No. 21-84

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Petitioners,

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C V R L C A A
Respondents.

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

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BRIEF OF THE LIBERTY JUSTICE CENTER AS IN SUPPORT OF PETITIONERS

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Daniel R. Suhr
Counsel of Record

August 20, 2021

QUESTION PRESENTED

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

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INTEREST OF AMICUS CURIAE[1]

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

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

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

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

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

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

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

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

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

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

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

REASON TO GRANT THE PETITION

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

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

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

State attorneys general are not immune from the increased polarization. But this has not always been the case. Prior to the 1980s, state attorneys general offices could be described as "placid and reactive." Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 Rev. Pol. 525, 538 (1994); *see* Thomas R. Morris, *States Before the U.S. Supreme*

were able to avoid such pitfalls by shifting the focus from individual smokers to the states' own losses—restitution for Medicaid expenses incurred from treating smoking-related illnesses. *Id.* at 2189. The tobacco suits made clear the power of cooperation among attorneys general: ultimately forty-six states joined

Not Anymore, Governing.com (Nov. 14, 2017), https://bit.ly/3yUUOCF (last visited Aug. 17, 2021). With an increase in power and pressure to follow the

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

CONCLUSION

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

August 20, 2021

Respectfully submitted,

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