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Self-Intervention

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SELF-INTERVENTION

LUMEN N. MULLIGAN*

You cannot intervene in your own case, duh! Yet the U.S. Supreme Court disagreed, holding that Federal Rule of Civil Procedure 24(a)(2) allows state legislative leaders, seeking to represent the state’s sovereign interest, to intervene when the attorney general is already representing the state’s sovereign interest. In this Article, I contend that the text, history, and practice of Rule 24(a)(2) prohibit such “self-intervention.” I then explore how the fictive approach to state immunity established in Ex parte Young causes this confusion, while concluding that the doctrine, properly understood, focuses on real, not nominal, parties in interest. I further conclude that such irregular joinder strikes at important state separation-of-power principles that assign the representation of state litigation to executive officers. Finally, I show that a Federal Rule of Civil Procedure 25(d) substitution analysis is the stronger approach to suits such as these.

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INTRODUCTION

An existing party in interest cannot move to intervene in its own suit. I can’t believe I had to write this obviously true proposition! Yet, the U.S. Supreme Court disagrees.¹ In *Berger v. North Carolina State Conference of the NAACP*, the Court held that state legislatures, purporting to represent the state sovereign interest, have a right to intervene to defend the validity of a state statute even though an executive official represents the state sovereign interest. In this Article, I argue that these intervention attempts are little more than motions to intervene in one’s own case, which I coin as “self-intervention.” Allowing such self-intervention is unsupportable as a matter of the text, history, and practice of Federal Rule of Civil Procedure 24(a)(2)—the intervention as of right rule. Further, such an approach confuses the legal fiction of *Ex parte Young*, which deploys the use of nominal parties to avoid Eleventh Amendment immunity, with the real party in interest. In reality—and in doctrine—the real party in interest in these suits is the state. I further conclude that the courts should not, under the guise of intervention, allow statehouses to vest themselves with the executive authority to represent the state sovereign interest in court that is constitutionally assigned to the executive. I close by noting that these self-intervention motions

1. See *Berger v. N.C. State Conf. of the NAACP (Berger IV)*, 142 S. Ct. 2191, 2206 (2022). This Article was originally drafted prior to the Court’s decision, after certiorari was granted. *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 577 (2021) (mem.). Based upon this prior SSRN posting, I signed an amicus brief in this case. See Brief of Federal Courts Scholars as Amici Curiae in Support of Respondents, *Berger v. N.C. State Conf. of the NAACP*, 2022 WL 525082 (2022) (No. 21-248). After the Court published *Berger*, this piece was revised, in part, to address that opinion. This Article expresses my views alone.

are better understood as failing efforts for Rule 25(d) public official substitution.

How is it that we find our courts increasingly facing self-intervention motions? Gerrymandering drives the recent presentation of this phenomenon—even though after *Berger* such motions will arise in any number of areas outside of political disputes.² Gerrymandering remains a substantial concern in the states.³ As a result, in some states one party wins statewide (i.e., non-gerrymanderable) elections while the other party wins legislative district (i.e., gerrymanderable) elections.⁴ Such division of authority leads to situations where the statehouse passes or supports a statute that embodies a policy choice contrary to those held by the relevant executive official tasked with taking on the state’s litigation duties.⁵ This splitting of party power and political interests has led to self-intervention motions filed by statehouses to join in suits defended fully by the

2. See *infra* Section IV.C (predicting an impact for all non-corporeal entities).

3. See, e.g., Nick Corasaniti et al., *How Maps Reshape American Politics*, N.Y. TIMES (Nov. 7, 2021), <https://www.nytimes.com/interactive/2021/11/07/us/politics/redistricting-maps-explained.html> [<https://perma.cc/LY88-MX6Y>].

4. Wisconsin provides a prime example. See John Johnson, *Why Do Republicans Overperform in the Wisconsin State Assembly?*, MARQ. U. L. SCH. BLOG (Feb. 11, 2021), <https://law.marquette.edu/facultyblog/2021/02/why-do-republicans-overperform-in-the-wisconsin-state-assembly-partisan-gerrymandering-vs-political-geography> [<https://perma.cc/LZ8U-ZPKB>] (showing that Democrats have a stable four point statewide majority, thus allowing statewide victories, while Republicans have maintained control of the legislature); Jonathan Krasno et al., *Wisconsin’s State Legislative Districts Are a Big Republican Gerrymander*, WASH. POST (May 24, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/24/wisconsins-state-legislative-districts-are-a-big-republican-gerrymander> [<https://perma.cc/UW2M-SDWG>] (discussing the impact of gerrymander on electoral results). For a similar discussion of North Carolina, see Jason Zengerie, *Is North Carolina the Future of American Politics?*, N.Y. TIMES MAG. (June 20, 2017), <https://www.nytimes.com/2017/06/20/magazine/is-north-carolina-the-future-of-american-politics.html> [<https://perma.cc/6G53-DJSD>].

5. Cf. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2453 (2006) (discussing the similar phenomenon in a divided executive branch: “Not surprisingly, a divided executive creates substantial opportunities and incentives for conflict. First, there are matters of simple politics.”).

state attorney general. This pattern, while not a new one,⁶ occurred recently in both Wisconsin and North Carolina.⁷

I turn first to Wisconsin. Here, Wisconsin statutes imposed a series of regulations upon abortion services.⁸ Planned Parenthood of Wisconsin challenged the validity of these state statutes in federal court.⁹ The Republican-controlled statehouse¹⁰ supported the validity of the legislation. Democratic Attorney General Josh Kaul, while pledging to defend all Wisconsin law, had been endorsed by an arm of Planned Parenthood of Wisconsin during his campaign.¹¹ Nonetheless, Attorney General Kaul defended the suit, specifically denying “that the regulations violated the Constitution.”¹² The Wisconsin legislature, however, sought to intervene as of right, “as an agent of the state.”¹³ The district court and circuit court refused to grant the motion to intervene.¹⁴

A similar pattern arose in North Carolina. In December 2018, the North Carolina General Assembly passed Senate Bill 824 (S.B. 824), a photo-ID-to-vote law.¹⁵ At the time, the General Assembly was controlled by the Republican Party,¹⁶ while

6. See Anthony Johnstone, *A State Is a “They,” Not an “It”: Intrastate Conflicts in Multistate Challenges to the Affordable Care Act*, 2019 B.Y.U. L. REV. 1471 (outlining a similar phenomenon in multiple actors claiming statute as the state for amicus briefing purposes).

7. I will also address a case out of Arizona, which is an intra-party spat. See *infra* Section II.B.

8. See *Planned Parenthood of Wis., Inc. v. Kaul*, 384 F. Supp. 3d 982, 984 (W.D. Wis. 2019).

9. *Id.*

10. See Wisconsin Policy Forum, *Divided Government Returns to Wisconsin*, WIS. POL’Y F. (Jan. 2019), <https://wispolicyforum.org/research/divided-government-returns-to-wisconsin> [<https://perma.cc/3T3K-S4BE>] (noting party control of the statehouse).

11. See Patrick Marley, *Planned Parenthood Sues to Overturn Some Wisconsin Abortion Restrictions*, MILWAUKEE J. SENTINEL (Jan. 16, 2019), <https://www.jsonline.com/story/news/politics/2019/01/16/planned-parenthood-sues-over-wisconsin-abortion-restrictions/2586697002> [<https://perma.cc/9NA6-JFFR>].

12. *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 796 (7th Cir. 2019).

13. *Id.* at 798.

14. *Id.*

15. *N.C. State Conf. of the NAACP v. Berger (Berger III)*, 999 F.3d 915, 918 (4th Cir. 2021) (en banc), *rev’d*, 142 S. Ct. 2191 (2022).

16. See *Republicans Keep Control of North Carolina Legislative Chambers*, SPECTRUM NEWS 1 (Nov. 4, 2020), <https://spectrumlocalnews.com/nc/charlotte/news/2020/11/04/republicans-keep-control-of-north-carolina-legislative-chambers> [<https://perma.cc/94BX-KZHV>]

Governor Roy Cooper¹⁷ and Attorney General Josh Stein¹⁸ were members of the Democratic Party. Voter identification laws, such as S.B. 824, had been hallmark Republican Party policy planks, which the Democratic Party had rejected.¹⁹ This policy split motivated the North Carolina House and Senate to override Governor Cooper's veto, thereby enacting S.B. 824 on December 19, 2018.²⁰ Suit to enjoin S.B. 824 soon followed.²¹ Although Attorney General Stein defended that suit—indeed, he prevailed in defending the law on appeal²²—the leaders of the General Assembly sought to intervene as of right representing the sovereign “interests of the State of North Carolina.”²³ The legislative leaders, “[p]ointing to past statements opposing voter identification laws by the Governor and Attorney General . . . , claimed that the defendants ‘cannot be trusted to defend S.B. 824.’”²⁴ The district and circuit courts refused to allow the intervention.²⁵ This led to a successful petition for writ of certiorari from the Supreme Court, where those decisions were reversed.²⁶

While the lower courts correctly denied intervention in these cases, in this Article I argue that treating such self-intervention attempts as if they are at all amenable to a Rule

(noting that the Republican Party held a veto-proof majority in the North Carolina General Assembly through 2018).

17. See *Roy Cooper*, N.C. OFF. OF THE GOVERNOR, <https://governor.nc.gov/about-first-family/roy-cooper> [<https://perma.cc/M7GW-KUZZ>] (for general information and dates of service); Nick Niedzwiadek et al., *North Carolina Governor Vows to Stymie GOP-Driven Election Changes*, SLATE (Mar. 11, 2021), <https://www.politico.com/news/2021/03/11/roy-cooper-veto-north-carolina-election-changes-475306> [<https://perma.cc/K959-64TG>] (identifying Cooper as a Democrat).

18. See *About the Attorney General*, N.C. DEP'T OF JUST., <https://ncdoj.gov/about-ncdoj/the-attorney-general> [<https://perma.cc/ZBL7-U5YE>] (for general information and dates in office); *Josh Stein Wallops Opponent in Q2 Fundraising*, N.C. DEMOCRATIC PARTY, <https://www.ncdp.org/press/josh-stein-wallops-opponent-in-q2-fundraising> [<https://perma.cc/3L7Y-Z5VY>] (identifying Stein as a Democrat).

19. See, e.g., *Republicans and Democrats Move Further Apart in Views of Voting Access*, PEW RSCH. CTR. (Apr. 22, 2021), <https://www.pewresearch.org/politics/2021/04/22/republicans-and-democrats-move-further-apart-in-views-of-voting-access> [<https://perma.cc/4DUF-Y3Y4>].

20. *Berger III*, 999 F.3d at 918.

21. *Id.*

22. *Id.* at 923.

23. *Id.* at 921.

24. *Id.* at 919–20.

25. *Id.* at 934.

26. See *supra* note 1.

24(a)(2) analysis constitutes a fundamental error. Furthermore, the Supreme Court compounded upon this error in *Berger*, when it continued to treat such self-intervention motions as amenable to a Rule 24(a)(2) analysis and—worse still—when it held that state legislative leaders may intervene as of right in suits that are defended by other state agents.²⁷ Even though the Supreme Court has ruled on this question, for two broad reasons, it continues to matter that American courts analyze these self-intervention motions appropriately. First, the majority of state courts model their civil procedure upon the Federal Rules,²⁸ yet these state high courts retain the authority to interpret their rules distinctly from the Supreme Court's interpretation of the Federal Rules.²⁹ Thus, these high courts should avoid the errors embedded in the *Berger* opinion. And second, the federal courts themselves should limit the damaging impact of the *Berger* decision from metastasizing to other non-corporeal entities like corporations.³⁰

My argument proceeds in five parts, concluding that these motions are little more than erroneous attempts to intervene in one's own case. In Part I, I review the leading Fourth Circuit, Seventh Circuit, and District of Arizona cases that engage with the self-intervention issue, while also narrowing the issues under discussion. In Part II, I address the text, history, and practice of Rule 24(a)(2), showing that this rule is not compatible

27. *Berger v. N.C. State Conf. of the NAACP (Berger IV)*, 142 S. Ct. 2191 (2022).

28. See David Marcus, *The Collapse of the Federal Rules System*, 169 U. PA. L. REV. 2485, 2486 (2021) (“[T]he Federal Rules System, by my definition of the term, embraces the procedural regimes of many American jurisdictions.”). Measuring the degree of overlap between federal and state systems of procedure is challenging. Nevertheless, the consensus is that the Federal Rules have a strong impact on the form of state procedure being embodied in court-made rules rather than statutory code. As to content, the consensus view is that the Federal Rules initially had a strong impact, though that trend has slowed, if not reversed recently. See, e.g., Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311 (2001); John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2003); John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

29. See FED. R. CIV. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts”) (emphasis added); Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CAL. L. REV. 411, 424 (2018) (“States thus remain free to reject Supreme Court decisions interpreting federal procedural rules, even if state rules are patterned on the federal ones.”).

30. See *infra* Section IV.C (predicting an impact for all non-corporeal entities).

with self-intervention. In Part III, I explain how the fictive approach to immunity established in *Ex parte Young* causes this confusion, while concluding that the doctrine here supports a focus on real, not nominal, parties in interest. In Part IV, I conclude that such self-intervention strikes at important state law separation-of-power principles that assign the representation of state litigation to executive officers. In Part V, I contend that a Rule 25(d) substitution analysis is the stronger approach to suits such as these.

I. L'ÉTAT C'EST MOI!³¹

Currently arising out of states with divided governments, the federal courts are seeing self-intervention motions by legislatures to join suits already being defended by the state attorneys general. These suits are not ones in which the state executive fails to defend, leaving the legislature to step in to defend.³² Nor are these suits in which the legislature presents a unique interest to intervene as the legislature itself.³³ Rather, these joinder motions seek to have two representatives speak for the same party in interest—the state as a sovereign. In this Part, I introduce the three leading cases raising this issue, present a

31. The perhaps apocryphal statement of France's King Louis XIV to parliament, which translates to "I am the state!" See Herbert H. Rowen, "*L'État C'est à Moi*": Louis XIV and the State, 2 FRENCH HIST. STUD. 83 (1961).

32. These cases lack the "self-intervention" aspect to them precisely because the prior state actors had abandoned representation. See *Cameron v. EMW Women's Surgical Ctr.*, 142 S. Ct. 1002, 1012 n.5 (2022) (allowing state attorney general to intervene in federal appellate proceeding "to defend Kentucky's interests" after "no other official [was] willing to do so"); *Karcher v. May*, 484 U.S. 72, at 75, 81–82 (1987) (holding that state legislators leaders could intervene to defend the constitutionality of state law after the attorney general declined to do so); *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (rejecting the argument for lack of standing that the state legislature and its leadership, who intervened to represent their "own" legislative interests rather than those of the State as a whole, could displace the attorney general as representative of the state's sovereign interest); *Hollingsworth v. Perry*, 570 U.S. 693, 694–95 (2013) (holding that proponents of a ballot initiative who "ha[d] no role . . . in the enforcement of" the initiative and were not "agents of the State" lacked standing to defend it on appeal). Moreover, as addressed *infra* Part V, these questions of abandoned representation are better viewed as Rule 25(d)(2) substitution issues than intervention questions.

