POLITICS AND THE COURTROOM: A BATTLE BETWEEN FEDERAL RULE OF CIVIL PROCEDURE 24 AND AMICUS CURIAE BRIEFS

INTRODUCTION

On May 15, 2018, The Honorable Andrew S. Hanen for the Southern District of Texas ruled that a group of twenty-two Dreamers[1] could intervene in a lawsuit brought by the State of Texas seeking an end to the 2012 DACA program implemented by former President Barack Obama.[2] This decision is one of the most recent in a series of court decisions granting groups of both documented and undocumented immigrants original litigant status in cases challenging the validity of immigration policies.[3]

Immigration intervention motions represent a novel manipulation of a Federal Rule of Civil Procedure (FRCP) that was originally intended to cover absentee claims in real property disputes.[4] FRCP 24 (Rule 24) governs third-party intervention into a lawsuit and permits parties to participate in a suit as if they were original litigants.[5] Given that Rule 24 treats third parties as original litigants, it was originally one of the more restrictive FRCPs.[6] Recent court decisions, however, have lowered the Rule 24 burden to intervene.[7] Although Rule 24 provides a mechanism for ideological social justice movements and political speech to be heard in court,[8] the ease with which third parties can now intervene has caused Rule 24 to clash with the long-standing doctrines of standing, class actions, jurisdiction, and res judicata.[9] Such politico-ideological advocacy

1. The term "Dreamers" refers to individuals who would have qualified for permanent legal status in the United States under the proposed Development, Relief, and Education for Alien Minors Act (DREAM Act). The DREAM Act failed to pass, but one purpose of the Deferred Action for Childhood Arrivals (DACA) program was to provide relief to Dreamers. *See The Initial DREAM Act S.1291 (2001)*, LAWLOGIX (July 29, 2013), https://www.lawlogix.com/what-is-the-dream-act-and-who-are-dreamers/ [https://perma.cc/PMA7-F4MJ].

2. Telephonic Conference Before the Honorable Andrew S. Hanen, Texas v. United States, No. 1:18-CV-68 (S.D. Tex. May 15, 2018), ECF No. 34 (defined as *Texas II*, *see infra* note 200); Julián Aguilar, *Judge Allows Group of "Dreamers" to Formally Fight Texas' Lawsuit to End DACA*, TEX. TRIB. (May 15, 2018, 3:00 PM), https://www.texastribune.org/2018/05/15/judge-allows-group-dreamers-formally-fight-texas-lawsuit-end-daca/ [https://perma.cc/R75Q-6G7E].

3. *See infra* Section IV.A.

4. *See infra* Section I.A.

5. *See* sources cited *infra* note 24.

6. *See* text accompanying and sources cited *infra* notes 33, 35, 37.

7. *See infra* Part III.

8. *See infra* Part III.

9. *See Res Judicata*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising

was previously reserved for amicus curiae[10] briefs, in which the writing amicus or "friend of the court"[11] is not treated as an original litigant, has no legally-recognized stake in the case, and does not risk interfering with other doctrines.[12]

In addition to its recently lowered burden, Rule 24 intervention is especially important in the wake of the Supreme Court's recent decision in *Town of Chester v. Laroe Estates, Inc.*[13] In *Town of Chester*, the Court held that an intervenor does not need independent Article III standing if she seeks the same relief as an original litigant.[14] In social justice cases,[15] such as immigration actions, that relief is generally simple: upholding or overturning the validity of certain state or federal laws.[16] Thus, because a social justice intervenor is more likely to seek the same relief as an original litigant than in other categories of cases,[17] the Court's removal of an independent standing requirement increased even more the likelihood of mass intervention by intervenors in social justice cases.

This Note argues that courts have recently construed the scope of Rule 24's "significantly protectable interest" and "adequacy of representation" burden[18] too broadly. Part I looks at the original purpose of Rule 24—to cover absentee claims in real property disputes—and its subsequent textually and judicially defined burden. Part II examines the reasons why Rule 24 is an attractive option for litigants. Part III discusses courts' lowering of the burden in the social justice context. Part IV focuses on the increasing politicization and debate-style uses of Rule 24 through the lens of immigration actions. Part V analyzes the negative implications of the

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from the same transaction or series of transactions and that could have been—but was not—raised in the first suit.").

10. *See Amicus Curiae*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Someone who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.").

11. *Id.*

12. *See infra* Section II.A.

13. 137 S. Ct. 1645 (2017).

14. *Id.* at 1648.

15. "'Social justice' or 'cause' lawyering refers to the use of law and legal strategies to achieve community advancement objectives." Faith Rivers James, *Leadership and Social Justice Lawyering*, 52 SANTA CLARA L. REV. 971, 972 (2012). This Note uses the term "social justice" interchangeably with "public interest." *See id.* at 973–74.

16. *See* JON GREENBAUM, LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, TOWARD A MORE JUST JUSTICE SYSTEM: HOW OPEN ARE THE COURTS TO SOCIAL JUSTICE LITIGATION? 1, 23 (2016), https://lawyerscommittee.org/wp-content/uploads/2016/08/Toward-A-More-Just-Justice-System.pdf [https://perma.cc/U77Y-YZ9R].

17. *See* Justin P. Gunter, Note, *Dual Standards for Third-Party Intervenors: Distinguishing Between Public-Law and Private-Law Intervention*, 66 VAND. L. REV. 645, 648 (2013) (discussing "social reform" laws brought on by progressivism in the twentieth century, which have created specific "social reform" causes of action and remedies for public interest plaintiffs and expanded the jurisdiction of the federal courts).

18. *See* text accompanying and sources cited *infra* notes 61, 75.

lowered Rule 24 burden and the Court's decision in *Town of Chester* on other carefully crafted doctrines: standing, class actions, jurisdiction, and res judicata.

Part V concludes by arguing that courts should tighten the Rule 24 burden and reserve such politico-ideological advocacy, particularly when the relief sought is the same as that of the original parties, for its traditional forum: amicus briefs. If courts do not tighten the burden, they will face endless contentious public interest intervention motions that crowd the stage of the original litigation.[19] With the lowered Rule 24 burden, litigants have sought intervention on massive scales.[20] Massive scale intervention is demonstrated by both the quantity of motions to intervene that are filed generally and within a given litigation, as well as by the quantity of intervenors seeking intervention under any one motion.[21] Both the relief intervenors seek as well as court decisions themselves have become too politico-ideological despite the efficiency afforded by having all interested voices present.[22] Intervention at this scale is no longer practical.[23]

I. IMPLEMENTATION AND PROCEDURAL FUNCTION OF RULE 24

Rule 24, adopted in 1938, was written to replace Former Equity Rule 37 of the Federal Equity Rules for claims in equity and varying state statutes that provided rights to intervene in claims based in law.[24] Former Equity Rule 37, however, expressly limited the role of intervenors, stating that any intervention "shall be in subordination to, and in recognition of, the propriety of the main proceeding."[25] This subordinate status was not

19. *See* Kerry C. White, Note, *Rule 24(A) Intervention of Right: Why the Federal Courts Should Require Standing to Intervene*, 36 LOY. L.A. L. REV. 527, 562 (2002) (noting that public interest litigation, bolstered by intervention, leads to a "lawsuit mania"); *see also infra* text accompanying notes 208–214.

20. *See infra* Section V.A.

21. *See infra* Section V.A.

22. *See infra* Section II.B.

23. *See infra* Part V.

24. Federal Equity Rule 37 governed third-party intervention. *See* 7C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1903 (3d ed. 2019). Former Equity Rule 37 read, in pertinent part: "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding." *Id.* at n.2. Rule 24 also replaced state statutes governing third-party intervention. *See* James Wm. Moore & Edward H. Levi, *Federal Intervention I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565, 578 (1936).

25. WRIGHT & MILLER, *supra* note 24, § 1903 n.2; *see also* Moore & Levi, *supra* note 24, at 579 ("[A]n intervenor [as interpreted in the 1930s] . . . has restricted rights.").

carried into Rule 24, even in its earliest form in 1938.[26] With the drafting of Rule 24, "the intervenor is treated *as if [she] were an original party and has equal standing* . . . . [T]he intervenor is entitled to litigate fully on the merits once intervention has been granted."[27] This "original litigant" status is the key distinction between a Rule 24 intervenor and an amicus.[28]

A. Intended Use

The original purpose of Rule 24 was to consolidate Federal Equity Rule 37 and competing state statutes supplying a legal right to intervene.[29] At the time Rule 24 was passed, the Advisory Committee textually distinguished Rule 24's divergent equitable and legal origins.[30]

As originally written, the equity portion of Rule 24, section 24(a)(3), solely addressed real property rights.[31] This section of the rule was considered an absolute right[32] because of the likelihood of a third person's rights being "seriously jeopardized" should the court award a piece of real property to a litigant without allowing the third party to speak of her rights to the same property.[33] This is because awarding title to property to one party necessarily binds others who claim title to the same property.[34] These policy concerns were driven by the doctrine of res judicata, and courts recognized value in "prevent[ing] their processes from being used to the prejudice of the rights of interested third persons."[35]

The other portion of Rule 24 dealing with one's legal rights or claims, section 24(a)(2), focused originally on adequacy of representation by the current parties to the litigation. This was a discretionary right.[36] To

26. *See* Spangler v. United States, 415 F.2d 1242, 1245 (9th Cir. 1969); *see also* Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co., 386 U.S. 129, 133 (1967) (explaining that Rule 24 was "not merely a restatement of existing federal practice at law and in equity").

27. WRIGHT & MILLER, *supra* note 24, § 1920 (emphasis added); *accord* Ross v. Bernhard, 396 U.S. 531, 541 n.15 (1970) ("[T]he intervenor has a right to a jury trial on any legal issues he presents.").

28. *See infra* Section II.A.

29. WRIGHT & MILLER, *supra* note 24, § 1920.

30. "As originally adopted a distinction was made . . . between subdivision (a)(2), allowing intervention of right by a person whose interest in the action was not adequately represented by existing parties, and subdivision (a)(3), allowing intervention of right by one who might be adversely affected by the distribution of property . . . ." WRIGHT & MILLER, *supra* note 24, § 1903; *accord* Rule 24(a) as written today, *infra* note 69.

31. FED. R. CIV. P. 24 advisory committee's note to 1966 Amendment.

32. Moore & Levi, *supra* note 24, at 581.

33. *Id.* at 582. The law's concern with real property at the beginning of the twentieth century was echoed in other areas of the law that dealt with *in rem* and *in personam* actions separately. *See id.*; Morris E. Cohn, Note, *Jurisdiction in Actions* in Rem *and* in Personam, 14 ST. LOUIS L. REV. 170, 172 (1929) (discussing the distinction as it pertains to personal jurisdiction).

34. Moore & Levi, *supra* note 24, at 582.

35. *Id.* at 573.

