

## Intervention and Universal Remedies

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*Civil procedure plays a pivotal role in shaping litigation, including some of the most divisive and politically consequential cases heard in federal court—those seeking nationwide injunctions to block federal policies. But we know very little about how such cases are actually litigated. It is often assumed that procedural rules, crafted to apply to many types of cases, work equally well in the nationwide-injunction context. This Article challenges that view. In fact, procedural rules are having a critical substantive effect on the outcomes of these cases. And they are undermining the very values they were designed to serve.*

*This Article examines over five hundred nationwide-injunction cases and shows that a surprising participant is influencing the results: an outsider who has joined as an intervenor. Intervenors can stand on equal footing with the original parties, so a decision to grant or deny intervention has real-world stakes for the entire life cycle of a case. Judges also have an immense amount of discretion to allow an intervenor to join. That discretion has led to intervention in nationwide-injunction cases being common, contested, unpredictable—and enormously consequential.*

*Judicial discretion over intervention functionally gives courts control over how nationwide-injunction cases proceed, or whether they proceed at all. With few principles guiding that discretion, procedural rulings can appear to be influenced by the court's own political leanings, undermining public confidence in the court's decision on the merits. What's more, intervenors can keep cases alive even after government officials have withdrawn, thereby increasing the odds that high-stakes, politically salient questions will be resolved by the courts rather than the democratic process.*

*This Article represents the first scholarly examination of the significant role that intervention plays in nationwide-injunction suits. More broadly, this Article*

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*uses intervention to explore the function of procedural rules and the federal courts in a democratic system. And it analyzes how procedural rules influence notions of judicial neutrality and judicial minimalism. Finally, this Article offers two reforms that would promote procedural values and cabin the role of the federal courts in ideological litigation.*

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## INTRODUCTION

In some of the most contentious and consequential cases heard by federal courts, a surprising participant has influenced the outcome of the case: an outsider who has joined as an intervenor. Take, for instance, *California v. Texas*<sup>1</sup>—yet another legal challenge to the Affordable Care Act<sup>2</sup> (ACA) heard by the Supreme Court.<sup>3</sup> It may seem that the Court was destined to be asked to resolve the merits of such a high-profile, politically salient case. But it didn't have to be. Texas and seventeen other states had sought a nationwide injunction preventing any provision of the Act from being enforced.<sup>4</sup> In a twist, in the district court, the United States agreed that the Act was likely unconstitutional.<sup>5</sup> It capitulated on the merits and argued only for more limited relief.<sup>6</sup> The petitioners in the Supreme Court—the defenders of the Act—were twenty states, the District of Columbia, and the U.S. House of Representatives, which had intervened below.<sup>7</sup> Had the district court denied intervention to the defending states, there likely would have been no party to raise the merits on appeal.

In fact, that's exactly what happened in the lead up to the Supreme Court's review of a case asking for a nationwide injunction to bar the Department of Health and Human Services (HHS)

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<sup>1</sup> 141 S. Ct. 2104 (2021).

<sup>2</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 26, 29, and 42 U.S.C.).

<sup>3</sup> *California*, 141 S. Ct. at 2112.

<sup>4</sup> See Brief for Respondent/Cross-Petitioner States at 46–48, *California v. Texas*, 141 S. Ct. 2104 (2021) (Nos. 19-840 & 19-1019).

<sup>5</sup> *California*, 141 S. Ct. at 2113.

<sup>6</sup> See *Texas v. United States*, 340 F. Supp. 3d 579, 591–92 (N.D. Tex. 2018), *aff'd in part, vacated in part*, 945 F.3d 355 (5th Cir. 2019), *rev'd and remanded sub nom. California*, 141 S. Ct. 2104 (2021). The United States argued that the individual mandate could be severed from all but two of the ACA's provisions and that the court should issue declaratory relief limited to the parties. *Id.*

<sup>7</sup> *California*, 141 S. Ct. at 2113. The original intervenors were sixteen states and the District of Columbia. Four additional states and the U.S. House of Representatives joined while the appeal was pending. *Texas*, 945 F.3d at 374.

from enforcing its abortion “gag rule.”<sup>8</sup> After the administration transitioned following President Joe Biden’s election, the United States informed the Court that it would be repealing the Rule and had agreed with the plaintiffs to dismiss the case.<sup>9</sup> Nineteen states and a group of medical associations cried foul. They moved to intervene before the Supreme Court to defend the Rule.<sup>10</sup> The Supreme Court denied their motion and dismissed the case, over the dissent of three Justices who would have granted intervention and kept the case alive.<sup>11</sup>

As these examples illustrate, intervenors play a significant role in litigation seeking universal remedies, like the nationwide injunction.<sup>12</sup> Rule 24, the federal rule of civil procedure that governs intervention, allows courts to transform outsiders into parties on equal footing with the original plaintiff and defendant.<sup>13</sup> Intervenors in nationwide-injunction cases have raised new legal arguments, introduced evidence, sought discovery, filed dispositive motions, opposed settlement, disputed joint filings, and appealed adverse rulings.<sup>14</sup> And, just as critically, in each case where the court denied intervention, the nonparty did none of those things. In other words, a decision to grant or deny intervention has real-world stakes for some of the most high-profile and contentious cases heard in federal court.

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<sup>8</sup> See *Am. Med. Ass’n v. Becerra*, 141 S. Ct. 2619, 2619 (2021) (mem.). The gag rule barred recipients of family planning funds under Title X from advising or assisting their patients in obtaining an abortion.

<sup>9</sup> See Federal Parties’ Response in Opposition to the Motions for Leave to Intervene at 11–13, *Am. Med. Ass’n v. Becerra*, 141 S. Ct. 2619 (2021) (Nos. 20-429, 20-454 & 20-539).

<sup>10</sup> See generally Motion of Ohio and 18 Other States for Leave to Either Intervene or to Present Oral Argument as *Amici Curiae*, *Am. Med. Ass’n v. Becerra*, 141 S. Ct. 2619 (2021) (Nos. 20-429, 20-454 & 20-539); Motion of the American Association of Pro-Life Obstetricians & Gynecologists et al. to Intervene or to Present Oral Argument as *Amici Curiae*, *Am. Med. Ass’n v. Becerra*, 141 S. Ct. 2619 (Nos. 20-429, 20-454 & 20-539).

<sup>11</sup> *Am. Med. Ass’n*, 141 S. Ct. at 2619 (“Justice Thomas, Justice Alito, and Justice Gorsuch would grant the motions for leave to intervene and deny the stipulations to dismiss the petition.”).

<sup>12</sup> The term “universal remedies” is an umbrella term for equitable relief that applies nationwide and to nonparties. One example is the nationwide injunction, although that term is imprecise. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 n.1 (2018) (Thomas, J., concurring) (“[Nationwide] injunctions are distinctive because they prohibit the Government from enforcing a policy with respect to anyone, including nonparties—not because they have wide geographic breadth.”). Another example of a universal remedy is when a court vacates or sets aside federal agency rules under the Administrative Procedure Act. See Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1122, 1138–39 (2020) [hereinafter Sohoni, *Power to Vacate*]; Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997, 2004–05 (2023).

<sup>13</sup> FED. R. CIV. P. 24(a)–(b).

<sup>14</sup> See *infra* Part I.B.

Yet the role that intervenors have played in universal-remedy cases has largely gone unnoticed by scholars. There has been a “robust debate” on nationwide injunctions,<sup>15</sup> much of it focused on whether such remedies are constitutional or advisable.<sup>16</sup> Scholars have also made important contributions analyzing how nationwide injunctions conceptually interact with federal court doctrines,<sup>17</sup> remedial limits,<sup>18</sup> and procedural reforms.<sup>19</sup> But these

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<sup>15</sup> Suzette Malveaux, *National Injunctions: What Does the Future Hold?*, 91 U. COLO. L. REV. 779, 779 (2020).

<sup>16</sup> See generally Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068 (2017); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) [hereinafter Bray, *Multiple Chancellors*]; Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335 (2018); Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920 (2020); Doug Rendleman, *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, 91 U. COLO. L. REV. 887 (2020); John Harrison, *Federal Judicial Power and Federal Equity Without Federal Equity Powers*, 97 NOTRE DAME L. REV. 1911 (2022) [hereinafter Harrison, *Federal Judicial Power*].

<sup>17</sup> Several articles address different aspects of Article III standing. See Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481, 487 (2017); Katherine Mims Crocker, *An Organizational Account of State Standing*, 94 NOTRE DAME L. REV. 2057, 2060 (2019); Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1301–02 (2019); Joseph D. Kmak, *Abusing the Judicial Power: A Geographic Approach to Address Nationwide Injunctions and State Standing*, 70 EMORY L.J. 1325, 1346–48 (2021); Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955, 1961 (2019); Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1266 (2021) [hereinafter Bayefsky, *Remedies and Respect*]. For additional doctrines, see Zachary D. Clopton, *Nationwide Injunctions and Preclusion*, 118 MICH. L. REV. 1, 37–44 (2019) [hereinafter Clopton, *Injunctions and Preclusion*] (nonmutual issue preclusion); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 103–05 (2019) (preclusion); Nadin R. Linthorst, *Entering the Political Thicket with Nationwide Injunctions*, 125 PENN ST. L. REV. 67, 83 (2020) (political question doctrine); James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 STAN. L. REV. 1269, 1282 (2020) (*Ex parte Young* relief); and Ezra Ishmael Young, *The Chancellors Are Alright: Nationwide Injunctions and an Abstention Doctrine to Salve What Ails Us*, 69 CLEV. ST. L. REV. 859, 902 (2021) [hereinafter Young, *The Chancellors*] (abstention). Many of these cited works fall into several of the listed categories.

<sup>18</sup> See, e.g., Ronald A. Cass, *Nationwide Injunctions’ Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 31 (2019); Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 4–8 (2019); Portia Pedro, *Toward Establishing a Pre-Extinction Definition of ‘Nationwide Injunctions’*, 91 U. COLO. L. REV. 847, 861–63 (2020).

<sup>19</sup> See, e.g., Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2032 (2015) (class actions); Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Election Law, Voting Rights, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POLY 487, 540 (2016) [hereinafter Morley, *De Facto Class Actions*] (class actions); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2139–47 (2017) (Rule 65);

works generally focus either on how such cases start<sup>20</sup> or on the end result—rather than the mechanisms that governed *how* that result came to be.<sup>21</sup>

Broadening our focus to include the reality of how universal-remedies cases are litigated has important implications. Parties seeking these remedies are often asking courts to resolve highly salient questions of social and political policy. When courts grant nationwide injunctions, they can resolve those questions for everyone in the country regardless of ongoing democratic debates. Courts may effectively remove those questions from the political process even though most of the people affected will have no opportunity to be heard in the proceedings. It bears investigating then whether the rules that govern such high-stakes litigation still protect the values they were designed to serve.

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Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J.F. 242, 246–52 (2017) (venue); Andrew D. Bradt & Zachary D. Clopton, *MDL v. Trump: The Puzzle of Public Law in Multidistrict Litigation*, 112 NW. U. L. REV. 905, 918 (2018) (multidistrict litigation); Suzette M. Malveaux, Response, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 58–60 (2017) (class actions); Michael T. Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 633–38 (2017) (class actions); Katherine B. Wheeler, *Why There Should Be A Presumption Against Nationwide Preliminary Injunctions*, 96 N.C. L. REV. 200, 225 (2017) (class actions); Ryan Kirk, *A National Court for National Relief: Centralizing Requests for Nationwide Injunctions in the D.C. Circuit*, 88 TENN. L. REV. 515, 532 (2021) (venue); George Rutherglen, *Universal Injunctions: Why Not Follow the Rule?*, 107 VA. L. REV. ONLINE 300, 307–10 (2021) (class actions).

<sup>20</sup> For example, scholars have examined the identity of the parties interested in nationwide injunctions, like state actors or public-interest groups. See, e.g., Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 72–73 (2018); Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. RICH. L. REV. 633, 635–46 (2018); Charlton C. Copeland, *Seeing Beyond Courts: The Political Context of the Nationwide Injunction*, 91 U. COLO. L. REV. 789, 798–99 (2020).

<sup>21</sup> A related set of scholarship analyzes applications for emergency relief, including cases seeking universal remedies. These scholars have focused on a particular procedural posture, rather than on how procedural decisions influence the course of the litigation. See, e.g., Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 NOTRE DAME L. REV. 1941, 1951–59 (2022); Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827, 835–43 (2021); Stephen I. Vladeck, Essay, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 128–32 (2019) [hereinafter Vladeck, *Solicitor General*]; William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 18–22 (2015). Another set is scholarship analyzing how courts have shaped separation-of-power dynamics by exercising managerial powers in cases involving executive actions. See, e.g., Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 998–1003 (2022).

This Article draws attention to that question by analyzing how one significant rule—Rule 24—has operated in nationwide-injunction cases.<sup>22</sup> It surveys over five hundred cases where plaintiffs sought nationwide injunctions to provide the first examination of who seeks to intervene, the role they seek to play, and how courts have applied Rule 24's test to grant or deny intervention in this context.<sup>23</sup> Through a granular assessment of motions and (often unpublished) orders, it concludes that intervention in these suits is commonly sought, often contested, unpredictably obtained, and enormously consequential. These results amplify concerns about what values Rule 24 is protecting if courts are making highly discretionary procedural decisions that influence the merits of politically charged cases.

Rule 24 serves three goals. It is meant to secure a meaningful opportunity for affected nonparties to participate in cases affecting their interests, to enhance judicial efficiency, and to safeguard some measure of party control.<sup>24</sup> This Article concludes that intervention practice in nationwide-injunction cases does little to promote those values. Whether nonparties are allowed to intervene often comes down not to the reasons they assert, but to how the court chooses to exercise its discretion. And there are few doctrinal guideposts to cabin that discretion or to provide for more constrained review on appeal. Courts have interpreted Rule 24 in inconsistent and contradictory ways, even within circuits, so it is often unclear what rule or exception applies in each case.<sup>25</sup> This confusion opens the door to problematic judicial decision making—or the perception of it—guided more by political or ideological preferences than by the rule of law.

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<sup>22</sup> This Article thus also builds on and updates literature about how Rule 24 operates in public law litigation. See Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215, 298 (2000); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 328–29 (1989) [hereinafter Tobias, *Public Law*]; Stephen C. Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 UCLA L. REV. 244, 248–49 (1977) [hereinafter Yeazell, *Intervention*].

<sup>23</sup> An appendix to this Article provides details for each case, including whether intervention was sought, a high-level description of the intervenor, and the court's resolution (if any) of the motion to intervene. The appendix is published at Monica Haymond, Appendix to Intervention and Universal Remedies, <https://perma.cc/9KPX-2BML>.

<sup>24</sup> See Appel, *supra* note 22, at 298; Tobias, *Public Law*, *supra* note 22, at 328–29; Order Granting Motion to Dismiss Appeal of Denial of Intervention as of Right, *Franciscan All., Inc. v. Cochran*, No. 17-10135, at 4 (5th Cir. June 30, 2017) (Costa, J., concurring) (“Motions to intervene ask . . . whether a party has a right to be heard.”).

<sup>25</sup> See *infra* notes 66–67.

Therefore, Rule 24, as applied, conflicts with those three underlying values. It fails to provide a meaningful opportunity for outsiders to participate, as the cost of litigating whether an outsider can be involved may outweigh the benefits of participating.<sup>26</sup> It undermines judicial efficiency, as parties spend untold resources contesting intervention. And it does little to safeguard party control, especially when intervenors are allowed to obstruct a party's preferred pathway to resolving the case based on intervention factors the party cannot predict.

Not only does Rule 24 not promote these values, but its application in nationwide-injunction suits raises additional normative concerns. First, the discretion to grant intervention gives courts control over whether the case will proceed—a facet of party control that is usually not within a court's "managerial role" to set aside.<sup>27</sup> As there are few guidelines that control judicial discretion over intervention, that decision prompts questions about whether the court is seeking to influence the strategic decisions in the case based on its own political leanings. Those questions, in turn, undermine public confidence in the court's decision on the merits.

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<sup>26</sup> This result therefore also informs the scholarly discussion over whether courts are justified in issuing nationwide injunctions that affect the rights of nonparties who had no opportunity to participate. Morley, *De Facto Class Actions*, *supra* note 19, at 528; Young, *The Chancellors*, *supra* note 17, at 911–12; Linthorst, *supra* note 17, at 79; Trammell, *supra* note 17, at 74–78. Proponents of such relief have relied on procedural joinder rules, like Rule 24, to argue that an avenue exists for motivated nonparties to participate. Rendleman, *supra* note 16, at 954 (“A nonparty suffering under a defendant’s illegal post-injunction policy has two alternatives. First, she can intervene in the original lawsuit.”); *id.* at 963 (“Other procedural techniques that broaden participation on the plaintiff side are intervention as a party to express supporting claims . . . .”); Clopton, *Injunctions and Preclusion*, *supra* note 17, at 38–39 (suggesting that nationwide injunctions “involve numerous intervenors and amici curiae” whose arguments “provide the functional equivalent of district-court percolation” so that courts and commentators should not be concerned that nationwide injunctions prevent multiple court opinions on a subject); Wheeler, *supra* note 19, at 224 (explaining that “[o]ne such reform includes the creation of a system of notice for parties who may be affected by a nationwide injunction,” which “would allow parties who would be affected by a nationwide preliminary injunction to have an opportunity to become involved in the action, giving them the chance to represent their interests”); *see also* California v. Azar, 911 F.3d 558, 583 (9th Cir. 2018) (“Short of intervening in a case, non-parties [affected by a nationwide injunction] are essentially deprived of their ability to participate, and these collateral consequences are not minimal.”); *cf.* Frost, *supra* note 16, at 1110 (suggesting that any harm to nonparties can be potentially alleviated by amici curiae participation). At least one court has also referenced intervention as a reason to avoid issuing nationwide injunctions—since “nonparties with similar interests” can intervene “to seek the protection of injunctive relief” without needing a nationwide injunction to protect them. Georgia v. President of the U.S., 46 F.4th 1283, 1306 (11th Cir. 2022).

<sup>27</sup> *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 386 (1982).



Second, intervention in nationwide-injunction cases expands judicial involvement in politically contentious suits. Intervenor can keep high-stakes ideological litigation alive even after government officials decide to withdraw, drop their appeal, or settle their dispute—even if the intervenors themselves do not have standing.<sup>28</sup> And intervenors can help political actors who potentially lack a cognizable injury to continue pursuing ideological lawsuits by providing the one good plaintiff necessary for standing. Intervention thus increases the chances that contentious, high-profile, politically salient questions about public policy will be resolved by the judiciary rather than the democratic branches. This role frustrates the “passive virtues” courts use to stay out of the political fray.<sup>29</sup>

One answer to this problem is to see Rule 24’s dysfunction in nationwide-injunction cases as a sign that we should be concerned with the remedy itself. Perhaps when the federal rules break down, they signal—like a canary in a coal mine—that there is something else amiss. But the federal rules were designed to adapt to changing trends in litigation.<sup>30</sup> The harms examined here are likely the result of more developments than just the expanded use of nationwide injunctions.<sup>31</sup> Instead of raising alarm about the propriety (or constitutionality) of those changes, these harms illustrate why our procedural design should consciously consider how the federal rules interact with these emerging practices. When the federal rules can be amended to resolve dysfunction, they should be.

To that end, this Article makes two proposals to address the harms caused by intervention in nationwide-injunction cases. First, courts should reject intervenors whose only basis for intervening is to defend federal policies when the government has made a strategic decision to end the litigation. This is a simple yet effective fix for intervention’s core normative problems in this

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<sup>28</sup> See *infra* Part I.

<sup>29</sup> See Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40–47 (1961).

<sup>30</sup> See Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1856–77 (2014); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 982–87 (1987).

<sup>31</sup> See, e.g., Bray, *Multiple Chancellors*, *supra* note 16, at 445–57; Ahdout, *supra* note 21, at 948–56; Jonathan Remy Nash, *State Standing for Nationwide Injunctions against the Federal Government*, 94 NOTRE DAME L. REV. 1985, 1990–91 (2019); Huddleston, *supra* note 19, at 248–49; Young, *The Chancellors*, *supra* note 17, at 880.

context. Courts can achieve this by amending their own extratextual doctrine defining when an intervenor is “adequately represented” by an existing party: the federal government’s representation of the public’s interest is not rendered inadequate when the government resolves a case by settling it or declining to appeal. There may be exceptions for intervenors who have evidence of malfeasance or collusion. But this change properly burdens the intervenor with demonstrating circumstances beyond a party exercising routine control over the litigation. This fix would enhance two values of Rule 24—judicial efficiency and party control—while reducing the two normative, institutional costs of discretion and judicial entanglement.

Admittedly, raising the bar to show inadequate representation comes at a cost to outsiders who may be excluded from participating. This Article’s second proposal addresses those participation issues. Courts considering a nationwide injunction should provide an opportunity for outsiders to voice their concerns about the remedy’s scope. Outsiders should be given a chance to argue why a court should (or should not) issue a remedy that affects their interests—especially when they had no right to defend those interests on the merits. This proposal does not limit judicial discretion to grant a nationwide injunction. But it may reduce the frequency that courts issue such relief to cases where an injunction is necessary. Or, at the very least, it may encourage courts to rely on a fuller record and reasoned explanation for the injunction’s scope.<sup>32</sup>

This Article proceeds in the following parts. Part I provides context for this discussion by laying out the mechanics and values of Rule 24 intervention, focusing on how courts have interpreted Rule 24’s requirements in contradictory and unpredictable ways. It then discusses how that broad discretion has played out in other adjudicative contexts and analyzes the features that distinguish nationwide-injunction litigation. Part II describes an original dataset of over five hundred nationwide-injunction cases. It shows that intervention is common, analyzes the reasons outsiders seek to intervene, and demonstrates that intervention is both unpredictable and consequential. Part III examines how this

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<sup>32</sup> *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1245 (9th Cir. 2018) (vacating an injunction “because the record is insufficiently developed as to the question of the national scope of the injunction”); *Azar*, 911 F.3d at 584; Sam Bray, *Finally, a Court Defends the National Injunction*, WASH. POST (Oct. 14, 2017), <https://perma.cc/2LJ5-5PVL> (criticizing courts for not thoroughly justifying the nationwide injunctions they issue).

practice has had pernicious effects on the values underlying Rule 24 and the judiciary as an institution reliant on public support. Part IV concludes by proposing two solutions for ameliorating these effects, recognizing that changing how Rule 24 operates in this context may influence how and when courts are willing to issue nationwide injunctions.

## I. RULE 24 INTERVENTION

To analyze how intervention in nationwide-injunction cases is different, it is helpful to first explain how the Rule typically operates.<sup>33</sup> In short, not well. Courts have yet to endorse a uniform standard for how outsiders can intervene under the Rule. So, this avenue to enter litigation is largely dependent on judicial discretion.

This Part discusses the two most common forms of intervention: as-of-right intervention under Rule 24(a)(2) and permissive intervention under Rule 24(b).<sup>34</sup> Those two categories appear to have different requirements and purposes, with one providing a right to intervene (courts “*must* permit” as-of-right intervention<sup>35</sup>) and the other a discretionary avenue to participate (a court “*may* permit” permissive intervention<sup>36</sup>). But a distinction in text has not led to a difference in practice.

Courts have interpreted Rule 24’s general terms—words like “timely,” “interest,” “impair,” and “adequate”—in conflicting ways that have narrowed or greatly expanded the scope of eligible intervenors.<sup>37</sup> The result is an array of paths open to any court, in any case, that offers a road to intervention or a road to exclusion. In other words, all types of intervention are now discretionary.

That discretion is potentially compatible with promoting the values behind Rule 24, like efficiency and fairness. But how those

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<sup>33</sup> This Part analyzes intervention doctrine independent of the substantive or institutional features of each case, as courts have purported to do, though there are limited exceptions. For commentary on how Rule 24’s interpretation in particular contexts has had “spill over” effects in the understanding of the Rule as a whole, see Mila Sohoni, *Equity and the Sovereign*, 97 NOTRE DAME L. REV. 2019, 2044–46 (2022).

<sup>34</sup> Rule 24 provides the standard for parties to intervene before district courts, but outsiders may intervene at any stage of the litigation. When they intervene on appeal, appellate courts often look to the same Rule for intervention on appeal. *Cameron v. EMW Women’s Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1010–11 (2022).

<sup>35</sup> FED. R. CIV. P. 24(a) (emphasis added).