33. An option arguably left open, if standing could be found, in *Bethune-Hill*. See 139 S. Ct. at 1952–53, 1953 n.3; see also *N.C. State Conf. of the NAACP v. Berger (Berger III)*, 999 F.3d 915, 928 (4th Cir. 2021) (en banc), *rev'd*, 142 S. Ct. 2191 (2022) (quoting *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 800 (7th Cir. 2019)).

few clarifying comments narrowing the issues under review, and highlight that this issue is not one limited to intra-state, political disputes.

A. Planned Parenthood of Wisconsin, Inc. v. Kaul

I turn first to the Seventh Circuit's *Planned Parenthood of Wisconsin, Inc. v. Kaul* opinion.³⁴ Here, Planned Parenthood of Wisconsin, Inc. (PPWI) filed a suit against Wisconsin's attorney general and an assortment of other state officials, all in their official capacities.³⁵ PPWI brought an *Ex parte Young*-style suit, before the Court had issued *Dobbs v. Jackson Women's Health Organization*,³⁶ to enjoin enforcement of state abortion regulations that it alleged violated the constitutional rights of itself and its patients.³⁷

The attorney general answered the complaint instead of moving to dismiss for failure to state a claim. His answer, however, denied that the regulations violated the Constitution.³⁸ A week later, the Wisconsin legislature sought to intervene as of right,³⁹ where this Article focuses, and permissively.⁴⁰ In so doing, the legislature looked to *Virginia House of Delegates v. Bethune-Hill*,⁴¹ and sought "to intervene only as an agent of the state," and not in its separate legislative capacity.⁴² The Supreme Court in *Bethune-Hill* held that one house of a state legislature lacked standing as an intervenor-defendant to appeal a judgment below, striking a state redistricting statute when the original defendants declined to take the appeal.⁴³ In reaching that judgment, the Court stated in dicta that a state could authorize the legislature, or even one house, to litigate on the state's behalf instead of the attorney general.⁴⁴ The Wisconsin legislature relied upon *Bethune-Hill* as

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

35. *Id.* at 796.

36. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973)).

37. *Kaul*, 942 F.3d at 796.

38. *Id.*

39. See FED. R. CIV. P. 24(a)(2).

40. See FED. R. CIV. P. 24(b).

41. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019).

42. *Kaul*, 942 F.3d at 798.

43. *Bethune-Hill*, 139 S. Ct. at 1950–51.

44. *Id.* at 1952.

the basis for arguing that a state may by statute appoint any government entity to represent it in court.⁴⁵

The district court denied the motion to intervene, which the Seventh Circuit affirmed on appeal.⁴⁶ First, the circuit court assumed, without deciding, that the Wisconsin statute gave the legislature a Rule 24(a)(2) “interest” as a representative of the state itself.⁴⁷ The circuit court further concluded, however, that because the attorney general represented this same state interest already, the legislature could intervene only if the attorney general’s representation was inadequate.⁴⁸ The court described this as the “unenviable task” of convincing a federal court that the attorney general, who was defending the statute, was inadequately representing the interests of his own state.⁴⁹ The court went on to apply a presumption of adequate representation by the attorney general, absent a showing of “bad faith or gross negligence.”⁵⁰ Judge Sykes concurred, arguing that the majority’s presumption was too strong. He nevertheless agreed with the majority that in this case, the legislature could not rebut his, or the majority’s, presumption of adequacy by resting “largely on political and policy differences with the Attorney General over abortion regulations, as well as disagreements about litigation strategy”⁵¹

B. *Arizonans for Fair Elections v. Hobbs*

I turn next to the District of Arizona’s *Arizonans for Fair Elections v. Hobbs* decision.⁵² This case arose out of the COVID-19 pandemic.⁵³ The plaintiffs argued that COVID-19 restrictions barred them from collecting the physical signatures needed to advance certain citizen initiatives they supported, which they contended amounted to First and Fourteenth Amendment violations.⁵⁴ State Attorney General Mark Brnovich defended

45. *Kaul*, 942 F.3d at 798; see also WIS. STAT. § 803.09(2m) (2019).

46. *Kaul*, 942 F.3d at 796.

47. *Id.* at 797–98.

48. *Id.* at 800–01.

49. *Id.* at 801.

50. *Id.*

51. *Id.* at 810–11; see also *id.* at 801 (majority opinion) (reaching the same conclusion as the concurrence).

52. *Arizonans for Fair Elections v. Hobbs*, 335 F.R.D. 269 (D. Ariz. 2020).

53. *Id.* at 272.

54. *Id.*

the suit on behalf of the state.⁵⁵ Attorney General Brnovich was a Republican.⁵⁶ As in the prior cases, the speaker of the Arizona House and president of the Arizona Senate sought to intervene as of right, this Article's focus, and permissively.⁵⁷ In a switch from *Kaul* and *Berger*, here, both Arizona legislative leaders were also Republicans.⁵⁸ Nevertheless, the legislative leaders relied upon an Arizona statute granting them the right "to defend the State's interest."⁵⁹ Applying *Kaul's* presumption of adequacy, the district court denied the motion to intervene, holding that the attorney general, who was defending the suit, adequately represented the state's interests.⁶⁰

C. North Carolina State Conference of NAACP v. Berger

I turn last to *North Carolina State Conference of NAACP v. Berger*.⁶¹ Here, the North Carolina NAACP challenged state voter identification laws as contrary to the Voting Rights Act, the Fourteenth Amendment, and the Fifteenth Amendment. The plaintiffs sought pre-enforcement, *Ex parte Young*-style review by way of suit for injunction, suing the governor and members of the state board of elections in their official capacities.⁶² The state attorney general defended the constitutionality of the state voter identification law, which included overturning a preliminary injunction against the state law on appeal.⁶³

Despite the state attorney general's consistent and ultimately successful defense of the law, the speaker of the North Carolina House of Representatives and the president pro tempore of the North Carolina Senate twice sought to intervene

55. *Id.* at 273.

56. *Attorney General Continues Election Investigation After Audit Flop*, HILL (Sept. 28, 2021), <https://thehill.com/homenews/campaign/574348-arizona-attorney-general-continues-election-investigation-after-audit-flop> [<https://perma.cc/32N8-6DR2>] (noting Brnovich is a Republican).

57. *Hobbs*, 335 F.R.D. at 273.

58. See Kevin Mahnken, *Democrats Fall Short of Majority in Arizona Legislature*, THE 74 (Nov. 12, 2020), <https://www.the74million.org/democrats-fall-short-of-majority-in-arizona-legislature> [<https://perma.cc/R7J7-DJJH>] (noting the controlling party of the Arizona House and Senate).

59. *Hobbs*, 335 F.R.D. at 273.

60. *Id.* at 275.

61. N.C. State Conf. of the NAACP v. *Berger* (*Berger III*), 999 F.3d 915 (4th Cir. 2021) (en banc), *rev'd*, 142 S. Ct. 2191 (2022).

62. *Id.* at 919.

63. *Id.* at 923.

in the suit.⁶⁴ The motions sought to intervene both as of right⁶⁵ and permissively.⁶⁶ This discussion focuses upon the motions to intervene as of right. In their first motion, “the Leaders purported to speak on behalf of the General Assembly, rather than the State of North Carolina as a whole.”⁶⁷ The district court denied this motion to intervene as of right,⁶⁸ and the leaders failed to timely appeal this issue.⁶⁹

As in *Kaul*, after the Supreme Court issued *Bethune-Hill*,⁷⁰ the leaders filed a second motion to intervene as of right.⁷¹ Grabbing onto the *Bethune-Hill* dicta,⁷² the North Carolina leaders, in a renewed motion, argued that they represented not just a legislative interest, but that they now sought to intervene to represent the sovereign “interests of the State of North Carolina.”⁷³ Indeed, they argued that state statute empowered them to represent the sovereign state interest.⁷⁴ Furthermore, the leaders argued that although the state attorney general was defending the suit, they disagreed with his strategic choices, which in their view supported their motion to intervene as of right.⁷⁵

The district court denied the motion to intervene as of right.⁷⁶ First, the district court questioned whether North Carolina law actually empowered the leaders to represent the state sovereign interest.⁷⁷ But even if it did, the district court held that, absent an adequacy problem in the attorney general’s

64. *Id.* at 919–21.

65. *See* FED. R. CIV. P. 24(a)(2).

66. *See* FED. R. CIV. P. 24(b).

67. *Berger III*, 999 F.3d at 919.

68. *Id.* at 920.

69. *Id.* at 921 (“The Leaders did not appeal the district court’s order denying their motion to intervene.”).

70. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019).

71. *Berger III*, 999 F.3d at 921.

72. *See supra* notes 41–44 and accompanying text (discussing the dicta regarding a state’s ability to assign its own agents for litigation).

73. *Berger III*, 999 F.3d at 921.

74. *Id.*; *see also* N.C. GEN. STAT. § 1-72.2(a)–(b) (2017).

75. *Berger III*, 999 F.3d at 921 (“[T]he Leaders argued, the Attorney General, though winning dismissal of the Governor from the case, had argued only for abstention on federalism grounds and failed to develop the factual record through expert reports . . . [Based upon conduct in a parallel state-court case and the action in the federal case, the Leaders believed that] the Attorney General’s performance showed that he could not be trusted to defend S.B. 824 . . .”).

76. *N.C. State Conf. of the NAACP v. Cooper*, 2019 WL 5840845, at *1 (M.D.N.C. Nov. 7, 2019).

77. *Id.* at *2.

representation, the leaders lacked a Rule 24(a)(2) right to intervene.⁷⁸ On this final question, the district court concluded that, at most, the leaders had identified “strategic disagreements” with the attorney general, whose approach “fell well within the range of reasonable litigation strategies.”⁷⁹

On appeal, a panel of the Fourth Circuit reversed this denial of intervention.⁸⁰ Sitting en banc, however, the Fourth Circuit affirmed⁸¹ over vigorous dissents.⁸² The circuit court noted first the “highly unusual posture” of this case in which the putative intervenors sought to represent the sovereign state interest when “the State of North Carolina’s ‘default’ representative—the Attorney General—has *not* ‘dropped out of the case.’”⁸³ Thus, the leaders sought to represent “precisely the interests already represented by the Attorney General in this case.”⁸⁴ Given that congruence of interest, the circuit court held that the attorney general enjoyed a strong but rebuttable presumption of adequate representation of the state sovereign interest.⁸⁵ On this record, the circuit court held that the district court did not abuse its discretion in finding that the leaders failed to rebut this strong presumption.⁸⁶ The U.S. Supreme Court then granted certiorari.⁸⁷

The Supreme Court overruled the Fourth Circuit.⁸⁸ The thrust of the Court’s position was that a state’s interests are not always unitary.⁸⁹ In some instances, the “practical interests” of various governmental actors will vary, such that the only means of capturing these various “perspectives” would be to have

78. *Id.*

79. *Id.* at *3.

80. N.C. State Conf. of the NAACP v. Berger, 970 F.3d 489 (4th Cir. 2020), *aff’d on reh’g*, Berger III, 999 F.3d at 915, *rev’d*, 142 S. Ct. 2191 (2022).

81. Berger III, 999 F.3d at 915, *aff’g* Cooper, 2019 WL 5840845, *rev’d*, 142 S. Ct. 2191 (2022).

82. *Id.* at 939 (Wilkinson, J., dissenting); *Id.* at 941 (Niemeyer, J., dissenting); *Id.* at 942 (Quattlebaum, J., dissenting).

83. *Id.* at 928 (majority opinion) (citing Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 800 (7th Cir. 2019)).

84. *Id.*

85. *Id.* at 930–31, 933.

86. *Id.* at 934.

87. N.C. State Conf. of the NAACP v. Cooper, 2019 WL 5840845, at *1 (M.D.N.C. Nov. 7, 2019), *aff’d*, N.C. State Conf. of the NAACP v. Berger (Berger III), 999 F.3d 915 (4th Cir. 2021) (en banc), *rev’d*, 142 S. Ct. 2191 (2022).

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

89. *Id.* at 2197–98.

multiple state agents as litigants.⁹⁰ Having found that a state's interest is not necessarily unitary, the Court readily concluded that even though the legislature and the attorney general both purported to represent the state sovereign interest, the attorney general's "perspective" on that interest could, and did, diverge from the legislature's.⁹¹

D. Narrowing the Issue

Despite this Supreme Court action, state supreme courts, exercising their independent interpretative authority over rules of procedure, are not bound by the U.S. Supreme Court's *Berger* opinion. Furthermore, the lower federal courts should cabin the *Berger* opinion as much as possible from impacting other non-corporeal entities. As such, it is key to isolate with precision the questions raised in these cases to empower clear analysis in future decisions.

First, although the legislatures in *Berger*, *Kaul*, and *Hobbs* rested their right to intervene, in part, on state law, federal law controls intervention practice in federal court. Following standard *Erie* doctrine,⁹² federal law—not state law—determines who may intervene in federal court. As the Court has consistently held since *Erie*, "Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created In the Rules Enabling Act, Congress authorized . . . [the] Court to promulgate rules of procedure subject to its review."⁹³ Furthermore, this is not a contested question—federal law controls procedure in federal court. As the Court has often held, "[c]oncerning matters covered by the Federal Rules of Civil Procedure, the characterization question is usually unproblematic: It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law."⁹⁴ Following these principles,

90. *Id.* at 2197.

91. *Id.* at 2205 ("The legislative leaders seek to give voice to a different perspective.").

92. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

93. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 406–07 (2010).

94. *Gasparini v. Ctr. for Humans, Inc.*, 518 U.S. 415, 427 n.7 (1996); *see also Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4–5 (1987); *Hanna v. Plumer*, 380 U.S. 460, 469–74 (1965).

there is no doubt that the right to intervene “is a purely procedural right and, even in a diversity suit, it is the Federal Rules of Civil Procedure rather than state law that dictate the procedures, including who may intervene, to be followed.”⁹⁵ This view of the primacy of federal law is even more secure in cases such as *Berger*, *Kaul*, and *Hobbs* given that they arise not in diversity jurisdiction, but as federal questions.⁹⁶ Federal courts nevertheless interpret the Federal Rules with sensitivity to important state interests and regulatory policies.⁹⁷ Thus, even though Rule 24 controls intervention in federal court, some circuit courts “inform the Rule 24(a)(2) calculus” with state law policy choices that speak to the issue.⁹⁸

Second, it is key to bear in mind that intervention is distinct from selecting a state’s agent for litigation. The Supreme Court notes that states, or any non-corporeal party for that matter, may select who acts as the state’s agent in court.⁹⁹ And the states may establish procedures, as many have, allowing one agent to substitute for another as the circumstances may require. Further, a state may designate one agent for certain matters and a different agent for others.¹⁰⁰ Though still in dicta, the Court’s most pointed statement addressing these matters comes from *Bethune-Hill*.¹⁰¹ This opinion, however, did not address intervention directly. Rather, it held that one house of a state legislature suing to enforce the legislature’s unique interest lacked standing,¹⁰² and, in so holding, offered dicta that a state may designate the agent of its choice to defend state statutes—which again does not address intervention.¹⁰³

Third, these types of cases do not raise 28 U.S.C. § 2403(b) or Rule 5.1 concerns. Those provisions allow state attorneys

95. *Williams v. Katz*, 23 F.3d 190, 192 (7th Cir. 1994); see also N.C. State Conf. of NAACP v. *Berger* (*Berger III*), 999 F.3d 915 (4th Cir. 2021) (en banc), *rev’d*, 142 S. Ct. 2191 (2022).