36. *Id.* at 581.

intervene under the original section 24(a)(2), a party needed to show both: (1) inadequate representation; and (2) that if denied intervention, she would otherwise be bound by any judgment in the action.[37] The textual requirement to demonstrate that one would be bound by the judgment if denied intervention echoed that of the real property and equity-driven section 24(a)(3) and reflected the same policy concerns about res judicata.[38] Although section 24(a)(2) does not deal with equity or real property,[39] the same idea carried through.[40]

Additionally, although the legal right targeted by section 24(a)(2) is not per se a real property right, the legal right nonetheless originates from real property rights. As originally intended, the Advisory Committee sought to cover intervenors with a property-like relationship to the litigation,[41] such as "unsecured creditors, stockholders, or bondholders, and . . . taxpayers."[42] Inadequate representation was determined based on collusion between the alleged representative of the third party seeking intervention (the "Proposed Intervenor") and the opposing party, representation of an interest adverse to the Proposed Intervenor, or, alternatively, breach of a duty.[43]

B. 1966 Advisory Committee Amendment

The 1966 Advisory Committee amendment (1966 Amendment) eliminated the textual distinction between legal and equitable claims.[44] First, the Advisory Committee removed section 24(a)(3), which dealt only with real property.[45] Section 24(a)(2), which was originally intended to cover legal rights between parties such as creditors and stockholders, was merged with 24(a)(3) into one section, which is today section 24(a)(2).[46] Rule 24 currently states that a Proposed Intervenor must simply claim "an interest"[47] in the property or transaction at issue in the litigation.

Second, the Advisory Committee removed one of the two requirements to intervene from the prior sections 24(a)(2) and (a)(3).[48] Under the 1966

37. WRIGHT & MILLER, *supra* note 24, § 1907.
38. *See* Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 688 (1961).
39. FED. R. CIV. P. 24(a)(2).
40. *See Sam Fox Publ'g Co.*, 366 U.S. at 688.
41. *See* FED. R. CIV. P. 24 advisory committee's note to 1966 Amendment (providing a trustee/beneficiary relationship as an example for purposes of interpreting Rule 24(a)(2)).
42. Moore & Levi, *supra* note 24, at 581, 592.
43. *Id.* at 591–92; *see also supra* note 41.
44. *See* FED. R. CIV. P. 24 advisory committee's note to 1966 Amendment.
45. *Id.*
46. WRIGHT & MILLER, *supra* note 24, § 1903; see *infra* note 69 for FED. R. CIV. P. 24(a) as written today.
47. See *infra* note 69 for FED. R. CIV. P. 24(a) as written today.
48. FED. R. CIV. P. 24 advisory committee's note to 1966 Amendment.

Amendment, Proposed Intervenors must only show that representation in the litigation is inadequate, not that they will be bound by any judgment in the action.[49] Third, and most importantly for this Note, the Advisory Committee altered the scope of section 24(a)(2), explicitly stating that:

> The representation whose adequacy comes into question under the amended rule is *not confined to formal representation like that provided by a trustee for his beneficiary* . . . . A party to an action may provide practical representation to the absentee seeking intervention *although no such formal relationship exists between them*, and the adequacy of this practical representation will then have to be weighed.[50]

This elimination of a textual equitable and legal distinction, and merger of both roots into section 24(a)(2), fundamentally altered analyses of Rule 24 and Rule 24 case law. Indeed, the drafter of the 1966 Amendment, Professor Benjamin Kaplan, noted that the purpose of the amendment was to "drive beyond the narrow notion of an interest in specific property."[51]

Cascade Natural Gas Corp. v. El Paso Natural Gas Co. (*Cascade*),[52] decided one year after the 1966 Amendment, marked a shift in Rule 24 interpretation.[53] In *Cascade*, the Proposed Intervenors were gas companies that claimed an injury due to an illegal merger and monopoly by their competitors.[54] The Court first noted that, at equity, "those 'adversely affected' by a disposition of property would usually be those who have [a real] interest in the property."[55] The Proposed Intervenors had no real property interest in the companies that merged; instead, they had an interest in not seeing their businesses suffer as a result of the merger.[56] The Court allowed intervention, thereby implicitly accepting the Advisory Committee's Note to the 1966 Amendment.[57] In so doing, the Court stated that intervention could no longer be confined "exclusively" to those with a

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49. This decision came after the Supreme Court, in *Sam Fox Publishing Co. v. United States*, exposed a logical fallacy with Rule 24—if representation is inadequate, a party would not be bound by a judgment in a later assertion of res judicata, thus making it "literally" impossible to intervene under the former rule. *See* FED. R. CIV. P. 24 advisory committee's note to 1966 Amendment; WRIGHT & MILLER, *supra* note 24, § 1903; Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 694 (1961).

50. FED. R. CIV. P. 24 advisory committee's note to 1966 Amendment (emphasis added).

51. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 405 (1967). Professor Kaplan noted that this was his main intention, in addition to dealing with the *Sam Fox* fallacy. *Id.*; *see supra* note 49.

52. 386 U.S. 129 (1967).

53. *Id.*; *see also* Flynn v. Hubbard, 782 F.2d 1084, 1087 (1st Cir. 1986) ("The [*Cascade*] Court explored the differences between the present rule and its predecessor.").

54. *Cascade*, 386 U.S. at 132–33.

55. *Id.* at 133.

56. *Id.* at 135.

57. *Id.* at 142–43.

property interest.[58] In other words, the Court determined that intervention must no longer be read in the narrow terms of a real property or property-like right.[59]

After the 1966 Amendment and *Cascade*, a party could allege an intangible harm rather than a right grounded in real property. Indeed, the *Cascade* Court was the first to shape the two requirements of the current Rule 24(a)(2) that together make up the burden to intervene as of right: a protectable interest[60] and adequacy of representation.[61] The *Cascade* Court held that intervention should be granted because Rule 24(a)(2) "recognizes as a proper element in intervention 'an interest' in the 'transaction which is the subject of the action,'" and because the existing parties "have fallen far short of representing . . . [Proposed Intervenors'] interests."[62]

The *Cascade* majority's embrace of the new Rule 24 was not accepted by all of the judiciary. In his dissent to *Cascade*, Justice Stewart expressed concern about allowing intervention when a Proposed Intervenor alleges simply a "general" harm as her interest in the litigation.[63] Following the Court's decision in *Cascade*, several courts also feared that intervention would begin to be permitted "by anyone at any time."[64]

Despite these concerns, the only time the Court has read a Proposed Intervenor as stretching the burden of Rule 24(a)(2) "too far" was in *Donaldson v. United States*.[65] In *Donaldson*, the Court applied a loose Rule 24(a)(2) burden to a fact-specific tax context, in a judgment which was later superseded by a tax statute.[66] Any initial concern about the scope

58. *Id.* at 133.

59. *See id.* at 133–34 (noting that the original purpose of Rule 24 was to allow intervention only where "right[s] . . . would be lost absent intervention," as with disputes over title to property).

60. The *Cascade* Court described a sufficient-interest requirement, *Cascade*, 386 U.S. at 132–36, which was later clarified by the Court in *Donaldson v. United States* to be a "significantly protectable interest." Donaldson v. United States, 400 U.S. 517, 531 (1971); *see also* Gunter, *supra* note 17, at 657–59.

61. *See* Rule 24(a)(2) as drafted today, *infra* note 69. Although the text of Rule 24 is facially a four-factor test, these two factors have caused the most unrest between circuits and are considered the most complex. *See* Gunter, *supra* note 17, at 657, 660; *Donaldson*, 400 U.S. at 531. Therefore, together they make up the burden on Proposed Intervenors. *See id.*

62. *Cascade*, 386 U.S. at 129, 135–36.

63. *Id.* at 147 (Stewart, J., dissenting) ("These general and indefinite interests do not even remotely resemble the direct and concrete stake in litigation required for intervention of right.").

64. Hobson v. Hansen, 44 F.R.D. 18, 25 (D.D.C 1968) ("But *Cascade* should not be read as a *carte blanche* for intervention by anyone at any time."); *see also* Diamond v. Charles, 476 U.S. 54, 68 n.21 (1986) (citing United States v. Am. Tel. & Tel. Co., 642 F.2d 1285 (D.C. Cir. 1980)) (arguing that intervention is proper only if the would-be intervenor has an interest in the outcome of the suit different from that of the public as a whole); *cf.* New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 690 F.2d 1203, 1210 n.5 (5th Cir. 1982) ("Yet in [*Cascade*], the Supreme Court recognized that the current, 1966 version of Rule 24 expands the opportunities for intervention.").

65. 400 U.S. 517, 528 (1971).

66. *Compare Donaldson*, 400 U.S. at 528, *with* Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 316 (1985).

of the Rule 24(a)(2) interest and adequacy of representation requirements seems to have disappeared in recent years.[67]

C. Court Application and Typical Use

Since its implementation and the *Cascade* Court's demarcation of the interest and adequacy of representation burden, courts have translated Rule 24 into a four-factor test.[68] To intervene as of right under Rule 24(a),[69] a party's motion to intervene must: (1) be timely; (2) claim a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) be so situated that the disposition of the action may, as a practicable matter, impair or impede the applicant's ability to protect that interest; and (4) demonstrate that the existing parties to the litigation fail to adequately represent the applicant's interest.[70] All four elements are required to intervene.[71] Therefore, succeeding on a motion to intervene as of right should theoretically be a high burden to pass. In reality, it is not.[72]

This Note will focus on courts' analysis of elements (2) and (4): a significantly protectable interest and adequacy of representation. These two elements together have, in practice, formed the burden a Proposed Intervenor must meet under Rule 24(a)(2) to intervene as of right.[73] Beyond the fact that these are the elements the *Cascade* Court focused on,[74] later courts have noted that these are the most complex and malleable factors, as well as theoretically the most difficult to prove.[75]

II. WHY INTERVENE?

Intervention is an attractive option to litigants due to its advantages over two similar procedural devices: amicus curiae briefs and joinder.

67. *See* discussion *infra* Section III.B.

68. 2 MOORE'S MANUAL: FEDERAL PRACTICE AND PROCEDURE § 14.100 (2019).

69. Rule 24(a) reads:

> (a) INTERVENTION OF RIGHT. On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

FED. R. CIV. P. 24(a). This Note focuses on Rule 24(a)(2).

70. *See* FED. R. CIV. P. 24(a)(2); WRIGHT & MILLER, *supra* note 24, § 1903.

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

72. *See infra* Parts III–V.

73. *See supra* text accompanying notes 61–62.

74. Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co., 386 U.S. 129, 132 (1967).

75. *See* Donaldson v. United States, 400 U.S. 517, 531 (1971) (coining the term "significantly protectable interest"); Gunter, *supra* note 17, at 657, 660–61 (describing the deep-seated circuit split as to which interests qualify as "significantly protectable" and noting that the adequacy of representation requirement is "the most complex" of the four).

First, and most importantly, Rule 24 intervention provides an opportunity for Proposed Intervenors to make politico-ideological statements in court with an original litigant status.[76] Such statements have been traditionally reserved for amicus briefs, in which the writing amicus is not considered an original litigant.[77] Second, the structure of how to enter a lawsuit under Rule 24 and the loose supplemental jurisdiction requirements that apply as to who may intervene give Rule 24 intervention a "distinct advantage" over other procedural devices, such as joinder.[78]

A. Differences from Amicus Briefs

Unlike intervention, in which a Proposed Intervenor must demonstrate a lack of "adequate representation" as well as a "significantly protectable interest" in the subject matter of the suit, amici bring up relevant matters not before the court.[79] For this reason, amicus briefs have long been considered a valuable forum to deliver political protests or "ideological preferences" before the court.[80] This is not to say that amici seek different relief than original litigants.[81] In fact, amici must align with a party "whose position the amicus supports."[82] The Federal Rules of Appellate Procedure additionally have procedures in place to ensure that amicus arguments are truly outside perspectives supporting an original party's desired relief, rather than "duplicative arguments" to those of an original party.[83] This requirement is echoed in the Supreme Court's rules.[84]

Further, there are no res judicata concerns with amici as there are with intervenors.[85] Amici are not parties to the proceeding and have no court-recognized legally protectable rights in the underlying litigation, nor must

76. *See supra* text accompanying note 27.