<sup>36</sup> *Id.* 24(b) (emphasis added).

<sup>37</sup> *Id.* 24.

values have been balanced has shifted over time depending on emerging substantive and societal needs.

Part I.A discusses how courts have interpreted Rule 24's elements. It describes the collapse of as-of-right and permissive intervention as separate categories and then provides a brief overview of the as-of-right factors to demonstrate the breadth of discretion afforded to courts under the Rule. Part I.B identifies the values behind intervention. Part I.C then discusses how those values have played out in different contexts and identifies the features that distinguish nationwide-injunction litigation. Those features help explain why the judiciary's treatment of intervention in the nationwide-injunction context has disrupted the balance Rule 24 was meant to promote.

#### A. The Components of Intervention

Courts have interpreted each component of Rule 24's test in a way that enhances their discretion to grant or deny intervention. This Section begins by describing the largely illusory difference between permissive and as-of-right intervention. It then analyzes each factor for as-of-right intervention: (1) that the outsider "claims an interest relating to the property or transaction that is the subject of the action," (2) that the outsider "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," and (3) that the "existing parties" do not "adequately represent that interest."<sup>38</sup>

##### 1. As-of-right and permissive intervention.

The distinction between as-of-right and permissive intervention has mostly collapsed in public law cases.<sup>39</sup> Despite differences in how the federal rules articulate the two tests, parties often rely on the same information to satisfy both tests and courts often

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<sup>38</sup> *Id.* 24(a)(2). An additional factor—whether the motion is timely—is widely accepted as discretionary, so will not be discussed further here. See 7C CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1902 (3d ed. 2024).

<sup>39</sup> The distinction has arguably long been illusory, even in private law cases. See, e.g., John E. Kennedy, *Let's All Join In: Intervention under Federal Rule 24*, 57 KY. L.J. 329, 375 (1968) ("Distinctions between intervention of right and permissive intervention are artific[e]al and have led to a precedential tangle of analytical distinctions.").

treat the two tests as having similar requirements.<sup>40</sup> Instead, the main distinctions are extratextual rights courts have read into the Rule, like the timing of appellate review, the standard of review on appeal, and the conditions courts can impose on an intervenor's participation. As this Section shows, even these distinctions have begun to disappear. To the extent they still make a practical difference to the outsiders who wish to intervene, the decision is generally left to the district court's discretion.

Historically, two significant differences between the types of intervenors were when and how denials of intervention were reviewed on appeal. Intervenors of right could appeal a rejection immediately and the decision would be reviewed *de novo* or for abuse of discretion. By contrast, rejected permissive intervenors either could not appeal or had to wait until the case proceeded to final judgment.<sup>41</sup>

Today, courts allow both types of intervenors to appeal.<sup>42</sup> And in the appellate courts, where as-of-right intervention is reviewed for abuse of discretion, the two forms often receive the same standard of review.<sup>43</sup> Permissive intervenors must still wait for

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<sup>40</sup> See, e.g., *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 804 (7th Cir. 2019) (cautioning that Rule 24(b)(1) “is not just a repeat of Rule 24(a)(2)” but acknowledging that a court may “consider[] [] the elements of intervention as of right as discretionary factors” and does not need to “explicitly break out its reasoning” between the two (quotation marks omitted in second quote) (quoting *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 776 (7th Cir. 2007)); *Tri-State Generation & Transmission Ass'n, Inc. v. N.M. Pub. Regul. Comm'n*, 787 F.3d 1068, 1075 (10th Cir. 2015) (affirming the district court's denial of permissive intervention in part because the proposed intervenor's interests were already adequately represented, even though “Rule 24(b) does not provide for consideration of adequate representation,” and collecting cites where other courts did the same).

<sup>41</sup> James W. Moore & Edward H. Levi, *Federal Intervention: I. The Right to Intervene and Reorganization*, 45 *YALE L.J.* 565, 581 (1936) [hereinafter Moore & Levi, *Federal Intervention I*]; Caleb Nelson, *Intervention*, 106 *VA. L. REV.* 271, 316 (2020); David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 *HARV. L. REV.* 721, 749 (1968). Courts are still split on what standard of review applies on appeal for intervention as of right. See *Berger v. N.C. State Conf. of the NAACP*, 142 *S. Ct.* 2191, 2206 n.\* (2022) (noting that the “parties disagree whether our review of this case should be governed by a *de novo* or abuse-of-discretion standard” but “find[ing] it unnecessary to resolve”). Compare *W. Energy All. v. Zinke*, 877 F.3d 1157, 1164 (10th Cir. 2017) (reviewing *de novo*), with *In re N.Y.C. Policing During Summer 2020 Demonstrations*, 27 *F.4th* 792, 799 (2d Cir. 2022) (reviewing for abuse of discretion).

<sup>42</sup> For example, one court recently cautioned that courts “must be careful not to collapse the two inquiries—the inquiry under Rule 24(a) and the inquiry under Rule 24(b)—into the single question whether intervention is sensible from a practical standpoint” because “the standard of appellate review is more deferential . . . under Rule 24(b).” *City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 987 (7th Cir. 2011); see also *id.* (noting that it was “[o]dd that the circuits can't agree” on the standard of review for intervention).

<sup>43</sup> See, e.g., *Pennsylvania v. President U.S.*, 888 F.3d 52, 57 (3d Cir. 2018) (applying abuse of discretion to review a denial of both forms of intervention).

final judgment as a matter of doctrine. But outsiders usually seek both forms of intervention and courts review both claims when asserted together.<sup>44</sup>

Importantly, however, courts do *not* allow an immediate appeal when courts *grant* permissive intervention but either deny or decline to address intervention of right.<sup>45</sup> That matters significantly when it comes to the third difference: conditions that courts may place on the intervenor's participation. The canonical line has been that, once admitted, intervenors of right "assume the status of full participants in a lawsuit and are normally treated as if they were original parties."<sup>46</sup> Supposedly, this meant that courts could not bar intervenors of right from engaging in significant party behavior like raising additional claims or legal defenses, adding parties, taking discovery, and appealing adverse decisions.<sup>47</sup> Conversely, district courts had broad, if not unlimited, discretion to prescribe how permissive intervenors could participate.<sup>48</sup>

Now, many courts claim the power to condition intervention as of right. But even they have been hesitant to impose significant hurdles.<sup>49</sup> Many of the limits courts impose on as-of-right intervenors dovetail with the limits courts impose on all parties—like

<sup>44</sup> See, e.g., *United States v. Michigan*, 68 F.4th 1021, 1024–29 (6th Cir. 2023).

<sup>45</sup> *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987) ("We conclude that because [the intervenor] is now a party to the suit by virtue of its permissive intervention, it can obtain effective review of its claims on appeal from the final judgment.")

<sup>46</sup> *District of Columbia v. Merit Sys. Prot. Bd.*, 762 F.2d 129, 132 (D.C. Cir. 1985); see also *Kaul*, 942 F.3d at 797 ("A party granted leave to intervene as of right under this rule has the 'full rights of a party.'" (quoting *Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1022 (7th Cir. 2006))); *id.* at 803 ("The court can even place conditions on the scope of permissive intervention, allowing more voices to be heard without overcomplicating the case with additional claims, defenses, discovery, and conflicting positions.")

<sup>47</sup> *Cotter v. Mass. Ass'n of Minority L. Enft Officers*, 219 F.3d 31, 36 n.2 (1st Cir. 2000) ("The traditional sense was that a court could not impose conditions on an intervention as of right."). A rule prohibiting limits on intervention of right makes sense given that they are usually bound by the judgment. See *Merit Sys. Prot. Bd.*, 762 F.2d at 132 ("By successfully intervening, a party makes herself 'vulnerable to complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party.'" (quoting 3B JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 24.16[6] (2d ed. 1985))).

<sup>48</sup> See 7C WRIGHT ET AL., *supra* note 38, § 1922; *Beauregard, Inc. v. Sword Servs. L.L.C.*, 107 F.3d 351, 352 n.2 (5th Cir. 1997) ("It is undisputed that virtually any condition may be attached to a grant of permissive intervention.")

<sup>49</sup> See 7C WRIGHT ET AL., *supra* note 38, § 1922 (recognizing that courts have limited the conditions they have imposed to those "of a housekeeping nature"); see also, e.g., *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 469–70 (4th Cir. 1992) (doubting whether courts may deny intervenors discovery). *But see, e.g., Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 737 n.11 (D.C. Cir. 2003) (asserting that courts may bar in-

limiting discovery, declining to hold nonmandatory evidentiary hearings, or imposing page limits.<sup>50</sup> And courts of appeals review restrictions on intervention of right for their reasonableness, like the restrictions on other parties.<sup>51</sup>

Notably, even in this one remaining significant difference between the two categories, the decision is left to the district courts' discretion. There is no general requirement that district courts determine an intervenor's right to participate before analyzing whether the court would grant even significantly limited permissive intervention.

## 2. Interest.

The "interest" component of the test for as-of-right intervention has been the subject of significant scholarly attention, so this Section mainly summarizes and updates that commentary. The main takeaway is that there are few guidelines governing what constitutes an interest under Rule 24.

Before the modern amendments to the Rule, the "interest" necessary to intervene seemed to comport with a narrow, technical understanding of the term.<sup>52</sup> Professor Caleb Nelson, who thoroughly canvassed the history of the interest requirement, concluded that courts "typically [did] not authoriz[e] intervention by people who lacked any relevant legal claims."<sup>53</sup>

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tervenors of right from raising additional claims). Most courts have not embraced, for instance, Professor David Shapiro's suggestion that intervenors of right could be prevented from appealing adverse decisions. Shapiro, *supra* note 41, at 753–54.

<sup>50</sup> For example, the Supreme Court has held that courts can prevent intervenors from blocking settlements or consent decrees. *Loc. No. 93, Int'l Ass'n. of Firefighters v. City of Cleveland*, 478 U.S. 501, 528–29 (1986). But the Court specified that this limit could apply to any party, "whether an original party, a party that was joined later, or an intervenor." *Id.* And the court later specified that "[a] court's approval of a consent decree between some of the parties [ ] cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." *Id.* at 529.

<sup>51</sup> See, e.g., *San Juan County v. United States*, 503 F.3d 1163, 1189 (10th Cir. 2007) (en banc).

<sup>52</sup> See, e.g., *Radford Iron Co. v. Appalachian Elec. Power Co.*, 62 F.2d 940, 942 (4th Cir. 1933) ("It is well settle[d] that the only interest which will entitle a person to the right of intervention in a case is a legal interest as distinguished from interests of a general and indefinite character which do not give rise to definite legal rights.").

<sup>53</sup> Nelson, *supra* note 41, at 318.

In 1966, Rule 24's text was significantly revised.<sup>54</sup> It is unclear whether the new language meant to expand the interest an outsider could use to intervene, but some courts interpreted stray statements from the Supreme Court as supporting a broader reading. For example, in *Donaldson v. United States*,<sup>55</sup> the Court described an "interest" as that which is "significantly protectable."<sup>56</sup> This novel phrase was arguably broader than the usual description of an interest as merely protectable or legal, but the phrase's breadth had never been clearly defined.<sup>57</sup> Making matters worse, the Supreme Court's next intervention decision, *Trbovich v. United Mine Workers of America*,<sup>58</sup> assumed the intervenor's interest even though the underlying statute did not provide him with a cause of action.<sup>59</sup> This suggested that, whatever a significantly protectable interest might be, it is not tied to whether the person has a legal right protected by a legal remedy.<sup>60</sup>

Without further guidance, federal district and appellate courts have recognized an expanding assortment of interests qualifying third parties for a right to intervene, especially in public law cases.<sup>61</sup> For example, some courts have recognized that beneficiaries of a regulatory scheme have a right to intervene to defend their economic and professional interests.<sup>62</sup> Other courts

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<sup>54</sup> Now, assuming the other factors are met, a third party has a right to intervene when they "claim[ ] an interest relating to the property or transaction that is the subject of the action." FED. R. CIV. P. 24(a)(2).

<sup>55</sup> 400 U.S. 517 (1971).

<sup>56</sup> *Id.* at 531.

<sup>57</sup> Nelson, *supra* note 41, at 347; *see also* 7C WRIGHT ET AL., *supra* note 38, § 1908.1 ("[S]ignificantly protectable interest' has not been a term of art in the law and there is sufficient room for disagreement about what it means so that this gloss on the rule is not likely to provide any more guidance than does the bare term 'interest' used in Rule 24 itself").

<sup>58</sup> 404 U.S. 528 (1972).

<sup>59</sup> *Id.* at 531 ("This Court has held that [29 U.S.C.] § 403 prohibits union members from initiating a private suit to set aside an election."); *id.* at 538–39 (noting that "the statute gives the individual union members certain rights against their union," that the Secretary of Labor "in effect becomes the union member's lawyer" to enforce those rights, and that a union member who initiated the enforcement proceeding "may have a valid complaint about the performance of his lawyer").

<sup>60</sup> *Id.* at 539.

<sup>61</sup> *See, e.g.*, *Brumfield v. Dodd*, 749 F.3d 339, 344 (5th Cir. 2014) (explaining that the interest should be judged by a "more lenient standard" because "the case involves a public interest question or is brought by a public interest group" (quoting MOORE, *supra* note 47, § 24.03[2][c])); *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999) (noting that the Sixth Circuit subscribes to a "rather expansive notion of the interest sufficient to invoke intervention of right" (quoting *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997))).

<sup>62</sup> *See e.g.*, *N.Y. Pub. Int. Rsch. Grp., Inc. v. Regents of Univ. of N.Y.*, 516 F.2d 350, 351–52 (2d. Cir. 1975) (holding that pharmacists have an interest in a regulation that affects the economic interests of members of the pharmacy profession and that might



have held that those who advocated for a law to pass can intervene to defend its legality.<sup>63</sup> Students and their parents may intervene to protect their interest “in a sound educational system.”<sup>64</sup> Nonprofits may have an interest in preserving their time and resources.<sup>65</sup> The press may have an interest in informing the public.<sup>66</sup> Companies may have an interest in avoiding a more burdensome standard for liability.<sup>67</sup> And environmentalists may have an interest in protecting natural areas or wildlife.<sup>68</sup>

This expansion has come at the cost of coherence and consistency.<sup>69</sup> For example, take whether a company benefiting from a challenged regulatory scheme can intervene. That interest might be seen to be purely financial; at bottom, it is about whether the company will continue to profit from the regulation. Some courts might say that Rule 24 “requires a showing of something more than a mere economic interest” and deny the motion.<sup>70</sup> Other courts—even in the same circuit—might conclude that

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change how they do business); *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (holding that gasoline dealers have an interest in a provision of the Wisconsin Uniform Sales Act that affects their businesses).

<sup>63</sup> See, e.g., *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995); *City of Houston v. Am. Traffic Sols., Inc.*, 668 F.3d 291, 294 (5th Cir. 2012) (holding that a “public-spirited” civic organization that successfully petitioned for a law may intervene to vindicate their “particular interest” in protecting that law). Similarly, some courts have held that those who previously challenged and changed a law have an interest in “protect[ing] the fruits of their earlier litigation.” *Bitterroot Ridge Runners Snowmobile Club v. U.S. Forest Serv.*, 2017 WL 11612499, at \*1 (D. Mont. May 9, 2017).

<sup>64</sup> *Morgan v. McDonough*, 726 F.2d 11, 13 (1st Cir. 1984) (quoting *United States v. Bd. of Sch. Comm’rs*, 466 F.2d 573, 575 (7th Cir. 1972)).

<sup>65</sup> *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 306 (5th Cir. 2022).

<sup>66</sup> *Comm’r, Ala. Dept. of Corr. v. Advance Loc. Media, LLC*, 918 F.3d 1161, 1172–73 (11th Cir. 2019).

<sup>67</sup> *New York v. Scalia*, 2020 WL 3498755, at \*1 (S.D.N.Y. June 29, 2020).

<sup>68</sup> *Utah Ass’n of Cnty. v. Clinton*, 255 F.3d 1246, 1252 (10th Cir. 2001); *Mausolf v. Babbitt*, 85 F.3d 1295, 1302 (8th Cir. 1996); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527–28 (9th Cir. 1983). *But see* *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004) (rejecting the Chamber of Commerce’s intervention because they asserted a “political or programmatic” interest rather than a “legal ‘interest’” (emphasis omitted)).

<sup>69</sup> Many scholars have noted this trend. See, e.g., Nelson, *supra* note 41, at 274–75 & n.10; Justin P. Gunter, Note, *Dual Standards for Third-Party Intervenors: Distinguishing Between Public-Law and Private-Law Intervention*, 66 VAND. L. REV. 645, 657 (2013); Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 434; Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 251, 254–55 (1990).

<sup>70</sup> *Ross v. Marshall*, 426 F.3d 745, 757 (5th Cir. 2005); see also *Texas v. United States*, 805 F.3d 653, 657–58 (5th Cir. 2015) (“[W]e held that the officials’ generalized, ‘purely economic interest’ was insufficient.” (quoting *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984))).

“economic interests can justify intervention” and grant it.<sup>71</sup> And both courts will likely be applying current circuit precedent.

It is little wonder then why courts openly acknowledge that the interest test is often up to the court’s discretion. As one court put it, judges “pay lip service” to the test and then “regularly manage to manipulate (ignore?) the language to reach the result required by practical considerations.”<sup>72</sup>

To cabin the interest analysis, some courts have compared the interest requirement to the injury-in-fact test for Article III standing. The strategy appears to be that if standing curbed ideological litigation, it will also curb ideological intervention.<sup>73</sup> This has sparked a separate debate about whether Article III standing is independent of or intertwined with Rule 24’s requirements (or whether intervenor standing is required at all when the outsider seeks the same relief as a party).<sup>74</sup>

But the comparison has not worked to reduce judicial discretion in recognizing interests for intervention; it has merely traded one vague element for another. It is unclear, for instance, whether the injury-in-fact requirement encompasses fewer or more interests than Rule 24. Some courts have held that “so little is required for Article III standing that if no more were required for intervention as a matter of right, intervention would be too easy and clutter too many lawsuits with too many parties.”<sup>75</sup> After all, litigants

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<sup>71</sup> *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n*, 834 F.3d 562, 568 (5th Cir. 2016).

<sup>72</sup> *San Juan County*, 503 F.3d at 1193; *see also Wal-Mart Stores*, 834 F.3d at 568 (“Often, this is a tautological exercise—a party may intervene if its interest is legally protectable and its interest is legally protectable if it can intervene.”).

<sup>73</sup> As Judge Laurence Silberman put it, if standing were not required for intervention, “then any organization or individual with only a philosophic identification with a defendant—or a concern with a possible unfavorable precedent—could attempt to intervene and influence the course of litigation.” *Deutsche Bank Nat. Tr. Co. v. FDIC*, 717 F.3d 189, 195 (D.C. Cir. 2013) (Silberman, J., concurring).

<sup>74</sup> *See Nelson*, *supra* note 41, at 286–91. *See generally* Zachary N. Ferguson, Note, *Rule 24 Notwithstanding: Why Article III Should Not Limit Intervention of Right*, 67 *DUKE L.J.* 189 (2017); Gregory R. Manring, Note, *It’s Time for an Intervention!: Resolving the Conflict Between Rule 24(a)(2) and Article III Standing*, 85 *FORDHAM L. REV.* 2525 (2017); Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 *FORDHAM L. REV.* 1539 (2012). So far, the Supreme Court has declined to address an entrenched circuit split over this question. *See Dillard v. Chilton Cnty. Comm’n*, 495 F.3d 1324, 1337 n.10 (11th Cir. 2007) (summarizing cases in split).

<sup>75</sup> *City of Chicago*, 660 F.3d at 985 (7th Cir. 2011) (collecting cases).

have standing to recover even nominal damages<sup>76</sup>—but I am unaware of any court granting intervention because the outsider had an interest in recovering a single dollar judgment.

### 3. Impairment.

The next factor in the Rule 24 analysis is whether the applicant's interest "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest."<sup>77</sup> This factor also fails to limit judicial discretion to determine who has a right to intervene.

Courts have struggled to articulate a consistent standard for when an interest may be practically impaired. How "practical" does the impairment need to be? Does it matter if the intervenor could sue on their own in a separate action to protect their rights?<sup>78</sup> Is it sufficient that the pending case might result in adverse precedent?<sup>79</sup> The answers have varied, so this factor has also opened the door to substantial judicial discretion.

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<sup>76</sup> *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021).

<sup>77</sup> FED. R. CIV. P. 24(a)(2).

<sup>78</sup> *Compare* *United States v. LULAC*, 793 F.2d 636, 644 (5th Cir. 1986) (holding that outsiders had no right to intervene in part because they could bring a separate action to protect any of their rights), *with* *City of Chicago*, 660 F.3d at 985 ("But the possibility that the would-be intervenor if refused intervention might have an opportunity in the future to litigate his claim has been held not to be an automatic bar to intervention.").

<sup>79</sup> *Compare* *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 532 (7th Cir. 1988) (holding that stare decisis may only justify intervention "when the putative intervenor's position so depends on facts specific to the case at hand that participation as *amicus curiae* is inadequate"), *and* *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006) (recognizing that the state intervenor's interest might be impaired by "an adverse ruling" that would affect the state's future defense of its laws), *with* *Martin v. Travelers Indem. Co.*, 450 F.2d 542, 554 (5th Cir. 1971) (affirming intervention in part because the precedent of the case at hand would "loom large" in a subsequent action), *and* *Black Fire Fighters Ass'n of Dall. v. City of Dallas*, 19 F.3d 992, 995 (5th Cir. 1994) (holding that an association that had filed a separate lawsuit involving "common legal issues" demonstrated a potentially impaired interest should there be "any potential adverse effects on that case" by a judgment in the instant case). Adding more confusion to the mix, some courts say that an adverse ruling can lead to sufficient impairment only when there is an exceptional circumstance present. *See, e.g.*, *Whitecap Inv. Corp. v. Putnam Lumber & Exp. Co.*, 2012 WL 5997710, at \*6 (D.V.I. Nov. 29, 2012) (explaining that "stare decisis can furnish the practical disadvantage required for the applicant to be entitled to intervention as of right," but requiring "additional exceptional circumstances [to] be present" (quotation marks omitted in second quote) (quoting *Jet Traders Inv. Corp. v. Tekair, Ltd.*, 89 F.R.D. 560, 569 (D. Del. 1981))).

#### 4. Adequate representation.

The final factor in the Rule 24 analysis grants a right to intervene “unless existing parties adequately represent [the outsider’s] interest.”<sup>80</sup> The adequate-representation requirement has become the most problematic factor for those seeking a reliable rule for public law cases that involve a governmental actor, like suits for nationwide injunctions. This is because courts have read several conflicting extratextual presumptions and exceptions into the Rule that obscure who has a right to intervene.

Historically, courts often required a stronger showing of inadequate representation from nonparties seeking to intervene in suits brought by or against a governmental entity, particularly the federal government. They frequently presumed that the government represented a broader public interest that incorporated some subset of individual interests.<sup>81</sup> Litigants then had to meet a higher threshold to intervene by substantiating claims that the government was acting with “gross negligence or bad faith,” rather than showing that the parties were merely acting on behalf of a different or adverse interest—the standard that often applied in cases between private parties.<sup>82</sup>

The 1966 amendments did not significantly revise the text of the adequate-representation requirement.<sup>83</sup> But mere months after the Rule went into effect, the Supreme Court issued a decision suggesting that the presumption of adequate representation no

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<sup>80</sup> FED. R. CIV. P. 24(a)(2).

<sup>81</sup> See, e.g., *MacDonald v. United States*, 119 F.2d 821, 827–28 (9th Cir. 1941) (holding that the proposed intervenor’s private interests in the scope of a homestead patent was adequately represented by the federal government in a suit about whether the government had retained mineral rights to later convey to the homesteaders); *L. Singer & Sons v. Union Pac. R.R.*, 311 U.S. 295, 308 (1940) (Frankfurter, J., concurring) (“The interests of merely private concerns are amply protected even though they must be channelled through the Attorney General or the Interstate Commerce Commission or a state commission.”); *United States v. Am. Soc. of Composers, Authors & Publishers*, 11 F.R.D. 511, 513 (S.D.N.Y. 1951) (“To permit intervention by private citizens, whose purpose in the main is self interest, in proceedings instituted by the Government is more likely to hinder rather than help in the enforcement of laws.”).