96. See *Berger III*, 999 F.3d at 919; *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 797 (7th Cir. 2019); *Arizonans for Fair Elections v. Hobbs*, 335 F.R.D. 269, 272 (D. Ariz. 2020).

97. See, e.g., *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750–52 (1980).

98. *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 208 (1st Cir. 1998); *Dep’t of Fair Emp. & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 741 (9th Cir. 2011).

99. See *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951–52 (2019) (dictum); *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013) (dictum).

100. *Bethune-Hill*, 139 S. Ct. at 1951–52.

101. *Id.*

102. *Id.* at 1950 (“We further hold that the House, as a single chamber of a bicameral legislature, has no standing . . .”).

103. *Id.* at 1952.

general the right of intervention when “a State or any agency, officer, or employee thereof is not a party, . . . [and] the constitutionality of any statute of that State affecting the public interest is drawn in question.”¹⁰⁴ Cases like *Berger*, *Kaul*, and *Hobbs*, however, do not trigger these statutes precisely because the attorney general is already the named representative of the state. This is to say, section 2403(b) and Rule 5.1 truly address intervention settings precisely because in such instances the state’s interests are not represented, which is not the case in suits like *Berger*, *Kaul*, and *Hobbs*.

Finally, cases like *Berger*, *Kaul*, and *Hobbs* do not raise the question of whether legislators, asserting a legislative interest in defending a law they drafted that is distinct from the sovereign state interest, may intervene.¹⁰⁵ That question was arguably left open in *Bethune-Hill*.¹⁰⁶ Rather, “the unusual question presented” in these cases is whether a court must allow as a matter of intervention not one but “two state entities . . . to speak on behalf of the State *at the same time*.”¹⁰⁷

II. RULE 24(A)(2) DOES NOT SANCTION SELF-INTERVENTION

Simply put, courts err in treating the posture of cases like *Berger*, *Kaul*, and *Hobbs* as motions to intervene at all. To be sure, the lower courts were correct in the application of some presumption of adequacy in cases where a *non-party* seeks to intervene in a case where the party shares the same interest with the *non-party* putative intervenor.¹⁰⁸ That presumption

104. 28 U.S.C. § 2403(b); FED. R. CIV. P. 5.1 (similar).

105. N.C. State Conf. of NAACP v. *Berger* (*Berger III*), 999 F.3d 915, 921 (4th Cir. 2021) (en banc), *rev'd*, 142 S. Ct. 2191 (2022) (representing the state sovereign interest only); *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 797–98 (7th Cir. 2019) (same).

106. *See supra* note 33; *cf.* *Raines v. Byrd*, 521 U.S. 811, 826 (1997) (holding that six Members of Congress lacked standing to challenge enactment of Line Item Veto Act); *Powell v. McCormack*, 395 U.S. 486, 496 (1969) (holding that a Member of Congress may bring a constitutional challenge to his exclusion from the House of Representatives).

107. *Berger III*, 999 F.3d at 928 (quoting *Kaul*, 942 F.3d at 800).

108. *See, e.g.*, STEVEN S. GENSLER & LUMEN N. MULLIGAN, FEDERAL RULES OF CIVIL PROCEDURE RULES AND COMMENTARY, Ch. IV, r. 24 (Feb. 2022 update), Westlaw [hereinafter GENSLER & LUMEN N. MULLIGAN 2022] (“[C]ourts start by presuming that an existing party who shares the intervenor’s objectives adequately represents the intervenor’s interests.”). Indeed, every federal circuit to address the issue has adopted some version of a presumption of adequacy when proposed intervenors share an objective or interest with existing parties. *See In re Thompson*,

assumes, however, that intervention applies at all. In *Berger, Kaul*, and *Hobbs*, the putative joining party seeks entry into the case representing the same party in interest that is already present and represented in the suit. That is to say, in these suits we have the same party in interest, the sovereign state, seeking to join in a suit where the defendant already is the same party in interest, the sovereign state interest. This is little more than a party seeking to intervene in its own suit. But a party cannot intervene in its own case. In this Part, then, I show that Rule 24's text, history, and precedent bar self-intervention.

I begin with the Rules interpretation generally. The Supreme Court does not consistently engage in one approach to Rules interpretation.¹⁰⁹ On the one hand, the Court in Rules-interpretation cases often treats the Rules, for all practical purposes, like statutes.¹¹⁰ This tends to lead to textualist interpretive approaches. For example, the Court often claims, "We give the Federal Rules of Civil Procedure their plain meaning. As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous."¹¹¹ In such cases, the Court often deploys semantic and syntactic rules of statutory construction, which tend to heavily emphasize

965 F.2d 1136, 1142–43 (1st Cir. 1992); *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179–80 (2d Cir. 2001); *Del. Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 970, 973 (3d Cir. 1982); *Stuart v. Huff*, 706 F.3d 345, 353 (4th Cir. 2013); *Entergy Gulf States La., L.L.C. v. U.S. EPA*, 817 F.3d 198, 203 (5th Cir. 2016); *United States v. Michigan*, 424 F.3d 438, 443–44 (6th Cir. 2005); *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 659 (7th Cir. 2013); *FTC v. Johnson*, 800 F.3d 448, 452 (8th Cir. 2015); *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003); *Tri-State Generation & Transmission Ass'n, Inc. v. N.M. Pub. Regul. Comm'n*, 787 F.3d 1068, 1072–73 (10th Cir. 2015); *Clark v. Putnam Cnty.*, 168 F.3d 458, 461 (11th Cir. 1999).

109. See Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167, 2175–79 (2017) [hereinafter *Interpretive Theory*] (discussing this problem).

110. See, e.g., *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1172 (2013) (interpreting Rule 54(d)(1) and explaining that as "in all statutory construction cases, we assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose"); see also *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988) (noting that the Federal Rules are as "binding as any statute").

111. See *Bus. Guides, Inc. v. Chromatic Commc'ns Enters.* 498 U.S. 533, 540–41 (1991); *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 123 (1989) ("We give the Federal Rules of Civil Procedure their plain meaning, and generally with them as with a statute, when we find the terms unambiguous, judicial inquiry is complete."); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980) (using similar language); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 29 (1st Cir. 2009) (applying the Supreme Court's traditional interpretive approach).

textualist tools of interpretation.¹¹² Further, following this Rules-as-statutes approach, the Court tends to sidestep policy arguments, noting that such policy questions must be sent to the drafters of the Rules.¹¹³ On the other hand, this text-centric view of Rules interpretation does not always carry the day.¹¹⁴ Indeed, the Court often engages with Rules cases from a decidedly non-textual perspective.¹¹⁵ This policy-driven approach to the Rules has grabbed headlines of late as demonstrated by cases such as *Scott v. Harris*,¹¹⁶ *Wal-Mart Stores, Inc. v. Dukes*,¹¹⁷ *Bell Atlantic Corp. v. Twombly*,¹¹⁸ and *Ashcroft v. Iqbal*.¹¹⁹ In this family of cases, we see the Court divorce itself from text, often almost entirely, and look predominately to policy.¹²⁰ Given these extremities of approaches, one could well be left frustrated for lack of direction in approaching a Rules interpretative question, such as whether a non-corporeal party can self-intervene.

In prior work, Professor Glen Staszewski and I attempted to mitigate this frustration. We defended an overarching approach to Rules interpretation that looks to both the plain meaning of the text and the policy goals of the Rules drafters, not the Court

112. See *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 547–48 (2010) (employing textualist tools in a Rule 15 case); *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying *expressio unius est exclusio alterius* in a Rule 8 pleading case); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69–166 (2012) (identifying and describing numerous semantic and syntactic canons of statutory interpretation).

113. See, e.g., *Jones v. Bock*, 549 U.S. 199, 216 (2007) (holding in a Rules case that “[w]hatever temptations the statesmanship of policy-making might wisely suggest, the judge’s job is to construe the statute—not to make it better. The judge ‘must not read in by way of creation,’ but instead abide by the ‘duty of restraint, th[e] humility of function as merely the translator of another’s command.’” (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947))); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (similar); *Amchem. Prods. v. Windsor*, 521 U.S. 591 (1997) (similar).

114. See Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 131–42 (2015) (identifying and describing two distinct methodologies of Rules interpretation invoked by the Roberts Court).

115. See *id.* at 136–42; Lumen N. Mulligan & Glen Staszewski, *The Supreme Court’s Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1195–97 (2012).

116. *Scott v. Harris*, 550 U.S. 372 (2007).

117. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

118. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007).

119. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

120. See Porter, *supra* note 114, at 149–53 (recognizing and describing this phenomenon).

itself as an adjudicative body.¹²¹ We argued that because the Federal Rules of Civil Procedure are promulgated in a different fashion than statutory enactment, even if legislative history and purpose are not the primary tools of interpretation that a judge might use in a statutory case, they are especially germane in a Rules case.¹²² Indeed, we started from Justice Frankfurter's insight that "[p]lainly the Rules are not acts of Congress and cannot be treated as such."¹²³ Following this methodology, in addition to a Rule's text, traditional purposive tools of construction are also especially germane to Federal Rules interpretation.¹²⁴ This follows because the Rules are promulgated in a different fashion than statutory enactments¹²⁵—by intra-judicial branch promulgation—that lacks the separation-of-powers considerations that surround statutory interpretation and generally drive the normative foundations for a textualist approach.¹²⁶ Furthermore, the Rules themselves include the official notes and policy statements as part of their formally enacted documentation, which tends to assuage concerns about the use of legislative history and purposes in the statutory realm.¹²⁷ Thus, legislative history and purpose are unique tools of interpretation that a judge should use in a Rules case.¹²⁸ As part of this purposive analysis, the

121. See *Interpretive Theory*, *supra* note 109, at 2227–28 (defending this conclusion because of the intra-branch nature of Rules promulgation and the simultaneous passage of the official advisory committee notes).

122. *Id.*

123. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting).

124. See *Interpretive Theory*, *supra* note 109, at 2227–28 (discussing purposive interpretation of Federal Rules).

125. *Id.* at 2186–93.

126. *Id.* at 2183–86.

127. *Id.* at 2197–98.

128. See David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 957 (2011) (arguing that the Rules should be interpreted using a purposivist method); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103 (2002) (“[T]he Court should accord the Notes authoritative effect.”); *id.* at 1158 (“The fact that the Notes proceed through the approval process along with the text also helps to meet textualist objections to their use.”); 28 U.S.C. § 2073(d) (2012). Specifically, section 2073(d) requires that “[i]n making a recommendation under this section or under section 2072 or 2075, the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body’s action, including any minority or other separate views.” *Id.* The Rules differ greatly from most federal statutes in this regard. Cf. Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81 (2015) (claiming that a textualist approach to interpreting administrative

interpretation of the Federal Rules “must be guided, in part, by an understanding of the deficiencies in the original version of Rule 11 that led to its revision,” as well as the relevant drafting history.¹²⁹ Turning back, then, to Rule 24 intervention, one finds that the text, history, and practice of the rule all illustrate that intervention is available only to non-parties.

A. *The Plain Meaning of Rule 24(a)(2)*

Federal Rule 24(a)(2) governs intervention as of right that is not mandated by federal statute. It reads as follows:

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

....

(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.¹³⁰

Rule 24(a)(2)’s text is clear—“existing parties” cannot be a “movant” seeking intervention. The Rule itself distinguishes between the “movant” and “existing parties,” limiting the ability to seek intervention to movants only. These words cannot be synonymous, of course, because it is a “basic principle of statutory construction that different words in the same statute

regulations should include consideration of the regulatory preamble and other mandatorily created materials that were part of the public record when elected officials reviewed and approved the proposal); *see also* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 570 (1985) (“Congress seldom provides explicit guidance, even in legislative history, on how it wishes courts to interpret statutory language.”); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 890 n.13 (2003) (“[P]ast history shows that it is most unlikely that Congress will enact rules of interpretation that will generally resolve the disputed issues of interpretive choice.”).

129. *Cooter & Gell v. Hartmarx*, 496 U.S. 384, 392 (1990).

130. FED. R. CIV. P. 24(a)(2).

must be given different meanings.”¹³¹ As a matter of plain meaning, then, intervention movants cannot simultaneously be existing parties.

This interpretation is further cemented by looking to the plain meaning of the terms “party” and “intervention.” I turn first to the meaning of party as used in Rule 24(a)(2). “Party” was understood to be a plaintiff or a defendant when Rule 24(a)(2) was drafted and revised. The Supreme Court looks to contemporaneous editions of *Black’s Law Dictionary* to supply the plain meaning of a statute,¹³² and it has used *Black’s* to define the term “party.”¹³³ The meaning of “party,” as found in *Black’s*, was clear both in 1938 when the Rules were promulgated and in 1966, the date of the last substantive revision to Rule 24(a)(2).¹³⁴ The third edition of *Black’s Law Dictionary*,¹³⁵ which was the current version in 1938, and the fourth edition, which was the current version in 1966,¹³⁶ define party as follows:

“Party” is a technical word, and has a precise meaning in legal parlance. By it is understood he or they by or against whom a suit is brought, whether in law or equity; the party plaintiff or defendant, whether composed of one or more individuals, and whether natural or legal persons . . . and all

131. *Lindsey v. Tacoma-Pierce Cty. Health Dep’t*, 195 F.3d 1065, 1074 (9th Cir. 1999), *amended by* 203 F.3d 1150 (9th Cir. 2000); *see also* *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”); *Singh v. Att’y Gen. of the U.S.*, 12 F.4th 262, 273 (3d Cir. 2021) (“[P]arallel provisions in the same statute utilizing different words suggest differing meanings”); *Taracorp, Inc. v. NL Indus., Inc.*, 73 F.3d 738, 744 (7th Cir. 1996) (“[W]hen interpreting statutes to determine the intent of legislatures: we assume that the same words . . . have the same meaning in a given act and that the choice of substantially different words to address analogous issues signifies a different approach.”); *NLRB v. Food Fair Stores, Inc.*, 307 F.2d 3, 10 (3d Cir. 1962) (applying “the rule of statutory construction which holds that different words appearing in the same statute are presumed to have different meanings”).

132. *See* *Pasquantino v. United States*, 544 U.S. 349, 356 (2005) (citing *Party*, BLACK’S LAW DICTIONARY (4th ed. 1951)).

133. *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009).

134. Caleb Nelson, *Intervention*, 106 VA. L. REV. 271, 329 (2020).

135. *Party*, BLACK’S LAW DICTIONARY (3d ed. 1933).

136. *Party*, BLACK’S LAW DICTIONARY (4th ed. 1951) (providing the same definition as the third edition).

others who may be affected by the suit, indirectly or consequentially, are persons interested, but not parties.