77. *See* sources cited *supra* note 10.

78. Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1086 (1985) [hereinafter Freer, *Rethinking*].

79. *Compare* FED. R. APP. P. 29, *with* FED. R. CIV. P. 24(a)(2).

80. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 748, 831–34 (2000).

81. FED. R. APP. P. 29 advisory committee's note to 2010 amendment.

82. *Id.* It bears noting that this standard for amici, who do not require standing, is echoed by the standard set in place for *intervenors* to demonstrate standing in *Town of Chester*. 137 S. Ct. 1645 (2017); *see infra* Section V.A.

83. FED. R. APP. P. 29 advisory committee's note to 2010 amendment.

84. *See* SUP. CT. R. 37 ("An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.").

85. *See* 5 C.F.R. § 1201.34(d), (e)(5) (2012); *see also* Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1274–76 (1992).

they demonstrate Article III standing.[86] Therefore, any claim they may have would not be precluded by res judicata in later actions. On the other hand, by granting intervention, courts recognize that an intervenor has a legally protectable right and award intervenors with original litigant status.[87] Once an intervenor is awarded such status, they are precluded from re-litigating their claims under principles of res judicata.[88]

Despite their differences, both intervenors and amici have the potential to play pivotal roles in a given litigation. In *City of Lockhart v. United States*, the intervenors were not just sideline litigants, but rather presented the only argument before the Supreme Court.[89] In all cases, intervenors are able to present oral argument before courts without leave, as they are considered original litigants.[90] Alternatively, amici are "friends of the court"[91] who argue without a direct stake in the case, and may only present oral argument if a court asks them to or grants them leave.[92] An automatic right to appeal further attaches to denial of a motion to intervene as of right, while amici have no such involvement in the outcome of the case.[93] However, the outside perspectives raised by amicus briefs can be weighed equally with arguments raised by original litigants, thus allowing amici to play as critical of a role in litigation as intervenors can.[94] Indeed, at the Supreme Court level, "the Court decided [*Mapp v. Ohio*] based on an argument put forth by an amicus curiae but not addressed by either party."[95] Amicus briefs remain important today, as amicus "briefs were

86. *See* 5 C.F.R. § 1201.34(e)(5) (2012).

87. 5 C.F.R. § 1201.34(d) (2012).

88. *See Res Judicata*, BLACK'S LAW DICTIONARY (11th ed. 2019).

89. 460 U.S. 125, 129–30 (1983).

90. *See, e.g.*, *Oral Argument*, U.S. CT. APPEALS FOR FOURTH CIR. (July 2019), https://www.ca4.uscourts.gov/appellateprocedureguide/Calendaring___Argument/APG-oralargument.html [https://perma.cc/WFE6-GUQT].

91. *See Amicus Curiae*, BLACK'S LAW DICTIONARY (11th ed. 2019).

92. *See* Stephen G. Masciocchi, *What Amici Curiae Can and Cannot Do with Amicus Briefs*, COLO. LAW., Apr. 2017, at 23, 24.

93. *See, e.g.*, Diamond v. Charles, 476 U.S. 54, 62–64 (1986). Given these differences, states' choice to file under Rule 24(a)(2)—rather than introduce their argument under relevancy grounds as amici—demonstrates that the state recognizes the issue or interest as important and protectable for its citizens. *See, e.g.*, Order, Darweesh v. Trump, No. 1:17-cv-00480-CBA (E.D.N.Y. Feb. 10, 2017), ECF No. 71 (granting motion to intervene filed by the New York State Attorney General to dispute executive order Protecting the Nation from Foreign Terrorist Entry into the United States (Executive Order)); Order, Aziz v. Trump, No. 1:17-cv-00116-LMB-TCB (E.D. Va. Feb. 3, 2017), ECF No. 37 (granting motion to intervene by the Commonwealth of Virginia and two affected individuals to dispute the Executive Order).

94. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 77 n.173 (1991) (citing Mapp v. Ohio, 367 U.S. 643 (1961)); *see also* Brief of *Amici Curiae* River City Gender Alliance and ACLU of Texas in Opposition to Plaintiffs' Motion for Preliminary injunction, Franciscan All. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (No. 7:16-cv-00108-O) (amicus brief filed by Proposed Intervenors while they were waiting for a decision on their motion to intervene).

95. Elhauge, *supra* note 94, at 77 n.173.

cited or referred to in 18 percent of the opinions rendered by the Court or by individual Justices over the last decade."[96] During the 2017–18 term alone, amicus brief filings set a new record: amicus briefs were filed in all sixty-three cases heard by the Court, with an average of fourteen briefs filed per case.[97] This has led to a total of roughly eight hundred amicus briefs filed per term.[98] This record is reflective of a trend, as these numbers indicate an 800 percent increase in amicus brief filings since the 1950s and a 95 percent increase in amicus brief filings since 1995.[99] In addition to their influence on Court decisions and their increasing filing frequency, amicus briefs are also important at the threshold level and are "influential in determining which cases the Court will hear."[100]

To be sure, some commentators and judges take issue with politico-ideological advocacy in amicus briefs,[101] even though amici are not considered original litigants like intervenors are.[102] Critics of amicus briefs have rebuked them for "treat[ing] the Court as if it were Congress considering a piece of legislation, not a judicial body deliberating points of law."[103] In *Jaffee v. Redmond*,[104] Justice Scalia challenged amicus briefs as a "form of interest group lobbying" by self-interested organizations.[105] Despite these arguments, the majority of practitioners view such politico-ideological arguments as appropriate in the amicus context in order to "provide valuable assistance" and background information to courts, which the original parties have not already supplied.[106]

Critics' fears about amicus briefs will not materialize as long as courts forbid litigants from "mold[ing] the litigating amicus curiae into a vessel enabling third parties, lacking the requisite standing, to enter into federal courts and directly participate in a given litigation."[107] This, critics argue, would provide the "mystical gateway" to original litigant status that public

96. *Amicus Briefs in the Supreme Court*, MAYER BROWN, https://www.mayerbrown.com/en/perspectives-events/publications/no-date/amicus-briefs-in-the-supreme-court [https://perma.cc/24SQ-29DF].

97. *Professors' Amicus Curiae Briefs Shape the Law*, COLUM. L. SCH. (Jan. 18, 2019), https://www.law.columbia.edu/news/2019/01/supreme-court-amicus-curiae-briefs [https://perma.cc/EL2Z-XMAC].

98. Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902 (2016).

99. *Id.*

100. *Id.* at 1901.

101. *See e.g.*, Kearney & Merrill, *supra* note 80.

102. *Compare* FED. R. CIV. P. 24, *with* FED. R. APP. P. 29.

103. Kearney & Merrill, *supra* note 80, at 756 n.36 (quoting Lee Epstein, *Courts and Interest Groups*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 335, 349 (John B. Gates & Charles A. Johnson eds., 1991)).

104. 518 U.S. 1 (1996).

105. Kearney & Merrill, *supra* note 80, at 746.

106. *Id.* at 745.

107. Lowman, *supra* note 85, at 1281.

interest attorneys seek.[108] Of course, in practice, the amicus brief has not been molded in such a way; instead, Rule 24 intervention has.[109] This Note maintains that amicus briefs remain the appropriate, and most effective, forum for outside politico-ideological perspectives.

B. Differences from Rule 19 and Rule 20 Joinder: Safeguarding Truth, Justice, and Efficiency

Although third-party intervention has its origins in real property, its advantages mirror those of FRCP 19 (Rule 19)[110] and FRCP 20 (Rule 20)[111] general litigation joinder. Rules 19 and 20 support inclusive packaging because including every party with an interest in the litigation in one suit "eliminates duplicative litigation" and is therefore more efficient and expends fewer judicial resources.[112] In the case of social justice litigation, this advantage is especially prevalent because the efficiency interest is "forward-looking" and "turn[s] on similar legal questions [rather] than various divergent factual disputes."[113] Moreover, inclusive packaging in litigation can help ensure that all absentees "gain notice of the pending suit and of [their] right to intervene."[114] In that sense, under the logic of joinder, having a low Rule 24(a)(2) burden would support res judicata because theoretically all parties should receive notice of a pending lawsuit.

However, having a low Rule 24(a)(2) burden actually defeats the purpose of res judicata. The logic of joinder does not apply in the Rule 24 context. This is because with joinder, either the original parties or the court invite another party into the litigation. With intervention, the intervening third party invites itself into the litigation.[115] Given that Rule 24 Proposed Intervenors selectively choose the lawsuits into which they will intervene, and may now do so through a very generalized "interest" in the lawsuit, the amount of people who may intervene is limitless.[116] Further, jurisdictionally, there is no barrier as to who may intervene—other than the complete diversity requirement for lawsuits brought under diversity jurisdiction—because courts only need supplemental jurisdiction

108. *Id.*
109. *See* discussion *infra* Section V.A.
110. FED. R. CIV. P. 19.
111. FED. R. CIV. P. 20.
112. Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 813 (1989) [hereinafter Freer, *Avoiding*].
113. Gunter, *supra* note 17, at 663.
114. Freer, *Avoiding*, *supra* note 112, at 841.
115. *Compare* FED. R. CIV. P. 19, *and* FED. R. CIV. P. 20, *with* FED. R. CIV. P. 24.
116. *See* discussion *infra* Parts III–V.

over cases in order for Proposed Intervenors to join them.[117] Given the structure of how to intervene and the lack of jurisdictional limits, intervention faces an overinclusiveness issue and getting notice of a lawsuit to those in another state is practically more difficult than with joinder.[118] Although inclusive packaging is an advantage to those seeking to intervene on a massive, politico-ideological scale, the low Rule 24 burden defeats the goals of res judicata.[119] While truth may be protected because all voices are brought together, justice is shortchanged due to notice issues. Further, any efficiency advantages with Rules 19 and 20 are altogether lost due to the structure of who may intervene under Rule 24 and the lack of jurisdictional limits.

III. MOTIONS TO INTERVENE IN THE SOCIAL JUSTICE CONTEXT: COURTS EASE THE RULE 24(A)(2) BURDEN AND CLOSE THE GAP BETWEEN SUBSTANCE AND PROCEDURE

For decades after *Cascade*, courts struggled to articulate what exactly constituted a significantly protectable interest and adequacy of representation for the Rule 24(a)(2) burden.[120] As a result of these difficulties and differences of opinion, courts' interpretations of what connotes a significantly protectable interest and adequacy of representation under Rule 24(a)(2) grew even broader.[121] This loosened burden made intervention under Rule 24(a)(2) very attractive to Proposed Intervenors.

117. 28 U.S.C. § 1367 (2012); Freer, *Rethinking*, *supra* note 78, at 1087; *see also* Jeffrey L. Rensberger, Note, *Ancillary Jurisdiction and Intervention Under Federal Rule 24: Analysis and Proposals*, 58 IND. L.J. 111, 112 (1982). The looser supplemental jurisdiction requirement can be traced to Rule 24's original requirement that to intervene, a party must demonstrate that it would be bound by the judgment. *Id.* at 118; *cf. Jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining ancillary jurisdiction as a court's jurisdiction to adjudicate claims properly before the court and over which "the court would not otherwise have jurisdiction" and noting that "[t]he concept of ancillary jurisdiction has now been codified . . . in the supplemental-jurisdiction statute").