<sup>82</sup> *Moore & Levi, Federal Intervention I*, *supra* note 41, at 594; see also *Shapiro, supra* note 41, at 742; 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).

<sup>83</sup> The Rule before the amendment provided for intervention as a matter of right “when the representation of the applicant’s interest by existing parties is or may be inadequate.” FED. R. CIV. P. 24(a), 308 U.S. 647, 690 (1938) (amended 1966). The amendment did, however, excise the requirement that the intervenor be “bound” by the decision, which was a significant change and arguably refocused attention to the adequate-representation requirement. *Shapiro, supra* note 41, at 731 n.46; Kaplan, *supra* note 82, at 401–02.

longer applied. In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*,<sup>84</sup> the Court granted intervention to several commercial entities in an antitrust enforcement action.<sup>85</sup> The whole of the Court's analysis was an assertion that it had "conclude[d] that the new Rule 24(a)(2) is broad enough to include [one of the intervenors]" because "the 'existing parties' have fallen far short of representing its interests."<sup>86</sup>

A few years later, the Court decided *Trbovich*. The case involved a private party, Mike Trbovich, seeking to intervene in a government enforcement action regarding a union election. Trbovich moved to intervene to present additional claims and evidence in favor of overturning the election.<sup>87</sup> Under pre-*Cascade* doctrine, Trbovich would have needed to show that the Secretary of Labor was colluding with the union or committing some malfeasance in his prosecution of the suit. But the Court confirmed that was no longer the case.<sup>88</sup> The Court explained that, under the statute, the Secretary had "the duty to serve two distinct interests, which are related, but not identical."<sup>89</sup> One of those interests was as "the union member's lawyer."<sup>90</sup> The other was a competing "obligation to protect the 'vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.'"<sup>91</sup> Because Trbovich did not share those two interests, the Court understood that he might have a different "approach to the conduct of the litigation."<sup>92</sup>

That analysis appeared to eliminate the heightened requirement that had previously applied. Merely asserting a distinct interest, the Court concluded, rendered it "clear" that "there [was] sufficient doubt about the adequacy of representation to warrant

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<sup>84</sup> 386 U.S. 129 (1967).

<sup>85</sup> *Id.* at 135–36 (quoting FED. R. CIV. P. 24(a)(2)).

<sup>86</sup> *Id.* at 136. Despite the dearth of analysis, the majority's opinion prompted a dissent by Justice Potter Stewart, joined by Justice John Marshall Harlan, who objected to the majority's "radical extensions of intervention doctrine." *Id.* at 160 (Stewart, J., dissenting). According to Justice Stewart, "It ha[d] been the consistent policy of this Court to deny intervention to a person seeking to assert some general public interest in a suit in which a public authority charged with the vindication of that interest is already a party." *Id.* at 149–50.

<sup>87</sup> *Trbovich*, 404 U.S. at 529–30.

<sup>88</sup> *Id.* at 538.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 538–39 (quoting 104 CONG. REC. 10,947 (1958) (statement of Sen. Ted Kennedy)).

<sup>91</sup> *Id.* at 539 (quoting *Wirtz v. Loc. 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 475 (1968)).

<sup>92</sup> *Trbovich*, 404 U.S. at 539.

intervention.”<sup>93</sup> The only reason provided for this departure from previous practice was the text of Rule 24(a)(2): “The requirement of the Rule is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.”<sup>94</sup>

After *Cascade* and *Trbovich*, it was unclear whether the heightened adequate-representation requirement still applied when private parties sought to intervene in suits involving the government. At first, lower courts responded in one of two ways. They either recognized that *Trbovich* abrogated the presumption or ignored that the case went so far. Courts in the first camp have applied the minimal adequate-representation test, recognizing a right to intervene when the outsider identifies an interest distinct from the parties.<sup>95</sup> Courts in the second camp have simply continued to apply the presumption. The Fifth Circuit, for instance, acknowledged *Trbovich*, but then held that “[t]he policy against private intervention in government litigation . . . militates against the allowance of (a)(2) intervention.”<sup>96</sup>

The Supreme Court has remained silent in the decades since *Trbovich* on the nature of the adequate-representation requirement.<sup>97</sup> In the absence of guidance, *Cascade*’s and *Trbovich*’s quasi-abrogation has resulted in a constellation of intervention tests. Many courts continue to apply a presumption that the government represents individual interests, even in circuits that

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<sup>93</sup> *Id.* at 538. Notably, the Court did not think full party status was proper—it held that the statute prevented intervenors from raising additional claims left out from the Secretary’s complaint. *Id.* at 536–37. But the limits envisaged by the Court may have been relatively minor, as it emphasized that the intervenor should have full rights to propose different remedies than those argued for by the Secretary. *Id.* at 537 n.8.

<sup>94</sup> *Id.* at 538 n.10 (quoting 3B MOORE, *supra* note 47, at § 24.09-1[4]).

<sup>95</sup> See, e.g., *Johnson v. S.F. Unified Sch. Dist.*, 500 F.2d 349, 353 (9th Cir. 1974); *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 870 (8th Cir. 1977); *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977).

<sup>96</sup> *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 845–46 (5th Cir. 1975); see also *Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976) (understanding *Trbovich* to hold that the adequate-representation requirement was meant to be “minimal,” but then restating that “a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee”); *Athens Lumber Co. v. FEC*, 690 F.2d 1364, 1366–67 (11th Cir. 1982) (“*Trbovich*, however, cannot be read to stand for a general proposition that a public agency is unable to represent adequately the individual interest of a member of the public.”).

<sup>97</sup> *Berger*, 142 S. Ct. at 2204 (recognizing that some courts apply a presumption of adequate representation, and that this might conflict with *Trbovich*, but declining to decide whether it may “sometimes be appropriate when a private litigant seeks to defend a law alongside the government”).

have read *Trbovich* to roll back that same presumption.<sup>98</sup> For instance, just two years after the D.C. Circuit held that a private interest of a “different scope[ ]” could show inadequate representation by the government,<sup>99</sup> a different panel held that “a citizen or subdivision of [a] state must overcome th[e] presumption of adequate representation.”<sup>100</sup>

The confusion has created a spectrum of doctrines that broaden or limit intervention, depending on the doctrine the court chooses to apply. Some courts have recognized that a personal interest can overcome the presumption, rather than negate the presumption’s application in the first instance—a test that often allows more intervention.<sup>101</sup> Other courts have expanded the analysis by looking to a set of practical factors to see if the presumption should apply, such as whether the government is “capable” and “willing” to make the intervenor’s arguments or whether the intervenor “offers a necessary element to the proceedings that would be neglected.”<sup>102</sup> Still others have required the heightened showing that applied before the 1966 amendment—a showing of an adverse interest, collusion, or malfeasance.<sup>103</sup> And still others require “a showing of gross negligence or bad faith” by the government,<sup>104</sup> which has been described as rendering intervention “unavailable in all but the most extreme cases.”<sup>105</sup>

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<sup>98</sup> See, e.g., *Athens Lumber*, 690 F.2d at 1367; *Ruthardt v. United States*, 303 F.3d 375, 386 (1st Cir. 2002); *XTO Energy, Inc. v. ATD, LLC*, 2016 WL 3148399, at \*15 n.9 (D.N.M. Apr. 18, 2016) (noting the Tenth Circuit’s conflicting precedents on the adequate-representation prong).

<sup>99</sup> *Costle*, 561 F.2d at 912 n.41 (D.C. Cir. 1977) (emphasis omitted).

<sup>100</sup> *Env’tl. Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979).

<sup>101</sup> See, e.g., *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025 (8th Cir. 2003). Some courts reject this. See, e.g., *Daggett v. Comm’n on Governmental Ethics & Election Pracs.*, 172 F.3d 104, 112 (1st Cir. 1999) (“The general notion that the Attorney General represents ‘broader’ interests at some abstract level is not enough.”).

<sup>102</sup> *Watt*, 713 F.2d at 528; see also *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982).

<sup>103</sup> *Coal. of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep’t of the Interior*, 100 F.3d 837, 845 (10th Cir. 1996); *Sanguine, Ltd. v. U.S. Dep’t of the Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984); see also *Conservation L. Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992) (acknowledging that the First Circuit has at times required “adversity of interest, collusion, or nonfeasance,” but granting intervention because the interests of the intervenors were different from the government (quoting *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979))).

<sup>104</sup> *Kaul*, 942 F.3d at 799 (quoting *Ligas*, 478 F.3d at 774).

<sup>105</sup> *Id.* at 805 (Sykes, J., concurring).

In addition to this conflict, one doctrinal development is worth emphasizing given its impact on public law cases. Some courts have held that intervenors can overcome the presumption of adequate representation by showing that the government has failed to appeal a ruling that prejudices the proposed intervenor's interests.<sup>106</sup> Sometimes, even the *possibility* that the government will settle or not appeal is enough for an intervenor to be granted the right to defend the challenged policy.<sup>107</sup>

In sum, there are few consistent principles that cabin the adequate-representation analysis, especially when private parties seek to intervene in government suits. Any court evaluating whether a nonparty can participate has a range of precedents available to it. One set imposes a near-insurmountable barrier. Another presents an easily bypassed hurdle. This dynamic has resulted in unconstrained judicial discretion and little guidance to litigants seeking to participate in suits that affect their interests.

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As this Section has shown, each element of the Rule 24 test has expanded the discretion available to courts to grant or deny the intervention of any particular movant in any particular case. But discretion alone does not equate to an unprincipled procedural design. To evaluate that discretion, it is necessary to know the values that a particular procedural rule is meant to promote.

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<sup>106</sup> *Compare* *Chiglo v. City of Preston*, 104 F.3d 185, 188 (8th Cir. 1997) (“We conclude that the proposed intervenors must show something more than mere failure to appeal.”), *and* *Orange Env’t, Inc. v. County of Orange*, 817 F. Supp. 1051, 1061–62 (S.D.N.Y. 1993) (“[T]he fact that the Legislature . . . gauges the County’s prospects for success on appeal differently does not make a case for inadequate representation.”), *and* *United States v. City of Chicago*, 897 F.2d 243, 244 (7th Cir. 1990) (“In this circuit intervention to take an appeal is permissible only if the original parties’ decision to discontinue the battle reflects ‘gross negligence or bad faith.’” (quoting *United States v. S. Bend Cmty. Sch. Corp.*, 692 F.2d 623, 627 (7th Cir. 1982))), *with* *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1228 (6th Cir. 1984) (“We conclude that, as of the time [the party] decided not to appeal, its representation of [the proposed intervenor’s] interest became inadequate.”), *and* *County of Fresno v. Andrus*, 622 F.2d 436, 439 (9th Cir. 1980) (“NLP’s arguments in opposition to the motion for a preliminary injunction were virtually identical to the Department of the Interior’s arguments, but the Department did not pursue these arguments, as NLP would have, by taking an appeal. This unwillingness indicates that the Department does not represent NLP fully.”), *and* *Nuesse v. Camp*, 385 F.2d 694, 704 n.10 (D.C. Cir. 1967) (“Of course, even where the interests of a person may have been adequately represented at trial, failure to take an appeal from an adverse judgment may introduce the element of inadequacy, entitling the interested person to intervene after judgment to file an appeal.”).

<sup>107</sup> *Mosbacher*, 966 F.2d at 44 (“[E]vidence that parties are ‘sleeping on their oars’ or ‘settlement talks are underway’ may be enough to show inadequacy.” (quoting *Moosehead*, 610 F.2d at 54–55)).



## B. The Values of Intervention

This Section provides an overview of three competing values animating joinder rules, like Rule 24.<sup>108</sup> These three values are: affording an opportunity for outsiders to meaningfully participate, increasing judicial efficiency, and safeguarding the right of the original parties to control the lawsuit.<sup>109</sup>

### 1. Meaningful participation.

Intervention has always been about affording a meaningful opportunity for outsiders to participate in suits that will affect their interests. As Professor James Moore and Attorney General Edward Levi explained shortly before the rules were adopted, intervention's "utility lies in offering protection to non-parties" who "comprise a large and undefined group with varied interests, oftentimes of tremendous financial and legal importance."<sup>110</sup> This principle has only expanded with the rise of public law litigation. As more policies are debated in courts rather than in legislatures or administrative agencies—the traditional avenues for participation in policymaking—some think that courts should hear from the spectrum of interests affected.<sup>111</sup>

Affording an opportunity for interested outsiders to participate serves both individual and institutional principles. It supports the "deep-rooted historic tradition that everyone should

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<sup>108</sup> Rule 24 is closely tied, in both purpose and form, to other joinder rules like Rule 19 (joinder of necessary parties) and Rule 23 (class actions). See Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 69, 109 (J.P.M.L. 1966).

<sup>109</sup> These values also align with the pronounced goals of the federal rules to make litigation "just, speedy, and inexpensive." FED. R. CIV. P. 1. The goals of any procedural rule are disputed. And many disagree both about how to define those values and how to prioritize overlapping and conflicting values. This Section provides a brief overview of the three that commonly arise in judicial decisions, rules committee proceedings, and scholarly discussions, without taking a position on whether this is the best way to articulate these values or how these values should be properly balanced writ large.

<sup>110</sup> Moore & Levi, *Federal Intervention I*, *supra* note 41, at 565. This value of outsider protection has been continually expressed throughout Rule 24's amendments. See *Amendments*, 39 F.R.D. at 109–10; *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972) ("The right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard.")

<sup>111</sup> See Nelson, *supra* note 41, at 360–61 (describing the evolution of public law litigation and participation in federal court); Tobias, *Public Law*, *supra* note 22, at 328–29 (discussing judicial approaches to public law litigation).

have his own day in court”<sup>112</sup> and affirms the dignity and autonomy of those whose interests are tangled up in litigation.<sup>113</sup> It also supports the legitimacy of judicial decisions as the products of a fair and comprehensive procedural system.<sup>114</sup>

The key question, however, is what it means to have a right to participate. Even proponents of broad intervention acknowledge that participation by nonparties has some limit.<sup>115</sup> For instance, in aggregate litigation, it would often be exceedingly difficult (if not impossible) to afford each affected nonparty an equal opportunity to participate on par with the original parties.<sup>116</sup>

The principle is thus often articulated as protecting *meaningful* participation. Courts and commentators have repeatedly referred to the outsider’s ability to provide an “effective presentation of [their] interest,”<sup>117</sup> or to the court’s responsibility “to give the intervenor a sense that it has at least been heard.”<sup>118</sup> The boundary on these rights is necessarily somewhat context specific. It requires that courts provide enough guidance for outsiders

<sup>112</sup> *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (quoting 18A WRIGHT ET AL., *supra* note 38, § 4449).

<sup>113</sup> See Bayefsky, *Remedies and Respect*, *supra* note 17, at 1303; Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1393–96 (1991) [hereinafter Sturm, *Public Law Remedies*]; Cass R. Sunstein & Richard B. Stewart, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1279–80 (1982); Randolph D. Moss, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 YALE L.J. 1811, 1815–17 (1986).

<sup>114</sup> Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 279 (2004) (“[T]he legitimacy of adjudication depends on affording those who are to be bound a right to participate, either directly or through adequate representation.”); *id.* at 262–81, 286–89; Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 625 (1993) (“A strong participation right can be justified only by a normative theory of process value that grounds the value of participation in the conditions of adjudicative legitimacy, such as respect for a party’s dignity or autonomy.”); William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 952 (1989); Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 42 (1979); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978); see also Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 356–57 (1997); Sturm, *Public Law Remedies*, *supra* note 113, at 1391–93; Eric K. Yamamoto, *Efficiency’s Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 387 (1990).

<sup>115</sup> See, e.g., Kennedy, *supra* note 39, at 375; Ernest E. Shaver, Note, *Intervention in the Public Interest Under Rule 24(a)(2) of the Federal Rules of Civil Procedure*, 45 WASH. & LEE L. REV. 1549, 1571 (1988).

<sup>116</sup> See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1311 (1976) [hereinafter Chayes, *Public Law Litigation*]; Appel, *supra* note 22, at 298–99.

<sup>117</sup> Shapiro, *supra* note 41, at 756.

<sup>118</sup> Appel, *supra* note 22, at 298.

to know how to participate.<sup>119</sup> And the core features of that participation often include the ability to present evidence, raise arguments, participate in settlement negotiations, and appeal adverse decisions.<sup>120</sup>

In this way, intervention stands in stark contrast to amicus curiae participation. Amici are not parties to the case—their role is generally to serve the interests of the court by presenting additional arguments not raised or fleshed out by the parties.<sup>121</sup> Although rare exceptions exist, amici usually have no right to present evidence outside the record. Nor do the parties need to involve them in settlement negotiations.<sup>122</sup> Nor can amici appeal. Even the right to present arguments is limited, as courts have no corresponding obligation to consider those arguments.<sup>123</sup>

The discretionary nature of intervention complicates whether Rule 24 protects the opportunity for intervenors to meaningfully participate. Because courts have broad discretion to decide whether an intervenor is permissive or of right, and then impose extreme limits on their participation, some intervenors with strong interests will find their ability to protect those interests unduly circumscribed by the courts. And there is little recourse to fix abuses of that discretion before the intervenor's rights in the case are adjudicated, as intervenors cannot appeal a grant of permissive intervention until after final judgment.

## 2. Judicial efficiency.

Intervention also serves the interests of the judicial system by allowing courts to hear common claims in one case. By having one court adjudicate related questions of law and fact in one action, courts avoid duplicative suits that cause congestion, delay, and potentially conflicting judgments.<sup>124</sup> Courts especially rely on

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<sup>119</sup> Jeremy Waldron, *The Rule of Law and Importance of Procedure*, 50 NOMOS: AM. SOC'Y POL. LEGAL PHIL. 3, 26 (2011) (“[P]eople rely on [the courts’] articulated procedures as indicating the points of access at which citizens can hope to influence and participate in their proceedings.”).

<sup>120</sup> *Nuesse*, 385 F.2d at 704 n.10.

<sup>121</sup> *Id.*

<sup>122</sup> Appel, *supra* note 22, at 299.

<sup>123</sup> *Kim v. Hanlon*, 99 F.4th 140, 153 (3d Cir. 2024) (“[I]f only raised by amici, such issues are normally not considered on appeal.”); *Lavallee v. Med-1 Sols., LLC*, 932 F.3d 1049, 1056 (7th Cir. 2019) (“Moreover, we don’t usually consider arguments introduced on appeal by an amicus.”).

<sup>124</sup> Moore & Levi, *Federal Intervention I*, *supra* note 41, at 607; *see also* Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 6–7 (2018) (“Courts and

this principle in complex litigation, where there is a “great public interest” in “having a disposition at a single time of as much of the controversy to as many of the parties as is fairly possible.”<sup>125</sup> Intervenor might also increase the accuracy of the court’s decision by providing relevant information that has been withheld by or is unavailable to the original parties.<sup>126</sup>

Intervention increases efficiency in part by ensuring that court judgments and settlements are not challenged by affected outsiders after the fact.<sup>127</sup> Nonparties who are both affected by a judgment and inadequately represented may bring separate actions or intervene to reopen consent decrees, requiring the court to relitigate the same questions and unravel the agreement in the original suit.<sup>128</sup>

But the benefits of adding parties to the suit may have diminishing returns. “Additional parties always take additional time,” as one court put it, because “[e]ven if they have no witnesses of their own, they are the source of additional questions, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair.”<sup>129</sup> And when there are too many issues or arguments raised, this can delay the court’s resolution of the original party’s claim and “cloud[ ]” the court’s understanding of the issues.<sup>130</sup>

The discretionary nature of intervention also reduces judicial efficiency. Courts receive more contested briefing on whether an outsider should be allowed to intervene because there are conflicting doctrines that support both sides. District courts must therefore spend more time and judicial resources deciding intervention motions, and those decisions are more likely to be appealed.

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parties benefit from increased efficiency, the avoidance of duplicative litigation, and consistency in judgments and precedent.”); 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, 813–15 (1989).

<sup>125</sup> *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 824 (5th Cir. 1967); see also Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 332–33 (2008) [hereinafter Bone, *Effective Rules*].

<sup>126</sup> See Edward J. Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701, 729–38 (1978).

<sup>127</sup> Kennedy, *supra* note 39, at 330.

<sup>128</sup> See *Martin*, 490 U.S. at 762–73.

<sup>129</sup> *Bush v. Viterna*, 740 F.2d 350, 359 (5th Cir. 1984) (quoting *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943)).

<sup>130</sup> *Stadin v. Union Elec. Co.*, 309 F.2d 912, 920 (8th Cir. 1962); see also *Trager v. Hiebert Contracting Co.*, 339 F.2d 530, 531 (1st Cir. 1964) (“If every person who fears he may be holding the stake could forthwith share dominion over the defense of the principal action we would have too many cooks working at cross purposes over the broth or, at the least, struggling for a place at the stove.”).

### 3. Party control.

Finally, the values of judicial efficiency and meaningful participation for outsiders are balanced against the interests of the original parties. Party control is a central component of the adversarial system.<sup>131</sup> Plaintiffs have significant power over where a case will be litigated, the claims in dispute, the parties involved, and the presentation of their claims before the court.<sup>132</sup> Defendants have a similar although more limited power to request a change in venue, add counterclaims or parties, and shift the narrative before the court with their own presentation of the issues.<sup>133</sup>

Intervenors can displace the original parties' authority over the lawsuit.<sup>134</sup> Many features of an intervenor's opportunity to participate infringe on the original party's right to control the suit, including the right to seek additional discovery, raise new claims or arguments, present different evidence, object to settlements, and appeal. Intervenors who exercise these powers can impose real harms on the parties by delaying the court's resolution and driving up the costs of the litigation.<sup>135</sup> Even when limited to just raising additional legal reasoning, intervenors can "drown out the effective presentation" of the party's argument.<sup>136</sup>

The discretionary nature of intervention exacerbates these costs. For the same reason that courts may have to spend more of their own time deciding contested motions to intervene, the original parties may spend more time and money litigating whether a proposed intervenor can be kept out of the case.

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<sup>131</sup> *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (explaining that "[i]n our adversarial system of adjudication, we follow the principle of party presentation" and rely "in the first instance and on appeal . . . on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present" (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008))).

<sup>132</sup> Shapiro, *supra* note 41, at 726–27.

<sup>133</sup> *Id.*; *see also* *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005).

<sup>134</sup> This is not always true. Sometimes intervenors work with the original parties. *See, e.g., infra* Part II (discussing how intervenors join to shore up standing). And intervention can sometimes hasten the court's adjudication of the parties' rights by preventing collateral attacks and duplicative proceedings. *UAW Loc. 283 v. Scofield*, 382 U.S. 205, 214 (1965); *Martin*, 490 U.S. at 766–67.

<sup>135</sup> Kennedy, *supra* note 39, at 376; Shapiro, *supra* note 41, at 746.

<sup>136</sup> Appel, *supra* note 22, at 298.

### C. The Values of Intervention in Private and Public Law Litigation

In many ways, the Federal Rules of Civil Procedure are all about promoting these three values through discretion.<sup>137</sup> That was originally by design. The drafters of the federal rules had faith that judges could apply general procedural rules to achieve just ends.<sup>138</sup> And it has continued, in part, as matter of expediency. The Advisory Committee responsible for amending the federal rules tends to propose general rules that can achieve consensus—papering over divisive policy choices that must then be resolved by courts in individual cases.<sup>139</sup>

There is an extensive literature documenting and evaluating the discretion afforded to judges under the federal rules.<sup>140</sup> The Article contributes to one key feature of this debate: the importance of looking at how discretion under the federal rules has operated in practice. If there is one common thread, scholars agree that procedural design should be informed by how courts have read and applied the federal rules in case-specific circumstances.<sup>141</sup> For instance, scholars have looked at how the federal rules compare depending on the substantive area of law,<sup>142</sup> the

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<sup>137</sup> Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 861 (2018) [hereinafter Lahav, *Procedural Design*] (“The soul of the Federal Rules, it might be said, is judicial discretion . . . .”); Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1962 (2007) (“Federal district judges exercise extremely broad and relatively unchecked discretion over many of the details of litigation.”).

<sup>138</sup> Subrin, *supra* note 30, at 944–48, 1001 (describing the views of the drafters of the federal rules as “rely[ing] on expertise and judicial discretion”).

<sup>139</sup> Bone, *Effective Rules*, *supra* note 125, at 326; David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1235 [hereinafter Marcus, *Trans-Substantivity*].