The similarity here between *Black's* definition of “party” and the text of Rule 24(a)(2) is striking. Rule 24(a)(2) speaks of “movants” who have an “interest relating to . . . the action” and contrasts such persons with “existing parties.”¹³⁷ Similarly, *Black's* defines “others who may be affected by the suit,” that is, “persons interested,” as “not parties,” contrasting such persons from the “party plaintiff or defendant.”¹³⁸ This contemporary usage of “party” further demonstrates that the plain meaning of Rule 24(a)(2) bars motions to intervene from an existing party.

Such a strong showing of contemporaneous usage often controls in matters of statutory construction at the high Court.¹³⁹ That said, the Court will at times hold that a statutory term was meant to have a dynamic construction that evolves over time and not be limited by its contemporaneous definition.¹⁴⁰ Even adopting this view and giving “party” a contemporary definition does not change its meaning. In fact, the current *Black's Law Dictionary* defines “party” as “[o]ne by or against whom a lawsuit is brought <a party to the lawsuit>.”¹⁴¹ This approach continues, as such, to focus on the formal inclusion of a person to a lawsuit as the definition of “party.”

137. FED. R. CIV. P. 24(a)(2).

138. *Party*, *supra* note 135.

139. *See, e.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (adopting the interpretation of “contracts of employment” that prevailed at the time of the statute’s adoption in 1925); *Wis. Central Ltd. v. United States*, 138 S. Ct. 2067, 2070–71 (2018) (adopting the meaning of “money” that prevailed at the time of the statute’s enactment in 1937); *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009) (interpreting the statutory phrase “now under Federal jurisdiction” to cover only those tribes that were under federal jurisdiction at the time of the statute’s adoption in 1934); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612–13 (1992) (adopting the meaning of “commercial” that was “attached to that term under the restrictive theory” when the Foreign Sovereign Immunities Act was enacted in 1976).

140. *See, e.g.*, *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2412–43 (2015) (noting that the words “restraint of trade” in the Sherman Act have been interpreted dynamically); *West v. Gibson*, 527 U.S. 212, 218 (1999) (interpreting the term “appropriate” in Title VII’s remedies provision dynamically); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275–76 (1995) (interpreting the term “involving commerce” in the Federal Arbitration Act dynamically).

141. *Party*, BLACK’S LAW DICTIONARY (7th ed. 1999) (this edition was the most current in the 2007 Federal Rules restyling project).

This same contemporaneous plain-meaning analysis plays out with Rule 24(a)'s use of "intervene." Both the third and fourth editions of *Black's Law Dictionary* define intervention as follows:¹⁴²

In the Civil Law

The act by which a third party demands to be received as a party in a suit pending between other persons.

In Practice

A proceeding in a suit or action by which a third person is permitted by the court to make himself a party, either joining the plaintiff in claiming what is sought by the complaint, or uniting with the defendant in resisting the claims of the plaintiff

As these definitions make clear, only a non-party or a third party may intervene. Indeed, the definition itself contrasts the third party with the existing plaintiff and the defendant, following the structure of Rule 24(a)(2)'s text. And, once again, contemporary usage continues with the third-party/party distinction, defining intervention as "[t]he entry into a lawsuit by a third party who, despite not being named a party to the action, has a personal stake in the outcome."¹⁴³

Of course, dictionary definitions are not the end-all of a plain-meaning understanding of a statute or rule. The structure of the provision as a whole, which focuses upon the notion that only non-parties may intervene, lends meaning to Rule 24(a)(2) as well.¹⁴⁴ Rule 24 rests at the end of a series of joinder of party rules: namely, Rule 14 for defendant-initiated joinder of third-party defendants, Rule 19 for party-initiated necessary joinder of non-parties, Rule 20 for party-initiated permissive joinder of non-parties, Rule 22 for party-initiated interpleader, and Rule 23 for party-initiated joinder of class actions. Against this structure, "[w]hat distinguishes intervention from these other methods of adding new parties is that it requires action by an

142. *Intervention*, *supra* note 135; *Intervention*, *supra* note 136.

143. *Intervention*, *supra* note 141.

144. See *Culbertson v. Berryhill*, 139 S. Ct. 517, 522 (2019); *Maracich v. Spears*, 570 U.S. 48, 60 (2013).

outside party who seeks a seat at the table.”¹⁴⁵ Rule 24, then, clearly sits structurally as the one mechanism by which non-parties can themselves initiate joinder. We know this by the lack of non-party initiated joinder mechanisms in the other Rules, the use of “intervene” in the text, and by the title of the provision itself.¹⁴⁶ The textual meaning of Rule 24(a)(2) could not be more plain: only non-parties may seek intervention.

B. Rule 24(a)(2)’s Drafting History

The legislative history of Rule 24(a)(2) also fully supports the notion that only non-parties may intervene. Professor James Moore was a primary architect and drafter of the Federal Rules.¹⁴⁷ Moore tells us directly that intervention controls whether “non-parties may come into a pending litigation to protect interests that are jeopardized thereby or to expedite the hearing of a claim or defense.”¹⁴⁸ Once again, we find that intervention is open only to non-parties.

And this is no surprise given the history of intervention as a tool of Anglo-American law. Professor Caleb Nelson’s work offers the definitive contemporary account of the evolution of intervention in federal practice.¹⁴⁹ Professor Nelson shows that intervention has its roots in admiralty law where non-parties

145. *In re Plavix Mktg., Sales Prac. & Prod. Liab. Litig.* (No. II), 974 F.3d 228, 234 (3d Cir. 2020).

146. While the title of a statutory provision cannot limit the plain meaning of statutory text, it can offer support to the plain-meaning constructions within the text. *See Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528–29 (1947) (referring to “the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text,” and noting that “[f]or interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.”); *United States v. Tidwell*, 521 F.3d 236, 246 (3d Cir. 2008) (noting that statutory title reinforces interpretation of text and structure of statute); *United States v. Williams*, 474 F.3d 1130, 1132 (8th Cir. 2007) (same).

147. *See* REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE 2 (1937) (“The rules, other than those on depositions, discovery, and summary judgments, were drafted under the supervision of Charles E. Clark, the Reporter, on whose staff James William Moore, Joseph M. Friedman, and others have rendered valuable service.”); George W. Pugh, *Moore’s Federal Practice*, 22 LA. L. REV. 907, 907 (1962) (describing Moore as having been “Chief Research Assistant on the Reporter’s Staff of the Supreme Court’s Advisory Committee in its preparation of the Federal Rules”).

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

149. Nelson, *supra* note 134, at 300–36.

required a mechanism to join *in rem* suits that could adjudicate property to which they had an interest.¹⁵⁰ Similarly, Nelson traces the historical practice in equity of allowing only non-parties the right to intervene.¹⁵¹ These pre-Rules cases at law were less uniform. Some courts allowed non-parties to intervene only with a claim of interest in property, while others allowed the non-party to have a mere interest in the success of the existing parties.¹⁵² But still, this older practice allowed only non-parties to intervene. Rule 24, as Nelson recounts,¹⁵³ largely codified this older equity practice, following the general trend of the Rules drafters to incorporate equity norms into the Rules.¹⁵⁴ Moreover, the official Advisory Committee Note states that Professor Moore's article, quoted above, formed the basis for Rule 24.¹⁵⁵

The drafters substantially revised Rule 24(a) most recently in 1966, yet still they maintained the insistence that intervention may only be done by non-parties.¹⁵⁶ At that time, the drafters of Rule 24(a) sought to harmonize intervention by right with Rule 19 necessary joinder. Specifically, Rule 24(a) was amended to clarify that a person "is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i)," mandatory joinder.¹⁵⁷ Accordingly,

[i]ntervention of right is . . . [the] counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an

150. *Id.* at 300–04.

151. *Id.* at 304–08.

152. *Id.* at 308–09.

153. *Id.* at 311–15.

154. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 970 (1987).

155. See WILLIAM D. MITCHELL, CHAIRMAN, ADVISORY COMM. ON RULES FOR CIV. PROC. ET AL., FINAL REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE (1937) ("This rule amplifies and restates the present federal practice at law and in equity.").

156. Nelson, *supra* note 134, at 329–36 (2020). The drafters have revised Rule 24 since, such as the inclusion of Rule 5.1 in 2006, which had the effect of removing language from Rule 24(c). See STEVEN S. GENSLER & LUMEN N. MULLIGAN, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY (2021). Rule 24(a)(2), however, has not been substantially altered.

157. DEAN ACHESON, CHAIRMAN, ADVISORY COMM. ON RULES FOR CIV. PROC. ET AL., FINAL REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE (1966).

absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion.¹⁵⁸

Rule 19, of course, applies only to a “person . . . [who] must be joined as a party.”¹⁵⁹ That is to say, Rule 19 applies to join “absent persons” only.¹⁶⁰ This legislative history that links Rule 24(a)(2) and Rule 19 practice intervention speaks only to non-parties.

C. *The Court’s Rule 24(a)(2) Practice*

In addition to the text, structure, and legislative history, the Court’s precedent establishes that intervention is a mechanism only for non-parties, not preexisting parties, to enter suits from which they are absent. Predating the advent of the Federal Rules by more than twenty-five years, in the *Rocca v. Thomas* decision, the Court held that intervention “covers the right of one to interpose in, or become a party to, a proceeding already instituted”¹⁶¹ The Court continues to deploy this non-party definition of the right to intervene after the promulgation of the Rules. For example, in 1964, it held that “third parties might intervene to protect their interests”¹⁶² More clearly, in 1967, the Court held that “intervention as of right” is only warranted when “a third party asserts a right that would be lost absent intervention.”¹⁶³ Again, in 1988, the Court focused upon “nonparty” status in seeking to intervene.¹⁶⁴ Justice Scalia commented that intervention was open only to third parties,¹⁶⁵ further cementing the key insight that intervention is only

158. *Id.* (citing DAVID W. LOUISELL & GEOFFREY C. HAZARD, PLEADING AND PROCEDURE: STATE AND FEDERAL 749–50 (1962)).

159. FED. R. CIV. P. 19(a)(1).

160. GENSLER & MULLIGAN, *supra* note 156, at Rule 19 (Rule 19 applies only to “absent persons”).

161. *Rocca v. Thompson*, 223 U.S. 317, 330 (1912); *see also* *New York v. N.Y. Tel. Co.*, 261 U.S. 312, 317 (1923); *New York v. Consolidated Gas Co.*, 253 U.S. 219, 219–21 (1920).

162. *Reisman v. Caplin*, 375 U.S. 440, 449 (1964).

163. *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 133–34 (1967).

164. *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (*per curiam*).

165. *Devlin v. Scardelletti*, 536 U.S. 1, 15 (2002) (Scalia, J., dissenting) (“[T]hose who intervene” do so “through third-party practice.”).

available for non-parties. And coming full circle, in 2009, the Court quoted *Rocca*, again confirming that intervention is open only to non-parties.¹⁶⁶

* * *

Simply put, only a non-party may seek intervention. Rule 24(a)(2)'s text demands this conclusion. The Rule's legislative history equally requires this conclusion. And the Court's practice under the Rule conforms to this conclusion. As such, in cases like *Berger*, *Kaul*, and *Hobbs*, the legislature representing the state's interest cannot intervene in its own case when the attorney general is defending the state's interest. Such a scenario is little more than a party intervening in its own suit.

III. SAME PARTIES IN INTEREST

Not so fast, you might say! Sure, a party cannot intervene in its own case. But is that what is really happening in *Berger*, *Kaul*, and *Hobbs*? Isn't one defendant the state attorney general and the putative joining defendant a separate party, the legislature? Indeed, the Court makes this precise argument in *Berger*.¹⁶⁷

In these cases, however, the answer is no. It is an "inescapable fact that an artificial entity can only act . . . through its individual officers or agents . . ." ¹⁶⁸ Following this same logic, "[t]he State is a political corporate body [that] can act only through agents."¹⁶⁹ This need for the state to act only through agents also applies when the state engages in litigation.¹⁷⁰ As such, one must take care not to elide the agent of the party in interest, the attorney general or the legislature, with the actual party in interest itself, the sovereign state. In this Part, I will

166. See *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) ("[W]hen the term [to intervene] is used in reference to legal proceedings, it covers the right of one to interpose in, or become a party to, a proceeding already instituted.") (quoting *Rocca*, 223 U.S. at 330).

167. See *Berger v. N.C. State Conf. of the NAACP (Berger IV)*, 142 S. Ct. 2191, 2203 (2022).

168. *Bellis v. United States*, 417 U.S. 85, 90 (1974).

169. *Poindexter v. Greenhow*, 114 U.S. 270, 288 (1885).

170. *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013) ("To vindicate that interest or any other, a State must be able to designate agents to represent it in federal court."); see also *House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (citing *id.*).

show that *Ex parte Young* doctrine entices just such a conflating of agent with the party in interest. But, I argue, this is error as it is the party in interest, not the nominal party, that counts for Rule 24(a)(2) purposes in official capacity cases.

A. *Ex parte Young: Nominal and Real Parties in Interest*

Justice Gorsuch, writing for the majority in *Berger* and citing *Ex parte Young*, held that the legislature’s intervention was not the action of the same party. “As a formal matter and consistent with principles of sovereign immunity, the NAACP has not sued the State. Only state officers are or may be ‘parties’ here—and, so far, the legislative leaders are not among them.”¹⁷¹ This argument, as I lay out below, should not have carried the day.

Ex parte Young,¹⁷² with its nominal listing of government officials as parties in suits against the state, drives this “who’s the party” confusion in *Berger*. This is not to tear down the importance of this opinion.¹⁷³ “Indeed it is not extravagant to argue that *Ex parte Young* is one of the three most important decisions the Supreme Court of the United States has ever handed down.”¹⁷⁴ Rather, it is a reminder that *Ex parte Young*

171. See *Berger IV*, 142 S. Ct. at 2203.

172. *Ex parte Young*, 209 U.S. 123 (1908).

173. But, of course, there are critics. See, e.g., James Leonard, *Ubi Remedium Ibi Jus, or, Where There’s a Remedy, There’s a Right: A Skeptic’s Critique of Ex Parte Young*, 54 SYRACUSE L. REV. 215, 217 (2004) (describing *Ex parte Young* doctrine as an “anomaly” and a “fiction”); David P. Currie, *Ex Parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547, 548 (1997) (arguing that sovereign immunity is a rotten idea to be remedied, but “if the Constitution is defective it should be amended, not ignored”); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1480 (1987) (describing the Court’s Eleventh Amendment jurisprudence as incoherent, leaving litigants “with . . . an ad hoc mishmash of *Young* and *Edelman*, of full remedy and state sovereignty, of supremacy and immunity, of law and lawlessness”); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1044 (1983) (describing *Ex parte Young* and its progeny as “jerry-built” and “complicated” by “use of fictions”); Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 375 (1930) (arguing that the doctrine “promotes collisions” between the states and the federal government).

174. CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4231, at 135 (3d ed.); see also James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 STAN. L. REV. 1269 (2020) (addressing the fundamental importance of the opinion); Charlton C. Copeland, *Ex Parte Young: Sovereignty, Immunity, and the Constitutional Structure of American Federalism*, 40 U. TOL. L. REV. 101, 104 (2009) (“*Young* is one of the Court’s most important

is based upon the “legal fiction” that the named person in an official capacity suit is not the state itself for Eleventh Amendment purposes.¹⁷⁵ But, of course, the real party in interest in an official capacity suit is the state itself.¹⁷⁶ The *Berger* opinion, as such, errs by treating the listed, nominal party in an *Ex parte Young* suit as something other than a fictive placeholder for the real party in interest.

Ex parte Young doctrine operates as an exception to Eleventh Amendment immunity. Eleventh Amendment sovereign immunity is the privilege of a state not to be sued without its consent in federal court.¹⁷⁷ Textually, the Eleventh Amendment overturns the *Chisholm v. Georgia*¹⁷⁸ opinion, which took jurisdiction over a state in a suit brought in diversity by a citizen of a different state.¹⁷⁹ Following *Hans v. Louisiana*,¹⁸⁰ the Court reads the Amendment, more broadly than its plain test, as standing for a general state immunity principle.¹⁸¹ In broad strokes, the notion is that the states’ traditional court immunity remains, “except as altered by the plan of the Convention or certain constitutional Amendments.”¹⁸² States, however, may waive their own

decisions.”); John F. Duffy, *Sovereign Immunity, the Officer Suit Fiction, and Entitlement Benefits*, 56 U. CHI. L. REV. 295, 333 n.152 (1989) (“*Ex parte Young* has become ‘the fountainhead’ of federal power to enforce the Civil Rights Act.”); Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 437 (1962) (describing *Ex parte Young* as a “mainstay” in challenging governmental actions).

175. See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 378 n.14 (2006) (“[W]e have recently characterized the doctrine as an expedient ‘fiction’ necessary to ensure the supremacy of federal law.”); *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) (calling *Ex parte Young* a “fiction”); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984) (describing *Young* as a narrowly-construed fiction).

176. See *Coeur d’Alene Tribe*, 521 U.S. at 269–70; *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985); Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 182 (2020).

177. U.S. CONST. amend. XI. See generally LUMEN N. MULLIGAN, *FEDERAL CIVIL JURISDICTION IN A NUTSHELL* 263–70 (2d ed. 2019) (discussing state immunity).

178. 2 U.S. 419 (1793).

179. MULLIGAN, *supra* note 177, at 264–66.

180. 134 U.S. 1 (1890).

181. See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984). See generally MULLIGAN, *supra* note 177, at 266–70 (discussing Eleventh Amendment jurisprudence over time).

182. *Alden v. Maine*, 527 U.S. 706, 713 (1999).

immunity.¹⁸³ Congress may abrogate it under certain conditions.¹⁸⁴ But without waiver or valid abrogation, federal courts lack jurisdiction to adjudicate a private person's suit against a state.¹⁸⁵

Ex parte Young stands as an essential exception to this broad immunity principle.¹⁸⁶ In *Ex parte Young*,¹⁸⁷ the state of Minnesota passed a series of civil and criminal regulations capping railroad passenger and freight prices.¹⁸⁸ The railroad shareholders sought to enjoin the enforcement of these laws, which they believed to be unconstitutional under the Due Process Clause.¹⁸⁹ The plaintiff shareholders sued Minnesota State Attorney General Young in his official capacity to enjoin him from enforcing the regulatory regime in federal court.¹⁹⁰ The attorney general asserted Eleventh Amendment immunity, refused to submit to the authority of the federal court, and began to enforce the state regulations.¹⁹¹ The federal court, then, had the attorney general arrested by federal marshals.¹⁹² The attorney general in turn filed a habeas corpus petition with the Supreme Court for release.¹⁹³

In reviewing the petition, the Court first held that the state regulations at issue violated the Due Process Clause.¹⁹⁴ The Court next held that a suit for injunction could proceed against the attorney general, not as an agent of the state, but in his individual capacity.¹⁹⁵ The Court reasoned—very much akin to the old English common law—that when a state official acts unconstitutionally, the official does not act as the state per se because the federal Supremacy Clause overrides the

183. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–76 (1999).

184. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996); MULLIGAN, *supra* note 177, at 277–85.

185. See *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 266–68 (2011) (Roberts, J., dissenting).

186. See MULLIGAN, *supra* note 177, at 272–77.

187. 209 U.S. 123 (1908).

188. *Id.* at 127–28.

189. *Id.* at 129–30.

190. *Id.* at 129.

191. *Id.* at 132–34.

192. See *id.* at 134.

193. *Id.* at 126.

194. *Id.* at 145–47.

195. *Id.* at 161 (“His power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States circuit court.”).

unconstitutional state law.¹⁹⁶ At the same time, however, the Court reasoned that this same official is the state for state action purposes, as this is a necessary concession in order to “permit the federal courts to vindicate federal rights.”¹⁹⁷

In the years since, the Court has been more transparent in labeling the inherent tension in *Ex parte Young* as a legal fiction.¹⁹⁸ Professor Kenneth Culp Davis summed this up well:

You may get relief against the sovereign if, but only if, you falsely pretend that you are not asking for relief against the sovereign. The judges often will falsely pretend that they are not giving you relief against the sovereign, even though you know and they know, and they know that you know, that the relief is against the sovereign.¹⁹⁹

This understanding of *Ex parte Young* doctrine now rests as blackletter law. This legal fiction permits plaintiffs to seek injunction and other prospective relief against state officials in their official capacity for federal constitutional violations.²⁰⁰

Thus, to avoid Eleventh Amendment immunity when seeking injunctive relief, plaintiffs must name, not the state, but state officials in their official capacities in the pleading

196. *Id.* at 159–60.

197. *Pennhurst State Sch. & Hosp.*, 465 U.S. 89, 105 (1984).

198. *See* *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 378 n.14 (2006); *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997); *Pennhurst*, 465 U.S. at 114 n.25.

199. Davis, *supra* note 174, at 435. Attorney General Young argued this very point in his briefing: “Counsel for the plaintiffs contend . . . that these actions are not against the state, and yet at the same time they argue with equal vehemence that by means of these actions they have prevented the state from initiating any proceedings to enforce its laws If the state is a party, how can the suits be maintained in the face of the Eleventh Amendment? If the state is not a party no objection can reasonably be offered by these suitors to any steps it may take to enforce its laws It would be a waste of time and would be almost discourteous to this court for me to argue the proposition, which is now so well settled, that a suit against the officers of a state to either compel them to perform discretionary duties or to prevent them from performing such duties is a suit against the state.” Barry Friedman, *The Story of Ex parte Young: Once Controversial, Now Canon*, in *FEDERAL COURT STORIES* 247, 262 (Vicki C. Jackson & Judith Resnik eds., 2010).

200. *See Stewart*, 563 U.S. at 267 (Roberts, C.J., dissenting) (“*Ex parte Young* rests on the ‘obvious fiction’ that such a suit is not really against the State, but rather against an individual who has been ‘stripped of his official or representative character’ because of his unlawful conduct.”) (quoting *Coeur d’Alene Tribe*, 521 U.S. at 270); *Tarrant Reg’l Water Dist. v. Sevenoaks*, 545 F.3d 906, 911 (10th Cir. 2008); *Hill v. Kemp*, 478 F.3d 1236, 1255–56 (10th Cir. 2007); *Guzman-Vargas v. Calderon*, 672 F. Supp. 2d 273, 295–96 (D. P.R. 2009).

captions.²⁰¹ As a result, it is understandable that some would view a suit against the state attorney general as a claim against the attorney general as the real party in interest. From that erroneous vantage, the state legislature could be viewed as a different party than the attorney general. They are different names in the pleading captions, after all.

But this understanding of *Ex parte Young*, as the Court has held, would overinflate mere “empty formalism”²⁰² designed to ensure the supremacy of federal law. We should not confuse these nominal parties in *Ex parte Young*-type pleadings for the real parties in interest. As the Court held in *Idaho v. Coeur d’Alene Tribe of Idaho*, “[t]he real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading.”²⁰³ The Court went on to highlight the need to focus on the party in interest—the state—not the fictive nominal party. It held that “[a]pplication of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.”²⁰⁴ That is to say, the real party in interest matters in these suits, contrary to focusing on the nominal party which forms the basis of the Court’s *Berger* opinion.

B. *The State Is the Real Party in Interest*

The real party in interest, of course, is the person who, under the governing substantive law, possesses the contested enforceable rights.²⁰⁵ Here it is the state’s rights, not the

201. See, e.g., *Verizon Md. Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 645 (2002) (holding that the plaintiff “may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*”).

202. *Coeur d’Alene Tribe*, 521 U.S. at 270 (1997); see also *Stewart*, 563 U.S. at 266 (Roberts, C.J., dissenting) (critiquing the majority for extending “the fiction of *Ex parte Young*—what we have called an ‘empty formalism’”).

203. *Coeur d’Alene Tribe*, 521 U.S. at 270.

204. *Id.*

205. *Cranpark, Inc. v. Rogers Grp., Inc.*, 821 F.3d 723, 730 (6th Cir. 2016); see also *Payroll Mgmt., Inc. v. Lexington Ins. Co.*, 815 F.3d 1293, 1299 n.10 (11th Cir. 2016); *RK Co. v. See*, 622 F.3d 846, 850 (7th Cir. 2010); *In re Signal Int’l, LLC*, 579 F.3d 478, 487 (5th Cir. 2009); *Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 756 (7th Cir. 2008); *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 193 (2d Cir. 2003); *Consul Gen. of Republic of Indon. v. Bill’s Rentals, Inc.*, 330 F.3d 1041, 1045 (8th Cir. 2003); *Whelan v. Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992); *Va. Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th Cir. 1973).

nominal defendant's rights, that are at issue, making the state the real party in interest. Indeed, the entire goal of an *Ex parte Young* suit is to tie the hands of the state.²⁰⁶ As such, in official capacity suits, the real party in interest is the state. On this point the Court has been quite clear. No amount of *Ex parte Young* Eleventh Amendment fiction should confuse us.

In fact, the Court has reached this issue of fictive party name versus party in interest in *Ex parte Young* suits before. In *Kentucky v. Graham*,²⁰⁷ the Court ruled that a suit against a state official in the individual's official capacity "is *not* a suit against the official personally, for the real party in interest is the [state] entity."²⁰⁸ The Court reiterated this in *Coeur d'Alene*, holding that "[t]his commonsense observation of the State's real interest when its officers are named as individuals has not escaped notice or comment from this Court, either before or after *Young*."²⁰⁹ Thus, given that the state in cases like *Berger*, *Kaul*, and *Hobbs* is already the real defendant party in interest, it is a nonstarter for any person to also seek intervention as the state. The state, as the party in interest, is already present.²¹⁰

Moreover, the Court has held that potential official capacity intervenors represent the state as the real party in interest. In *Karcher v. May*, the New Jersey attorney general declined to defend the constitutionality of a mandatory-moment-of-silence

206. *Ex parte Young*, 209 U.S. 123, 174 (1908) (Harlan, J., dissenting) ("No relief was sought against him individually, but only in his capacity as attorney general. And the manifest, indeed the avowed and admitted, object of seeking such relief, was to *tie the hands of the state* so that it could not in any manner or by any mode of proceeding *in its own courts*, test the validity of the statutes and orders in question."); see also GENSLENER & MULLIGAN 2022, *supra* note 108, at 509 ("Rule 17(a)'s primary focus is upon plaintiffs (or those positioned as claimants) and not those defending against claims."). *But see* *Eaton Corp. v. Westport Ins. Co.*, 332 F.R.D. 585, 587 (E.D. Wis. 2019) ("[I]t does not follow that the concept of real party in interest does not apply to defendants.").

207. 473 U.S. 159 (1985).

208. *Id.* at 166.

209. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, at 269 (1997).

210. One could contend that these statements from *Graham* and *Coeur d'Alene Tribe* are not holdings. In *Graham*, the particular facts of the case presented saw the defendants sued in their personal capacities. *Kentucky v. Graham*, 473 U.S. 159, 161. *Coeur d'Alene Tribe* raised the issue of whether a suit brought in a personal capacity can, as a function of a real-party-in-interest analysis, be one that is against the state. *Coeur d'Alene Tribe*, 521 U.S. at 270. Nevertheless, because the party-in-interest status in both *Graham* and *Coeur d'Alene* was an essential proposition along the Court's chosen decisional path of reasoning, which was actually decided upon using the facts of the case, the better view is that these issues decided are holdings. See Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1065 (2005) (defining holding).

statute in public schools.²¹¹ As such, the speaker of the New Jersey House of Representatives and the president of the New Jersey Senate intervened as defendants²¹² in their official capacities representing the state's interests.²¹³ The legislative leaders, however, lost their leadership posts.²¹⁴ As a result, the Court held that the legislative leaders lacked official capacity status and that their attempt to appeal in their personal capacities failed for lack of standing.²¹⁵ In so holding, the Court distinguished between their prior official capacity status and their personal capacity status. The Court held that "[t]he concept of 'legal personage' is a practical means of identifying the real interests at stake in a lawsuit. We have repeatedly recognized that the real party in interest in an official-capacity suit is the entity represented and not the individual officeholder."²¹⁶ Thus, we see again that the Court looks to the real party in interest to determine party status in *Ex parte Young* suits.

* * *

Despite *Ex parte Young*'s fictive approach to Eleventh Amendment immunity, it is clear that the Court holds that the real party in interest in official capacity suits is the state. Similarly, it holds that putative intervenors seeking to join in their official capacities are also the state pursuant to a real-party-in-interest analysis. The inescapable conclusion, then, is that, in suits like *Berger*, *Kaul*, and *Hobbs*, the courts face an attempted intervention by the same party in interest that is already a defendant. And, as discussed above, Rule 24(a)(2) cannot support such self-intervention.

IV. A BACKDOOR SEPARATION-OF-POWERS PROBLEM

The *Berger* majority is not deaf (How could it be given the case law?) to the argument that in *Ex parte Young* suits the state is the real party in interest. In what it labeled as a functional

211. *Karcher v. May*, 484 U.S. 72, 74–75 (1987).

212. *Id.* at 75.

213. *Id.* at 76.

214. *Id.*

215. *Id.* at 77–78.

216. *Id.* at 78.

view, the Court recognizes that the state is the party in interest but rejects the notion that the sovereign interest is a singular concept.