118. *See* discussion *infra* Section V.B.

119. This is because social justice intervenors use the procedural advantage to band together in large numbers to intervene. *See, e.g.*, text accompanying and sources cited *infra* notes 150, 168, 176, 192, 196, 200, 245.

120. *See* sources cited *supra* notes 63–64.

121. *See, e.g.*, Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173, 1175 (9th Cir. 2011); *see also id.* at 1176 (construing a significantly protectable interest as an "interest [that] is protectable under some law").

A. When the Rule 24(a)(2) Burden Began to Broaden

The first successful social justice intervention motion at the Supreme Court occurred in 1998 in *Grutter v. Bollinger*.[122] *Grutter* was a reverse affirmative action lawsuit brought by a white law student against the University of Michigan Law School alleging that its affirmative action policy was discriminatory.[123] A group of forty-one minority students moved to intervene to protect their interest in accessing higher education.[124] The District Court denied the motion on the grounds that the interest was not sufficient for intervention,[125] but the Sixth Circuit overturned the decision.[126] The Sixth Circuit emphasized that the burden to show a significantly protectable interest and inadequate representation was low and accepted a "rather expansive notion of the interest sufficient to invoke intervention of right."[127] The Sixth Circuit also held that intervenors must only show that the representation "*might* be" inadequate.[128] The Supreme Court affirmed.[129]

Lower courts both contributed to and followed the Supreme Court's precedent. For example, the Ninth Circuit defined significantly protectable interest as merely "a measure [the Proposed Intervenor] has supported."[130] Similarly, the Tenth, Second, and Eighth Circuits each referred to the burden as "minimal."[131] The Eleventh Circuit adopted a broad interest standard of seeking to "vindicat[e] important personal interests"[132] and that Proposed Intervenors need only "some" evidence to show inadequacy of representation.[133]

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122. Grutter v. Bollinger, 539 U.S. 306 (2003); *see also* Joanne Villanueva, *The Power of Procedure: The Critical Role of Minority Intervention in the Wake of* Ricci v. DeStefano, 99 CALIF. L. REV. 1083, 1088 (2011). One prior public interest intervention motion had been filed in the reverse affirmative action context, but was filed too late and denied as moot. *Id.* at 1089–90 (citing Bakke v. Regents of Univ. of Cal., 553 P.2d 1152 (Cal. 1976)). *Bakke* was a state action, filed under California's state intervention rule, which though entirely discretionary, is analogous to Rule 24(a)(2). *Id.* at 1089 n.36.

123. *Grutter*, 539 U.S. at 316–17; *see also* Gratz v. Bollinger, 183 F.R.D. 209 (E.D. Mich. 1998), *rev'd sub nom.* Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999).

124. *Grutter*, 188 F.3d at 397.

125. *Gratz*, 183 F.R.D. at 213.

126. *Grutter*, 188 F.3d at 400–01.

127. *Id.* at 398 (quoting Mich. State AFL–CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997)).

128. *Id.* at 400.

129. Grutter v. Bollinger, 539 U.S. 306, 343–44 (2003).

130. Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995).

131. San Juan Cty. v. United States, 420 F.3d 1197, 1210 (10th Cir. 2005) (quoting Utah Ass'n of Ctys., 255 F.3d 1246, 1253 (10th Cir. 2001)); U.S. Postal Serv. v. Brennan, 579 F.2d 188, 193 (2d Cir. 1978); Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action, 558 F.2d 861, 869 (8th Cir. 1977) (quoting Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972)).

132. Dillard v. Baldwin Cty. Comm'rs, 225 F.3d 1271, 1278 (11th Cir. 2000) (quoting Meek v. Metro. Dade Cty., 985 F.2d 1471, 1480 (11th Cir. 1993)).

133. Clark v. Putnam Cty., 168 F.3d 458, 461 (11th Cir. 1999).

B. To Infinity and Beyond: The Rule 24(a)(2) Burden Becomes Nearly Unlimited in Scope

As discussed in *Donaldson*, the one time a Court majority has spoken about an interpretation of the Rule 24(a)(2) significantly protectable interest portion of the burden going "too far" was in a fact-specific taxpayer context.[134] The decision was later overturned by a tax statute.[135] As to the adequacy of representation portion of the burden, the Court has adopted a favorable attitude towards intervention. In line with later circuit court decisions,[136] the Court held in *Trbovich v. United Mine Workers of America*[137] that Proposed Intervenors satisfy the "minimal" adequate representation prong of the burden by showing "[their] representation . . . 'may be' inadequate."[138]

Indeed, in *Wilderness Society v. United States Forest Service*,[139] in which Proposed Intervenors were an environmental group alleging environmental impact statement violations against the Forest Service under the National Environmental Policy Act, the Ninth Circuit expanded even further the increasingly broad interpretation of Rule 24's already minimal requirements. The court broadly defined "interest" simply as an interest under "some law" and "representation" as parties with "a relationship."[140]

Similarly, as the burden grew gradually lower, courts began to use words traditionally associated with an amicus brief to define the Rule 24 burden. In *Dumont v. Lyon*,[141] both individual intervenors and a religious charity group intervened to protect the Michigan Children's Services Agency's use of religious criteria in placing foster children.[142] Once the court granted the charity's motion to intervene,[143] the plaintiffs opposed the individual intervenors' motions because their interest was purely hypothetical—the "potential . . . [to] lose the opportunity to 'work with trusted social workers—'"[144] and because their interest was adequately

134. Donaldson v. United States, 400 U.S. 517, 528 (1971).

135. 26 U.S.C. § 7609 (2012); *compare Donaldson*, 400 U.S. at 528, *with* Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 316 (1985).

136. *See* sources cited *supra* notes 130–133.

137. 404 U.S. 528 (1972).

138. *Id.* at 538 n.10.

139. 630 F.3d 1173 (9th Cir. 2011).

140. *Id.* at 1176 (quoting Sierra Club v. EPA, 995 F.2d 1478, 1484 (9th Cir. 1993)).

141. 341 F. Supp. 3d 706 (E.D. Mich. 2018).

142. Motion to Intervene, Dumont v. Lyon, 341 F. Supp. 3d 706 (E.D. Mich. 2018) (No. 2:17-cv-13080-PDB-EAS), ECF No. 18.

143. Order Granting Unopposed Motion of St. Vincent Catholic Charities to Intervene, Dumont v. Lyon, 341 F. Supp. 3d 706 (E.D. Mich. 2018) (No. 2:17-cv-13080-PDB-EAS), ECF No. 31.

144. Order Granting Melissa Buck, Chad Buck, and Shamber Flore's Motion to Intervene at 15, Dumont v. Lyon, 341 F. Supp. 3d 706 (E.D. Mich. 2018) (No. 2:17-cv-13080-PDB-EAS), ECF No.

represented by the charity that had been granted intervention.[145] However, the court allowed intervention on a theory that the individual Proposed Intervenors brought outside "perspectives" to the analysis that other representatives may not have.[146] Problematically, an "outside perspectives" interest standard rings of that afforded an amicus brief, rather than intervention.[147]

When the relief sought is the same as that of the original litigants, and a broad Rule 24 burden is allowed, intervention leads to duplicative litigation. In *Amazon.com LLC v. Lay*,[148] a group of North Carolina citizens intervened in an action brought by Amazon against the North Carolina Department of Revenue.[149] The citizens sought to quiet a North Carolina order that Amazon disclose customers' personal information.[150] The court permitted intervention and explained that potential impairment of First and Fourteenth Amendment rights satisfied the significantly protectable interest under the "some law" requirement.[151] As for adequacy of representation, the court accepted the argument that the Proposed Intervenors would simply "not make the same arguments" that Amazon would.[152] As a result of the order, the intervenors were permitted to file their own intervention complaint,[153] to which the defendant had to file a separate motion to dismiss.[154] The defendant also had to settle separately with the intervenors.[155] This is despite the fact that Amazon sought the same relief as the intervenors: to quash the North Carolina Department of Commerce's order. Indeed, in the settlement order, the court acknowledged that it would be an "unnecessary use of judicial resources to

34. More specifically, the three individual intervenors' hypothetical injuries were in the volunteer work and future foster children, respectively, that they would lose if the religious charity were forced to cease its foster placement program. *Id.* at 17–18.

145. *Id.* at 19.

146. *See id.* at 18–19.

147. *See supra* text accompanying note 79.

148. Amazon.com LLC v. Lay, 758 F. Supp. 2d 1154 (W.D. Wash. 2010).

149. Order Granting Intervenors' Motion to Intervene and Motion to File Complaint in Intervention Using Pseudonyms at 2, Amazon.com LLC v. Lay, 758 F. Supp. 2d 1154 (W.D. Wash. 2010) (No. 2:10-cv-00664-MJP), ECF No. 58.

150. *Id.*

151. *Id.* at 3; *see also* Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173, 1175–76 (9th Cir. 2011).

152. Order Granting Intervenors' Motion to Intervene and Motion to File Complaint in Intervention Using Pseudonyms at 3, Amazon.com LLC v. Lay, 758 F. Supp. 2d 1154 (W.D. Wash. 2010) (No. 2:10-cv-00664-MJP), ECF No. 58.

153. Complaint in Intervention for Declaratory and Injunctive Relief, Amazon.com LLC v. Lay, 758 F. Supp. 2d 1154 (W.D. Wash. 2010) (No. 2:10-cv-00664-MJP), ECF No. 61.

154. North Carolina Motion to Dismiss Complaint in Intervention (Fed. R. Civ. P. 12), Amazon.com LLC v. Lay, 758 F. Supp. 2d 1154 (W.D. Wash. 2010) (No. 2:10-cv-00664-MJP), ECF No. 64.

155. Stipulated Judgement Re Complaint in Intervention, Amazon.com LLC v. Lay, 758 F. Supp. 2d 1154 (W.D. Wash. 2010) (No. 2:10-cv-00664-MJP), ECF No. 82.

further litigate Intervenors' overlapping claims [with those of Amazon]."[156]

These trends are problematic because, as explicitly acknowledged by courts, litigation costs and judicial energy are unnecessarily expended for arguments that can be made by an original party or in an amicus brief.[157] As the Fourth Circuit noted, "[w]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented."[158] This, of course, would make it so any party seeking the same relief as an original litigant, which is the standard set out in *Town of Chester* for intervenors to avoid showing independent standing, [159] would fail the interest and adequacy representation prongs of the burden to intervene. When an outside party seeks the same relief as an original litigant, as is often the case in social justice actions, [160] an amicus brief is the appropriate forum to supply additional perspectives.[161] Indeed, this is already the desired standard for an amicus: "coordination between the amicus and the party whose position the amicus supports."[162]

Courts' expansion of the Rule 24 burden led to a flood of litigation[163] by social justice parties seeking to intervene.[164] With each intervention

156. *Id.* at 2.

157. See discussion of the removal of the independent standing requirement when a Proposed Intervenor seeks the same relief as an original party, *infra* Section V.A.