<sup>140</sup> As a small sampling, see Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1613 (2003); Stephen C. Yeazell, Essay, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 646–67; and Resnik, *supra* note 27, at 391–92.

<sup>141</sup> See, e.g., Edward A. Purcell, Jr., *Exploring the Interpretation and Application of Procedural Rules: The Problem of Implicit and Institutional Racial Bias*, 23 U. PA. J. CONST. L. 2538, 2529–30 (2021) (“Proceduralists have increasingly recognized that they can never know the actual significance of any procedural rule—however fair and rational it might appear on its face—without empirical evidence showing its uses and practical results.”); Marcus, *Trans-Substantivity*, *supra* note 139, at 1230 (“To answer these queries properly, a court should have data, expertise with their analysis, and metrics to evaluate outcomes under the trans-substantive rule and the substance-specific alternative.”); Carl Tobias, *Rethinking Intervention in Environmental Litigation*, 78 WASH. U. L.Q. 313, 314, 316–17 (2000).

<sup>142</sup> See, e.g., David L. Noll & Luke P. Norris, *Federal Rules of Private Enforcement*, 108 CORNELL L. REV. 1639, 1686–92 (2023); Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on*

private or public nature of the action,<sup>143</sup> and the stage of the litigation.<sup>144</sup>

But scholars have yet to incorporate the nationwide-injunction landscape into this discussion. Cases seeking nationwide injunctions share features that distinguish them from other types of litigation: they affect numerous interests not represented by the litigating parties, they involve contentious policies of national importance, and the court's remedy can foreclose other avenues for participation. How these features distort the operation of the federal rules, and the extent to which the procedural design should be amended to account for those changes, warrant careful consideration.

To contribute to that process, this Section begins by surveying how Rule 24 has operated in other contexts that had features distorting the application of the federal rules, including railroad receiverships, antitrust enforcement actions, and cases seeking structural injunctions. It then analyzes the features that differentiate nationwide-injunction litigation.

1. Comparing Rule 24's operation in distinct legal contexts.

This Section provides a brief overview of how the values of intervention have been balanced over time to accommodate the function of litigation and the role that judicial discretion has played in that analysis.

*a) Receiverships and reorganizations.* When intervention was first adopted in the federal rules, the drafters put their faith in district courts to exercise their discretion properly and allow intervention where necessary to protect nonparties.<sup>145</sup> But one context raised particular concern: receiverships and reorganizations. In a traditional receivership, a court appointed a disinterested third party who “took possession of the property, sold the

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*Civil Rights*, 92 WASH. U. L. REV. 455, 464 (2014); Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1053 (2013).

<sup>143</sup> See, e.g., Tobias, *Public Law*, *supra* note 22, at 340–43.

<sup>144</sup> For instance, scholars have looked at how the federal rules interact depending on the sequence of the litigation. See Lahav, *Procedural Design*, *supra* note 137, at 872–86; Louis Kaplow, *Multistage Adjudication*, 126 HARV. L. REV. 1179, 1252 (2013); Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1, 21 (2010). They have also compared their operation in the liability and remedy stages of litigation. See, e.g., Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981, 989 (1993) [hereinafter Sturm, *Participation*].

<sup>145</sup> Moore & Levi, *Federal Intervention I*, *supra* note 41, at 595 (“[I]n many cases where intervention might be denied as an absolute right, it would seem desirable that the trial court exercise its discretion and allow intervention.”).

assets, paid creditors, and wound up the affairs of the company.”<sup>146</sup> In the late nineteenth century, struggling railroad owners began using receiverships to avoid financial losses. Rather than waiting for creditors to sue when a railroad was on the brink of bankruptcy, the railroad company approached the court on its own, requested a receiver (who often turned out to be one of the railroad’s current managers), and proceeded with reorganization to shed the railroad’s debt with a new corporate shell.<sup>147</sup> Objectors were often heard only at the end of the process (the confirmation of the sale), when courts were disinclined to undo the receiver’s work.<sup>148</sup>

The railroad receivership and reorganization model required a different evaluation of how intervention should operate. These cases were of significant public importance,<sup>149</sup> could involve protracted litigation and negotiation, often affected numerous financial interests, and required a different adequate-representation analysis than the trustee-based concept courts had previously used.<sup>150</sup> When Moore and Levi outlined how the new Rule 24 should operate generally, they devoted significant space to discussing how the Rule should operate differently in this context. They suggested that courts should carefully parse the interest asserted by the nonparty and allow them to participate at different levels in different stages of the litigation.<sup>151</sup> This served the judiciary’s interests and those of the nonparties—it informed the court of relevant information before it dedicated significant time to the plan and provided nonparties with greater participation rights—with notably little regard for the control rights of the original party seeking the receivership.

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<sup>146</sup> JAMES W. ELY, JR., *RAILROADS & AMERICAN LAW* 176 (2001).

<sup>147</sup> *Id.* at 177–79.

<sup>148</sup> Moore & Levi, *Federal Intervention I*, *supra* note 41, at 598–99.

<sup>149</sup> ELY, *supra* note 146, at 177 (“The contractual rights of creditors and bondholders were now subordinated to the public interest that transportation services be preserved if possible.”).

<sup>150</sup> See Moore & Levi, *Federal Intervention I*, *supra* note 41, at 603–04; Edward H. Levi & James W. Moore, *Federal Intervention: II. The Procedure, Status, and Federal Jurisdictional Requirements*, 47 *YALE L.J.* 898, 933–34 (1938) [hereinafter Levi & Moore, *Federal Intervention II*] (summarizing and providing additional support for their argument that receiverships and reorganizations should involve a different adequate representation analysis); see also Comment, *Methods of Attacking Receiverships*, 47 *YALE L.J.* 746, 757–58, 765 (1938) (critiquing Rule 24’s liberal approach to intervention in the context of receiverships).

<sup>151</sup> Moore & Levi, *Federal Intervention I*, *supra* note 41, at 606; Levi & Moore, *Federal Intervention II*, *supra* note 150, at 934.



*b) Antitrust enforcement.* A new context arose in the mid-twentieth century that led to a different balancing of intervention: the government antitrust enforcement action.<sup>152</sup> These suits arose under the Sherman Act<sup>153</sup> and the Clayton Act.<sup>154</sup> In the typical case, the federal government sued seeking a consent decree that would require the company to end an anticompetitive practice.<sup>155</sup> Nonparties sought to intervene, arguing that the consent decree failed to go far enough to curb unlawful practices or that the decree would collaterally harm their individual economic interests.<sup>156</sup> These cases differed from other forms of litigation before the court. They were bilateral suits that adjudicated the liability of a single entity, but the remedy affected a diverse set of conflicting financial interests. Widespread intervention might protect those interests, but it could also block settlements and force the government to spend resources on protracted, fact-intensive legal battles.

Courts responded to this new context by adopting a narrow view of intervention to shut nonparties out of the case.<sup>157</sup> Courts presumed that the executive had been charged with representing the public interest writ large and that interest necessarily subsumed whatever collateral private financial interests were also affected.<sup>158</sup> This view of intervention downplayed the participation rights of affected nonparties in favor of judicial efficiency and party control. And courts were explicit in their choice. As the Supreme Court explained, it was “sound policy” to let the government negotiate its own settlements, and it would only police its

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<sup>152</sup> As David Shapiro observed, “the increased complexity of litigation and the growing number of cases involving the public interest or a wide variety of private interests have been accompanied by a steady change in the attitude toward intervention.” Shapiro, *supra* note 41, at 722.

<sup>153</sup> 15 U.S.C. §§ 1–7.

<sup>154</sup> *Id.* §§ 12–27.

<sup>155</sup> Robert P. Schuwerk, *Private Participation in Department of Justice Antitrust Proceedings*, 39 U. CHI. L. REV. 143, 143 (1971) (“The great bulk of federal civil antitrust suits are terminated by consent decrees.”).

<sup>156</sup> See, e.g., *United States v. Chi. Title & Tr. Co.*, 1966 WL 86610, at \*2 (N.D. Ill. 1966) (rejecting a proposed intervenor’s argument that the consent decree that would “create[] an undue advantage to an unknown but favored competitor in the Chicago market to [the intervenor’s] detriment”).

<sup>157</sup> Schuwerk, *supra* note 155, at 147–48.

<sup>158</sup> *Id.* at 148–49; see also *United States v. Gen. Elec. Co.*, 95 F. Supp. 165, 168 (D.N.J. 1950) (“[T]he Department of Justice adequately represent[s] the public interest in free competition including the interests of the present applicants for intervention.”).

representation of the public interest for “bad faith or malfeasance.”<sup>159</sup> Courts routinely exercised their discretionary managerial powers to encourage the parties to settle—a nudge that defendants rarely needed—and consistently rejected intervenors who might interfere with negotiations regardless of their asserted interests.<sup>160</sup>

*c) Structural injunctions.* In the wake of *Brown v. Board of Education*,<sup>161</sup> the Civil Rights Movement, and a growth in statutory causes of action, courts began issuing an increasing number of orders that reformed state and local institutions through detailed, long-term decrees.<sup>162</sup> Scholars consider these “structural injunctions” as distinct from other types of litigation in part because they: adjudicate the concrete realization of constitutional rights and values, affect numerous legal and practical interests and perspectives related to the defendant, expand the judicial role from passive umpire to institutional manager, and involve a protracted remedial phase with a sustained dialogue between the court and the parties.<sup>163</sup>

These features raised several procedural and institutional challenges.<sup>164</sup> One strain of sustained criticism questioned the court’s competency to engage in the administrative and sometimes political task of reform by decree.<sup>165</sup> If the court’s remedy

<sup>159</sup> *Sam Fox Pub. Co. v. United States*, 366 U.S. 683, 689 (1961).

<sup>160</sup> Kaplan, *supra* note 82, at 402 (noting the Supreme Court’s “disfavor of private interventions in government antitrust suits”); Shapiro, *supra* note 41, at 743 & n.103 (noting a motion to dismiss that asserted that the Supreme Court’s decision in *Cascade* was “the first decision of the Supreme Court in over 25 years to allow intervention in a government antitrust suit”).

<sup>161</sup> 347 U.S. 483 (1954).

<sup>162</sup> See Chayes, *Public Law Litigation*, *supra* note 116, at 1293, 1302; ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 16 (2003). Famous examples include suits to desegregate schools, reform prisons, police departments, mental health facilities, and public housing. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1021 (2004).

<sup>163</sup> Fiss, *supra* note 114, at 18–28; Chayes, *Public Law Litigation*, *supra* note 116, at 1288–89, 1302–04; Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 46 (1982); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 472–473 (1980) (summarizing features raised by critics, but disputing just how new or rare these features are in other types of litigation).

<sup>164</sup> See generally John C. Jeffries, Jr., & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387 (2007) (examining the history of structural reform injunctions and their relationship to the democratic political process); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978) (focusing on the constitutional separation of powers issues raised by structural injunctions).

<sup>165</sup> Eisenberg & Yeazell, *supra* note 163, at 472–73.

affected everyone who interacted with the public institution, it seemed fair to question the legitimacy of that remedy if the court only heard the limited views of the original parties.

For many, the answer was increased intervention, particularly at the remedial stage of litigation when the court was fashioning the decree. Scholars and commentators encouraged courts to exercise their discretion to grant participation to nonparties representing a capacious variety of relationships and interests in the institution.<sup>166</sup> They identified several benefits from this practice. Broad intervention helped legitimize the resulting decree as the product of a “judicially structured process of deliberation” that considered the interests of those affected by its decision.<sup>167</sup> That, in turn, promoted the finality and efficacy of the decree; because more people participated in fashioning the decree, fewer people are likely to collaterally challenge it or undermine its implementation. And it recognized the dignity of each affected individual by providing an opportunity for them to be heard.<sup>168</sup> These benefits came with a concomitant cost to the control rights of the original parties—an imbalance that some justified was a consequence of litigating a shared constitutional right.

As these examples show, courts and scholars have analyzed the procedural values behind intervention in the context of a variety of adjudicative structures and substantive doctrines. The next part assesses the factors that distinguish nationwide-injunction litigation and argues that these features raise concerns about how the values of intervention are being balanced in this context.

## 2. What makes nationwide-injunction litigation different.

Nationwide injunctions are a type of universal remedy—an umbrella term that captures forms of relief that apply nationwide and to nonparties.<sup>169</sup> Nationwide injunctions enjoin the defendant, like the federal government, from enforcing a policy against

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<sup>166</sup> See, e.g., Sturm, *Participation*, *supra* note 144, at 991; Moss, *supra* note 113, at 1829–34 (arguing for Rule 23(e) fairness hearings in structural-injunction cases in part because courts blocked intervention by applying the presumption of adequate representation for Rule 24); Yeazell, *Intervention*, *supra* note 22, at 260.

<sup>167</sup> Sturm, *Participation*, *supra* note 144, 982 n.7; see also Sturm, *Public Law Remedies*, *supra* note 113, 1391–96.

<sup>168</sup> See *supra* note 113.

<sup>169</sup> John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. ON REGUL. BULL. 37, 38 (2020) [hereinafter Harrison, *Section 706*].

anyone.<sup>170</sup> They may be enforced by contempt, even by nonparties.<sup>171</sup> Another universal remedy is vacatur, a judicial order declaring that a government rule shall no longer have legal effect against anyone.<sup>172</sup> These forms of relief are distinct, though they often overlap because plaintiffs will seek both in the same action.<sup>173</sup>

This Section identifies three features that I argue are relevant to Rule 24's operation that distinguish nationwide-injunction litigation from traditional private suits or other types of public law cases: (1) the universal nature of the remedy affects numerous interests not captured by the litigating parties; (2) these cases are often high profile and involve politically salient national rules and policies; and (3) the remedy often forecloses other types of participation—either in other lawsuits or in the political process.<sup>174</sup>

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<sup>170</sup> See Bray, *Multiple Chancellors*, *supra* note 16, at 419 n.5 (explaining that the distinguishing feature of nationwide injunctions “is that the injunction protects nonparties”); Trump v. Hawaii, 138 S. Ct. 2392, 2425 n.1 (2018) (Thomas, J., concurring) (same).

<sup>171</sup> Milan D. Smith, Jr., *Only Where Justified: Toward Limits and Explanatory Requirements for Nationwide Injunctions*, 95 NOTRE DAME L. REV. 2013, 2018 nn.18–19 (2020). *But see generally* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685 (2018).

<sup>172</sup> Sohoni, *Power to Vacate*, *supra* note 12, at 1122.

<sup>173</sup> For a discussion on the difference between these two forms of relief, see *id.* and Harrison, *Section 706*, *supra* note 169, at 37. Cases seeking or resulting in vacatur of an agency action will often share features with cases for nationwide injunctions. But they may also raise distinct concerns that warrant their own separate analysis. For instance, nonparties may have different participation concerns if the court's vacatur results in future agency hearings where those nonparties can participate. And petitions for review of agency actions may be governed by different intervention rules. See *Richardson v. Flores*, 979 F.3d 1102, 1104 (5th Cir. 2020) (“[T]he Federal Rules of Appellate Procedure contemplate intervention only in proceedings to review agency action. FED. R. APP. P. 15(d). But despite the lack of an on-point rule, we have allowed intervention in cases outside the scope of Rule 15(d).”). For this reason, this Article is limited to suits seeking nationwide injunctions.

<sup>174</sup> This is not meant to be an exhaustive list. Instead, it identifies three factors that are helpful in analyzing how nationwide-injunction cases can distort procedural functions. These features also apply to other types of suits. For instance, there are often high-profile, politically salient challenges to state laws. But these factors are likely to be more acute in the nationwide-injunction context. Nationwide injunctions affect more interests; a statewide injunction affects only those governed by that state's laws, as opposed to a nationwide injunction that blocks a policy for everyone in the country. And nationwide injunctions can foreclose more alternative avenues for participation; a statewide injunction leaves other states and the federal government free to adopt the same policy, as opposed to a nationwide injunction that potentially forecloses the federal government or the states from adopting that policy—especially when it is a field that has been preempted under federal law.

First, nationwide-injunction cases implicate a wide variety of interests.<sup>175</sup> Ordinarily, a district court judgment has no precedential effect and no preclusive effect on nonparties. At the appellate level, a case might set precedent that would foreclose or hamper similarly situated claimants, but the order would bind only the parties. By contrast, a nationwide injunction applies to all who have a related interest to the adjudicated claim because it bars the government from enforcing the policy against anyone.

That interest may be legal or practical. For instance, those who have standing to bring a similar legal claim against the challenged policy may benefit by having their claim vindicated alongside the plaintiffs. By contrast, an injunction barring the government from enforcing a policy may give rise to claims by other parties who used to benefit from the government's enforcement and now suffer a legal injury. On the practical side, a nationwide injunction might affect to different degrees, for example: the advocates of the government policy, the policy's opponents, individual beneficiaries of the regime, advocacy groups, experts, the federal agencies and officials responsible for adopting and enforcing the policy, and the connected state officials who help effectuate the policy's enforcement.

Second, nationwide-injunction cases involve headline-grabbing, divisive political disputes of national importance. That attention, as numerous courts and scholars have noted, can exacerbate perceptions that the judiciary is engaged in politics. When judges are seen as exercising significant power over national policy, the judiciary itself appears more political.<sup>176</sup> Forum shopping exacerbates this suspicion. Parties file where they think a particular judge or circuit has a favorable ideological bent, so when those courts issue the predicted injunction, those courts appear to confirm their ideological reputation.<sup>177</sup>

Of course, not all nationwide injunctions concern highly salient issues. Some cases involve technical or narrow exercises of

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<sup>175</sup> Harrison, *Federal Judicial Power*, *supra* note 16, at 1932 (“Universal injunctions, for example, present problems of litigation structure because they involve relief that reaches beyond the parties to the case.”).

<sup>176</sup> Or in the colorful words of one judge—courts risk being seen “as partisan warriors in contradiction to the rule of law.” *In re Trump*, 958 F.3d 274, 292 (4th Cir. 2020) (Wilkinson, J., dissenting).

<sup>177</sup> Allison Orr Larsen & Neal Devins, *Circuit Personalities*, 108 VA. L. REV. 1315, 1374–75 (2022) (identifying the Fifth Circuit as the “go-to circuit for conservative challenges to progressive policies” and the Ninth Circuit as playing a similar role for progressive challenges).

government power. So even when a court enjoins the government from enforcing a policy, there may be few who were captured by that regulation in the first place. But other types of litigation are unlikely to involve the same social and political dimensions—and thus raise the same questions about the judiciary’s neutrality—as those brought to change federal policy.

Finally, nationwide injunctions can prevent other avenues for participation. One way is by foreclosing litigation by other plaintiffs. Once one injunction prevents the government from enforcing the policy, litigants are unlikely to pursue duplicative injunctions in separate fora.<sup>178</sup> Similarly, because nationwide injunctions incentivize forum shopping, many cases will be brought in the jurisdictions with well-known ideological leanings. That prevents the thoughtful deliberation and participation by judges in other jurisdictions.

Another way nationwide injunctions hamper participation is by short-circuiting the political process. The democratic branches are the preferred venue for making national policy. Judges respect this principle by declining to adjudicate generalized social and political grievances. But when a court enjoins a federal policy, it cuts off that public debate.<sup>179</sup> Nationwide injunctions therefore risk undercutting principles of self-governance, as members of the community have fewer opportunities to participate in defining their societal rights and obligations.

These features emphasize the importance of the procedural architecture governing how nationwide injunctions are litigated. Procedural rules can increase opportunities for nonparties to participate, protecting interested outsiders and offsetting democratic participation costs. It can also alleviate skepticism about judicial competency by providing courts with increased access to information and avenues to avoid politicized outcomes. But to structure the system to best protect those values, it is critical to first know how the system is working.

## II. INTERVENTION IN NATIONWIDE-INJUNCTION CASES

This Part documents the widespread but previously unrecognized phenomena of outsiders seeking or gaining party status to

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<sup>178</sup> Smith, *supra* note 171, at 2032.

<sup>179</sup> CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 27 (1999) (“[A] broad, early ruling may have unfortunate systemic effects. It may prevent the kind of evolution, adaptation, and argumentative give-and-take that tend to accompany lasting social reform.”).

influence the results of high-profile, politically charged cases. Analyzing the granular details of how these cases have been litigated reveals that intervenors play an assortment of roles once they become parties. Some of those functions—in particular, preventing settlement or guaranteeing an appeal of an adverse decision—produce concerning normative effects. In turn, examining how courts have resolved these motions reveals that courts exercise unpredictable discretion that undermines the values of Rule 24 and exacerbates institutional fault lines. Those concerns are discussed in Part III.

#### A. The Dataset: Methodology and Results

First a note about methodology. To determine how often outsiders seek to intervene in cases for nationwide injunctions, I began by examining the cases identified in preexisting nationwide-injunction scholarship.<sup>180</sup> I then built on that dataset by conducting a Westlaw search for references to nationwide injunctions—including similar monikers like “national,” “universal,” “government-wide,” and “cosmic”—to find cases where the court considered or granted such relief.<sup>181</sup> Only cases in which a nationwide injunction was sought or issued were included; complaints solely for other forms of universal remedies (like vacatur) were excluded, even if paired with injunctive relief, so long as that relief was limited to a geographical area, jurisdiction, or set of plaintiffs.<sup>182</sup>

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<sup>180</sup> See, e.g., *supra* notes 16–22. I included only cases brought after July 1, 1966, when the modern version of Rule 24 went into effect. FED. R. CIV. P. 24 advisory committee’s note to 1966 amendment. Later amendments to Rule 24 did not substantively change the Rule’s requirements for intervention.

<sup>181</sup> For example, I searched for all federal cases with “nationwide” in the same sentence as “injunction.” As of August 13, 2023, that search resulted in 1,749 hits. I then narrowed that set by excluding results that derived from the same case, that did not concern litigation against the federal government, or that only discussed injunctions sought or issued in other cases (and not by the plaintiff in that case, though I included the case that was discussed). I excluded, for instance, cases concerning nationwide injunctions preventing a private entity from using a registered trademark anywhere in the country, or cases involving a party-specific injunction against an entity with “nationwide” in its name. Cases that were consolidated before the district court are designated as a single case in the Appendix, with an identifying footnote. Cases that were litigated separately before the district court, even if they were later consolidated on appeal, received separate entries. See Appendix, *supra* note 23.

<sup>182</sup> I reviewed two sets of motions to verify whether a case sought a nationwide injunction, in addition to the court’s opinions in the case: the plaintiffs’ complaint and the parties’ motions for injunctive relief (temporary, preliminary, or permanent). This way, I sought to capture cases where the plaintiffs either narrowed or expanded their requested

This approach is not without limitations. It is difficult to identify all cases seeking nationwide injunctions because parties rarely specify the scope of relief in their complaint or motion for an injunction. Instead, many plaintiffs ask for a nationwide injunction by omitting a geographic or party limitation. As a result, it is possible that this dataset includes only the more high-profile nationwide-injunction suits—those that either received scholarly attention or that ended with a court opinion describing the relief sought.

Those cases, however, are also the ones most likely to raise the normative concerns discussed in Part III. If scholars and judges are likely to focus their attention on injunctions that meaningfully affect politically salient issues, then this dataset likely captures those cases where we can expect the most problematic intervention practices to arise. And it is the discretionary decisions made in high-profile challenges to politically salient policies that run the risk that judges will be perceived as being guided by their political preferences when they grant or deny intervention.<sup>183</sup>

Yet to mitigate these effects, the dataset included similar suits referenced by nationwide-injunction cases either in the parties' briefing or in the court's decision. This meant that many more cases that concerned a similar challenge to a federal policy were included, so long as the complaint did not limit its request for injunctive relief. These cases were included even if they quickly fizzled out as a more leading case continued in another jurisdiction. The dataset therefore includes a meaningful number of cases that are nominally nationwide-injunction suits, but that were stayed or dismissed before an intervenor could have participated.<sup>184</sup>

Nevertheless, the results are striking. In the 524 cases analyzed, over a third of those cases—181 or about 35%—include at least one motion by an intervenor.<sup>185</sup> In those cases where intervention was sought, the motion was granted to at least one party in about two-thirds of the cases (113 cases or 62%) and was denied

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relief, or where only the defendant identified the nationwide scope of the injunction in its opposition.

<sup>183</sup> Those cases are also likely to involve more policies that a new presidential administration will abandon or reconsider. This, in turn, means that more outsiders are likely to criticize the government's litigation decisions and wish to intervene to defend the policy themselves.

