greg Abbott described his typical workday as, "I go into the office, I sue the federal government and I go home." Sue Owen, *Greg Abbott Says He Has Sued Obama Administration 25 Times*, Politifact (May 10, 2013), https://bit.ly/37UWosk (last visited Aug. 17, 2021). It is no accident that Abbott—a Republican—made his comment during the Obama Administration. During the Trump Administration, the homepage for DAGA read, in large orange font, "Democratic Attorneys General are the first line of defense against the new administration." Democratic Att'ys Gen. Ass'n, https://web.archive.org/web/20180201061037/https://democraticags.org/. Abbott sued the Obama administration "at least 44 times"; Massachusetts Attorney General Maura Healy "led or joined dozens of lawsuits" challenging the Trump administration in 2017 alone. Dan Frosch & Jacob Gershman, *Abbott's Strategy in Texas: 44 Lawsuits, One Opponent: Obama Administration*, Wall St. J. (June 24, 2016), https://on.wsj.com/3z7xvWk (last visited Aug. 17, 2021); Steve LeBlanc & Bob Salsberg, *Massachusetts' Maura Healey Helping Lead Effort to Litigate Trump*, Boston.com (Dec. 18, 2017), https://bit.ly/2VUe4lT (last visited Aug. 17, 2021). After President Biden took office in January 2020, Missouri Attorney General Eric Schmitt, who serves as vice chair of RAGA, said that Republican attorneys general "play a very important role in checking a very aggressive

administrative state that's been unleashed." David Siders, *Republican AGs Take Blowtorch to Biden Agenda*, Politico (March 21, 2021), https://politi.co/3yWjcEc (last visited Aug. 17, 2021).

State attorneys general and their litigation have moved away from the traditional core of defending state interests and into the realm of politics, partisanship, and policy debates.[3] They now face potential backlash from other officeholders within state government. State legislators have the power to cut attorneys general budgets—as happened in North Carolina. Lemos & Young, *supra*, at 121. State legislators can also impose limitations on the office, like requirements of legislative approval before initiating a suit. *Id.* Or, they can even assert control over the conduct of the office by vesting litigation authority for certain categories of litigation in government attorneys outside of the office. Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 Cornell L. Rev. 929, 983–84 (2017).

State attorneys general are neither insulated from the growing politicization of America nor from the

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[3] Paul Nolette writes:

> The long-term effect of the federal government's invitation for AGs to influence national policy has been to encourage AGs to define state interests much differently than in the past. A crucial element of this shift is that while AGs have traditionally acted as representatives of their states, they have increasingly claimed the ability to represent a broader range of interests. This includes representing the interests of individuals as opposed to the states themselves.

Paul Nolette, *Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America* 200–01 (2015).

increasing polarization of both state and national politics. Once overlooked attorneys tasked with defending their states' interests, now they have interests of their own: protecting their politically elected position by pleasing their legislative and executive branch party mates and attacking the laws and policies of the opposite party. Any presumption that those same attorneys general will adequately advocate for the same interests of a would-be intervenor cannot be justified in today's political climate.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

August 20, 2021

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