I begin with the Court's holding on this score. The Court began with a recognition of the importance of the party in interest in intervention questions—a starting point enmeshed in the text, history, and purpose of Rule 24(a)(2). “Functionally, of course, this suit implicates North Carolina’s sovereign interests regardless of the named parties.”²¹⁷ Despite this recognition of the real party in interest, the Court then moved to an atextual, ahistorical, and non-purposive emphasis upon an interest having multiple perspectives, which it conflated with the nominal-party status. “Yet . . . a plaintiff who chooses to name this or that official defendant [i.e., the nominal party] does not necessarily and always capture all relevant state interests.”²¹⁸ Doubling down on this notion, the Court held that “full consideration of the State’s practical interests may require the involvement of different voices with different perspectives.”²¹⁹ “To hold otherwise,” the Court concluded, “would risk allowing a private plaintiff to pick its preferred defendants and potentially silence those whom the State deems essential to a fair understanding of its interests.”²²⁰

In this Part, I take up the Court’s error of focusing upon the nominal party, or “perspectives” to use the Court’s language, instead of the party in interest, or what the Court refers to as the “functional” party. First, on the record in *Berger*, even if state interest is not singular, it was in this case. Second, the notion of a state interest as non-singular with multiple “perspectives” is atextual, ahistorical, and non-purposive as it relates to Rule 24(a)(2) analysis. Third, this multiple-perspectives-on-an-interest approach is ripe with pragmatic challenges. And, most importantly, the Court’s approach invites state law separation-of-powers difficulties.

217. *Berger v. N.C. State Conf. of the NAACP (Berger IV)*, 142 S. Ct. 2191, 2203 (2022).

218. *Id.*

219. *Id.*

220. *Id.*

A. *Not on This Record*

The Court grounded its holding on the notion that a state is a “they,” not an “it.”²²¹ Thus, from this vantage point, these different branches of the state can have different perspectives on the state’s sovereign interest.²²² But in *Berger*, the interest perspectives did not diverge.

In *Berger*, the attorney general and the legislature had the same goal (i.e., their perspectives on the state’s interest converged). As the Fourth Circuit held, and the Supreme Court did not overrule, the legislative leaders sought to represent “precisely the interests already represented by the Attorney General in this case.”²²³ Indeed, the legislative leaders sought to represent the sovereign “interests of the State of North Carolina” in defending S.B. 824, the voter identification bill at the center of the dispute in *Berger*.²²⁴ And, in fact, both the attorney general and the legislature sought to ensure the constitutionality of S.B. 824.²²⁵ Moreover, as noted above, the legislative leaders could not seek to represent any unique interest of the legislature because they abandoned that argument.²²⁶ And the attorney general is required by statute to defend state statutes, such as S.B. 824.²²⁷ As the text of Rule 24(a)(2) makes clear, then, the legislature definitionally lacks an interest different from the “state’s” that the attorney general already represents.

The *Berger* majority’s invention of “perspectives” offers little to alter this analysis. The Court held that, although the interests of the state were the same, the “perspectives” of the attorney general and the legislative leaders differed because the legislature focuses on “defending the law vigorously on the merits without an eye to crosscutting administrative concerns” such as obtaining guidance for the administration of upcoming elections.²²⁸ Of course, this notion of unique legislative

221. *Id.* at 2205.

222. *Id.*

223. N.C. State Conf. of NAACP v. *Berger* (*Berger III*), 999 F.3d 915, 928 (4th Cir. 2021) (en banc), *rev’d*, 142 S. Ct. 2191 (2022).

224. *Id.* at 921.

225. *Id.* at 921–23.

226. *Id.* at 921 (“The Leaders did not appeal the district court’s order denying their motion to intervene.”).

227. See N.C. GEN. STAT. ANN. § 114–2 (West 2017).

228. *Berger v. N.C. State Conf. of the NAACP* (*Berger IV*), 142 S. Ct. 2191, 2205 (2022).

perspective was forfeited.²²⁹ Notably, the majority did not address this forfeiture issue.

B. Where Does the Court's "Perspective" Come From?

Beyond the record in *Berger*, the more telling issue here is the atextual, ahistorical, and non-purposive nature of the Court's opinion. As discussed in detail above, Rule 24(a)(2) addresses "interests" of "parties" and "movants."²³⁰ What is missing from Rule 24(a)(2) is any use of "perspective," which is the locus of the Court's decision.²³¹ Here, I turn to a critique of the *Berger* Court's atextualist turn.

A textualist approach to Rule 24(a)(2) cannot accommodate a focus upon "perspective" as part of an intervention as of right analysis. As discussed above,²³² the Court often deploys a textualist, Rules-as-statutes approach to Federal Rules of Civil Procedure questions. From this Rules-as-statutes perspective, use of atextualist terms such as "perspective" has no place.²³³ The Court, when in this mode of Rules interpretation, decidedly rejects policy arguments and the like in favor of a hyper-textualist interpretive stance.²³⁴ Moreover, from my preferred purposivist view, perspective should play no role as it is not a notion grounded in the Advisory Committee Notes, purposes of Rule 24, or its history.²³⁵

Such an atextual, ahistorical, non-purposive turn is not without precedent in Rules cases, however.²³⁶ Indeed, the Court often engages with Rules cases from a decidedly non-semantic, non-purposivist vantage point.²³⁷ This inherent-authority approach to the Rules²³⁸ has come to the fore in many high-

229. See *id.* at 2212 (Sotomayor, J., dissenting).

230. See FED. R. CIV. P. 24(a)(2); *supra* Part II.

231. *Berger IV*, 142 S. Ct. at 2203.

232. See *supra* notes 109–113 and accompanying text (discussing the Rules-as-statutes approach).

233. See *id.* (outlining the strictly textual approach that eschews policy arguments).

234. *Id.*

235. See *supra* Part II.

236. See Porter, *supra* note 114, at 131–42 (identifying and describing two distinct methodologies of Rules interpretation invoked by the Roberts Court).

237. *Id.* at 136–42; see also Mulligan & Staszewski, *supra* note 115, at 1195–97.

238. See Mulligan & Staszewski, *supra* note 109, at 2199–2211 (critiquing this approach).

profile cases such as *Scott v. Harris*,²³⁹ *Wal-Mart Stores, Inc. v. Dukes*,²⁴⁰ *Bell Atlantic Corp. v. Twombly*,²⁴¹ and *Ashcroft v. Iqbal*.²⁴² In this family of cases, the Court divorces itself from text almost entirely and looks predominantly to policy that the Justices set themselves.²⁴³ That is to say, in this family of cases, the policy the Court sets is not one reflected in the Rules themselves or the Advisory Committee Note, but rather one of the Justices' own making. The invention of an atextual, non-purposive "perspective" as an aspect of Rule 24(a)(2) analysis in *Berger* fits squarely in this family of cases.

Indeed, when the Court acts in this inherent-authority mode—from the use of video evidence in summary judgment to certification of class actions to the use of "perspective" in intervention—the Court's interaction with the Rules can hardly be described as the straightforward exercise of textual interpretation.²⁴⁴ Moreover, the Court has not provided any principled explanation for when deviation from its textualist or purposivist approaches to Rules cases should occur, nor has it acknowledged that it is adopting a fundamentally different interpretive methodology in these cases.²⁴⁵ This is not to say that such inherent-authority cases always lead to poor outcomes from a policy perspective; but rather, these cases result from the Justices' own view of what constitutes sound policy—not the text or legislative history of the Rules.

Bell Atlantic v. Twombly is a ready example. The Court had, prior to this 2007 opinion, affirmed the "no set of facts" standard for interpreting compliance with Rule 8(a)(2) under *Conley v. Gibson* for decades.²⁴⁶ The Court rejected this accumulation of

239. 550 U.S. 372 (2007).

240. 564 U.S. 338 (2011).

241. 550 U.S. 554 (2007).

242. 556 U.S. 662 (2009).

243. See Porter, *supra* note 114, at 149–53 (recognizing and describing this phenomenon).

244. See *id.* at 136–37.

245. See Marcus, *supra* note 128, at 928 (claiming that the Court's interpretive methodology in Rules cases varies "wildly and inexplicably"); Porter, *supra* note 114, at 142, 156 (describing "the Roberts Court's interpretive bipolarity," and recognizing "the Court's lack of transparency and self-reflection about its" disparate approaches).

246. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). The Court had regularly upheld this standard for the fifty years between *Conley* and *Twombly*. See *Erickson v. Pardus*, 551 U.S. 89, 93 (2007); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 507 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993); *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 149–50 n.3

precedent in *Twombly*, an antitrust class action suit against several telecommunications providers.²⁴⁷ The issue for the Court was that the complaint asserted only that the defendants had colluded in violation of the antitrust laws without providing any specific factual allegations of that unlawful agreement.²⁴⁸ While this bare allegation survived a Rule 12(b)(6) challenge under the *Conley* standard,²⁴⁹ the *Twombly* Court overruled *Conley*.²⁵⁰ Famously, the *Twombly* opinion now requires courts to disregard all recitals in a complaint that are mere legal conclusions and assess whether the well-pleaded factual allegations state a “plausible” claim for relief.²⁵¹ The opinion crafted a new and more demanding test for assessing the sufficiency of complaints.²⁵²

Key for this discussion, however, is that the Court predicated this standard on *its* policy choice to avoid the high costs of discovery and related incentives to settle unmeritorious cases.²⁵³ Indeed, the consensus among commentators recognizes *Twombly* as a pronouncement regarding the policy underlying pleading requirements in federal court²⁵⁴—not as an interpretation of Rule 8(a)(2)’s text. Indeed, proponents of the opinion welcomed it not because of its textual exegesis, but because it limited discovery costs.²⁵⁵ Similarly, opponents focus their ire on the policy implications of *Twombly* as opposed to textual interpretive difficulties.²⁵⁶ Much the same point has

(1984); *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506 (1959).

247. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 549–50 (2007).

248. *Id.* at 565 n.10.

249. *Id.* at 561.

250. *Id.* at 563 (retiring the key passage from *Conley*).

251. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”) (quoting *id.* at 570).

252. See GENSLER & MULLIGAN, *supra* note 156, at Rule 8.

253. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 826–27 (2010) (reviewing *Twombly*).

254. See *Twombly*, 550 U.S. at 579 (Stevens, J., dissenting) (noting the same).

255. See Lynn C. Tyler, *Recent Supreme Court Decision Heightens Pleading Standards, Holds Out Hope for Reducing Discovery Costs*, 77 U.S.L.W. 2755 (2009); Mark Herrmann et al., *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. 141, 142–47 (2009) (arguing that *Twombly* and *Iqbal* were properly decided in an adjudication, are correct interpretations of Rule 8, and set sound policy).

256. See Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010); A. Benjamin

been made about the so-called summary judgment trilogy cases, where the Court enacted its own policy preferences that did not align with the Rule's text.²⁵⁷

Berger, then, is just such a Court-chosen policy opinion. "Perspective" lacks any textual hook or any foundation in purposivist analysis. Rule 24(a)(2)'s text, history, and purposes all focus on "interest," "parties," and "movants."²⁵⁸ As Staszewski and I have argued previously, such free-wheeling approaches to Rules cases are contrary to statute.²⁵⁹

The inherent-authority approach to Rule 24(a)(2) fails because the Rules Enabling Act trumps the Court's pre-statutory inherent authority to establish procedure. Of course, in the absence of statute, the Supreme Court and lower federal courts have implied powers that cannot be dispensed with because they are necessary to the exercise of all others.²⁶⁰ At the same time, the Court has itself held, "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the

Spencer, *Plausibility Pleading*, 49 BOS. COLL. L. REV. 431, at 448–50, 461–73 (2008) (detailing the many ways in which the *Twombly* rule deviates from past practice, the text, the intent, and the legislative history of Rule 8); Mulligan & Staszewski, *supra* note 115, at 1197 & nn.35–39 (describing these critiques and collecting sources). There were some interpretation-based critiques as well. See RICHARD A. POSNER, HOW JUDGES THINK 53 (2008) (contending that the Court in *Twombly* could not possibly have based its decision on "legalist" principles); Marcus, *supra* note 128, at 974 ("Every relevant indicator suggests that the Court misinterpreted Rule 8 in *Twombly* and *Iqbal*").

257. See Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 94–111 (2006) (arguing that the trilogy cases are an example of procedural reform through reinterpretation that do not comport with the text of Rule 56). This point about methodology should be kept separate from the policy merits. That is to say, one can agree with the policy outcome in the trilogy, as we do. See Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1343 (2005) ("[T]here exists no justification for imposing any burden on a movant for summary judgment that would not parallel the burden that party would have at trial prior to moving for judgment as a matter of law."); EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 85 (2d ed. 2000) (similar). Yet still note that this policy outcome is not couched within the text of Rule 56. See *Rules Interpretive Theory*, *supra* note 109, at 2202.

258. See FED. R. CIV. P. 24(a)(2) (deploying the terms "interest," "parties," and "movant," but not "perspective"); *supra* Part II (discussing Rule 24(a)(2)'s text, history, and purposes).

259. See *Rules Interpretive Theory*, *supra* note 109, at 2205–06.

260. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)).

statutes or constitution of the United States.”²⁶¹ And Congress has acted. It passed the Rules Enabling Act in 1934, which now controls all federal rulemaking.²⁶²

Because Congress has so strongly acted here, any attempt to replace this structure in favor of an inherent-authority approach to Rules construction is to ignore statute. As Professor Catherine Struve concludes, “[T]he prior existence of inherent judicial authority concerning a particular matter . . . [of procedure] should, in any event, be irrelevant to the Court’s interpretation of a Rule governing the matter.”²⁶³ Indeed, all agree that the Rules Enabling Act is delegated rulemaking authority from Congress—not a codification of inherent court power.²⁶⁴ The Rules Enabling Act, furthermore, contemplates that major policy changes to the Rules should be accomplished pursuant to the rulemaking process.²⁶⁵ Moreover, the committee process and notice-and-comment procedures that limit the Court’s ability to dictate the precise content of the Rules have been required by Congress since 1988.²⁶⁶ The Court has not possessed a full-throated, non-statutorily constrained license to control civil procedure by way of inherent authority since at least 1872.²⁶⁷ Any suggestion that the Court is free to ignore the force of the Rules simply fails to acknowledge the commands of the Rules Enabling Act. Yet, the *Berger* Court does just this ignoring of the Rules Enabling Act by inventing “perspective” as an element of Rule 24(a)(2) analysis.²⁶⁸

261. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941) (footnote omitted).

262. 28 U.S.C. §§ 2071–2077; see also Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (providing a detailed history of the Rules Enabling Act).

263. Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1131 (2002).

264. *Id.* at 1125; see also Porter, *supra* note 114, at 176.

265. See Struve, *supra* note 263, at 1130 (“Accordingly, since the Enabling Act conditions the delegation of rulemaking power on the Court’s use of the prescribed procedures, it appears to require the Court to resort to those procedures when seeking to change a Rule.”); Marcus, *supra* note 245, at 933–36 (agreeing that the terms of the Rules Enabling Act are best understood to counsel interpretive restraint, but recognizing the limitations of a formal approach and the need for institutional analysis in this context).

266. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4650 (Nov. 19, 1988).

267. See Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: I. The Background*, 44 YALE L.J. 387, 392 (1935).

268. *Berger v. N.C. State Conf. of the NAACP (Berger IV)*, 142 S. Ct. 2191, 2203 (2022).

C. Pragmatic Challenges

Once the Court, applying Rule 24(a)(2) or any other Rule, leaves text and purpose as interpretive tools, it risks unintended consequences. One would readily predict such poor consequences here when the Court allows self-intervention under the guise of affording multiple atextual perspectives in an intervention analysis.