<sup>184</sup> The dataset also includes cases that are still pending. These cases have been listed as not involving intervenors so long as no one had sought to intervene as of August 10, 2024.

<sup>185</sup> See Appendix, *supra* note 23. This number excludes pro se motions to intervene.



to at least one party in about a third of the cases (57 cases or about 31%).<sup>186</sup> The Appendix provides a full list of the cases included, along with a brief description of the policy at issue, whether intervention was sought, and the result of the intervention motion.

These results demonstrate that intervention is a significant feature of how nationwide-injunction cases are litigated. Although an important conclusion in its own right, the next three Sections provide more context to that result by analyzing the motions filed in these cases, the decisions courts reached, and the consequences that granting intervention had on the case. This provides a clearer view of three aspects of intervention practice in this context: the role that proposed intervenors have sought to play, how courts have reacted to nonparties seeking to intervene, and the results that intervenors have achieved when allowed to participate.

## B. Motives to Intervene

What should we make of the fact that intervention is commonly sought in nationwide-injunction cases? A nationwide injunction by its nature affects large numbers of nonparties. So, it may seem unsurprising that at least some of them have the desire and the resources to try to participate. This Section describes six overarching motives that have driven intervention in nationwide-injunction cases: (1) to add evidence, (2) to add arguments, (3) to add new claims, (4) to add a new perspective or change the narrative framing of the case, (5) to add a new party with an injury sufficient to show Article III standing, or (6) to prevent a settlement or guarantee an appeal.

The aim is not to perfectly capture every reason for intervening. This analysis necessarily relies on how outsiders have articulated their interests to the court and the other parties. There may well be some hidden motivations that one does not typically reveal in an institutional setting.<sup>187</sup> Many parties will also have more than one reason for intervening.

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<sup>186</sup> *Id.* Note that some cases involved more than one proposed intervenor. The court declined to rule on the intervention motion, or the motion was still pending as of August 10, 2024, in 11 cases (6%). *Id.*

<sup>187</sup> For instance, this analysis likely cannot capture when outsiders are also motivated by ulterior political objectives or coordination problems. It is possible that someone who intervenes to provide a different narrative framing for the litigation, see *infra* Part II.B.4, is more interested in obtaining a high-profile platform to influence the political process than changing the substantive outcome of the case. Or someone might seek to intervene because they were coordinating with a party, a conflict over litigation strategy arose, and the outsider

But by identifying the general categories of motives, we can see how courts have responded to those reasons and compare them to what intervenors have been able to achieve. These categories also allow us to separate benign or beneficial purposes from those that are more detrimental. As discussed in Part III, intervenors in this sixth category, whose purpose is to prevent a settlement or guarantee an appeal, give rise to the most concerning normative consequences.

1. To supplement the evidentiary record.

Many intervenors seek to add new evidence for the court to consider, often to bolster a substantive claim or to justify the scope of the remedy.<sup>188</sup> Sometimes the intervenor submits that evidence directly to the court. Or the intervenor might bring the evidence to the court's attention after obtaining discovery from one of the original parties.<sup>189</sup>

For example, in two challenges against the Trump Administration's ban on transgender individuals serving in the military,<sup>190</sup> several states moved to intervene to develop the factual record to support a nationwide injunction.<sup>191</sup> California intervened in *Stockman v. Trump*<sup>192</sup> to introduce harms to "California's National Guard," the "State's public colleges and universities, which support

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intervened to add their different arguments and evidence, see *infra* Part II.B.1–2. The intervenor might choose not to articulate the coordination breakdown to the court to avoid undermining a similarly situated party in the case, even if they are required to provide some gentler reason why they are not adequately represented by that party.

<sup>188</sup> See, e.g., Reply in Support of Zachary Fort et al.'s Motion to Intervene at 3, *California v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 2024 WL 779604 (N.D. Cal. Feb. 26, 2024) (No. 3:20-CV-06761) (describing the reason that individual gun owners, a gun manufacturer, and a nonprofit organization sought to intervene as to provide "information and expertise relating to the Non-Firearm Object industry and market participants, and the interplay between federal law and individual rights implicated in the relief Petitioners' seek"); Reply in Support of Proposed Business Intervenors' Motion to Intervene as Defendants at 2–3, *California v. Wheeler*, 2020 WL 4915601 (N.D. Cal. Aug. 13, 2020) (No. 20-CV-03005) (submitting an affidavit "regarding the balance of equities" against a nationwide injunction that explained "the harms to farmers, ranchers, builders, mine operators, and other landowners or operators that would occur if the [rule in question] were enjoined").

<sup>189</sup> See *infra* Part II.D.

<sup>190</sup> See Ahdout, *supra* note 21, at 977–79 (discussing the history of the transgender military ban).

<sup>191</sup> *Karnoski v. Trump*, 2018 WL 1784464, at \*7–9 (W.D. Wash. Apr. 13, 2018), *vacated and remanded*, 926 F.3d 1180 (9th Cir. 2019).

<sup>192</sup> 331 F. Supp. 3d 990 (C.D. Cal. 2018), *vacated and remanded*, 2019 WL 6125075 (9th Cir. Aug. 26, 2019).

ROTC programs,” and the “State’s transgender community.”<sup>193</sup> And Washington state intervened in *Karnoski v. Trump*<sup>194</sup> to “seek discovery to establish further evidence related to its proprietary and sovereign harms.”<sup>195</sup> Similarly, in the multisuit challenge to President Donald Trump’s “travel ban,” several states moved to intervene on appeal to “present evidence and arguments as to standing, irreparable injury, the equities, and the public interest,” including harms to the states’ “healthcare systems,” “companies,” and “tax revenue.”<sup>196</sup>

Intervenors defending challenged policies also seek to supplement the record or pursue discovery. For example, in the case against the Food and Drug Administration’s (FDA) in-person dispensing requirements for a medical-abortion drug, mifepristone, several states sought to add evidence to show “the purposes that FDA drug approvals are intended to serve.”<sup>197</sup> As they explained in their appellate filings, after the district court denied their motion to intervene, the states were “forced” to “watch from the sidelines as *amici* while [the plaintiff] and FDA developed the factual record.”<sup>198</sup> Had they been allowed to intervene, the states would have sought “direct access to technical discussions in FDA’s safety reviews of mifepristone,” that were otherwise “significant[ly] redact[ed],” making it difficult to “fully assess[ ] the information before the agency.”<sup>199</sup>

Similarly, when several states challenged President Barack Obama’s Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), a group of undocumented individuals—DAPA-eligible mothers of U.S.-citizen children—moved to

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<sup>193</sup> State of California’s Notice of Motion and Motion to Intervene as Party Plaintiff; Memorandum of Points and Authorities at 13–14, *Stockman v. Trump*, 331 F. Supp. 3d 990 (C.D. Cal. 2018) (No. 5:17-CV-01799).

<sup>194</sup> 2018 WL 1784464 (W.D. Wash. Apr. 13, 2018), *vacated and remanded*, 926 F.3d 1180 (9th Cir. 2019).

<sup>195</sup> State of Washington’s Reply to Defendants’ Opposition to Motion to Intervene at 6, *Karnoski v. Trump*, 328 F. Supp. 3d 1156 (W.D. Wash. July 27, 2018) (No. 2:17-CV-01297).

<sup>196</sup> States’ Emergency Motion to Intervene Under Federal Rule 24 and Circuit Rule 27-3 at 2, 7, 14–15, *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017) (No. 17-17168).

<sup>197</sup> Memorandum in Support of Motion to Intervene at 11, *Am. Coll. of Obstetricians & Gynecologists v. FDA*, 467 F. Supp. 3d 282 (D. Md. 2020) (No. 8:20-CV-01320).

<sup>198</sup> Opposition to Motion to Vacate Briefing Schedule at 2–3, *Am. Coll. of Obstetricians & Gynecologists v. Indiana*, 2021 WL 3276054 (4th Cir. May 19, 2021) (Nos. 20-1784, 20-1824 & 20-1970).

<sup>199</sup> Brief of Intervenors-Appellants at 28, *Am. Coll. of Obstetricians & Gynecologists v. Indiana*, 2021 WL 3276054 (4th Cir. May 19, 2021) (Nos. 20-1784, 20-1824, & 20-1970).

intervene.<sup>200</sup> They wanted to “submit evidence from their own experiences and the experiences of other undocumented immigrants” in the suing states.<sup>201</sup> This evidence was relevant to “rebut the States’ claims that DAPA will have negative economic and social effects,” and thus show that the states lacked Article III standing.<sup>202</sup> In a later lawsuit against Deferred Action for Childhood Arrivals (DACA), the same set of undocumented immigrants intervened, joined this time by New Jersey. New Jersey explained that it wanted to “include essential additional facts for the Court to consider in the balancing of the equities necessary for a preliminary injunction and an ultimate adjudication on the merits.”<sup>203</sup> In opposing New Jersey’s motion, the plaintiff states argued that they would be prejudiced by having to spend time addressing New Jersey’s “extensive list of witnesses” and “declarations from thirteen individuals—including an ‘expert on immigration politics and policy,’ three ‘tax policy experts,’ an economist, DACA recipients, and state officials.”<sup>204</sup>

## 2. To add new arguments.

This category involves intervenors who seek to supplement the arguments the court considers for a particular claim. As plaintiffs, intervenors raise additional reasons why the challenged policy is unlawful. As defendants, intervenors augment the federal government’s defense.

For an example on the plaintiff’s side, several intervenors sought to assert new arguments in the challenges against the travel ban. In the Ninth Circuit appeal from Washington state’s claim, Hawaii sought to intervene to protect its own temporary restraining order and add arguments that Washington had not raised.<sup>205</sup> Hawaii also wanted to counter the federal government’s

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<sup>200</sup> Proposed Defendant-Intervenors’ Reply in Support of Their Motion for Leave to Intervene at 1–2, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2014) (No. 1:14-CV-00254).

<sup>201</sup> *Id.* at 3.

<sup>202</sup> *Id.*

<sup>203</sup> Amended Memorandum of Law in Support of Proposed Defendant-Intervenor’s Motion to Intervene at 19, *Texas v. United States*, 328 F. Supp. 3d 662 (S.D. Tex. 2021) (No. 1:18-CV-00068).

<sup>204</sup> Plaintiff States’ Response in Opposition to New Jersey’s Motion to Intervene at 8, *Texas v. United States*, 328 F. Supp. 3d 662 (S.D. Tex. 2021) (No. 1:18-CV-00068) (quoting Memorandum of Law in Support of Proposed Defendant-Intervenor’s Motion to Intervene at app. A, tabs 1–10, 18, *Texas v. United States*, 328 F. Supp. 3d 662 (No. 1:18-CV-00068)).

<sup>205</sup> State of Hawaii’s Emergency Motion to Intervene Under Federal Rule 24 and Circuit Rule 27-3 at 11–12, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105).

assertion that it had “plenary powers” over immigration policy—an argument to which Washington had yet to respond.<sup>206</sup>

Intervenors on the defendant’s side often explain how their arguments are different in scope from those asserted by the federal government. In a challenge to the Environmental Protection Agency’s (EPA) rule defining “waters of the United States,” for instance, conservation groups intervened to argue that “the Final Rule does not *go far enough* in identifying waters protected under the Clean Water Act.”<sup>207</sup> Similarly, several healthcare providers sought to intervene in a suit against HHS’s rules allowing healthcare providers to abstain from providing medical services that conflict with their beliefs.<sup>208</sup> The providers wanted to advocate for the Rule as a whole, in contrast to HHS, which they argued was likely to “endorse a more limited construction of the Rule” to avoid constitutional questions.<sup>209</sup>

In addition, defense-side intervenors argue that their participation is important because the federal government either failed to raise a defense or asserted an incorrect legal argument. For instance, the states who wanted to defend in-person dispensation for mifepristone explained that they would have raised the additional defense that the plaintiffs failed to exhaust their administrative remedies.<sup>210</sup> And in the challenge to DAPA, the individual intervenors objected to the federal government’s position on one of the key questions underlying the dispute—whether the policy created a substantive right to state driver’s licenses.<sup>211</sup> The plaintiff states argued they had Article III standing in part because federal law required them to spend resources processing driver’s license applications from DAPA recipients.<sup>212</sup> Rather than dispute the as-

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These arguments included that other parts of the Executive Order violated the Establishment Clause and that the Order exceeded statutory limits on the president’s power.

<sup>206</sup> *Id.* at 12.

<sup>207</sup> Proposed Intervenors Natural Resources Defense Council and National Wildlife Federation’s Unopposed Motion for Leave to Intervene as Defendants and Memorandum in Support at 16, 18–19, *Texas v. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019) (No. 3:15-CV-00162) (emphasis in original).

<sup>208</sup> *New York v. U.S. Dep’t of Health & Hum. Servs.*, 2019 WL 3531960, at \*1 (S.D.N.Y. Aug. 2, 2019).

<sup>209</sup> *Id.* at \*5.

<sup>210</sup> Response/Reply Brief of Intervenors-Appellants at 13, *Am. Coll. of Obstetricians & Gynecologists v. Indiana*, 2021 WL 3276054 (4th Cir. 2021) (Nos. 20-1784, 20-1824 & 20-1970).

<sup>211</sup> Brief for the Appellants at 13, *Texas v. United States*, 805 F.3d 653 (5th Cir. 2015) (No. 15-40333).

<sup>212</sup> *Id.*

sertion that DAPA created a financial burden, the federal government's strategy was to undermine their standing by claiming that the states were free to refuse such licenses, so any injury was "self-inflicted."<sup>213</sup> The intervenors, by contrast, thought the states were right that they were obligated to issue licenses to DAPA applicants, but incorrect that it was a burden—the intervenors argued that the states lacked standing because DAPA was a net positive for state resources.<sup>214</sup>

### 3. To add new claims.

More rarely, intervenors seek to add separate claims against one of the original parties. For instance, in the Fourth Circuit appeal from the International Refugee Assistance Project's challenge to the travel ban, a lawful permanent resident sought to intervene to add a claim under the Administrative Procedure Act<sup>215</sup> (APA) and to address the federal government's argument that a statute barred judicial review of the Executive Order.<sup>216</sup>

Defendant-intervenors have also added individual claims against the parties seeking nationwide injunctions. As an example, in *Board of Education v. United States Department of Education*,<sup>217</sup> a school district sought a nationwide injunction barring the federal government from enforcing a policy interpreting "sex" in Title IX and its regulations from including "gender identity."<sup>218</sup> A transgender student in the district intervened to defend the department's interpretation and to pursue her own claims that the district violated her constitutional and Title IX rights.<sup>219</sup>

### 4. To add a new perspective or narrative framing.

Proposed intervenors often seek to participate in nationwide-injunction cases to provide an additional perspective for the court

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<sup>213</sup> *Id.* at 13–14.

<sup>214</sup> *See id.* at 44, 54–55, 57.

<sup>215</sup> Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 500 et seq.).

<sup>216</sup> John Doe #8 Motion for Leave to Intervene on Behalf of Plaintiffs-Appellees and File a Separate Brief at 5, *Int'l Refugee Assistance Project v. Trump*, 876 F.3d 116 (4th Cir. 2017) (No. 17-1351). The individual intervenor was represented by several nonprofits, including the Brennan Center for Justice and the Council on American-Islamic Relations. *Id.* at i. He was also a plaintiff in a separate challenge against the Executive Order. *Id.* at 1; *see Sarsour v. Trump*, 245 F. Supp. 3d 719 (E.D. Va. 2017).

<sup>217</sup> 208 F. Supp. 3d 850 (S.D. Ohio 2016).

<sup>218</sup> *Id.* at 859.

<sup>219</sup> *Bd. of Educ. v. U.S. Dep't of Educ.*, 2016 WL 4269080, at \*3 (S.D. Ohio Aug. 15, 2016).

to consider when evaluating the substantive claims or the propriety of injunctive relief. This aim often dovetails with the goal of influencing how the case is perceived by the public, especially in politically salient cases.

For example, numerous intervenors have claimed that their participation is necessary to present the perspective of the individual or entity who will be harmed if the challenged policy is enjoined or allowed to continue. In cases involving immigration policy, for instance, intervenors often represent the views of individual immigrants potentially subject to removal. In the suit against DACA, the individual intervenors wanted to present the court with the perspective of “the young immigrants who are the real targets of this lawsuit and who have a direct and personal stake in the outcome of this case.”<sup>220</sup> And in a challenge by several states against a DHS memo temporarily pausing deportations as the new Biden Administration reassessed its policies,<sup>221</sup> two nonprofits intervened to provide “a necessary perspective” to the litigation—that the case was “not just a fight among governments over sovereign power” but “involve[d] serious human stakes.”<sup>222</sup> The nonprofits presented the views of noncitizens who would be at risk of removal if the court enjoined the pause, including those who had “paths to regularize their immigration status, claim[ed] humanitarian protection, or s[ought] long-term grants of prosecutorial discretion in their favor.”<sup>223</sup>

This perspective-based intervention is by no means limited to the immigration context. For example, in the challenge against the ACA highlighted in the introduction, several employers sought to intervene to “provide a critical perspective [ ] on how the ACA’s unconstitutional mandate and Congress’s zeroing out the individual tax penalty impact and injure private employers.”<sup>224</sup> Similarly, in a challenge against the Department of Education’s exemptions for religious schools from LGBTQ antidiscrimination requirements,

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<sup>220</sup> Proposed Defendant-Intervenors’ Memorandum of Law in Support of Their Motion for Leave to Intervene at 18–19, *Texas v. United States*, 328 F. Supp. 3d 662 (S.D. Tex. 2018) (No. 1:18-CV-00068).

<sup>221</sup> *Texas v. United States*, 524 F. Supp. 3d 598, 607–08 (S.D. Tex. 2021).

<sup>222</sup> Proposed Intervenors’ Emergency Motion to Intervene and Incorporated Memorandum of Law at 1, 13, *Texas v. United States*, 524 F. Supp. 3d 598 (No. 6:21-CV-00003).

<sup>223</sup> *Id.* at 1.

<sup>224</sup> *Texas v. United States*, 2018 WL 4076510, at \*1 (N.D. Tex. June 15, 2018) (alteration in original) (quoting Motion of WG Hall, LLC and Quickway Distribution Services Inc. to Intervene at 1, *Texas v. United States*, 2018 WL 4076510 (N.D. Tex. June 15, 2018) (No. 18-CV-00167)).

several religious schools sought to intervene.<sup>225</sup> They argued that the court “should not assess the Religion Exemption’s constitutionality without hearing from the very institutions the exemption was designed to protect.”<sup>226</sup> An organization representing religious higher education institutions also sought to intervene to explain “the vital importance of the religious exemption to religious colleges in an ever-changing world.”<sup>227</sup> And in a challenge to HHS’s conscience-based abstention rule, proposed intervenors argued that they were “uniquely situated to provide the Court with the perspective of physicians and medical professionals who advocated for the Rule and rely on it to protect their conscience rights.”<sup>228</sup>

5. To add a new injured plaintiff for Article III standing.

Outsiders also seek to intervene to prevent courts from dismissing nationwide-injunction suits for lack of standing. This strategy turns on the interplay of two doctrines. The first is the recognition by federal courts that intervenors, once added to a case, are full parties to the litigation equal to the original plaintiff.<sup>229</sup> The second is an exception to the Article III standing requirement known as the “one-plaintiff rule.”<sup>230</sup> This rule allows courts to adjudicate cases involving multiple plaintiffs if one plaintiff demonstrates standing.<sup>231</sup> Together, these two doctrines mean that a plaintiff can continue pressing their claim for relief, even if they lack standing, so long as an outsider with sufficient standing intervenes.

For example, in the travel ban case, several visa petitioners and two lawful permanent residents sought to intervene because

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<sup>225</sup> See generally Motion to Intervene and Memorandum in Support, Hunter v. U.S. Dep’t of Educ., 650 F. Supp. 3d 1104 (D. Or. 2023) (No. 6:21-CV-00474).

<sup>226</sup> *Id.* at 8.

<sup>227</sup> Proposed Defendant-Intervenor CCCU’s Motion to Intervene and Memorandum in Support at 8, Hunter v. U.S. Dep’t of Educ., 650 F. Supp. 3d 1104 (D. Or. 2023) (No. 6:21-CV-00474). The organization also maintained a website, highlighting its intervention in the case as one of its advocacy efforts and providing more information about the harms to religious schools. See *Our Role in Advocacy*, COUNCIL FOR CHRISTIAN COLLS. & UNIVS., <https://perma.cc/7LHL-FD4C>.

<sup>228</sup> New York v. U.S. Dep’t of Health & Hum. Servs., 2019 WL 3531960, at \*5 (quoting Memorandum of Law of Proposed Intervenor Dr. Regina Frost and Christian Medical and Dental Associations in Support of Motion to Intervene at 16, New York v. U.S. Dep’t of Health & Hum. Servs., 2019 WL 3531960 (No. 19-CV-04676)).

<sup>229</sup> See *supra* Part I.

<sup>230</sup> Bruhl, *supra* note 17, at 484.

<sup>231</sup> *Id.*



the government had challenged the plaintiff state's standing. The individuals had an independent basis for standing and so were potentially "critical to the Court's retaining Article III jurisdiction over that claim."<sup>232</sup> Later, in a related challenge to the third travel ban Executive Order, Washington state sought to intervene to prevent "gamesmanship" by the federal government, which had "repeatedly sought to use [its] control over the immigration system to change [individual] plaintiffs' circumstances to affect their standing."<sup>233</sup> Similarly, in Chicago's lawsuit against the Trump Administration's sanctuary-city policies, the United States Conference of Mayors attempted to intervene to buttress the city's standing with its own standing as an organization.<sup>234</sup>

6. To prevent the parties from settling or to guarantee an appeal.

Finally, outsiders also intervene to prevent the original parties from dismissing the case, either by settling or by declining to take an appeal after an adverse judgment. These intervenors essentially hijack the suit, overriding the wishes of the original parties.

In nationwide-injunction suits, this often arises when the intervening party wants to prevent the federal government from making a strategic litigation decision that curbs or ends a policy the intervenor wants to protect. For instance, in a challenge to a final agency rule interpreting the definition of "waters of the United States," several conservation nonprofits sought to intervene to prevent the agency from "settling this suit on terms different than the Conservation Groups would accept."<sup>235</sup> Similarly, in the case about Title IX religious exemptions, the set of religious schools argued that they had a right to intervene to defend those

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<sup>232</sup> Proposed Plaintiffs-Intervenors' (*Ali* Plaintiffs) Motion for Leave to Intervene at 18, *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (No. 17-15589); *see also* Proposed Plaintiffs-Intervenors' (*Doe* Plaintiffs) Motion for Leave to Intervene at 1, *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (No. 17-15589) (explaining that several former refugees sought to intervene "to establish both the cognizable injury suffered by refugees and demonstrate the irreparable harm they w[ould] suffer" if the Executive Order took effect).

<sup>233</sup> States' Emergency Motion to Intervene Under Federal Rule 24 and Circuit Rule 27-3, *supra* note 196, at 11–13.

<sup>234</sup> The United States Conference of Mayors' Motion to Intervene at 3–4, 6, *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017) (No. 17-CV-05720).

<sup>235</sup> Proposed Intervenors Natural Resources Defense Council and National Wildlife Federation's Unopposed Motion for Leave to Intervene as Defendants and Memorandum in Support, *supra* note 207, at 19–20.

exemptions because the federal government might “consider settlement on terms that the Religious Schools may not accept.”<sup>236</sup> The organization representing religious higher education institutions went even further, arguing that “any attempt to settle th[e] case short of outright dismissal would be woefully inadequate.”<sup>237</sup>

Another important category is cases where outsiders sought to intervene to prevent the federal government from dropping its defense of a challenged policy—because of either a change in views or a change in administration.<sup>238</sup> For example, in a later lawsuit against a rule providing a different definition of “waters of the United States,” several energy organizations sought to intervene because “the upcoming presidential election present[ed] the real possibility that the interests of a new administration w[ould] cause a change in the way the present case is litigated.”<sup>239</sup> Likewise, in the challenge against the FDA’s in-person dispensation requirements for mifepristone, the states attempted to intervene to prevent “a circumstance where the injunction remains in place, but the United States in effect refuses to defend” the rule.<sup>240</sup> The states asserted that their intervention was necessary so “that

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<sup>236</sup> Reply Memorandum in Support of the Religious Schools’ Motion to Intervene at 2, *Hunter v. U.S. Dep’t of Educ.*, 650 F. Supp. 3d 1104 (D. Or. 2023) (No. 6:21-CV-00474).