158. Virginia v. Westinghouse Elec. Corp., 542 F.2d 214, 216 (4th Cir. 1976).

159. *See infra* Section V.A.

160. *See supra* text accompanying notes 16–17.

161. *See supra* text accompanying notes 79–83.

162. FED. R. APP. P. 29 advisory committee's note to 2010 amendment; *see also supra* text accompanying note 82.

163. *See, e.g.*, Brief in Support of Proposed Intervenors Stand with Trans and Williamston High School Gay-Straight Alliance's Motion to Intervene as Defendants Pursuant to Fed. R. Civ. P. 24(B), Reynolds v. Talberg, No. 1:18-cv-00069-PLM-PJG (W.D. Mich. Mar. 12, 2018), ECF No. 9 (seeking intervention on behalf of lesbian, gay, bisexual, and transgender students to uphold anti-bullying and harassment policy in their school district); Motion to Intervene as Defendant and Memorandum in Support, Parents for Privacy v. Dall. Sch. Dist. No. 2, 326 F. Supp. 3d 1075 (D. Or. 2018) (No. 3:17-cv-01813-HZ), ECF No. 24 (seeking intervention on behalf of transgender students and parents to uphold the validity of school district's safety plan for student bathroom use); Motion to Intervene of River City Gender Alliance and ACLU of Texas, Franciscan All. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (No. 7:16-cv-00108-O), ECF No. 7 (seeking intervention on behalf of 150 transgender individuals receiving care at Catholic hospitals in order to uphold the validity of U.S. Department of Health and Human Services' "Nondiscrimination in Health Programs and Activities" regulation).

164. It bears noting, however, that although the loosened significantly protectable interest and adequacy of representation requirements, coupled with the removal of the independent standing requirement, heavily favor social justice intervenors, they also favor intervenors seeking to quiet public interest actions. *See, e.g.*, Motion of Republican Congressional Delegation, Ohio Voters, and Republican Party Organizations to Intervene, Ohio A. Philip Randolph Inst. v. Smith, No. 1:18-cv-00357-TSB (S.D. Ohio July 20, 2018), ECF No. 42; Memorandum in Support of Motion of Republican Congressional Delegation, Ohio Voters, and Republican Party Organizations to Intervene, Ohio A. Philip Randolph Inst. v. Smith, No. 1:18-cv-00357-TSB (S.D. Ohio July 20, 2018), ECF No.

motion, various public interest Proposed Intervenors publicize their filings on social media, generating politico-ideological support.[165] Proposed Intervenors use social media to engage community support of the motion before the court—much like lobbyists do with legislation before Congress.[166] This goal could easily be accomplished instead through the filing and publicizing of an amicus brief. An amicus brief would still allow social justice advocates' voices to be heard in court and advertised on social media, but would not unnecessarily waste judicial resources and interfere with other doctrines.[167] Indeed, in one case, a social media post advertised a 240-person effort to intervene and encouraged other supporters to intervene as well, telling others "[i]t's . . . NOT too late to Intervene [sic]."[168] This type of situation is where massive-scale intervention begins to tread dangerously close to skirting the rigorous requirements of FRCP 23 (Rule 23) class actions.[169]

IV. INTERVENTION TO MAKE POLITICAL STATEMENTS

In recent years, courts have allowed a nearly limitless definition of "significantly protectable interest" and "adequacy of representation" in determining whether a party may intervene.[170] As such, Proposed Intervenors and groups of intervenors have recently begun to use the procedural tool to rally political support over social media and on public interest group websites.[171] This trend most recently spread to immigration

43; Order Granting Motion for Intervention (DKT. 42), Ohio A. Philip Randolph Inst. v. Smith, No. 1:18-cv-00357-TSB (S.D. Ohio Aug. 16, 2018), ECF No. 64 (allowing intervention by Ohio Republican voters in lawsuit by Democratic Party organizations regarding partisan gerrymandering issue); Juliana v. United States, No. 6:15-cv-1517-TC, 2016 WL 183903, at *4 (D. Or. Jan. 14, 2016) (permitting industrial organizations to intervene in lawsuit brought by environmental activists regarding fossil fuel emissions dispute simply because their interest was "broader" than that of government parties).

165. *See, e.g.*, Equality Case Files, FACEBOOK (June 30, 2017), https://www.facebook.com/EqualityCaseFiles/posts/franciscan-alliance-v-cochran-acluriver-city-gender-alliances-5th-circuit-appeal/1352627471439111/ [https://perma.cc/H4LW-XVVA] (publicizing motion to intervene filed in *Franciscan Alliance*, discussed *supra* note 163, which garnered over 13 likes, comments, and shares); Protest SeaWorld, FACEBOOK (Feb. 29, 2016), https://www.facebook.com/protestseaworldsandiego/posts/aldf-and-sscs-file-motion/479366265581709/ [https://perma.cc/ML3X-DE3T] (publicizing motion to intervene by the Animal Legal Defense Fund, gaining 14 likes and a share).

166. *See infra* text accompanying note 259.

167. See discussion of interference with standing, class actions, res judicata, and jurisdiction, *infra* Part V.

168. Preserve Roanoke, FACEBOOK (Nov. 28, 2015), https://www.facebook.com/PreserveRoanoke/posts/it%E2%80%99s-really-not-too-late/1061434510543520/ [https://perma.cc/6M38-9RLN] (advertising to members, "[f]irst, a big thank you to the 240 people who filed a Motion to Intervene," and second, letting others know "[i]t's . . . NOT too late to Intervene [sic]").

169. *See* discussion *infra* Section V.B.

170. *See* discussion *supra* Section III.B.

171. *See* sources cited *supra* notes 163–165, 168.

intervention motions.[172] In addition to the increased filing of intervention motions by social justice intervenors, those seeking to quiet public interest actions, as well as the government, have also taken advantage of the lower burden to intervene.[173] This has led to endless, contentious intervention motions crowding the stage of the original litigation, which has created what is essentially interest group lobbying and political debate under the auspices of the federal courts.[174]

A. Immigration Intervention Motions During the Obama and Trump Administrations

Individuals, in groups sometimes encompassing hundreds of people,[175] have intervened in a wide range of immigration-related cases. None have been dismissed for a lack of interest or adequacy of representation.[176] These intervenors thus make highly political statements, previously reserved for amici, as original litigants before the court. The burden is now too low, and massive scale politico-ideological intervention is not only impractical but also clashes with doctrines of standing, class actions, res judicata, and jurisdiction.[177]

As early as 2012, the Mexican American Legal Defense and Education Fund (MALDEF) began filing motions to intervene under Rule 24 on behalf of various individual documented and undocumented immigrants

172. *See* sources cited *infra* note 206.

173. *See infra* Part IV.B.

174. *See, e.g.*, text accompanying and sources cited *supra* note 103 (discussing critics' fear of procedural devices being used to allow interest groups to lobby before the courts); *see also infra* note 257 (discussing the rigorous requirements behind the standing doctrine, which was designed partly to ensure that parties allege a concrete, rather than hypothetical, injury).

175. *See, e.g.*, text accompanying and sources cited *infra* notes 192, 196.

176. All motions have either been granted as originally filed, rendered moot due to dismissal of the underlying suit, or granted on appeal. *See, e.g.*, Opposed Motion for Leave to Intervene, Alabama v. U.S. Dep't of Commerce, No. 2:18-cv-00772-RDP (N.D. Ala. July 12, 2018), ECF No. 6 (seeking intervention on behalf of a group of named individuals to challenge the State of Alabama's suit, which seeks an order declaring undocumented immigrants as non-persons under the Constitution); Petition to Intervene on Behalf of Individuals Currently and Formerly Detained at Berks County Residential Center, *In re* Berks Cty. Residential Ctr., BHA No. 061-16-0003 (Apr. 9, 2018) (groups of named parents and children requesting intervention on behalf of thirty-five detainees seeking an order to cease operation of the detention center pursuant to Pennsylvania Department of Human Services regulations); Intervenor-Defendants' Motion to Intervene, Tennessee v. U.S. Dep't of State, No. 1:17-cv-01040-STA-egb (W.D. Tenn. June 2, 2017), ECF No. 25 (Tennessee Immigrant and Refugee Rights Coalition, Bridge Refugee Services, Inc., and Nashville International Center for Empowerment seeking intervention on behalf of their thousands of members to support efforts to block refugee resettlement in Tennessee). *Berks County Residential Center* was brought under the Pennsylvania State version of Rule 24, which has a nearly identical interest and adequacy of representation burden. *See* 1 PA. CODE § 35.28 (2019).

177. *See infra* Part V.

living in the United States.[178] While MALDEF supplies Proposed Intervenors with staff attorneys and representation for their day in court, it is the individuals themselves who are named in the intervention complaints and whose rights are on the line.[179]

One such MALDEF intervention took place in *Texas v. United States* (*Texas I*).[180] In *Texas I*, the State of Texas filed a lawsuit against the United States to challenge President Obama's implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program.[181] MALDEF sought intervention on behalf of three undocumented immigrant mothers.[182] In its press release, MALDEF acknowledged that Texas's lawsuit was motivated by politics, and that intervention was the strongest move they could make, likely due to its procedural advantages over amicus briefs.[183] The release stated: "While this is *plainly nothing but a political case* filed by forces seeking to demonize immigrants and obstruct national progress, it ought not go forward without [intervention] from some of those most affected by our current antiquated immigration system . . . ."[184]

The Honorable Andrew S. Hanen of the Southern District of Texas denied the intervention motion in *Texas I*, but was reversed on appeal by the Fifth Circuit.[185] The Fifth Circuit examined the significantly protectable interest and adequacy of representation burden requirements of Rule 24(a)(2) in granting intervention.[186] The Fifth Circuit construed significantly protectable interest as "a stake in the matter that goes beyond a generalized preference that the case come out a certain way" and

178. MALDEF's first motion to intervene was filed on behalf of a group of seven Latino voters. *See* Texas v. Holder, 888 F. Supp. 2d 113 (D.D.C. 2012), *vacated and remanded on other grounds by* Texas v. Holder, 570 U.S. 928 (2013). The court granted the motion without any consideration of the Rule 24(a)(2) burden, simply stating: "We also grant[] motions to intervene filed by several individual Texas voters." *Id.* at 119.

179. Therefore, regardless of whether MALDEF has an interest in the litigation because immigration is a "measure it has supported," MALDEF is not the Proposed Intervenor. See discussion in *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995).

180. Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

181. *Id.* The DAPA program aimed to provide resources to undocumented immigrants who were parents of citizens or lawful permanent residents. U.S. CITIZENSHIP & IMMIGRATION SERVS., 2014 EXECUTIVE ACTIONS ON IMMIGRATION (2015).

182. *See Texas I*, 86 F. Supp. 3d 591.

183. Press Release, Mexican Am. Legal Def. & Educ. Fund, MALDEF Seeks to Intervene on Behalf of Individuals Affected by the President's Executive Action on Immigration (Jan. 23, 2015), http://www.maldef.org/news/releases/maldef_seeks_to_intervene_on_behalf_of_individuals_affected_by_exec_action_on_immigration/ [https://perma.cc/CD6R-G447].

184. *Id.* (emphasis added) (quoting Thomas A. Saenz, MALDEF President).