As it turns out, there is good reason for the pre-*Berger* consistent practice by the lower courts of barring self-intervention.²⁶⁹ Interpreting Rule 24(a)(2) to require intervention where a proposed intervenor and an existing party represent the same party in interest would create poor outcomes for courts and litigants. For example, in litigation involving governmental parties, such intervention would create an “intractable procedural mess.”²⁷⁰ Once this intervention door is opened, there is no reason why an unlimited number of state actors could not seek intervention in federal suits—ranging from any individual legislator who voted for the law under review to any individual county that supports it. “Allowing a single entity, even a state, to have [multiple] independent parties simultaneously representing it” could (and likely would) create a scenario where the attorney general and these various state agents would “take inconsistent positions on any number of issues,” from “briefing schedules, to discovery issues, to the ultimate merits of the case.”²⁷¹ In such a scenario, “[t]he district court would . . . have no basis for divining the true position of the State . . . on issues like the meaning of state law, or even for purposes of doctrines like judicial estoppel.”²⁷² In short, transforming a state party into a hydra undermines the federal courts’ ability to manage important cases and the state’s own sovereign interests.

Moreover, these consequences would not be limited to government party suits, because the Federal Rules of Civil Procedure are trans-substantive.²⁷³ In the corporate setting, for

269. See *supra* Part I (outlining the lower courts’ consistent rejection of self-intervention before *Berger IV*).

270. *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 801 (7th Cir. 2019).

271. *Id.*

272. *Id.* at 801–02.

273. See FED. R. CIV. P. 1 (Federal Rules “govern the procedure in all civil actions and proceedings in the United States district courts.”); *Ashcroft v. Iqbal*,

example, self-intervention would allow multiple corporate employees to intervene in suits brought against an entity. All of them could claim to represent the same corporate interest. Not only would this outcome create the same manageability concerns discussed above, but it would also upend well-established derivative lawsuit doctrine. In derivative lawsuits, before shareholders are permitted to step into the shoes of the corporation and represent that interest, they must satisfy an extremely high burden: they must show that the corporate board—that is, the designated representative of the corporation—has failed to act.²⁷⁴ A self-intervention approach would give shareholders (not to mention board members, executives, and individual employees) an end run around the demanding standard they have long faced, requiring federal courts to permit their intervention, by right, as a corporation's additional "agents." Such an outcome is untenable.

D. State Constitutional Challenges

So, what is really going on in these self-intervention motions now made under the guise of "perspective"? In reality, these represent a backdoor attempt to violate state separation-of-powers principles that would not likely withstand direct judicial review. That is, these motions are, functionally speaking, state law separation-of-powers violations.

Let's step back for a moment and reframe our discussion. The Court in *Bethune-Hill* reaffirmed the concept that federal constitutional law is silent as to who acts as a state's agent in federal court, so long as rules regulating federal court litigation are satisfied.²⁷⁵ This opinion lays out a two-prong test for who represents the state in federal court: (1) state law selection of an

556 U.S. 662, 684 (2009) ("Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard 'in all civil actions and proceedings in the United States district courts.'") (quoting *id.*); Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Body of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2079 (1989) (canvassing this issue).

274. See, e.g., *Ross v. Bernhard*, 396 U.S. 531, 534 (1970) (noting that in derivative lawsuits, equity courts have established as a "precondition for the suit" that the shareholder demonstrate that "the corporation itself had refused to proceed after suitable demand").

275. See *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (citing *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013)).

agent for litigation and (2) conformity to federal court litigation requirements.²⁷⁶ In *Bethune-Hill*, the Court concluded that the Virginia House of Delegates failed prong one of this test because a state statute assigned the power to litigate on behalf of the state near exclusively to the attorney general.²⁷⁷ By contrast, in *Hollingsworth*, while the state supreme court held that the proposition proponents were appropriate agents under state law to represent the state,²⁷⁸ the Court dismissed for lack of standing—a prong-two problem.²⁷⁹ To this point, I have argued that cases such as *Berger*, *Kaul*, and *Hobbs*, like *Hollingsworth*, face prong-two challenges: namely, the inapplicability of Rule 24(a)(2) to these situations because the state cannot self-intervene. In this Section, I turn to prong-one challenges to cases like *Berger*, *Kaul*, and *Hobbs*, focusing on the serious separation-of-powers concerns raised by legislative joinder seeking to represent the state itself.

This separation-of-powers issue arises because representing the federal or state government in litigation is an executive power. At the federal level, there is no doubt that the power to litigate on behalf of the United States is an executive power. Article II of the Constitution assigns the President the power and duty to “take Care that the Laws be faithfully executed.”²⁸⁰ In *Buckley v. Valeo*, the Court held that “[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts the responsibility to ‘take Care that the Laws be faithfully executed.’”²⁸¹ These authorities

276. *Id.*

277. *Id.* (citing VA. CODE ANN. § 2.2–507(A) (West 2017)).

278. *Hollingsworth*, 570 U.S. at 703.

279. *Id.* at 706, 715.

280. U.S. CONST. art. II, § 3. One could argue that the Executive Branch’s authority to enforce the laws is granted, not by the Take Care Clause, but rather by the seemingly more sweeping and unconditional Vesting Clause, which provides that “the executive power” shall be vested in the President. See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

281. 424 U.S. 1, 138 (1976) (invalidating provision of the Federal Election Campaign Act that authorized a committee of non-Executive Branch members to enforce the Act by initiating civil lawsuits in the name of the United States); *Springer v. Gov’t of the Philippine Islands*, 277 U.S. 189, 202 (1928) (“Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement.”).

clearly place the representation of the United States' sovereign interest with the executive branch of government.²⁸²

This same analysis applies to most, if not all, of the states. The state constitutions all list the attorney general as an executive officer.²⁸³ Indeed, forty-eight of them list the attorney general as an executive officer free from gubernatorial control, being subject in forty-three states to an independent-election requirement.²⁸⁴ Of course, the broad powers of state attorneys general arise from the hazy mists of the English common law tradition²⁸⁵ and vary from state to state.²⁸⁶ Yet even with these ancient origins and variations state to state, “[t]ypically state constitutions describe the attorney general as ‘the legal officer’ of the state . . . [vesting] authority for the attorney general to represent the state’s interests in litigation.”²⁸⁷ Indeed, “in virtually all states, the Attorney General is designated the state’s chief legal officer,”²⁸⁸ with some attorneys general holding that status by constitutional command²⁸⁹ and some by statute.²⁹⁰

The implication here is clear—absent a highly unusual state separation-of-power approach, state legislatures are not vested with the executive power to litigate as the state itself. Rather, the states all create attorneys general as executive officers and near-universally invest that office as the state’s chief legal officer.

282. There is a circuit court and scholarly discussion of whether *qui tam* cases violate that principle. This issue is beyond the scope of this Article and, moreover, only reinforces that government-run litigation is an executive power, regardless of whether outsourcing that power to private actors comports with the Constitution. Compare *Riley v. St. Luke’s Episcopal Hosp.*, 262 F.3d 749 (5th Cir. 2001) (en banc) (holding that *qui tam* is constitutional) with *Ara Lovitt, Fight for Your Right to Litigate: Qui Tam, Article II, and the President*, 49 STAN. L. REV. 853 (1997) (arguing that *qui tam* violates the Constitution).

283. See William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2452 (2006).

284. *Id.*

285. *Id.* at 2449–50.

286. *Id.* at 2452.

287. Johnstone, *supra* note 6, at 1477.

288. See Marshall, *supra* note 283, at 2452.

289. See CAL. CONST. art. V, § 13; N.Y. CONST. art. V, § 4; FLA. CONST. art. IV, § 4(b); ILL. CONST. art. V, § 15; MONT. CONST. art. VI, § 4, cl 4.

290. See, e.g., ARIZ. REV. STAT. ANN. § 41-192(A) (2006); COLO. REV. STAT. § 38-13-102(2.5) (2016); GA. CODE ANN. § 45-15-10 (2006); MISS. CODE ANN. § 7-5-1 (2010).

The same textual argument that drives the conclusion that representing the federal government in court is an executive power applies in the states. “[E]very state constitution, like the U.S. Constitution, provides in substance that the chief executive shall ‘take care’ or see to it that the laws are faithfully executed.”²⁹¹ This is the same textual starting point that grounds the federal law conclusion that representing the federal government is an executive power. Thus, the *Buckley* holding, that controlling litigation is an executive power, is compelling in the state constitutional law setting as well.²⁹² And in nearly every state, as noted above, this executive power is vested with the attorney general.

Moreover, this separation-of-powers concern with allowing the legislature to represent the state is heightened in most states as compared to the federal standard. Explicit separation-of-powers clauses, a common feature of state constitutions, push the conclusion that controlling litigation on behalf of the state is an executive power. Take the Virginia Constitution, for example. Article III, section 1 states: “The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time”²⁹³

Thirty-five states have similar textual separation-of-powers provisions.²⁹⁴ Moreover, in applying these textual separation-of-powers provisions, many state judges conclude that their state constitution demands “a more rigid separation between the branches than exists at the federal level.”²⁹⁵

Applying these principles here, the conclusion follows: Representing the state in court is the duty of the state attorney general, often as a state constitutional directive. Any attempt to alter that constitutional duty by state statute would invite constitutional challenge. And, of course, the “state courts have

291. Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565, 639 (2006); see also *id.* at 639 n.287.

292. See *Buckley v. Valeo*, 424 U.S. 1, 138 (1976). Of course, this opinion would not bind the states, but would merely be persuasive.

293. VA. CONST. art. III, § 1.

294. See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederal Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1190–91 (1999).

295. Christina Koningisor, *Secrecy Creep*, 169 U. PA. L. REV. 1751, 1767 (2021); see, e.g., *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924–25 (Fla. 1978).

the power to determine whether state laws are consistent with or conflict with their state constitutions.”²⁹⁶ And even in those states where the attorney general’s duty to represent the state is purely statutory, the power of representing the state is necessarily an executive one. Thus, assigning this power to litigate as the state to the legislature would itself violate state separation-of-powers doctrine, which is often more rigid than federal doctrine.

From this perspective, allowing the legislature to join a federal suit as the state itself grants the legislature a power through the back door that it could not take through the front door. Consider the constitutional backdrop in North Carolina, where the *Berger* case arose: The North Carolina Constitution has a textual separation-of-powers provision²⁹⁷ and it creates the attorney general as an executive officer.²⁹⁸ As noted above, the power to litigate on behalf of the state is an executive power.²⁹⁹ Nevertheless, a state statute purported to allow the North Carolina statehouse leaders “as agents of the State” to join suits when a case challenges the constitutionality of a state law.³⁰⁰ This North Carolina statute seems clearly void as a matter of state constitutional law, which is a conclusion noted, in dicta, by both the federal district court and the Fourth Circuit majority en banc in *Berger*.³⁰¹

296. Julia L. Ernst, *The Legacy of Theodore Roosevelt’s Approach to Governmental Powers*, 92 N.D. L. REV. 309, 350 (2017); see also Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bath tub?*, 64 WASH. L. REV. 19 (1989) (discussing the power of judicial review by state courts). Of course, the power of judicial review originally springs from the state courts. See Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 334 & n.49 (2011). And many argue that the different constitutional environment in most states—easier amendment and judicial elections to name just two—alters how judicial review is applied in the states. See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, at 1137, 1157–59 (1999); Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 899–900 (1989); Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View from The Federalist Papers*, 61 S. CAL. L. REV. 1669, at 1669, 1689 (1988).

297. See N.C. CONST. art. I, § 6 (“The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.”).

298. See *id.* art. III, § 7, cl. 1.

299. See *Buckley v. Valeo*, 424 U.S. 1, 138 (1976).

300. N.C. GEN. STAT. § 120-32.6(b) (2017).

301. See N.C. State Conf. of the NAACP v. *Berger* (*Berger III*), 999 F.3d 915, 922 (4th Cir. 2021) (en banc), *rev’d*, *Berger v. N.C. State Conf. of the NAACP* (*Berger*

The Court addressed this issue briefly and incompletely.³⁰² Of course, the Court lacks authority to interpret state constitutional law,³⁰³ which is really the point here. It held that the North Carolina Constitution allows a state statute to direct the scope of the attorney general's power.³⁰⁴ This is to say, North Carolina law seems to allow statute to regulate which executive officers represent the state in litigation. From that rather commonplace observation, the Court quickly noted that "the Board [failed to] identify anything to support its suggestion that the State's executive branch holds a constitutional monopoly on representing North Carolina's practical interests in court."³⁰⁵ Thus, citing no North Carolina law, the U.S. Supreme Court concluded that the North Carolina Constitution allows the legislature "authority to defend state law on behalf of the State."³⁰⁶

Wait, what just happened! Under the guise of federalism, the U.S. Supreme Court held, citing no law, that the North Carolina Constitution allows the legislature to carry out the executive function of defending a lawsuit because the legislature could assign other executive officials, other than the attorney general, to defend a lawsuit. The Court errs in two ways with this unprecedented move. First, the Court's conclusions of North Carolina law seem to be an error of North Carolina constitutional law analysis for the very separation-of-powers

IV), 142 S. Ct. 2191 (2022); N.C. State Conf. of the NAACP v. Cooper, No. 1:18CV1034, 2019 WL 5840845, at *2 n.3 (M.D.N.C. Nov. 7, 2019).

302. See *Berger IV*, 142 S. Ct. 2191, 2202–03 (2022).

303. See *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 630–33 (1875) (holding that the Court's statutory power to review state court decisions is limited to matters of federal law, although reserving whether Congress could assign it more power); *BP P.L.C. v. Mayor & City Council of Balt.*, 141 S. Ct. 1532, 1540 (2021) (confirming the continued validity of *Murdock*); *Michigan v. Long*, 463 U.S. 1032, 1043 (1983) (holding the Court lacks power on certiorari from the state courts to review truly independent interpretations of state constitutional law); *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945) ("The reason is so obvious that it has rarely upon thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.").

304. *Berger IV*, 142 S. Ct. at 2203 (citing N.C. CONST. art. III, § 7(2)); see also *Bailey v. State*, 353 N.C. 142, 152–53, 540 S.E.2d 313, 320 (2000).

305. *Berger IV*, 142 S. Ct. at 2202–03.

306. *Id.* at 2203.

concerns I outlined above.³⁰⁷ Second, and more to the point, the U.S. Supreme Court lacks the power to opine about state law.³⁰⁸

Allowing the North Carolina legislature, or any state legislature, to join as the state itself under federal procedural law, then, is little more than a backdoor way to achieve a result that is most likely void as a matter of state constitutional law. State constitutional law, as a general matter, will not allow the legislature to use this executive power. Yet, self-intervention achieves this same result. Failing to recognize this pragmatic impact would lead to the worst kind of formalist approach to separation of powers.³⁰⁹ The courts, therefore, should focus on the function that joinder would play here: granting the legislature the executive power to litigate by representing the state itself. The federal courts should not be partners in such a sleight-of-hand maneuver.³¹⁰

Of course, I am reasoning here in broad strokes about the laws of fifty different states. This raises the danger of making one-size-fits-all claims about fifty different legal regimes.³¹¹

307. See *supra* notes 283–304 and accompanying text (discussing state separation of powers); Brief of Former North Carolina Supreme Court Justice Robert F. Orr as Amicus Curiae in Support of Respondents, *Berger v. N.C. State Conf. of the NAACP*, 2022 WL 525076, at *3 (Feb. 16, 2022) (No. 21-248) (former Republican North Carolina Justice with eighteen years of experience in the state appellate courts showing that the statute at issue here, allowing the legislature to represent the state sovereign interest, “would violate the North Carolina Constitution”). No other party or amicus contradicted this position.