<sup>237</sup> Proposed Defendant-Intervenor Council for Christian Colleges & Universities’s Reply to Defendants’ Amended Opposition to Motions to Intervene at 5, *Hunter v. U.S. Dep’t of Educ.*, 650 F. Supp. 3d 1104 (D. Or. 2023) (No. 6:21-CV-00474).

<sup>238</sup> There are numerous examples in addition to the two discussed in the accompanying text. *See, e.g.*, *Oregon v. Becerra*, 141 S. Ct. 2621, 2621 (2021); *Texas v. United States*, 945 F.3d 355, 377 (5th Cir. 2019); *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928, 940 (N.D. Tex. 2019); *New York*, 2019 WL 3531960, at \*1; *Texas AFL-CIO’s Motion to Intervene and Brief in Support* at 2, *Nevada v. U.S. Dep’t of Labor*, 321 F. Supp. 3d 709 (E.D. Tex. 2018) (No. 4:16-CV-00731); Memorandum of Law in Support of the National Black Farmers Association and the Association of American Indian Farmers’ Opposed Conditional Motion for Leave to Intervene as Defendants at 11, *Wynn v. Vilsack*, 545 F. Supp. 3d 1271 (M.D. Fla. 2021) (No. 3:21-CV-00514) (requesting intervention if the government “declines to appeal an adverse ruling”).

<sup>239</sup> *American Petroleum Institute and Interstate Natural Gas Association of America: Notice of Motion and Motion to Intervene* at 15–16, *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013 (N.D. Cal. 2021) (No. 3:20-CV-06137); *see also* Reply in Support of Motion to Intervene by American Petroleum Institute and Interstate Natural Gas Association of America at 10–11, *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013 (No. 3:20-CV-04636) (arguing that “the likelihood of a change in policy is based on more than speculation” because the rule followed an executive order by President Trump and had received “attention . . . from Plaintiffs and other groups around the country,” leading the intervenor to conclude that “a new administration may alter or abandon its defense of the Rule”).

<sup>240</sup> Response/Reply Brief of Intervenor-Appellants, *supra* note 210, at 3–4.

a lawful federal rule does not fall, undefended, into a litigation black hole.”<sup>241</sup>

Many intervenors justify their participation as necessary to preserve the court’s power to review potentially problematic decisions or litigation strategies. After the Fifth Circuit enjoined the Department of Labor’s Fiduciary Rule, which reinterpreted the term “investment advice fiduciary” in the Employee Retirement Income Security Act of 1974<sup>242</sup> (ERISA), and the federal government (following a change in presidential administration) declined to seek en banc review, several states and an advocacy organization sought to intervene. The intervenors asserted that denying their motion would be “especially troubling because it effectively insulates the decision to vacate the Fiduciary Rule from further ‘appellate scrutiny.’”<sup>243</sup>

Some intervenors have referred to this concern as one over “sue and settle” tactics by federal agencies. According to its critics, this practice involves agencies agreeing to collusive settlements with plaintiffs that bind the agency’s discretion to make policy going forward. Or, in nationwide-injunction cases, the government declines to appeal injunctions blocking federal rules and then uses that injunction as a justification for bypassing the APA requirements that agencies repeal rules only through notice and comment.<sup>244</sup>

Two recent high-profile cases demonstrate this phenomenon. Several states sought to intervene in the so-called Public Charge cases, which arose from the Department of Homeland Security redefining the term “public charge” for purposes of immigration enforcement, after the government moved to dismiss following a change in the presidential administration.<sup>245</sup> The states asserted

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<sup>241</sup> *Id.*

<sup>242</sup> Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 29 U.S.C.).

<sup>243</sup> The States of California, New York, and Oregon’s Motion for Reconsideration at 4, Chamber of Com. v. U.S. Dep’t of Lab., 885 F.3d 360 (5th Cir. 2018) (No. 17-10238) (quoting *Edwards v. City of Houston*, 37 F.3d 1097, 1107 (5th Cir. 1994), *rev’d en banc*, 78 F.3d 983 (5th Cir. 1996)); *see also* Motion of AARP to Intervene as a Defendant-Appellee for the Purpose of Seeking Rehearing En Banc at 20–21, Chamber of Com. v. U.S. Dep’t of Lab., 885 F.3d 360 (5th Cir. 2018) (No. 17-10238).

<sup>244</sup> *See, e.g.*, Proposed Defendant-Intervenor Council for Christian Colleges & Universities’s Reply to Defendants’ Amended Opposition to Motions to Intervene, *supra* note 237, at 5–6 (arguing that “preventing the Plaintiffs and the federal defendants from employing a cynical ‘sue and settle’ strategy as a means of abolishing the Title IX religious exemption is one of the most important reasons to allow [the organization]’s participation”).

<sup>245</sup> *Texas v. Cook County*, 141 S. Ct. 2562, 2562 (2021).

that their intervention was necessary because the federal government “abandon[ed]” its defense and thus “evade[d] the Administrative Procedure Act’s strictures on modifying rules a new Administration finds uncongenial.”<sup>246</sup> Similarly, several states sought to intervene after a district court enjoined the Title 42 policy limiting immigration at the border during the COVID-19 emergency and the government chose not to stay the injunction. The states sought “to intervene to offer a defense of the Title 42 policy so that its validity can be resolved on the merits, rather than through strategic surrender.”<sup>247</sup> The Supreme Court granted certiorari in both cases to review the denials of intervention, though it declined to reach a decision in either.<sup>248</sup>

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As these examples illustrate, outsiders are generally driven to intervene in nationwide-injunction cases by at least one of six motives. But, as the next Section shows, consistency in the motives for intervention has not translated into consistent grants of intervention. Judicial decisions on intervention have been unpredictable across the range of Rule 24 factors.

### C. Decisions on Intervention Are Unpredictable

The unpredictable, discretionary nature of the intervention test, detailed in Part I, has played out with predictable effect in the nationwide-injunction context. Even accounting for factual differences among the cases or different doctrinal tests developed in different circuits, the legal reasoning applied by courts is often sharply inconsistent.

Take, for example, public law cases in the Fifth Circuit. Some courts recognized that outsiders had a right to intervene when they showed a different interest in the litigation or would make a different argument than the federal government. In Texas’s challenge to DACA, the Jane Doe intervenors had a right to participate because their interests differed from the federal government’s interests and they wished to raise different arguments.<sup>249</sup>

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<sup>246</sup> Motion to Recall the Mandate to Permit Intervention as Appellant at 1–2, *Casa de Md., Inc. v. Trump*, 981 F.3d 311 (4th Cir. 2020) (No. 19-2222).

<sup>247</sup> Motion to Intervene by the States of Arizona et al. at 1, *Huisha-Huisha v. Mayorkas*, 560 F. Supp. 3d 146 (D.D.C. 2021) (No. 21-CV-00100).

<sup>248</sup> *Arizona v. Mayorkas*, 143 S. Ct. 1312, 1312 (2023).

<sup>249</sup> *Texas*, 805 F.3d at 660–63.

Similarly, a district court allowed a transgender woman to intervene in a school's challenge to the Department of Education's interpretation of Title IX because the government would not make her same arguments (or be able to assert her same legal claim).<sup>250</sup>

But just as often, district courts denied intervention for the exact opposite reason. Conservation groups could not intervene in a challenge to Biden's offshore oil and gas leasing moratorium because the groups ultimately shared the same objective as the federal government, even if the groups asserted that they would make different arguments or had a distinct interest to protect.<sup>251</sup> So too, individual employers could not participate in Texas's challenge to the ACA because having a different litigation strategy (wishing to raise different arguments) was not enough to overcome the presumption that the state adequately represented them.<sup>252</sup>

This was true even in cases where the federal government was likely to make significantly different arguments than the proposed intervenors. In a challenge to the Department of Labor's regulations increasing minimum-salary requirements, a rule enacted during President Obama's tenure, the district court rejected the AFL-CIO's intervention motion.<sup>253</sup> According to the district court, the new Trump Administration adequately represented the labor union's interests.<sup>254</sup> The district court rejected the labor union's evidence suggesting that the Department was unlikely to provide a robust defense of the Rule.<sup>255</sup>

In each of these cases, district courts had the full panoply of intervention doctrine at their disposal. They could have applied the high bar posed by the presumption of adequate representation to bar intervenors joining the federal government's defense. Or they could have applied an exception to that bar, easily allowing intervenors to participate if they showed a personalized interest or asserted a different argument. Even in the same circuit, courts applied different versions of the same test to grant or deny intervention. There is little principle that accounts for these conflicting outcomes.

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<sup>250</sup> *See Bd. of Educ.*, 208 F. Supp. 3d at 859.

<sup>251</sup> Memorandum Order Denying Motion to Intervene at 6–7, *Louisiana v. Biden*, 543 F. Supp. 3d 388 (W.D. La. 2021) (No. 2:21-CV-00778).

<sup>252</sup> *Texas*, 2018 WL 4076510, at \*2–3.

<sup>253</sup> *Nevada v. U.S. Dep't of Lab.*, 2017 WL 3780085, at \*3 (E.D. Tex. Aug. 31, 2017).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

The outcomes are even more inconsistent when cases are compared across circuits. Take, for example, the wildly different results reached when a nonprofit intervenor filed nearly identical motions to intervene in seven cases<sup>256</sup> challenging an affirmative action provision in President Biden's American Rescue Plan.<sup>257</sup> In each case, the proposed intervenors sought conditional intervention. They wanted to participate only if the government's views turned out, during the litigation, to diverge from their own.<sup>258</sup> Two district courts deferred their consideration of the motion until the proposed intervenors notified the court that the government's views had in fact diverged.<sup>259</sup> Another district court granted the motion to intervene on the condition that the intervenor not seek discovery or extensions.<sup>260</sup> In the fourth, the district court denied the motion to intervene without prejudice to the group refileing at a later date.<sup>261</sup> In another, the district court allowed the group to participate as amici without addressing the motion to intervene.<sup>262</sup> And in two other cases, the district court never ruled on the motion.<sup>263</sup> Despite the close similarity between the subject of

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<sup>256</sup> See, e.g., *The National Black Farmers Association and the Association of American Indian Farmers' Opposed Conditional Motion for Leave to Intervene as Defendants*, Wynn v. Vilsack, 545 F. Supp. 3d 1271 (M.D. Fla. 2021) (No. 3:21-CV-00514); *The National Black Farmers Association and the Association of American Indian Farmers' Conditional Motion for Leave to Intervene as Defendants*, Faust v. Vilsack, 519 F. Supp. 3d 470 (E.D. Wis. 2021) (No. 1:21-CV-00548). The nonprofit intervenor made similar filings in *Miller v. Vilsack*, 2021 WL 11115194 (N.D. Tex. July 1, 2021), *amended*, 2021 WL 11115227 (N.D. Tex. Oct. 18, 2021); *Holman v. Vilsack*, 582 F. Supp. 3d 568 (W.D. Tenn. 2022); *Kent v. Vilsack*, No. 3:21-CV-00540 (S.D. Ill. *dismissed* Aug. 30, 2023); *McKinney v. Vilsack*, No. 2:21-CV-00212 (E.D. Tex. *dismissed* Oct. 18, 2022); and *Dunlap v. Sec'y of Agric.*, No. 2:21-CV-00942 (D. Or. *dismissed* Sept. 7, 2022).

<sup>257</sup> Pub. L. No. 117-2, 135 Stat. 4 (2021) (codified as amended in scattered sections of 15, 26, 29, 42 U.S.C.).

<sup>258</sup> See, e.g., *The National Black Farmers Association and the Association of American Indian Farmers' Opposed Conditional Motion for Leave to Intervene as Defendants*, *supra* note 256, at 1.

<sup>259</sup> *Order Holding Conditional Motion to Intervene in Abeyance*, *Holman v. Vilsack*, No. 1:21-CV-01085, at 1 (W.D. Tenn. July 13, 2021); *Clerk's Minutes: Preliminary Injunction Hearing at 1-2*, Wynn v. Vilsack, No. 3:21-CV-00514 (M.D. Fla. June 16, 2021).

<sup>260</sup> *Order*, *Miller v. Vilsack*, No. 4:21-CV-00595, at 2 (N.D. Tex. May 2, 2022).

<sup>261</sup> *Decision and Order Granting Defendants' Motion for a Stay*, Faust v. Vilsack, 2021 WL 4295769, at \*3 (E.D. Wis. Aug. 23, 2021).

<sup>262</sup> See *Order Granting Motion for Leave to File Amicus Brief by Association of American Indian Farmers, National Black Farmers Association*, *Kent v. Vilsack*, No. 3:21-CV-00540 (S.D. Ill. Apr. 22, 2022).

<sup>263</sup> See *McKinney v. Vilsack*, No. 2:21-CV-00212 (E.D. Tex. *dismissed* Oct. 18, 2022); *Dunlap v. Sec'y of Agric.*, No. 2:21-CV-00942 (D. Or. *dismissed* Sept. 7, 2022). This is likely because the courts stayed the litigation pending the outcome in the similar actions in other districts.

the suit and the outsiders who sought to intervene, the doctrine of intervention provided no predictable result.

What's more, the inconsistency may be far worse than what these examples show. This analysis only accounts for the fraction of decisions where courts have provided a reason for granting or denying intervention.<sup>264</sup> Far more often, courts decline to offer a reasoned explanation. That's true regardless of whether parties seek intervention as of right or permissively.<sup>265</sup> Some courts analyze only the question of permissive intervention—ignoring whether outsiders also have a right to intervene—even if intervenors of right supposedly have broader participation rights.<sup>266</sup>

These divergent outcomes have had a significant effect on how cases seeking nationwide injunctions have proceeded. As the next part shows, intervenors have played an important role in the outcome of nationwide-injunctions cases.

#### D. Decisions on Intervention Are Consequential

The unpredictable nature of intervention decisions matters because intervention can be significantly consequential. In the nationwide-injunction context, intervention has two main effects. The first effect, I argue, is more benign. Courts have considered and been persuaded by the new evidence or arguments introduced by the intervenor. The second—and more problematic—effect occurs when intervenors force cases to proceed past when the original parties would have ended the suit.

##### 1. Adding arguments and evidence.

The litigation over the Department of Education's interpretation of Title IX demonstrates that courts may heavily rely on the arguments and evidence presented by intervenors. In denying

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<sup>264</sup> Sometimes this aligns with other institutional practices. It is not surprising, for instance, that the Supreme Court rarely explains its decision to deny intervention given its routine practice of not providing written explanations for procedural decisions like denying cert or dismissing a case from its docket. *See* STEPHEN VLADECK, *THE SHADOW DOCKET* 46–51 (2023).

<sup>265</sup> *See, e.g.*, Order, *Texas v. United States*, No. 1:14-CV-00254, at 1 (S.D. Tex. Jan. 9, 2015) (denying both forms of intervention without reasoning); Order, *Texas v. United States*, No. 1:18-CV-00068, at 1 (S.D. Tex. May 15, 2018) (granting intervention with no explanation provided in the order).

<sup>266</sup> *See, e.g.*, Order, *Texas v. United States*, 2021 WL 411441, at \*1 n.1 (S.D. Tex. Feb. 6, 2021).

the plaintiffs' preliminary injunction, the court detailed the intervenors' "ample evidence" and repeatedly referenced their evidence as rebutting the assertions made by the plaintiffs.<sup>267</sup>

Similarly, the Jane Does' intervention in the litigation over DACA exemplifies just how consequential intervenor participation can be to the arguments and evidence presented to the court. The intervenors delayed the plaintiffs' briefing schedule for a preliminary injunction so they could seek discovery into, and challenge, the plaintiffs' standing.<sup>268</sup> They sought and obtained discovery from the federal government about how it was implementing DACA, including deposing several federal employees.<sup>269</sup> They objected to the plaintiffs' preliminary injunction and became the main defenders of DACA after the federal government, during Trump's administration, agreed with the plaintiffs that the policy was unlawful.<sup>270</sup> They convinced the court to exclude undisclosed witnesses from the plaintiff states.<sup>271</sup> And the court ultimately denied preliminary injunctive relief based on the intervenors' arguments.<sup>272</sup> Later in the case, after the court switched course and granted a permanent injunction, the intervenors appealed—joined by the federal government only after President Biden's administration took over.<sup>273</sup>

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<sup>267</sup> *Students & Parents for Priv. v. U.S. Dep't of Educ.*, 2016 WL 6134121, at \*25 (N.D. Ill. Oct. 18, 2016), *report and recommendation adopted*, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017).

<sup>268</sup> See Defendant-Intervenor's Advisory Regarding Proposed Scheduling Order at 1–4, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2018) (No. 1:18-CV-00068); Defendant-Intervenors' Memorandum of Law in Support of Their Motion to Dismiss Without Prejudice or, in the Alternative, to Transfer or Stay Proceedings at 1, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2018) (No. 1:18-CV-00068) (requesting the court decline jurisdiction under the first-to-file rule).

<sup>269</sup> See Defendant-Intervenors' Application for Leave to Conduct Discovery of Federal Defendants at 1, 3, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2018) (No. 1:18-CV-00068); *Texas v. United States*, 2020 WL 6440497, at \*1 (S.D. Tex. Aug. 21, 2020) ("This Court deferred ruling on that motion multiple times at the behest of Defendant-Intervenors Individuals for a number of reasons, including to allow for a period of discovery.").

<sup>270</sup> Defendant-Intervenors' Response to Plaintiffs' Motion for Preliminary Injunction, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2018) (No. 1:18-CV-00068); Federal Defendants' Response to Plaintiffs' Motion for a Preliminary Injunction at 13, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2018) (No. 1:18-CV-00068).

<sup>271</sup> Order Granting Defendant-Intervenors' Cross Motion to Exclude Plaintiffs' Evidence of Non-Disclosed Witnesses, *Texas v. United States*, No. 1:18-CV-00068, at 1 (S.D. Tex. Aug. 31, 2018).

<sup>272</sup> *Texas*, 328 F. Supp. 3d at 673, 742.

<sup>273</sup> *Texas v. United States*, 549 F. Supp. 3d 572, 583–84, 624 (S.D. Tex. 2021), *aff'd in part, vacated in part*, 50 F.4th 498 (5th Cir. 2022).



The DACA litigation is notable because the intervenors took significant control of the case during the Trump Administration, including standing as the only defenders of the policy once the federal government asserted that its only objection was to the scope of the remedy sought by the state plaintiffs. But many other examples show the court itself reaching out to find arguments and evidence that proposed intervenors offer, and then allowing them into the case *because* the court wished to address those issues. For example, in litigation over the legality of the 2020 Census Residence Rule, the district court granted intervention to several individuals, nonprofits, and local governments “particularly” because of the federal government’s “rather halfhearted Motion to Dismiss” and the court’s “concern[ ] that Defendants have overlooked a key argument as to why Plaintiffs potentially lack Article III standing.”<sup>274</sup> Granting intervention solved that problem: “Allowing intervention will increase the prospect that the court will be more fully informed of the best arguments that support Defendants’ position.”<sup>275</sup>

## 2. Keeping the case alive.

As previewed in the introduction, the intervenors who play the most disruptive and consequential role are those who argue that they have a right to participate because the government has chosen not to defend—or robustly defend—the challenged law, rule, or policy. In each of these cases, the court’s decision to grant or deny intervention directly led to whether the court reached the merits of the challenge. These intervention decisions often matter the most when there is a change in the administration, so that the federal government no longer wishes to defend the challenged policy.

For example, in the suit that became *California v. Texas* before the Supreme Court, the district court granted intervention to several liberal states and the District of Columbia after the federal government declined to defend the Affordable Care Act on the merits.<sup>276</sup> The intervenors were the *only* party to appeal the court’s determination that the ACA was unconstitutional—the

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<sup>274</sup> Alabama v. U.S. Dep’t of Com., 2018 WL 6570879, at \*3 n.2 (N.D. Ala. Dec. 13, 2018).

<sup>275</sup> *Id.*

<sup>276</sup> Order, Texas v. United States, 2018 WL 10562846, at \*2–3 (N.D. Tex. May 16, 2018).

federal government argued for the Fifth Circuit to affirm everything but the nationwide scope of the injunction.<sup>277</sup> And the intervenors were the only party to seek certiorari at the Supreme Court.<sup>278</sup>

In another challenge, several conservative states and energy industry groups intervened to defend a rule adopted by the EPA<sup>279</sup> pursuant to the Clean Water Act.<sup>280</sup> During the district court proceedings, President Biden was elected and the EPA announced its intent to revise the Rule. The EPA requested, and the court granted, remand back to the agency so the agency could reconsider it. The court also chose to vacate the Rule nationwide, so that the Rule was not in effect during the agency's review. Only the intervenors challenged the district court's decision. They unsuccessfully sought a stay before the district court<sup>281</sup> and the Ninth Circuit,<sup>282</sup> before receiving one from the Supreme Court.<sup>283</sup> In their application to the Supreme Court for a stay pending appeal, the intervenors emphasized that they were the only party seeking relief as a justification for the stay, characterizing the outcome as "an easy-to-replicate blueprint for a new Administration's premature elimination of rules adopted by the prior Administration, with the help of aligned plaintiffs and a single, sympathetic district court."<sup>284</sup> After winning the stay, the intervenors were then the only party to appeal the merits of the district court's vacatur.<sup>285</sup> The Ninth Circuit reversed the district court.<sup>286</sup>

In each of these examples, the decision to grant intervention led the intervenor to keep the case alive far past when the original parties resolved their dispute. And there are numerous examples where the court's opposite decision, denying intervention, led to the end of the court's review of the case.

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<sup>277</sup> *Texas*, 945 F.3d at 373–74 (5th Cir. 2019).

<sup>278</sup> *California*, 141 S. Ct. at 2113.

<sup>279</sup> See generally *In re Clean Water Act*, 568 F. Supp. 3d 1013, *rev'd and remanded*, 60 F.4th 583 (9th Cir. 2023).

<sup>280</sup> Pub. L. 92-500, 86 Stat. 816 (1972) (codified as amended in 33 U.S.C. § 1251 et seq.).

<sup>281</sup> See generally Order Denying Motion for Stay Pending Appeal, *In re Clean Water Act Rulemaking*, 2021 WL 5792968 (N.D. Cal. Dec. 7, 2021).

<sup>282</sup> See generally Order, *In re Clean Water Act Rulemaking*, Nos. 3:20-CV-04636, 3:20-CV-04869 & 3:20-CV-06137 (9th Cir. Feb. 24, 2022).

<sup>283</sup> *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1347–48 (2022).

<sup>284</sup> Application for Stay Pending Appeal at 1, *Louisiana v. Am. Rivers*, 142 S. Ct. 1347 (2022) (No. 21A539).

<sup>285</sup> *In re Clean Water Act*, 60 F.4th at 591.

<sup>286</sup> *Id.* at 596.

In *American College of Obstetricians & Gynecologists v. FDA*,<sup>287</sup> the challenge over the FDA's in-person dispensation requirements for mifepristone, several conservative states sought to intervene to prevent the federal government from abandoning the policy. As put in their motion, "a circumstance where the injunction remains in place, but the United States in effect refuses to defend application of the [FDA drug safety program], would only underscore the need for State intervention such that a lawful federal rule does not fall, undefended, into a litigation black hole."<sup>288</sup> The district court denied intervention.<sup>289</sup> In particular, the court rejected the states' "speculation" that the federal government and the states "may not be aligned in their litigation strategy" and noted that, even if that did happen, it would "not support a finding of inadequacy of representation."<sup>290</sup> The court concluded that "the federal government can be counted on to adequately defend the federal regulatory requirements."<sup>291</sup> It then invited the states to provide any missing information via amicus briefs<sup>292</sup>—though, in the court's final decision on the merits, it expressly noted it "need not address" those arguments.<sup>293</sup>

The states appealed the denial of intervention, but ultimately never joined the case. While their appeal was pending, President Biden was inaugurated. The agency then informed the district court that it would be choosing to "exercise enforcement discretion" by suspending the in-person dispensing requirement.<sup>294</sup> The plaintiffs voluntarily moved to dismiss the case, mooting the states' appeal.<sup>295</sup>

In other words, the decision to deny the states' intervention directly led to the case's later dismissal without a ruling on the merits of the court's injunction or on the FDA's in-person dispensing requirements. Had the states been allowed to intervene, the

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<sup>287</sup> 472 F. Supp. 3d 183 (D. Md. 2020), *clarified*, 2020 WL 8167535 (D. Md. Aug. 19, 2020), *vacated as moot sub nom.* *Am. Coll. of Obstetricians & Gynecologists v. Indiana*, 2021 WL 3276054 (4th Cir. May 19, 2021).