185. Order of Intervention at 16, Texas v. United States, No. 15-40333 (5th Cir. Nov. 9, 2015), Doc. No. 00513264639.

186. *Id.* at 4 ("The States and the Government concede the first and third requirements, but argue that the [Proposed Intervenors] do not satisfy the 'interest' requirement or the 'inadequate representation' requirement. We will address each of these two disputed requirements in turn.").

adequacy of representation as a representation where the Proposed Intervenors' "interests diverge from the putative representative's interests in a manner germane to the case."[187] This interpretation of the Rule 24(a)(2) burden is in line with other circuits' gradual loosening of the requirements.[188]

Still, however, the loosened burden as defined by the Fifth Circuit is more akin to the historic amicus role: providing relevant perspective and background information to the court that may not exactly match that provided by the original parties.[189] Especially in *Texas I* and other social justice cases, amicus briefs often supply the same ability to be heard in court as intervention, but without any of the doctrinal interferences. This is because in social justice cases, the relief is generally the same as that of the original parties—to uphold or quash a law.[190]

In *Lone Star College System v. Immigration Reform Coalition of Texas*, the University Leadership Initiative (ULI), a student organization at the University of Texas at Austin, successfully intervened in an action challenging favorable state financial aid legislation for immigrant students.[191] The trial court granted ULI intervention on behalf of the organization at the Austin campus, as well as on behalf of all undocumented immigrant students at any public college or university in Texas.[192] This included dozens of students attending the University of Texas at Austin.[193] The court accepted an interest standard of seeking "to 'vindicate important rights,'"[194] even though words such as "vindicate" rang of politico-ideological litigation. Such "lobbying" is more appropriate

187. *Id.* at 5, 13.

188. *See* text accompanying and sources cited *supra* notes 130–133.

189. *See supra* text accompanying note 79.

190. *See* GREENBAUM, *supra* note 16, at 23.

191. Motion to Intervene, Lone Star Coll. Sys. v. Immigration Reform Coal. of Tex., No. 14-0031 (Tex. July 1, 2014). *Lone Star* was filed in the Texas Supreme Court under Texas Rule of Civil Procedure 60, but the requirements mimic those of Rule 24 and this Note interprets the case in line with Rule 24. *See* TEX. R. CIV. P. 60; *see also* Jenkins v. Entergy Corp., 187 S.W.3d 785, 797 (Tex. Ct. App. 2006) ("[A] party 'has a justiciable interest in a lawsuit, and thus a right to intervene, when his interests will be affected by the litigation.'" (quoting Jabri v. Alsayyed, 145 S.W.3d 660, 672 (Tex. Ct. App. 2004))).

192. Motion to Intervene Granted, Lone Star Coll. Sys. v. Immigration Reform Coal. of Tex., No. 14-0031 (Tex. Aug. 7, 2014); *see also University Leadership Initiative*, U. TEX. CAMPUS LABS, https://utexas.campuslabs.com/engage/organization/ULI [https://perma.cc/W7C9-S5K7].

193. Motion to Intervene, Lone Star Coll. Sys. v. Immigration Reform Coal. of Tex. at 4, No. 14-0031 (Tex. July 1, 2014); Motion to Intervene Granted, Lone Star Coll. Sys. v. Immigration Reform Coal. of Tex., No. 14-0031 (Tex. Aug. 7, 2014); *see also University Leadership Initiative*, *supra* note 192.

194. Motion to Intervene at 6, Lone Star Coll. Sys. v. Immigration Reform Coal. of Tex., No. 14-0031 (Tex. July 1, 2014) (quoting *In re* Lumbermens Mut. Cas. Co., 184 S.W.3d 718, 723–24 (Tex. 2006)).

for amicus briefs, in which the judge is assumed to be in an ideological vacuum.[195]

Similarly, in *United States v. California*, Proposed Intervenors were hundreds of California domestic violence shelters that serve thousands of immigrant survivors.[196] Proposed Intervenors sought to uphold the validity of the California Values Act, which prevents police from aiding the U.S. Immigration and Customs Enforcement with deportation.[197] The Proposed Intervenors were granted intervention on a theory that their significantly protectable interest was "to express [their] views before the court."[198] Thus, a court again allowed an interest standard more akin to that of an amicus than an intervenor.[199]

A recent immigration intervention decision by Judge Hanen, entered on May 15, 2018, was in a case also captioned as *Texas v. United States* (*Texas II*),[200] which generated significant and unprecedented support on social media. In *Texas II*, a group of twenty-two Dreamers intervened in a lawsuit brought by the State of Texas against the United States seeking an accelerated termination of the DACA program.[201]

A Facebook post by DACA Time,[202] a public interest group unrelated to MALDEF that has not intervened itself, publicized the court's decision to grant the twenty-two Dreamers' intervention motion.[203] The post called the State of Texas and President Donald Trump part of a "lockstep" to see DACA eliminated.[204] For these Dreamers, having their views heard in

195. Kearney & Merrill, *supra* note 80, at 748.

196. Memorandum in Support of Motion to Intervene of the California Partnership to End Domestic Violence and the Coalition for Humane Immigrant Rights at 1, United States v. California, No. 2:18-cv-00490-JAM-KJN (E.D. Cal. May 4, 2018), ECF No. 73-1.

197. *Id.* at 1–2.

198. *Id.* at 5 (quoting United States v. City of Los Angeles, 288 F.3d 391, 398 (9th Cir. 2002)).

199. *See supra* text accompanying note 79.

200. Telephonic Conference Before the Honorable Andrew S. Hanen, Texas v. United States, No. 1:18-CV-00068 (S.D. Tex. May 15, 2018), ECF No. 34.

201. According to Thomas A. Saenz, MALDEF president and general counsel, "[s]uch a collusive lawsuit cannot go forward without intervenors who will actually and vigorously defend the critically important initiative." *MALDEF Files Motion to Intervene on Behalf of Dreamers in Texas-Led Lawsuit Challenging DACA*, MEXICAN AM. LEGAL DEF. & EDUC. FUND (May 8, 2018), http://www.maldef.org/news/releases/2018_05_08_MALDEF_Files_Motion_to_Intervene_on_Behalf_of_Dreamers_in_Texas-Led_Lawsuit_Challenging_DACA/ [https://perma.cc/UM3R-9ZFK]. Proposed Intervenors' alleged significantly protectable interest was "loss of authorized presence in the U.S., as well as loss of educational and economic opportunities." *Id.* Proposed Intervenors alleged inadequate representation because "the Trump administration is unlikely and unwilling to adequately protect their interests given its public opposition to DACA." *Id.*

202. DACA Time assists immigrants applying for DACA programming. *See* DACA TIME, https://www.dacatime.com/ [https://perma.cc/H9UL-8F3J].

203. DACA Time, *Judge Allows Group of "Dreamers" to Formally Fight Texas' Lawsuit to End DACA*, FACEBOOK (May 16, 2018), https://www.facebook.com/dacatime/posts/2135172443431037 [https://perma.cc/44LC-5H28].

204. *Id.* (quoting Julián Aguilar, *Judge Allows Group of "Dreamers" to Formally Fight Texas' Lawsuit to End DACA*, TEX. TRIB. (May 15, 2018), https://www.texastribune.org/2018/05/15/judge-all

court was a critically important way to take a political stance.[205] Other social media posts on immigration intervention demonstrate political activism through hundreds of reactions, comments, and shares.[206] Such comments call for supporters to "fight for this cause" and "be part of this advocacy."[207] Again, these words ring of politico-idealism and lobbying. While engaging every interested voice in court is an important public policy, amicus briefs, which do not shortchange other doctrines and still allow every voice to be heard, provide a more appropriate platform for political advocacy.

B. Government Intervention and Endless, Debate-Style Contentious Intervention

While this Note demonstrates that lowered-burden intervention by social justice intervenors has become increasingly political, another consideration is the FRCP's built-in system for government intervention.[208] Government intervention becomes political no matter who is in charge or what the issue is.[209] Additionally, as discussed, intervention can cut both ways because intervention motions under the lowered burden, while more favorable to social justice intervenors, are filed by those seeking to quiet social justice actions as well.[210] Thus, it is possible to have never-ending, back-and-forth contentious intervention motions.[211]

In fact, such a situation—where different groups of Proposed Intervenors file contentious intervention motions all within one

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ows-group-dreamers-formally-fight-texas-lawsuit-end-daca/?fbclid=IwAR1JrZ8oVXPB5fY69HFDAktZKCtFvnNPzbnallOJ2Ll5WzL2EcPifzOf4uM [https://perma.cc/J39L-ZPRF]).

205. *Id.*

206. Immigration Voice, FACEBOOK (Dec. 22, 2017), https://www.facebook.com/ImmigrationVoice/posts/dear-friendssave-jobs-usa-and-dhs-have-traded-another-set-of-motions-in-the-h4-e/1720291198037097/ [https://perma.cc/G7UJ-8E26] (advertising a motion to intervene filed by Immigration Voice to uphold the Department of Homeland Security's new rule allowing spouses of H-1B workers (frequently immigrants) to apply for employment authorization). The post, as of September 26, 2018, has 353 reactions, 58 comments, and 104 shares. Some of the comments read: "Thank you IV for intervening [in] this case, and having our back;" "Thank you immigration voice for the intervention. We should do everything to support and fight for this cause;" and "Keep sharing and wake up folks to join hands and be part of this advocacy." *Id.*

207. *Id.*

208. *See* FED. R. CIV. P. 24(b)(2) ("On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.").

209. *See, e.g.*, Ameron, Inc. v. U.S. Army Corps of Eng'rs, 787 F.2d 875 (3d Cir. 1986) (allowing members of Congress to intervene to defend constitutionality of federal statute).

210. *See* sources cited *supra* note 164.

211. *See* White, *supra* note 19, at 527–28 (noting that public interest litigation, bolstered by intervention, leads to a "lawsuit mania").

litigation—has occurred many times.[212] These contentious intervention motions transform a given litigation into a political debate stage, where public interest groups hash out issues such as voting and pollution all under the auspices of the federal courts.[213] The lowered burden to intervene facilitates this crowding and politicization of intervention.[214] When contentious intervention motions begin to overshadow the nature of the dispute between the original litigants and crowd the litigation stage, it is more practical to hear these views through their traditional forum of amicus briefs.

V. BOUNDARIES: WHERE TO DRAW THE LINE WITH INTERVENTION?

Justice Stewart's dissent in *Cascade* both imagined and feared a world where "interest" became too malleable a standard for intervention.[215] Courts' recent expansion of the significantly protectable interest requirement revitalizes concerns about when to limit the scope of the interest. Similarly, expansion of the adequacy of representation requirement generates concerns regarding when representation in the litigation may actually be adequate and intervention is therefore unnecessary. By allowing such a low burden for intervention under Rule 24(a)(2), courts have opened themselves up for dialogue regarding ideological, political, and policy questions on the original litigation stage.[216] These perspectives and questions are important, but are better addressed in amicus briefs. There, outsiders to the litigation can provide background information to sway the judge, without receiving the status of an original litigant or interfering with other doctrines.

212. *See, e.g.*, Feldman v. Ariz. Sec'y of State, 843 F.3d 366 (9th Cir. 2016) (contentious intervention motions filed by plaintiff-intervenor Bernie 2016, Inc. and defendant-intervenor The Arizona Republican Party over lawsuit by Democratic Party regarding vote collection issue); Consolidated Delta Smelt Cases, 717 F. Supp. 2d 1021 (E.D. Cal. 2010) (contentious intervention motions filed by plaintiff-intervenor Department of Water Resources and defendants-intervenors environmental rights groups over laws affecting delta smelt).