308. See *supra* note 232.

309. There is robust literature on formalist versus functionalist approaches to separation-of-powers issues that support a functionalist approach to cases such as this. See Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339 (2015); Suzanna P. Clair, *Separation of Powers: A New Look at the Functional Approach*, 40 CASE W. RES. L. REV. 331 (1989); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency*, 72 CORNELL L. REV. 488 (1987).

310. *Berger IV*, 142 S. Ct. at 2203 (2022) (Sotomayor, J., dissenting) (“Out of respect for federalism, if nothing else, we should not interpret state law to hijack federal courts’ ability to manage litigation involving States.”); see also *Va. Off. for Prot. and Advoc. v. Stewart*, 563 U.S. 247, 272 (2011) (Roberts, C.J., dissenting) (noting the “indignity” suffered by a State when “a federal judge . . . decide[s] an internal state dispute”).

311. See Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2122 (2015) (“We find it curious that state officials frequently act as if state law issues should be evaluated without reference to state law.”); see also Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1630–33 (2010) (highlighting nationalistic rhetoric used by commentators in critiquing

And, of course, states are free to organize themselves for litigation purposes as they see fit.³¹² I do not intend to make such slapdash claims or wrongly deny that a state may organize itself in a number of ways. It is, of course, permissible and possible that a state with a radically different approach to separation of powers could conclude that its legislature can litigate as the state itself without a state constitutional violation.³¹³ It is essential to recall, however, that federal law, including the Rules of Civil Procedure, preempts state law in federal court procedural matters.³¹⁴ This means, then, that the federal courts will take a uniform approach to joinder that will not factor in the potential for such a unique state approach to separation of powers.³¹⁵ And given that most, if not all, states face separation-of-powers concerns with legislative self-intervention, this necessity of taking a uniform federal approach to joinder militates against allowing multiple representatives to defend the same state interest.

* * *

In sum, the *Berger* Court errs in allowing a single party in interest to intervene in its own case in an effort to allow different “perspectives” to gain party status. First, even if this interpretation of Rule 24(a)(2) made legal sense, the record in *Berger* does not show that there were different perspectives to air. Second, and more important, the notion of a state interest as non-singular with multiple “perspectives” is atextual, ahistorical, and non-purposive to Rule 24(a)(2). Third, this multiple-perspectives-on-an-interest approach is ripe with

state courts interpreting state constitutions to establish right to same-sex marriage).

312. See *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013) (observing that although “[t]hat agent is typically the State’s attorney general,” states may make a different choice); *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 802 (7th Cir. 2019) (“[W]e can see no reason why a federal court would bat an eye if a state required its attorney general to withdraw from his representation and allow another entity, including a legislature, to take over a case.”).

313. See *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019).

314. See *supra* notes 92–98 and accompanying text.

315. See, e.g., *Federal Rules of Civil Procedure Establish Uniformity*, FED. JUD. CTR. (Sept. 16, 1938), <https://www.fjc.gov/history/timeline/federal-rules-civil-procedure-establish-uniformity> [<https://perma.cc/F7QV-QXF3>] (“The rules, which went into effect on September 16, 1938, after gaining congressional approval, ensured that the procedure followed in federal courts throughout the nation would be consistent and uniform.”).

pragmatic challenges that will impact any number of non-corporeal entities—not just state governments. And lastly, focusing back on state governments, the Court's approach invites state law separation-of-powers difficulties. As such, the Court should not have invented a new “perspectives” approach to intervention as of right in *Berger*.

V. SUBSTITUTION NOT INTERVENTION

What is a legislative body to do, then, if intervention is a nonstarter, to engage in public interest litigation beyond amicus briefing?³¹⁶ Two paths present themselves. First, it may seek substitution of the nominal official capacity party under Rule 25(d) in cases where the executive defendant fails to defend. And second, it may attempt to present an interest other than the state's and seek intervention that is *not* a self-intervention. In this Part, I address this first matter in detail, while touching upon the latter in passing.

A. *Substitution and Real Party in Interest*

I turn first to substitution. This same party-in-interest approach to party status controls elsewhere in the Federal Rules. Indeed, in official capacity suits, real party-in-interest, not nominal, status governs Rule 25(d) analyses. Rule 25(d) addresses situations where an official officeholder ceases to hold office while a suit is in progress. The Rule states: “An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party.”³¹⁷ While the Rule speaks in terms of substitution of parties, its focus is on the preservation of the state's representation. In fact, more accurately, Rule 25(d) is best understood as a substitution of the *nominal* party provision, not a substitution of the *real-party-in-interest* provision.

316. See GENSLER & MULLIGAN, *supra* note 156, at Rule 24 n.141 (“The ability to file an amicus brief is not a substitute for intervention of right under Rule 24(a).”).

317. FED. R. CIV. P. 25(d); *see also* FED. R. APP. P. 43(c)(2) (similar approach for appellate cases).

Rule 25(d) achieves this end by focusing upon the real party in interest. The Court in *Lewis v. Clarke* directly so held:³¹⁸

In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. This is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation. The real party in interest is the government entity, not the named official.³¹⁹

Any other approach would “glorify form over substance and reality.”³²⁰

It is no accident that the courts now read Rule 25(d) from this real-party-in-interest point of view. Prior to 1961, the Supreme Court in a series of opinions, most notoriously *Snyder v. Buck*,³²¹ treated the named individual in official capacity suits as the real party in interest, leading to a host of injustices.³²² The Rule Advisory Committee, in the 1961 amendments, altered Rule 25(d) to refocus the courts on the government's role as the real party in interest in official capacity suits.³²³ Speaking directly to official capacity defendants, the Advisory Committee concluded: “The amended rule will apply to . . . any action brought in form against a named officer, but intrinsically against the government or the incumbent thereof whoever he may be from time to time during the action.”³²⁴ The Advisory Committee thus acknowledged the fictive nature of *Ex parte*

318. 581 U.S. 155, 162 (2017).

319. *Id.* (internal citations omitted).

320. *Fleming v. Goodwin*, 165 F.2d 334, 338 (8th Cir. 1948); *see also* *Negron Gaztambide v. Hernandez Torres*, 145 F.3d 410, 415 (1st Cir. 1998) (“When the official capacity defendants entered office, they were substituted automatically as representatives of the Commonwealth, which is the real party in interest in the official capacity suits. As the current officeholders, their lack of participation in events prior to their ascendancy to office does not alter their substantive rights.”) (internal emphases omitted).

321. 340 U.S. 15 (1950); *see also* *United States v. Allied Oil Corp.*, 341 U.S. 1 (1951); *Def. Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631 (1949); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947).

322. *See* Charles Alan Wright, *Federal Rules of Civil Procedure*, 27 F.R.D. 221, 229–33 (1961) (discussing this case law).

323. *Id.* at 235–40 (discussing how the 1961 amendments to Rule 25(d) ensure a focus on the real party in interest, the government, by automatic substitution of official capacity defendants).

324. FED. R. CIV. P. 25, advisory committee note (1961).

Young suits and crafted a rule that does not let that immunity sleight of hand interfere with a real-party-in-interest focus.

Professor Benjamin Kaplan reaches the same conclusion in his near-contemporaneous discussion of the 1961 Rule 25(d) amendments:

This pleading style reflects the well-known theory—whether it is a peculiarly fictive theory need not be here debated—which regards the officer as shorn of official status in the degree that his conduct is illegal, and thus permits the action to be effectively maintained despite “sovereign immunity” or the eleventh amendment. But the purpose of the action is still to get relief against the one who occupies the office at the time of judgment, and for that reason rule 25(d) applies to the narrow procedural issue of substitution.³²⁵

Rule 17(d)’s text also supports this conclusion. Rule 17 is the capacity and real-party-in-interest provision. The rule focuses on public officers in subsection (d), which states: “A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer’s name be added.” As the 2007 Advisory Committee Notes recall, this provision was once part of Rule 25(d).³²⁶ This prior positioning highlights that the same focus on party in interest, which forms the hallmark of Rule 25(d) analysis, controls in Rule 17(d). The text, moreover, demands this approach to official capacity suits by stating that a pleader need not even state the office holder’s name because the real party in interest is the government.

B. *Berger, Kaul, and Hobbs as Substitution Cases*

Why this discussion of substitution of nominal parties in official capacity suits? Because it explains why the Court allows legislatures to defend state statutes when the relevant executive officials refuse. While the Court has discussed these matters as

325. Benjamin Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (I)*, 77 HARV. L. REV. 601, 608 (1964).

326. FED. R. CIV. P. 17, advisory committee note (2007) (“Former Rule 25(d)(2) is transferred to become Rule 17(d) because it deals with designation of a public officer, not substitution.”).

intervention questions, they are better understood as substitution of the nominal party under Rule 25(d).

I discussed *Karcher v. May* above.³²⁷ There, the New Jersey attorney general declined to defend the constitutionality of a state statute.³²⁸ As a result, the speaker of the New Jersey House of Representatives and the president of the New Jersey Senate intervened as defendants³²⁹ in their official capacities representing the state's interests.³³⁰ The Court (given that the parties framed the case as intervention when the real issue was one of standing) treated the legislative leaders as intervenors.³³¹ Better practice would have been to view this as substitution of the nominal party. In *Karcher*, one, and only one, defendant party in interest was present in the case—the state of New Jersey.³³² Properly understood, there was no joinder of a new party in interest. Rather, because the *present* party in interest lacked representation, the more appropriate motion would have been a Rule 25(d) substitution. Indeed, Rule 25(d)'s text and purpose, substituting nominal parties in the face of the failure of governmental representation, more closely maps the situation in *Karcher* than self-intervention by the same party in interest does.³³³

The Court faced a similar assumed intervention in *Hollingsworth v. Perry*.³³⁴ Here, California by popular referendum passed restrictions upon same-sex marriage, known as Proposition 8, which immediately brought a lawsuit to enjoin. No state executive or legislative official would defend

327. See *supra* notes 211–216 and accompanying text.

328. *Karcher v. May*, 484 U.S. 72, 75 (1987).

329. *Id.*

330. *Id.* at 76.

331. *Id.*

332. *Id.*

333. See *Echevarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24, 31 (1st Cir. 1988) (“[When] the action is brought against a public officer in his official capacity, the manipulation of names is merely a technicality that should not interfere with substantial rights.”) (internal citations omitted); *Zellmer v. Nakatsu*, No. C10–1288MJP, 2011 WL 6210631, at *2 (W.D. Wash. Dec. 13, 2011), *aff’d in part, rev’d in part sub nom.*, *Zellmer v. Constantine*, 520 F. App’x 564 (9th Cir. 2013), *vacated in part*, 2015 WL 417994 (W.D. Wash. Jan. 30, 2015) (“Although the text of Rule 25(d) specifically mentions situations where a public officer who is a party to a suit ‘dies, resigns, or otherwise ceases to hold office,’ the rule’s logic applies to all situations where the real party in interest in an official capacity suit is the governmental entity, not the individual officeholder.”).

334. 570 U.S. 693 (2013).

Proposition 8.³³⁵ The district court allowed the proponents of Proposition 8 to intervene as defendants.³³⁶ On appeal, this triggered a certified question to the California Supreme Court asking whether the Proposition 8 proponents, who were not otherwise agents of the state, could represent the state's interests.³³⁷ The California high court held that they could.³³⁸ The U.S. Supreme Court, as in *Karcher*, assumed the intervention below, yet dismissed for lack of standing to appeal.³³⁹ As in *Karcher*, the better approach here would have been to have viewed this as a Rule 25(d) motion to substitute the nominal party. There remained but one party in interest, the state of California, which cannot intervene in itself. The defect to be cured there was one of lack of nominal party, a Rule 25(d) substitution problem, not the addition of a new party in interest, a Rule 24 issue. If standing had not been a problem, substitution of the proper replacement nominal party would be superior to a motion to intervene in oneself.

Following this approach, the better path in *Berger*, *Kaul*, and *Hobbs* would be to treat such motions as ones for substitution. But unlike *Karcher* and *Hollingsworth*, substitution in cases like *Berger*, *Kaul*, and *Hobbs* should fail off the top. And why? Because the attorney general is defending and there is not a failure of nominal representation to remedy. But in a different case, one in which there was an attorney general's failure to defend and where there was a nominal party with standing,³⁴⁰ Rule 25(d) substitution should be available to an

335. *Id.* at 702.

336. *Id.*

337. *Id.* at 703.

338. *Id.*

339. *Id.* at 706. Of course, the *Hollingsworth* holding raises the nominal-versus real-party-in-interest problem again. The U.S. Supreme Court's standing analysis focused upon the nominal defendants, which to be sure is the key feature of an *Ex parte Young* analysis. Yet the California Supreme Court had ruled that the real party in interest was the state. Reconciling standing, *Ex parte Young*, and focus on the real party in interest is beyond the scope of this Article.

340. See generally Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539 (2012) (outlining the unique nature of Article III standing as it relates to official capacity defendants). See also Gregory R. Manring, *It's Time for an Intervention: Resolving the Conflict Between Rule 24(a)(2) and Article III Standing*, 85 FORDHAM L. REV. 2525 (2017) (outlining a similar argument); Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339 (2015) (similar).

alternative nominal defendant to safeguard the real party in interest's defense.³⁴¹

* * *

In closing, these self-intervention motions are better understood as motions to substitute the nominal official party under Rule 25(d). Rule 25(d) focuses on the real party in interest, which maps the proper locus of these *Ex parte Young* party issues. Further, unlike the self-intervention confusion that results from a Rule 24(a)(2) motion, Rule 25(d) is designed specifically to swap out nominal official capacity parties. And finally, such an approach better deals with situations in which the primary official capacity defendant fails to defend.

CONCLUSION

I end where I began, with the near-tautological statement that parties cannot intervene in themselves. Neither the text, history, nor practice under Rule 24(a)(2) would allow self-intervention. The courts should not allow the *Ex parte Young* fiction to alter this approach. And finally, allowing legislative intervention as a matter of federal law obscures a functional separation-of-powers violation. For these reasons, the courts should limit the impact of the *Berger* decision. The state supreme courts, exercising their independent interpretative authority over rules of procedure, should not replicate the U.S. Supreme Court's errors. And the lower federal courts should cabin the *Berger* opinion as much as possible from impacting other non-corporeal entities.

341. That possibility was arguably left open in *Bethune-Hill*. See Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1953 (2019); cf. Raines v. Byrd, 521 U.S. 811 (1997) (holding that six Members of Congress lacked standing to challenge enactment of Line Item Veto Act); see also Powell v. McCormack, 395 U.S. 486, 496 (1969) (holding that a Member of Congress may bring a constitutional challenge to his exclusion from the House of Representatives).

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