<sup>288</sup> Response/Reply Brief of Intervenors-Appellants, *supra* note 210, at 4.

<sup>289</sup> Order Denying Motion to Intervene, *Am. Coll. of Obstetricians & Gynecologists v. FDA*, 467 F. Supp. 3d 282, 287–93 (D. Md. 2020).

<sup>290</sup> *Id.* at 291.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 292–93.

<sup>293</sup> *Am. Coll. of Obstetricians & Gynecologists*, 472 F. Supp. 3d at 198.

<sup>294</sup> Joint Notice at 1, *Am. Coll. Of Obstetricians & Gynecologists v. FDA*, 472 F. Supp. 3d 183 (D. Md. 2020) (No. 8:20-CV-01320).

<sup>295</sup> Order, *Am. Coll. of Obstetricians & Gynecologists v. Indiana*, 2021 WL 3276054, at \*1 (4th Cir. May 19, 2021).

court likely would have been forced to hold an evidentiary hearing about the appropriate scope of the nationwide injunction (as instructed by the Supreme Court in an earlier remand<sup>296</sup>). It may also have needed to ultimately decide the constitutional arguments raised by the plaintiffs.<sup>297</sup>

This example has occurred repeatedly. As discussed, in the challenge to HHS's abortion gag rule, several conservative states sought to intervene to prevent the Supreme Court from dismissing the case. The Court ultimately denied the motion, but over the noted dissent of three Justices who would have denied the dismissal and granted the motions to intervene.<sup>298</sup> Had those Justices prevailed, the Supreme Court would have had the opportunity to weigh in on the Rule's constitutionality. Without the intervenors, that legal question remains open.<sup>299</sup>

This happened again in the Public Charge cases. Conservative states sought to intervene in three of the pending challenges against the Trump Administration's Rule.<sup>300</sup> When the Biden Administration took charge, it declined to appeal the orders enjoining the Rule from being implemented nationwide.<sup>301</sup> The Administration also started the rulemaking process for its replacement.<sup>302</sup> The states moved to intervene to appeal the injunctions, but their motions were uniformly rejected before the

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<sup>296</sup> *FDA v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 10, 11 (2020).

<sup>297</sup> Complaint at 38, *Am. Coll. of Obstetricians & Gynecologists v. FDA*, 472 F. Supp. 3d 183 (D. Md. 2020) (No. 8:20-CV-01320).

<sup>298</sup> *Am. Med. Ass'n v. Becerra*, 141 S. Ct. 2619, 2619 (2021) (mem.).

<sup>299</sup> See *supra* notes 8–11 and accompanying text.

<sup>300</sup> See *City & County of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 992 F.3d 742, 743 (9th Cir. 2021) (mem.); Motion to Recall the Mandate to Permit Intervention as Appellant at 1, *Casa de Md., Inc. v. Biden*, 971 F.3d 220 (4th Cir. 2020) (No. 19-02222); *Cook County v. Mayorkas*, 340 F.R.D. 35, 38 (N.D. Ill. Aug. 17, 2021), *aff'd*, 37 F.4th 1335 (7th Cir. 2022), *cert. denied sub nom. Texas v. Cook County*, 143 S. Ct. 565 (2023).

<sup>301</sup> See Unopposed Motion to Voluntarily Dismiss Appeal, *Cook County v. Wolf*, 2021 WL 1608766 (7th Cir. Mar. 9, 2021) (No. 20-03150); Order Dismissing Appeal, *Cook County*, 2021 WL 1608766, at \*1; Unopposed Motion to Voluntarily Dismiss Appeal, *Casa de Md. v. Biden*, 971 F.3d 220 (4th Cir. 2020) (No. 19-02222); Order Dismissing Appeal, *Casa de Md. v. Biden*, No. 19-02222, at 2 (4th Cir. Mar. 11, 2021); *Mayorkas v. Cook County*, 141 S. Ct. 1292 (2021) (mem.); *U.S. Citizens & Immigr. Serv. v. City & County of San Francisco*, 141 S. Ct. 1292 (2021) (mem.); *Dep't of Homeland Sec. v. New York*, 141 S. Ct. 1292 (2021) (mem.).

<sup>302</sup> Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021) (codified at 8 C.F.R. pts. 103, 106, 212, 213, 214, 245, 248).

district and appellate courts.<sup>303</sup> The Supreme Court granted certiorari on the intervention question but then dismissed the case, as the procedural “mare’s nest” below was too complicated for a clean decision on intervention.<sup>304</sup> Subsequently, the Seventh Circuit, where a nationwide injunction had been issued, denied states’ motion to intervene.<sup>305</sup> The states once again sought certiorari, but the Supreme Court rejected their petition without comment.<sup>306</sup>

In the end, these intervention decisions led the nationwide injunction issued by the district court against the Public Charge Rule to be left in place, as the federal government chose not to appeal it and no party was left to defend the Rule.

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As these examples illustrate, intervention in nationwide-injunction suits is common, unpredictable, and consequential. But not all intervenors are the same. Some act as elevated amici. They seek to add evidence and arguments with an increased likelihood that the court will consider those contributions. But other intervenors change not just the content of the court’s decision, but whether the court reaches a decision at all. Intervenors who stand alone on appeal raise separate normative concerns—about the values promoted by Rule 24 and, more broadly, about the proper function of the courts in these high-profile, politically charged cases.

### III. THE NORMATIVE CONSEQUENCES

As the examples in Part II demonstrate, intervention in universal-remedy cases can have enormous consequences for how and whether the case is adjudicated. This Part connects that in-depth analysis of intervention practice with the normative overview provided in Part I.B. It concludes that, as applied, Rule 24 no longer promotes the values it was designed to protect in the nationwide-injunction context.

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<sup>303</sup> *Cook County*, 340 F.R.D. at 38; Order Denying Intervention, *Casa de Md. v. Biden*, No. 19-02222, at 2–3 (4th Cir. Mar. 18, 2021); *City & County of San Francisco*, 992 F.3d at 743.

<sup>304</sup> *Arizona v. City & County of San Francisco*, 142 S. Ct. 1926, 1928 (2022) (Roberts, C.J., concurring).

<sup>305</sup> *Cook County*, 37 F.4th at 1345.

<sup>306</sup> *Cook County*, 143 S. Ct. at 565.

This intervention practice raises additional normative concerns for the judiciary as an institution. First, the broad discretion granted to courts under murky intervention doctrines means that courts have the power to determine who will be able to participate in high-profile, politically salient cases and, in the case of an intervenor who wants to appeal, whether the case will reach the merits at all. In other words, judges are no longer being asked “just” to enjoin a hotly contested public program, but also to decide who is a proper challenger to, or defender of, the law. The court’s decision on intervention can exacerbate concerns that courts are no longer impartial arbiters of these highly consequential disputes.

Second, this intervention practice expands the judiciary’s involvement in political cases. As demonstrated in Part II, intervenors can ensure that high-stakes ideological issues are resolved by the judiciary rather than the democratic branches by keeping cases alive long after the original parties have agreed to end the case. Courts are no longer able to rely on settlements or prudential decisions not to appeal. Instead, once allowed in, intervenors can close off the escape hatches once available to courts to avoid engaging in politically contentious disputes.

#### A. Undermining Procedural Values

Rule 24 intervention is designed to promote efficiency and fairness. It does this by balancing three goals: promoting meaningful participation for outsiders to protect their interests, improving judicial efficiency by consolidating related actions, and maintaining party control over litigation. That balance breaks down in the nationwide-injunction context.

##### 1. Participation.

Discretionary intervention in nationwide-injunction cases has led to unpredictable requirements and inconsistent outcomes: two features that undermine the participatory rights of nonparties and thus the legitimacy of the adjudication.

Start from the perspective of the outsider who is concerned that the court might enjoin a beneficial federal policy. That person has few guidelines outlining the criteria the court will use to evaluate the intervention motion outside the Rule’s vague text. For instance, if the outsider wants to provide arguments defending the federal policy, they can probably safely predict they will face *some* presumption that the government defendant already

represents their interests (assuming that the court recognizes their interest). But the lesson from analyzing intervention in nationwide-injunction cases is that the presumption's application is far from clear. It is anyone's guess what the court will require to overcome it.<sup>307</sup>

The court might, for instance, impose a small burden and just require articulating an individualized interest different from the large-scale public interests the government represents.<sup>308</sup> Or the court might require intervenors to articulate different legal arguments that the government is unlikely to make.<sup>309</sup> The government might have even needed to oppose that argument earlier in the litigation.<sup>310</sup> But to some courts, this will be insufficient, and the outsider needs to show a conflict between their interests and the government's. Or the court will say that so long as the outsider and the government seek the same ultimate objective—articulated at degrees of generality varying from “uphold the policy for this legal reason” to “uphold the policy at all”—the outsider has no opportunity to participate except as *amicus curiae*.

This scheme provides no clear points of access for individuals to have a voice in the legal process.<sup>311</sup> It therefore fails to protect the individual dignitary interests by providing a navigable path to enter the case, deterring participation. This, in turn, reduces confidence that the outcome is the product of informed decision-making, undermining the legitimacy of the court's order.<sup>312</sup> For instance, consider the intervenors who assert that their participation is necessary because no other party has presented the perspective of the individual or entity who will be directly harmed or benefited by the challenged policy. Or consider those who wish to develop the factual record to support or argue against a nationwide

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<sup>307</sup> In this way, nationwide-injunction cases stand in stark contrast to the history of intervention in antitrust-enforcement actions discussed in Part I.C, *supra*, where intervention was largely foreclosed but predictable.

<sup>308</sup> *Texas v. United States*, 2021 WL 411441, at \*4 (S.D. Tex. Feb. 6, 2021) (“The Proposed Intervenors have therefore met their minimal burden to show their interests are sufficiently adverse to the Defendants’ in a way that is germane to the case—despite the fact that they share the common goal of opposing Texas’s lawsuit.”).

<sup>309</sup> Opinion and Order, *Bd. of Educ. v. U.S. Dep’t of Educ.*, 2016 WL 4269080, at \*4 (S.D. Ohio Aug. 15, 2016).

<sup>310</sup> See *Pennsylvania v. Trump*, 2017 WL 6206133, at \*4–5 (E.D. Pa. Dec. 8, 2017), *rev’d sub nom. Pennsylvania v. President U.S.*, 888 F.3d 52 (3d Cir. 2018).

<sup>311</sup> See Waldron, *supra* note 119, at 26.

<sup>312</sup> See *Solum*, *supra* note 114, at 275–81 (noting that someone who has no opportunity to participate in adjudication “may complain that salient facts were not presented or that a relevant legal principle was overlooked”).

remedy. When the court excludes their participation, it is difficult to trust the accuracy and thoroughness of the court's decision. Given the institutional risks posed by nationwide injunctions, this outcome should give us pause that intervention is striking the right balance of procedural values.

But this does not mean that unpredictable and inconsistent intervention doctrine affects all outsiders equally. Not all intervenors ask for or warrant the same participatory rights. Outsiders who intervene to supplement the original party's presentation with arguments and evidence, or to shift the narrative frame of the litigation, might not need full access as a party to satisfy that goal. So long as they can "tell [their] story in [their] own way"<sup>313</sup> in an amicus brief or through conditional intervention, then other procedures might protect their interests and bolster the court's legitimacy.<sup>314</sup> By contrast, those defending a legal claim will likely require similar participation rights as the original parties. A thoughtful procedural design will need to parse the interests the outsider is seeking to protect to determine the extent of protection warranted.

## 2. Judicial efficiency.

This cost to participatory rights might be defensible if it came with a valuable increase in judicial efficiency and party control. But it does not.<sup>315</sup> Nationwide-injunction cases often attract multiple outsiders who seek to participate in the same suit, at all stages of the litigation. The discretionary control judges have over intervention encourages parties to vigorously contest the right of

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<sup>313</sup> Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1027–28 (2010) (exploring the theoretical basis for procedural rights).

<sup>314</sup> This also provides an opportunity to protect the dignitary interests of minority voices who might not have other avenues to be heard (either because the nationwide injunction cut off the democratic process or because those voices were also excluded from that process). See Douglas NeJaime & Reva Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1954 (2021) (arguing that courts are "important sites of communicative exchange" that "can amplify voices marginalized in politics and make audible claims that lawmakers and the public fail to consider"); Solum, *supra* note 114, at 236 n.137 ("By emphasizing rights of participation, procedural justice can at least ensure that the voices of excluded groups are heard when the rights of individual members of such groups are at stake."); Yamamoto, *supra* note 114, at 352–53, 420–21.

<sup>315</sup> Because nationwide injunctions settle a claim for all nonparties, they could be viewed as promoting judicial efficiency since they prevent duplicative claims by similarly situated nonparties. But, as other scholars have noted, that efficiency might come with costs to other institutional benefits. *E.g.*, Bray, *Multiple Chancellors*, *supra* note 16, at 461–62.



outsiders to participate, driving up the time and resources that must be spent considering the motions. And the stakes of a nationwide injunction further incentivize nonparties to seek time-intensive interlocutory appeals when courts deny their right to intervene.

The different motives outsiders have to intervene can also have different efficiency costs. Intervenors who wish to present additional arguments, evidence, or a narrative framing might tax the court's attention and delay its resolution of the claim. Intervenors who wish to add an injured plaintiff to support Article III standing might keep a case alive longer than would otherwise occur (decreasing efficiency), but it could also mean that similar cases that could have been brought as separate actions have been effectively consolidated before the court (increasing efficiency).<sup>316</sup> By contrast, intervenors whose goal is to force the plaintiff to fully litigate the merits of the dispute, by preventing a settlement or ensuring an appeal from an adverse decision, arguably impose a far greater strain on judicial resources by requiring the court to engage in a lengthier adjudicative process.

### 3. Party control.

Intervention necessarily diminishes party control, but discretionary intervention exacerbates those costs. The parties have a greater incentive to challenge proposed intervenors who have an unclear right to participate. This means more motions and hearings spent on auxiliary issues, diverting time and resources from the merits of the parties' underlying dispute. When time is limited—for instance, during expedited briefing schedules on a pre-

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<sup>316</sup> Any efficiency gains depend in part on whether the original party has standing to keep the case alive on their own and whether the intervenor would file suit separately if they are denied. If the original party lacks standing and the intervenor would have needed to file a separate suit to challenge the policy, then there are plausible efficiency gains in saving the court from adjudicating the dismissal of the first action and repeating the administrative process to start the intervenor's separate case. If the original party has standing, then the question is whether the nonparty would file a separate suit if denied. If they would file separately, granting intervention into the first case might increase efficiency by consolidating claims. But in the nationwide-injunction context, many plaintiffs have ended or stayed their own cases once the challenged policy has been enjoined. So, it is unclear that rejected intervenors routinely file separate suits to defend their own claims rather than wait to see how the original suit turned out. See *District Court Reforms: Nationwide Injunctions*, 137 HARV. L. REV. 1701, 1707–08 (2024) (noting that courts will often stay or dismiss cases involving nationwide injunctions rather than reaching their own independent conclusion).

liminary nationwide injunction—any time spent litigating intervention can reduce the quality of the parties’ presentation of the merits.

The intervenor’s purpose in participating affects this calculation. On the one hand, an intervenor who wishes to add more arguments or evidence will increase the litigation costs for the original parties who will have to spend time responding to those contributions.<sup>317</sup> On the other hand, a narrative-framing intervenor may divert little attention from the original party, who will be crafting their own narrative framing regardless of alternatives before the court.

But the intervenor whose goal is to prevent settlement or guarantee an appeal poses the greatest challenge to party control. By design, these intervenors believe that the current parties are inadequately defending the asserted claim and the nonparty’s participation is meant to correct those perceived deficiencies. These intervenors wrest control from the parties and force them to continue litigating even after they have resolved their dispute.

## B. Additional Normative Concerns

In addition to undermining the values behind Rule 24, intervention in nationwide-injunction cases also exacerbates two other concerns connected to judicial legitimacy: the reputation of the court as an impartial arbiter and the power of the court to avoid involving itself in political cases.

### 1. Intervention undermines the impartial judiciary.

One of the enduring critiques of the nationwide injunction is the political valence of the relief. These suits raise legal questions of great public interest with litigants split along partisan lines. The one-stop-shop nature of the order invites litigants to file in courts with sympathetic judges who are willing to grant broad remedies.<sup>318</sup>

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<sup>317</sup> And if the procedural avenues for adding those arguments and evidence are likewise discretionary (like discovery), that compounds the costs to the parties who will then have to litigate those separate issues.

<sup>318</sup> See Bray, *Multiple Chancellors*, *supra* note 16, at 457–61; Dep’t of Homeland Sec. v. New York, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring); Rendleman, *supra* note 16, at 939; Cass, *supra* note 18, at 49.

This practice “feeds the growing perception that the courts are politicized.”<sup>319</sup> Scholars, journalists, and public figures alike have drawn adverse inferences against the judges who issue universal remedies, often comparing the party of the president who appointed the judge to the party of the president defending the law being enjoined.<sup>320</sup> The nationwide injunction has thus been aptly referred to as “a new ‘political thicket’ into which the federal courts are being asked to venture.”<sup>321</sup>

These criticisms raise important questions about public confidence in the courts. Even if judges are not deciding cases on ideological grounds, “when politically active parties engage courts in challenges to decisions made in the political domain . . . it is difficult to separate the resulting decisions from an appearance of judicial entanglement with politics.”<sup>322</sup> As Professor Amanda Frost put it, “the federal judiciary’s reputation as impartial and non-partisan suffers when the public watches judges in the ‘red state’ of Texas halt Obama’s policies, and judges in the ‘blue state’ of

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<sup>319</sup> Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), <https://perma.cc/8ZAR-CWWJ>; see also Cass, *supra* note 18, at 53–54.

<sup>320</sup> See, e.g., Ruth Marcus, *Where Did All the Conservative Hand-Wringing Over Judicial Restraint Go?*, WASH. POST (Apr. 29, 2022), <https://www.washingtonpost.com/opinions/2022/04/29/Federal-Judges-Where-did-Judicial-Restraint-Nationwide-Injunction-Immigration-Title-42-Mask-Mandate/>; David Smith, *Trump-Appointed Judge Who Overturned Mask Mandate Becomes Instant Republican Heroine*, THE GUARDIAN (Apr. 20, 2022), <https://www.theguardian.com/us-news/2022/apr/19/Trump-Judge-Kathryn-Mizelle-Mask-Mandate-Coronavirus-COVID>; *Attorney General William P. Barr Delivers Remarks to the American Law Institute on Nationwide Injunctions*, U.S. DEPT OF JUST. (May 21, 2019), <https://perma.cc/9W4U-YVAG>; Manny Fernandez, *In Weaponized Courts, Judge Who Halted Affordable Care Act Is a Conservative Favorite*, N.Y. TIMES (Dec. 15, 2018), <https://www.nytimes.com/2018/12/15/us/Judge-Obamacare-Reed-Oconnor.html>; Andrew Kent, *Nationwide Injunctions and the Lower Federal Courts*, LAWFARE (Feb. 3, 2017), <https://perma.cc/SY5Y-8F7C>.

<sup>321</sup> Sohoni, *Power to Vacate*, *supra* note 12, at 1186 (quoting *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion)).

<sup>322</sup> Cass, *supra* note 18, at 55.

Hawaii enjoin Trump's.”<sup>323</sup> This reputational harm can be destabilizing for an institution, like the judiciary, that relies on public support to ensure compliance with its decisions.<sup>324</sup>

Widespread and discretionary intervention in nationwide-injunction cases exacerbates this problem. Individual judges are not only tasked with deciding whether to enjoin a hotly contested public program, but also who is a proper participant in that decision—including who might be allowed to challenge or defend the law. When the proposed intervenors are also political advocates, the court's decision on whether they may participate in the case can be seen as an indication of the judge's leaning on the merits. It can become difficult, as Dean Ronald Cass put it, “to separate the resulting decisions from an appearance of judicial entanglement with politics.”<sup>325</sup>

Take two examples discussed in Part II. First, in *Louisiana v. Biden*,<sup>326</sup> the district court rejected several conservation groups who sought to intervene to help defend a moratorium on offshore oil and gas lease sales. Part of the court's reasoning was that the conservation groups were “advocating for positions not at issue in this proceeding,” including their position that the agency's approach to oil and gas leasing should “protect the environment, climate, and public health.”<sup>327</sup> As the court put it, “[t]his [c]ourt intends only to address the constitutional and statutory authority issues in this lawsuit, not climate policy.”<sup>328</sup> But shortly thereafter, the court ordered the government to turn over all communications with those same conservation groups because the groups

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<sup>323</sup> Frost, *supra* note 16, at 1104; *see also* Cass, *supra* note 18, at 53. Some commentators have argued that the nationwide injunction does nothing to worsen the court's image as a political institution because “the federal judiciary already is politicized.” Rendleman, *supra* note 16, at 944. And empirical scholarship supports that judges' leanings in different types of litigation can be discerned by identifying the party of the President who appointed them. *See* Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeals*, 119 MICH. L. REV. 231, 259 (2020). The concern discussed in this Section is therefore not whether nationwide injunctions are a category uniquely problematic in politicizing the judiciary, but rather whether the judiciary as an institution may benefit from reducing aspects of the practice.

<sup>324</sup> Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–95, 1839–42 (2005); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 381 (2009); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864–66 (1992) (opinion of O'Connor, Kennedy, and Souter, J.J.).

<sup>325</sup> Cass, *supra* note 18, at 55.

<sup>326</sup> 338 F.R.D. 219 (W.D. La. 2021).

<sup>327</sup> *Id.* at 224–25.

<sup>328</sup> *Id.* at 225.

had been “indirectly involved in this matter” and the information was “important” to “determine whether there was improper influence, whether there was collusion, and/or whether the postponement or cancellation of these Lease Sales [were] pretextual.”<sup>329</sup> In other words, the court rejected the conservation groups from participating in the case because their role would be tangential, but then ordered all communication between the government and those same groups to be disclosed because it was “important”<sup>330</sup> to the court’s resolution of the merits of the case. One might conclude from this string of events that the district court was considering more than just the merits of the intervention motion when it declined to let the conservation groups participate.

Second, in *Alabama v. United States Department of Commerce*,<sup>331</sup> the district court granted intervention to several intervenors who sought to help defend the Department of Commerce’s 2020 Census Residence Rule that allowed foreign nationals in the United States to “be counted in the census and allocated to the state where their ‘usual residence’ is located” regardless of their legal status.<sup>332</sup> In granting several intervention motions, the district court noted that its decision was “particularly significant in light of [the Department of Commerce’s] rather halfhearted Motion to Dismiss for Lack of Jurisdiction.”<sup>333</sup> The court was “concerned that Defendants have overlooked a key argument as to why Plaintiffs potentially lack Article III standing.”<sup>334</sup> It allowed intervention to “increase the prospect that the court w[ould] be more fully informed of the best arguments that support Defendants’ position.”<sup>335</sup>

Given the district court’s explicit admission that it was granting intervention to bolster the arguments for dismissing the case, one might think that this intervention decision was also motivated by concerns beyond the four corners of the intervention dispute. But the district court went on to *reject* the motion to dismiss, including the arguments asserted by the intervenors.<sup>336</sup>

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<sup>329</sup> *Louisiana v. Biden*, 2021 WL 5370101, at \*5 (W.D. La. Nov. 17, 2021).

<sup>330</sup> *Id.*

<sup>331</sup> 2018 WL 6570879 (N.D. Ala. Dec. 13, 2018).

<sup>332</sup> *Id.* at \*1 (quoting Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5,525 (Feb. 8, 2018) (codified at 15 C.F.R. ch. 1)).

<sup>333</sup> *Id.* at \*3 n.2.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Alabama v. U.S. Dep’t of Com.*, 396 F. Supp. 3d 1044, 1058 (N.D. Ala. 2019) (concluding that the plaintiffs had Article III standing).