213. *See* cases cited *supra* note 212.

214. *See supra* note 211.

215. *See* Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co., 386 U.S. 129, 147 (1967) (Stewart, J., dissenting) ("These general and indefinite interests do not even remotely resemble the direct and concrete stake in litigation required for intervention of right.").

216. *See* White, *supra* note 19, at 553 ("Without a concrete interest, the [Proposed Intervenor] would merely be asking the federal courts to do, for the benefit of all citizens, what Congress would not do legislatively.").

A. Standing for Intervention Motions in the Wake of Town of Chester

Prior to the Court's June 5, 2017 decision in *Town of Chester v. Laroe Estates*,[217] there was a decades-long circuit split as to whether a Proposed Intervenor did or did not require independent standing along with meeting the Rule 24(a)(2) burden.[218] After *Town of Chester*, a third party seeking the same relief as an original litigant may intervene as long as there is an original litigant with standing.[219] With this decision, the Court removed standing, a "limiting concept," from the implicit, or outside of Rule 24, burden to intervene for parties seeking the same relief as an original litigant.[220] The Court additionally created a logical fallacy. As discussed, in analyzing intervention motions, courts have observed that "[w]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented."[221] This, of course, would make it so that any party seeking the same relief as an original litigant is likely to fail the interest and adequacy of representation prongs of the burden to intervene. Thus, under the Court's new Article III standing standard for intervention, it is nearly impossible to intervene. The last time such a logical fallacy was in place with the Rule 24 burden to intervene, the Advisory Committee had to amend Rule 24.[222]

Additionally, by focusing the standing inquiry on whether a Proposed Intervenor seeks the same relief as an original litigant, the Court created a standard that hearkens back to that of an amicus.[223] Amici align with the side of the litigation they agree with and provide outside perspectives that support that side's desired relief.[224] When the relief sought is simply to challenge the validity of a law, as is often the case in public interest

217. 137 S. Ct. 1645, 1651 (2017).

218. *See* Eric S. Oelrich, *The Relationship Between Standing and Intervention: The Tenth Circuit Answers by "Standing" Down*, 14 MO. ENVTL. L. & POL'Y REV. 209, 210 n.4 (2006) ("The Seventh, Eighth and D.C. Circuits have held that an 'intervenor must establish its own standing in addition to meeting FRCP 24(a)'s interest requirement prior to intervening' . . . . The Second, Fifth, Sixth, Ninth and Eleventh Circuits have come to the opposite conclusion, and they have all held 'that a party trying to intervene need only meet the Rule 24(a) interest requirement.'" (quoting San Juan Cty. v. United States, 420 F.3d 1197, 1204 (10th Cir. 2005))); *see also* Diamond v. Charles, 476 U.S. 54, 68 n.21 (1986) ("Compare *United States v. 39.36 Acres of Land*, 754 F.2d 855, 859 (CA7 1985) (intervention requires an interest in excess of that required for standing) . . . with *Southern Christian Leadership Conference v. Kelley*, 241 U.S.App.D.C. 340, 747 F.2d 777 (1984) (equating interest necessary to intervene with interest necessary to confer standing) . . . .").

219. *Town of Chester*, 137 S. Ct. at 1651 ("[A]n intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing.").

220. *See* Lowman, *supra* note 85, at 1251–52.

221. Virginia v. Westinghouse Elec. Corp., 542 F.2d 214, 216 (4th Cir. 1976).

222. *See* text accompanying and sources cited *supra* note 49.

223. *See supra* text accompanying notes 81–83.

224. *See supra* text accompanying notes 81–83.

litigation,[225] joining intervenors as original litigants is duplicative, rather than efficient. The same goals could be accomplished by providing outside perspectives as an amicus.

Town of Chester was an important decision for social justice intervenors. The purpose behind the standing doctrine is to limit the power of justiciability[226] by ensuring "that there is a specific controversy before the court."[227] For this reason, the requirements for Article III standing are rigorous. [228] Without standing, the Court fears that "litigious intermeddlers" would assert the rights of another and seek relief that the latter does not seek herself. [229] In other words, "[a]n interest shared generally with the public at large . . . will not do."[230] Social justice intervention after *Town of Chester* circumvents this very purpose by consolidating large portions of the public based *solely* on the public's shared interests.

Allowing politico-ideological litigation without standing through the backdoor of Rule 24 shortchanges long-standing policies behind the standing doctrine. Standing serves to "facilitate judicial efficiency"[231] by supplying rigorous requirements and ensuring that those who cannot meet its requirements do not file "ideological" lawsuits.[232] Ideological lawsuits would clog federal courts and make it so "their resources would not be properly focused on cases where the legal issues are clear and the dispute is ripe for resolution."[233] Indeed, as some commentators have noted:

> If courts or litigants could mold the . . . amicus curiae into a vessel enabling third parties, *lacking the requisite standing*, to enter into federal courts and *directly participate in a given litigation*, the effects could be far reaching. *The . . . amicus would thus become the*

225. *See* text accompanying and sources cited *supra* notes 16–17.

226. Expert Report of Neil M. Richards at 26, Data Prot. Comm'r v. Facebook [2017] IEHC 545 (H. Ct.) (Ir.) (No. 2016 4809 P), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120546 [hereinafter *Richards Report*].

227. *See* Oelrich, *supra* note 218, at 214 (quoting ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 61 (2d ed. 2002)).

228. A plaintiff must show: (1) injury in fact; (2) causation between the injury and the defendant's conduct; and (3) that a favorable federal court decision will redress the injury. *See Richards Report*, *supra* note 226, at 27. The standing doctrine, however, is a confused one and "many commentators believe that the Court has manipulated standing rules based on views of the merits of particular cases." *Id.* at 28 (quoting ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.5 (5th ed. 2015)).

229. *See* Oelrich, *supra* note 218, at 214.

230. *Id.* (alteration in original) (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997)).

231. *Id.*

232. *Id.*

233. *Id.*

> *mystical gateway to the federal judicial system that countless public interest attorneys have pursued*.[234]

In reality, this fear now rings true for *intervenors*, although the concern originated through imagining the possibility of allowing a third party without standing to directly participate in a lawsuit under the guise of an amicus, who does not need standing.[235] This circumvention is even more inevitable after *Town of Chester*. Thus, by removing the standing requirement for Proposed Intervenors seeking the same relief as an original party, the Court has shortchanged its own policies behind standing. By relegating politico-ideological perspectives to amicus briefs, where standing is not required, the Court would avoid this problem.

The Court treaded too far by permitting a Proposed Intervenor without independent standing access to the courts and rights equivalent to those of an original party, particularly when intervention is on a massive scale. In deciding *Town of Chester*, the Court likely had in mind "the exigencies of class litigation," and a desire to preserve judicial resources and maintain fairness by keeping all perspectives packaged in one case.[236] However, "standing goes to the heart of who does and does not have access to federal courts."[237] Particularly when intervention is on a massive scale, such as in endless contentious intervention motions within the same suit[238] or in intervention by groups of hundreds of people,[239] intervention under Rule 24 is a way to skirt both the standing requirements and the class action requirements of Rule 23.[240] With today's increasing litigation, particularly class litigation, "federal courts [should] proceed cautiously in adjudicating" classes.[241] By maintaining its precedent of reserving politico-ideological advocacy for amicus briefs, the Court avoids cutting its own other doctrines off at the knees.

B. Class Intervention, and Subsequent Rule 23 Class Action, Jurisdiction, and Res Judicata Concerns

Given the lowered Rule 24 burden, Proposed Intervenors have intervened in an increasing number of politico-ideological contexts and

234. Lowman, *supra* note 85, at 1281 (emphasis added) (footnote omitted).

235. *See* text accompanying and sources cited *supra* notes 85–86.

236. Daniel D. DeVougas, Note, *Without a Leg to Stand on? Class Representatives, Federal Courts, and Standing Desiderata*, 97 CORNELL L. REV. 627, 654 (2012) ("Considering that standing doctrine is a matter of constitutional significance, federal courts should not be so quick to tamper with it to accommodate the exigencies of class litigation."); *see also* discussion *supra* Section II.B.

237. DeVougas, *supra* note 236, at 654.

238. *See* text accompanying and sources cited *supra* notes 210–214.

239. *See, e.g.*, text accompanying and sources cited *supra* notes 163, 168, 192, 196.

240. *See infra* Section V.B.

241. DeVougas, *supra* note 236, at 654.

have packaged an increasing number of intervenors into one motion.[242] This trend, coupled with the removal of an independent Article III standing requirement, raises concerns about interference with the doctrines of Rule 23 class actions, jurisdiction, and res judicata. Courts should tighten the Rule 24 burden and relegate politico-ideological perspectives to amicus briefs, particularly when the relief sought is the same as that sought by the original litigants.

1. Class Intervention Concerns

A massive group of Proposed Intervenors intervening in an ongoing litigation is possible under the FRCP. Indeed, this procedural manipulation has been used a number of times.[243] Motions filed by large groups of Proposed Intervenors have been both denied and granted by courts in line with the Rule 24(a)(2) burden analysis.[244] Courts have not denied a massive scale intervention due to the reasoning that a large intervention group is, in substance, a class and therefore procedurally unsound. Along the same line, courts have not properly analyzed a large-scale Rule 24 intervention under the more rigorous Rule 23 class action requirements. Indeed, in *Bostic v. Schaefer*,[245] in which intervenors were all Virginia same-sex couples challenging the legality of Virginia's marriage statutes, the Fourth Circuit permitted massive-scale intervention explicitly styled as a class on a Rule 24 analysis.[246] This explicit styling is important because typically, large-scale Proposed Intervenors do not style themselves as a class, which allows for a more secretive circumvention of the Rule 23 requirements.[247]

After *Bostic*, intervention styled as a class is not just possible, but explicitly permissible in a growing number of courts.[248] However, both explicitly styled classes of intervenors as well as large groups of

242. *See supra* Parts III–IV.

243. *See, e.g.*, text accompanying and sources cited *supra* notes 150, 168, 176, 192, 196, 200.

244. *See, e.g.*, *In re* HealthSouth Corp. Ins. Litig., 219 F.R.D. 688 (N.D. Ala. 2004) (stating no misgivings about the possibility of class intervention and instead denying Rule 24 intervention by a class on the grounds that their interests were adequately represented by the original parties); Order, Akins v. Worley Catastrophe Response, LLC, Civil No. 12-2401, 2014 WL 1456382 (E.D. La. Apr. 14, 2014) (No. 2:12-cv-2401-JCW), ECF No. 70 (stating no misgivings about the possibility of class intervention and instead denying Rule 24 intervention by a class into another class action on the significantly protectable interest requirement of Rule 24).

245. 760 F.3d 352 (4th Cir. 2014).

246. *Id.* at 352 (allowing plaintiff-intervenors to intervene "on behalf of themselves and all others similarly situated").

247. *See, e.g.*, text accompanying and sources cited *supra* notes 150, 168, 176, 192, 196, 200.

248. *See, e.g.*, Tech. Training Assocs. v. Buccaneers Ltd. P'ship, 874 F.3d 692 (11th Cir. 2017) (granting intervention by class action into separate class action for suit regarding unlawful receipt of unsolicited faxes).

intervenors without class action stylization call into question all of the requirements of Rule 23: numerosity, commonality, typicality, and adequate representation.[249] Recently, the Court has demonstrated its unwillingness to certify classes that are too "unwieldy."[250] In light of the more rigorous standard imposed by the Court in *Wal-Mart Stores v. Dukes*,[251] one of "affirmative[] . . . compliance" with Rule 23's requirements, attorneys will bring fewer class actions due to the amount of resources required to support the high evidentiary burden.[252] Therefore, since an intervention class that actually represents itself as a class can intervene, groups of intervenors can consolidate—and have done so—into groups of hundreds of people[253] and effectively act as a class without having to satisfy the stringent Rule 23 requirements.

But, if the whole point of intervention is to intervene when the parties to the litigation do not adequately represent the Proposed Intervenors, a class action of intervenors becomes duplicative. To be certified as a Rule 23 class action, a class must already satisfy the adequacy of representation requirement.[254] In that respect, it makes more sense for large groups of intervenors to file a separate action.[255] However, an independent class then runs into standing issues because *Town of Chester* only removed an independent standing requirement for Proposed Intervenors.[256] Intervenor classes may choose to consolidate and use Rule 24 to get into court because they cannot satisfy one or both of the more stringent Rule 23 class action and Article III standing requirements.[257] Again, when a large group of public interest advocates cannot meet these rigorous requirements,

249. FED. R. CIV. P. 23.

250. John M. Husband & Bradford J. Williams, Wal-Mart v. Dukes *Redux: The Future of the Sprawling Class Action*, COLO. LAW., Sept. 2011, at 53, 53 (discussing the decision in *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011)).

251. 564 U.S. at 350.

252. *Id.*; Husband & Williams, *supra* note 250, at 55.

253. *See, e.g.*, text accompanying and sources cited *supra* notes 150, 168, 176, 192, 196.

254. *See Wal-Mart*, 564 U.S. at 349 n.5 ("[T]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be *fairly and adequately protected in their absence*. Those requirements therefore also tend to merge with the adequacy-of-representation requirement . . . ." (emphasis added) (quoting Gen. Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13 (1982))). Rule 23, like Rule 24, implicitly carries concerns about res judicata. *Id.* at 363.

255. The result of allowing an intervention class to intervene is a dual adequacy of representation inquiry. Douglas M. Towns, *Merit-Based Class Action Certification: Old Wine in a New Bottle*, 78 VA. L. REV. 1001, 1005 n.20 (1992) (citing Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir. 1975)). First, the court must inquire into adequacy of the leader of the class as a class action leader. *Id.* Second, the court must inquire into adequacy of the representation of an original party in the litigation into which intervention is sought. *Id.*

256. *See supra* text accompanying note 219.

257. *See* text accompanying and sources cited *supra* notes 228, 249.

which were put in place to weed out cases lacking an actual controversy, the underlying basis of the lawsuit is likely politico-ideological and better suited for an amicus brief.[258]

When a group of Proposed Intervenors cannot satisfy Rule 23 or Article III standing, and their only recourse is to intervene, they are "asking the federal courts to do, for the benefit of all citizens, what Congress would not do legislatively."[259] Now that Rule 24 is not only being used in an increasingly political and ideological context, but also on a massive class-sized scale, courts should tighten the burden on both significantly protectable interest and adequacy of representation.

2. Jurisdictional Concerns

An intervenor class could also lead to jurisdictional issues. In cases such as *Cascade*, where the claim was inherently jurisdiction-dependent as it dealt with monopolies in the California natural gas industry,[260] jurisdiction may not be as much of an issue.[261] However, "in cases where jurisdiction depends on factors other than the very nature of the claim, the jurisdictional requirements may require a court to draw the line somewhere on parties seeking to intervene. 'It is not always easy to draw th[at] line.'"[262] Indeed, part of the reason the Court tightened the Rule 23 requirements in *Wal-Mart* was because the proposed class worked at over three thousand stores throughout the United States.[263] The Court's denial of class certification turned on the commonality requirement, and the fact that practices between stores in different states were too different to support a common question of law or fact.[264] Rule 24 intervention that draws together Proposed Intervenors from various states would circumvent these concerns.

Perhaps since class-action styled intervention motions so far have been contained within one state, intervenor classes could satisfy the more stringent Rule 23 requirements. By way of example, the intervenors in *Amazon.com LLC v. Lay*[265] were all North Carolina residents, the

258. *See* discussion of standing after *Town of Chester v. Laroe Estates*, 137 S. Ct. 1645, 1651 (2017), *supra* Section V.A; *see also* text accompanying and sources cited *supra* notes 85–86, 231–235.

259. *See* White, *supra* note 19, at 553. On the other hand, the Advisory Committee has seen intervention repeatedly being granted and could always amend Rule 24 to tighten the burden. This may raise issues of institutional competence.

260. Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co., 386 U.S. 129, 134 (1967).

261. *See* New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 690 F.2d 1203, 1210 n.5 (5th Cir. 1982).

262. *Id.* (quoting *Cascade*, 386 U.S. at 134).

263. Wal-Mart Stores v. Dukes, 564 U.S. 338, 358 (2011).

264. *Id.* at 358–59; *see also* FED. R. CIV. P. 23.

265. *See supra* text accompanying note 150.

intervenors in *Texas II*[266] and *Lone Star College System v. Immigration Reform Coalition*[267] were all Texas Dreamers or Texas college students, and the intervenors in *Bostic v. Schaefer*[268] were all Virginia residents. The crux of the concern could arise when, for example, a Dreamer seeks intervention on behalf of all Dreamers *everywhere*, rather than containing the group intervention within one state. However, even if such classes are filed under Rule 23 and meet the stringent Rule 23 requirements, they could still fail for want of Article III standing if the proffered injury is determined to be too ideological in nature and not sufficiently concrete.[269] But, because they are filed under Rule 24, Rule 23 is not an issue, and standing is no longer an issue after *Town of Chester* if the relief sought is the same as that of the original litigants. Therefore, the best way to avoid interfering with these doctrines is for courts to tighten the Rule 24 burden to protect against politico-ideological litigation. These matters are better suited for amicus briefs.

3. Res Judicata Concerns

Jurisdictional limits still do not solve res judicata issues for class-styled or class-like intervention. Even if a Proposed Intervenor is in the same state as other Proposed Intervenors and the litigation, she may not learn about a pending class action—let alone a pending class intervention action—that affects her rights. Federal courts "have a unique responsibility . . . . [to] reduce the dynamics that threaten vulnerable absent class members."[270] After all, it was concern about res judicata and quieting title to real property that drove the creation of Rule 24 in the first place.[271] Because courts have construed Rule 24(a)(2) so far away from its original purpose, even in light of the 1966 Amendment, it now stands to open the door for res judicata issues it never anticipated. This is particularly so in light of courts' willingness to grant massive scale and even explicitly class-styled intervention.[272]

266. Aguilar, *supra* note 2; *see also supra* text accompanying note 200.
267. *See supra* text accompanying note 191.
268. *See supra* text accompanying note 245.
269. *See* discussion of the policies behind a rigorous standing doctrine, *supra* Section V.A.
270. Andrew S. Weinstein, *Avoiding the Race to Res Judicata: Federal Antisuit Injunctions of Competing State Class Actions*, 75 N.Y.U. L. REV. 1085, 1086 (2000).
271. *See supra* text accompanying note 35.
272. *See, e.g.*, text accompanying and sources cited *supra* notes 150, 168, 176, 192, 196, 200, 245.

Additionally, some courts interpret a party's interest in intervening in terms of a mere *stare decisis*[273] effect on that party's rights, rather than the more rigid cause-of-action-based res judicata.[274] When combined with class intervention, this is problematic. If untethered class-styled intervention under Rule 24 is permitted using an interest standard of *stare decisis*, or an interest in generally seeing a case come out a certain way for precedent-setting purposes, the scope of how many Proposed Intervenors are covered is functionally boundless. This would make delivering notice of an intervention motion to the full class under principles of res judicata nearly impossible.[275]

By way of example, imagine an intervention motion is filed on behalf of all Dreamers everywhere in the United States. A court permits the whole class to intervene under Rule 24 using a *stare decisis* interest standard.[276] Likely every Dreamer has an interest in seeing precedent set in their favor. With 3.6 million Dreamers living in the United States,[277] delivering notice of a suit that may affect this interest becomes unworkable. Courts should be concerned about res judicata issues for absentees who are unaware that they are being represented in an intervention action. The best way to solve these concerns is for courts to tighten the Rule 24(a)(2) burden. Such politico-ideological advocacy is better suited for amicus briefs, where standing as an original litigant and issues of representation in class actions, jurisdiction, and notice are not an issue.

CONCLUSION

Intervention under Rule 24 has been judicially construed in light of the 1966 Amendment to a loose burden far and away from its real-property-based origins. Recently, Rule 24 has been used in socially conscious ways

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273. *See Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.").

274. *See* WildEarth Guardians v. Nat'l Park Serv., 604 F.3d 1192, 1199 (10th Cir. 2010) ("In fact, for purposes of Rule 24(a)(2), sufficient impairment may result even from the '*stare decisis* effect' of a district court's judgment. . . . 'We may consider any significant legal effect in the applicant's interest and we are not restricted to a rigid *res judicata* test.'" (first quoting Utahns for Better Transp. v. U.S. Dep't of Transp., 295 F.3d 1111, 1116 (10th Cir. 2002); and then quoting Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. U.S. Dep't of the Interior, 100 F.3d 837, 844 (10th Cir. 1996))).

275. This is precisely why Rule 23 has a strict notice requirement for class members. *See* FED. R. CIV. P. 23(c)(2).

276. *See* text accompanying and sources cited *supra* note 273.

277. Alan Gomez, *There Are 3.6M 'DREAMers'—A Number Far Greater than Commonly Known*, USA TODAY (Jan. 18, 2018, 5:15 PM), https://www.usatoday.com/story/news/nation/2018/01/18/there-3-5-m-dreamers-and-most-may-face-nightmare/1042134001/ [https://perma.cc/AQ39-3X7J].

to advance politico-ideological views about immigration and other important public interest issues. Following the Court's decision in *Town of Chester*, intervenors who seek the same relief as an original litigant, a requirement that is easily satisfied in social justice cases, do not have to establish independent Article III standing and are thus treated as original litigants who may directly participate in a given litigation. This expansion has led to massive scale intervention. Massive scale intervention has occurred both through endless, debate-style filings of contentious intervention motions that crowd the stage of the original litigation, as well as through intervention by groups of hundreds of people, sometimes even styled as a class action of intervenors. Allowing standing and class action grouping through the backdoor of Rule 24 shortchanges and cuts the Court's other long-standing doctrines off at the knees.

If Rule 24 is left untethered, it will continue to interfere with the carefully crafted requirements of Article III standing and Rule 23 class actions. Should Rule 24 expand extra-jurisdictionally, additional res judicata and notice issues will arise. Rule 24 has been and will continue to be abused by politicians, special interest groups, and individual third parties on both sides of the political aisle. These perspectives are important, but are better suited for their traditional forum of amicus briefs. Courts should tighten the Rule 24 "significantly protectable interest" and "adequacy of representation" burden to intervene, and return politico-ideological perspectives on a given litigation to where they have traditionally thrived: in amicus briefs.

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