In hindsight, the district court's opinion appears to be guided more by a concern with ensuring the accuracy of the court's judgment than politics. But its broad discretion over intervention justifies observers interpreting the decision as an act of filtering the arguments and evidence according to the court's preferences on the merits.<sup>337</sup> In other words, the technical decision *appeared* more political regardless of the court's actual intentions.<sup>338</sup> As Professor Stephen Vladeck put it in another context, when procedural decisions are guided by uncertain standards, courts risk the perception that their decisions depend "upon the political or ideological valence of the particular federal government policy at issue."<sup>339</sup> That is a weighty risk in cases that already receive significant public attention and will likely be criticized as politically motivated.

Nor is it unduly cynical for observers to think that a court might want to influence the decision through a grant or denial of intervention. When a court wants to avoid ruling on a publicly fraught merits question, but the defendant is pushing the case towards a merits determination, the court can grant intervention to a party that wants to dismiss the case for pleading deficiencies. Likewise, a court bent on ensuring that it will resolve the merits

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<sup>337</sup> See, e.g., Emma Coleman Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 31, 47 (1979) ("In some instances it appears that a court which is sympathetic to the merits of the underlying claim of an intervention applicant will be more inclined to relax the procedural barriers to entry."). Compare this result, for instance, with another district court's decision denying intervention to a nonprofit organization that sought to intervene in a challenge to remove a war memorial with religious icons. *Trunk v. City of San Diego*, 2006 WL 8442259, at \*3 (S.D. Cal. Sept. 26, 2006). The proposed intervenor expressed concern that the government would not challenge the plaintiffs' standing, as it had yet to do so. *Id.* at \*2. The court rejected that this was a basis for intervention because the court on its own could always determine that the plaintiffs lacked standing. *Id.*

<sup>338</sup> For examples of reading intervention cases to signal the court's thoughts on the merits of the underlying dispute, see Steven D. Schwinn, *Can a State Attorney General Intervene in a Case to Defend a State Anti-Abortion Law After an Appellate Panel Struck the Law, When a Different Attorney General Previously Voluntarily Withdrew from the Case, Renounced Authority to Enforce the Law, and Agreed to Abide by the Court's Ruling?* (20-601), 49 PREVIEW U.S. SUP. CT. CASES 28, 31 (2021) ("[A] technical ruling [on intervention] in this case could say much about the current Court's thoughts on abortion."); Steven D. Schwinn, *May States Intervene in an Appeal to Defend the Trump Administration's 'Public Charge' Rule When the Biden Administration Has Declined to Defend It?* (20-1775), 49 PREVIEW U.S. SUP. CT. CASES 13, 15 (2022) ("Stripping away the technical issues, this case is really about the validity of the Trump Administration's 2019 rule and Arizona's opportunity to defend it.")

<sup>339</sup> Vladeck, *Solicitor General*, *supra* note 21, at 157.

might intentionally exclude third parties who wish to raise procedural objections or limit their participation to the arguments raised by the original parties.<sup>340</sup> Those limits will reverberate throughout the life cycle of the case. Evidence not presented to the district court will not be in the record for the appellate court to consider. And procedural objections not made below will be waived or receive an unfavorable standard of review on appeal.

The court may even dictate whether there will be an appeal at all. Proposed intervenors often show that the federal government does not adequately represent their interests by contrasting the government's predicted strategy with their own willingness to defend a law to the bitter end of appellate review.<sup>341</sup> Denying intervention, delaying ruling on an intervention motion, or granting only limited intervention can "insulate[ ] the district court's merits rulings from appellate scrutiny for as long as the delay lasts."<sup>342</sup>

Given the impact that intervention can have on a case, it makes sense for the public to be skeptical that politics might be motivating the court's decision in politically contentious changes. The varying and inconsistent standards guiding intervention compound that skepticism and exacerbate concerns that the ultimate decision to issue or deny a nationwide injunction is also politically motivated.

## 2. Intervention expands judicial involvement in political cases.

A second concern raised by widespread intervention in cases seeking nationwide injunctions is the further entanglement of courts in political cases. Broad intervention in such suits ensures that high-stakes ideological issues are resolved by the judiciary

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<sup>340</sup> Another part of Rule 24 facilitates this discretion. Rule 24(c) nominally requires third parties to provide the court with a pleading that includes the arguments they plan to raise and potentially a summary of the evidence they plan to present. *See* FED. R. CIV. P. 24(c). Even if proposed intervenors do not volunteer this information, courts have broad discretion to require third parties to address such questions at a motions hearing.

<sup>341</sup> *See, e.g.,* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 807 F.3d 472, 474–76 (1st Cir. 2015) ("Students argue that they will be more single-mindedly zealous than Harvard because Harvard's balancing of competing priorities may pose a 'settlement risk.'").

<sup>342</sup> *Order Granting Motion to Dismiss Appeal of Denial of Intervention as of Right, Franciscan All. v. Cochran*, No. 17-10135, at 4 (5th Cir. June 30, 2017) (Costa, J., concurring); *see also* *Davis v. Lifetime Cap., Inc.*, 560 F. App'x 477, 491 (6th Cir. 2014) ("Had the lower court resolved the motion to intervene more promptly, the disruptive effect on nearly concluded proceedings would have been substantially less.").

rather than the parties or the democratic branches because intransigent intervenors can keep the case alive long after the original parties have agreed to resolve the dispute.<sup>343</sup>

This closes off the prudential escape hatches often available in public law cases, leaving the judiciary squarely at the center of political disputes. These strategies—also known as “judicial minimalism” or “passive virtues”—include the numerous doctrines and practices developed by courts to avoid ruling on the merits, like dismissing a case for lack of standing or encouraging settlements between the parties.<sup>344</sup> Intervenor who seek to add a plaintiff for standing or to appeal an adverse decision preclude the court from exercising many of those options.

Broad intervention in nationwide-injunction cases also allows courts to undermine the democratic nature of government litigation. When representatives of an elected branch of the government are involved in a case, their strategy is often dictated by political considerations.<sup>345</sup> The government may choose to settle the case rather than create adverse precedent on an issue of ongoing concern. It may also choose to address the litigation through political channels by amending or withdrawing the challenged law. For instance, in *Diamond v. Charles*,<sup>346</sup> the Supreme Court noted that the Illinois Attorney General had declined to seek the Court’s review of an adverse appellate decision striking down an Illinois abortion statute, likely because the Illinois legislature had amended the law and the state no longer needed to spend resources defending the old statute.<sup>347</sup>

Newly elected officials may also withdraw from ongoing litigation, drop an appeal, or settle a case—especially when the new official represents a different party or platform from the outgoing

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<sup>343</sup> See, e.g., *Cal. Dep’t of Soc. Servs. v. Thompson*, 321 F.3d 835, 845 (9th Cir. 2003) (collecting cases in which “[i]ntervenors in suits with a governmental party” have “continue[d] an appeal after the governmental party has declined to do so”).

<sup>344</sup> Bickel, *supra* note 29, at 40–47 (discussing doctrines like standing, ripeness, mootness, and political questions); Chayes, *Public Law Litigation*, *supra* note 116, at 1299 (discussing settlement).

<sup>345</sup> Davis, *supra* note 17, at 1289. Scholars have billed this feature as a “significant advantage” that states have over intervening private organizations, nonprofits, and class actions because states “have built-in mechanisms of democratic accountability for their conduct of litigation on behalf of their citizens.” Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1923 (2019); see also Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1784 (2008); Lemos & Young, *supra* note 20, at 113–17.

<sup>346</sup> 476 U.S. 54 (1986).

<sup>347</sup> *Id.* at 64 n.16.



representative.<sup>348</sup> This was at issue both in *United States v. Windsor*,<sup>349</sup> after the Department of Justice under President Obama declined to defend the constitutionality of the Defense of Marriage Act,<sup>350</sup> and in *California v. Texas*, after President Trump declined to defend the constitutionality of the ACA.<sup>351</sup>

As these examples demonstrate, third parties can continue litigating a public law issue long after the government officials responsible for representing the case have bowed out. The Supreme Court in *Diamond* expressed “concern[ ] for state autonomy” when intervenors “attempt to maintain the litigation” in “an effort to compel the State to enact a code in accord with [their] interests.”<sup>352</sup> But the Court has yet to express the same concern in nationwide-injunction cases where intervenors impinge on the federal government’s litigation autonomy. Indeed, several Justices have instead suggested that intervention might be the fix for policing federal government decisions to decline an appeal of a nationwide injunction.<sup>353</sup>

This practice promotes government by litigation. Courts are asked to determine the legality of high-profile public programs, and the public has little electoral control over the defense of state and federal laws.

#### IV. TOWARD PROMOTING PROCEDURAL VALUES

As this Article has shown, nationwide injunctions can distort how the rules of civil procedure operate in litigation. This is

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<sup>348</sup> For an example, see *Cameron v. EMW Women’s Surgical Center, P.S.C.*, 142 S. Ct. 1002, 1013 (2022). *But see* Mitch Smith & Monica Davey, *Wisconsin’s Scott Walker Signs Bill Stripping Powers from Incoming Governor*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/us/wisconsin-governor-scott-walker.html> (describing a state law passed to prevent new officials “from withdrawing the state from a lawsuit challenging the Affordable Care Act”).

<sup>349</sup> 570 U.S. 744 (2013).

<sup>350</sup> *Id.* at 754. *Windsor* featured a Democratic President declining to defend a law signed by a previous democratic president. For a history of the Defense of Marriage Act, and the *Windsor* litigation, see generally ROBERTA A. KAPLAN, THEN COMES MARRIAGE: *UNITED STATES V. WINDSOR AND THE DEFEAT OF DOMA* (2015).

<sup>351</sup> Amy Goldstein, *Trump Administration Won’t Defend ACA in Case Brought by GOP States*, WASH. POST (June 7, 2018), [https://www.washingtonpost.com/national/health-science/Trump-Administration-Wont-Defend-ACA-in-Cases-Brought-by-GOP-States/2018/06/07/92f56e86-6a9c-11e8-9e38-24e693b38637\\_story.html](https://www.washingtonpost.com/national/health-science/Trump-Administration-Wont-Defend-ACA-in-Cases-Brought-by-GOP-States/2018/06/07/92f56e86-6a9c-11e8-9e38-24e693b38637_story.html).

<sup>352</sup> *Diamond*, 476 U.S. at 65; *see also* *Cameron*, 142 S. Ct. at 1013; *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2206 (2022).

<sup>353</sup> *Arizona v. City & County of San Francisco*, 142 S. Ct. 1926, 1928 (Roberts, C.J., concurring); *Danco Lab’s, LLC v. All. for Hippocratic Med.*, 143 S. Ct. 1075, 1075–76 (2023) (Alito, J., dissenting from grant of applications for stays).

driven in part by the nature of the nationwide injunction; each case may definitively resolve the legality of a high-profile political controversy, so each case draws the attention of numerous affected nonparties. Rule 24, as written, is ill-equipped to constrain how judges address this influx of interested outsiders. Courts have tugged at and molded the Rule's vague language to accommodate a conflicting assortment of interests and parties, resulting in broad judicial discretion over who can intervene. In nationwide-injunction suits, that discretion has frustrated the point of intervention—for courts to provide a meaningful opportunity for outsiders to participate and to reduce duplicative litigation without impairing party control—and ensnared the courts in decision-making that undermines its legitimacy.

This might lead one to question whether the real problem with Rule 24's dysfunction lies with the nationwide injunction itself. If nationwide injunctions disrupt how the federal rules operate—rules intended to be transsubstantive—perhaps we should focus our concern on the propriety or legality of nationwide injunctions rather than on reforming the federal rules.<sup>354</sup>

But that response risks treating the federal rules as a fixed point for measuring the scope of the judiciary's powers. Instead, the federal rules are a protean feature of the law that adapt to shifting societal conditions.<sup>355</sup> This is one reason for the rich literature on whether the federal rules are transsubstantive in fact as well as in theory.<sup>356</sup> And this is why the federal rules have been amended over time, sometimes dramatically, to account for how the litigation landscape has evolved.<sup>357</sup>

The harms examined in this Article are likely the result of more societal and legal shifts than just the expanded use of nationwide injunctions. States have been recognized to represent capacious interests that support standing to bring and intervene in federal court challenges to federal legislation, agency regulations,

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<sup>354</sup> Many thanks to Professor Stephen Sachs for this point.

<sup>355</sup> David Marcus, *The Collapse of the Federal Rules System*, 169 U. PA. L. REV. 2485, 2488 (2021) [hereinafter Marcus, *The Collapse*] (“[D]eeper currents in American political, social, and economic life have largely determined possibilities for the evolution of procedural doctrine.”); Lahav, *Procedural Design*, *supra* note 137, at 885.

<sup>356</sup> Malveaux, *supra* note 142, at 456 (“[T]his one-size-fits-all approach to process has been increasingly questioned in a society growing in complexity, size, and specialization.”).

<sup>357</sup> For example, the federal rules have been substantially amended to address changes brought on by the Civil Rights Movement, new statutory causes of action, and the perceived rise of litigation costs. *See* Subrin & Main, *supra* note 30, at 1856–77.

and executive orders.<sup>358</sup> Rules limiting the venue in which the federal government can be sued have been broadened.<sup>359</sup> The executive branch has engaged in increased forms of lawmaking that courts have subjected to judicial review.<sup>360</sup> And there has been an increase in the organizations who focus on challenging federal policy.<sup>361</sup>

Instead of raising alarm about the propriety (or constitutionality) of those changes, I suggest that the normative concerns in Part III show that the federal rules may need to be amended to account for these significant shifts in the litigation landscape. To that end, this Part analyzes two proposals to prevent or minimize the harms caused by intervention in nationwide-injunction cases: (1) modifying the adequate-representation requirement to exclude those intervenors whose sole motive is to intervene to defend a federal policy after the government has settled or foregone an appeal and (2) providing an opportunity for outsiders to intervene at the remedial stage of nationwide-injunction cases to contest the scope of the court's relief.

#### A. Modify the Presumption of Adequate Representation

One solution is for courts to reject intervention by non-federal-government outsiders who assert that their sole interest in the case is to defend a federal policy after the government has declined to continue litigating the challenge. This Section defines that proposal and analyzes its costs and benefits. It then examines how this approach might be implemented.

##### 1. Defining the proposal.

To repeat, one option is for courts to exclude intervenors who are disconnected from the federal government and whose only interest in the case is to replace the government as the defender of a federal policy. These nonparties are the mainsprings of the normative concerns raised in Part III. These proposed intervenors

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<sup>358</sup> See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007); *Texas v. United States*, 787 F.3d 733, 748–54 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 579 U.S. 547 (2016); *Hawaii v. Trump*, 878 F.3d 662, 682 (9th Cir. 2017) (*per curiam*), *rev'd and remanded*, 138 S. Ct. 2392 (2018); see also Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 854 & nn.1–4 (2016) (summarizing a variety of cases where states sued the federal government).

<sup>359</sup> Bray, *Multiple Chancellors*, *supra* note 16, at 445–57.

<sup>360</sup> Ahdout, *supra* note 21, at 948–56.

<sup>361</sup> Huddleston, *supra* note 19, at 248–49; Young, *The Chancellors*, *supra* note 17, at 880.

impose steep costs on the parties by undermining one of the fundamental powers granted to parties to control their lawsuit: whether to litigate the merits of a claim to final judgment. And they conscript the original parties' time and resources to continue litigating the claim after those parties resolved their dispute.

There are additional democratic concerns at stake when the government is the party encumbered by the intervenor's participation. The government acts as a representative of its people when defending its policies in court.<sup>362</sup> Changes in the political makeup of the government can—and arguably should—affect that defense. That means that government defendants may abandon appeals or settle cases when the administration has chosen to change its enforcement or understanding of the challenged policy.<sup>363</sup> Intervenors who prevent the government from effectuating its preferred litigation tactics thus also undermine democratic control of the elected branches.

These proposed intervenors force courts to wade into partisan waters to determine whether outsiders (or which outsiders<sup>364</sup>) will be allowed to defend a federal policy and whether the legality of that policy will be adjudicated or left to the political branches. Parts II and III furnish examples of how intervenors can make all the difference in avoiding high-profile political confrontations. Policies such as the in-person dispensation requirement for mifepristone, the abortion “gag rule,” or the Public Charge Rule all would have been subject to Supreme Court review on the merits had the nonparties been allowed to intervene to defend the policies. Because the courts denied intervention, the government resolved those challenges and amended its rules to reflect the administration's preferred policies. By contrast, challenges to DACA, the ACA, and the EPA's water regulations have all teed up the merits for the court's determination because the intervenor defended the policies in court.

There are a few concerns about this proposal worth considering. First, this solution might only be effective if courts apply a heightened presumption of adequate representation when the

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<sup>362</sup> *Stuart v. Huff*, 706 F.3d 345, 354 (4th Cir. 2013).

<sup>363</sup> *Diamond v. Charles*, 476 U.S. 54, 65 (1986); Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 575–76 (2012); Cristina M. Rodriguez, *Regime Change*, 135 HARV. L. REV. 1, 19 (2021).

<sup>364</sup> For an example outside the nationwide-injunction context, see *Perry v. Proposition 8 Off. Proponents*, 587 F.3d 947 (9th Cir. 2009) (rejecting intervention by one group of supporters, the Campaign for California Families, as it was adequately represented by another group of supporters that the court allowed to intervene).

government is a defendant—a presumption that is at least suspect given that it has no hook in the text of the current Rule.<sup>365</sup> But without the presumption, it may be too easy for litigants to overcome the “minimal” adequate-representation requirement that would otherwise apply.<sup>366</sup> Once in the case, those intervenors could defend the policy, including on appeal.

Second, proposals that expand the court’s ability to exercise passive virtues necessarily also allow it to avoid its lawmaking or information-forcing roles. Those functions serve important public interests, and it is not clear that wholesale preclusion is an unalloyed good. As to lawmaking, preventing intervenors from interfering with settlements or forcing appeals allows the government to avoid binding precedent that declares a particular type of policy unlawful—thereby maximizing its future policymaking authority. It also prevents the courts of appeals or the Supreme Court from reversing a legally erroneous order enjoining a policy and validating its legality. Even if the outsiders who would have intervened are able to bring their own future challenges against the same or similar policy, enabling the court to eventually perform its lawmaking role, it may matter when that function is fulfilled. For instance, a court order declaring a politically salient law unconstitutional may have different societal ramifications before or after an election.

As to information forcing, this proposal may enable the government to choose to end a case by settlement or acquiescence to

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<sup>365</sup> For insight into whether textualism does or should apply to interpret the federal rules, see generally Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167 (2017) (advocating for an administrative law model approach to the Rules); Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123 (2015) (laying out a *Chevron*-inspired deference regime for the interpretation of the federal rules); and David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927 (suggesting an “institutional” model for interpreting the federal rules).

A related objection is whether courts should still apply the exceptions that allow intervenors to overcome this presumption in cases of collusion, malfeasance, or nonfeasance. See, e.g., *Stuart*, 706 F.3d at 350; *Daggett v. Comm’n on Governmental Ethics & Election Pracs.*, 172 F.3d 104, 111 (1st Cir. 1999); *Kneeland v. NCAA*, 806 F.2d 1285, 1288 (5th Cir. 1987). It is important to differentiate malfeasance—when the government has intentionally engaged in misconduct—from nonfeasance—when the government has chosen not to do something. This Section argues that nonfeasance does not justify intervention. What’s more, to the extent that these exceptions merely allow outsiders to restyle the same problematic arguments to overcome the presumption—for example, by arguing that the government is colluding with the plaintiffs or committing malfeasance by declining to appeal an injunction against a disfavored policy—those arguments should be rejected. See *Stuart*, 706 F.3d at 354.

<sup>366</sup> See *supra* notes 94–94 and accompanying text.

avoid disclosing information that would otherwise remain unpublished. That litigation then fails to serve its democratic function to reveal politically salient information.<sup>367</sup> This could be enormously consequential, depending on the content of the information lost or the other avenues available to obtain it.

These concerns can perhaps be allayed by courts exercising other managerial powers, like scrutinizing settlements.<sup>368</sup> In other words, it is not clear that intervention is the proper mechanism for ensuring that courts exercise these important functions. It is also unclear that these potential costs outweigh the benefits of avoiding the normative issues analyzed above. The court's exercise of its lawmaking function over politically salient policies during an election cycle may exacerbate the institutional costs to the judiciary, even if they further democratic gains elsewhere.

Finally, one might also fairly question whether this proposal risks granting the executive an effective veto over laws adopted by Congress. If intervenors are excluded from defending government policies, then district courts are free to issue nationwide injunctions barring the enforcement of those policies without hearing a vigorous defense or being subjected to appellate scrutiny. An executive that is politically hostile to the policy therefore only has to sit back and wait for a challenge, rather than articulate the reasons for their opposition to the court or the public. This charge was raised by commentators<sup>369</sup> after *Hollingsworth v. Perry*,<sup>370</sup> where the Supreme Court held that the official sponsors of a state initiative lacked standing to defend the law in court after state

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<sup>367</sup> See ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 73 (2017).

<sup>368</sup> For example, courts have declined to enforce consent decrees against government defendants that “lock in government policies against subsequent revision” and thereby raise concerns about “the possibility of corrupt or imprudent contractual obligations,” limiting a future administration’s ability to “respond[ ] to changed circumstances” or impairing “the democratic imperative of contemporaneous self-governance.” Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 421–22 (2015); see also Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, 70 ADMIN. L. REV. 361, 405–08 (2018) (discussing how courts can use their managerial powers to remedy potentially abusive voluntary remand requests by federal agencies).

<sup>369</sup> See, e.g., Karl Manheim, John S. Caragozian & Donald Warner, *Fixing Hollingsworth: Standing in Initiative Cases*, 48 LOY. L.A. L. REV. 1069, 1120 (2015). For information about the intervenors, see *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010) (describing the intervention by Proposition 8 supporters), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 570 U.S. 693 (2013).

<sup>370</sup> 570 U.S. 693 (2013).

representatives declined to do so.<sup>371</sup> It has also become an increasingly common refrain by outsiders in nationwide-injunction suits who assert that the executive is “surrendering their way to their preferred victory.”<sup>372</sup>

It is worth emphasizing in response that this proposal is limited to diminishing intervention by nongovernment outsiders—those who represent interests separate from the federal government. As the Supreme Court has noted in challenges to state laws, sovereigns are not limited to one entity representing them in court.<sup>373</sup> In suits against federal laws, one federal defendant may bow out, enabling another to take its place.<sup>374</sup> That is exactly what happened in *Windsor* when the executive chose to enforce DOMA but not defend its constitutionality in court. The district court granted intervention to the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives, recognizing that the group had “a cognizable interest in defending the enforceability of statutes the House has passed when the President declines to enforce them.”<sup>375</sup>

This pathway may depend on the viability of congressional and legislator standing, which has been the subject of recent debate.<sup>376</sup> It also may require courts to take a firm line about who

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<sup>371</sup> *Id.* at 713.

<sup>372</sup> Reply Brief for Petitioners at 19, *Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023) (No. 22-592); *see also* *The States of California, New York, and Oregon’s Motion for Reconsideration*, *supra* note 243, at 4; Brief of Amici Curiae States of Ohio, Alaska, Kentucky, and Nebraska in Support of Petitioners at 2–3, *Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023) (No. 20-1775).

<sup>373</sup> *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2197 (2022).

<sup>374</sup> The Supreme Court has recognized “that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.” *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 940 (1983); *see also* *United States v. Lovett*, 328 U.S. 303, 306 (1946).

<sup>375</sup> *Windsor v. United States*, 797 F. Supp. 2d 320, 324 (S.D.N.Y. 2011). The district court also cited to other cases where courts “permitted Congress to intervene as a full party . . . where the Executive Branch decline[d] to enforce a statute that is alleged to be unconstitutional, although they have often neglected to explain their rationale for doing so.” *Id.*

<sup>376</sup> *See, e.g.*, Elizabeth Earle Beske, *Litigating the Separation of Powers*, 73 ALA. L. REV. 823, 868–76 (2022); Tara Leigh Grove, *Government Standing and the Fallacy of Institutional Injury*, 167 U. PA. L. REV. 611, 631–34 (2019); Vicki C. Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in the U.S. Constitutional Democracy*, 93 IND. L.J. 845, 876–85 (2018); Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1, 16 (2016); Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 343–44 (2015); Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 HARV. L. REV. 124, 130–31 (2014); Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1514–15 (2013).

can represent the federal government in court—a question that the Supreme Court has so far avoided.<sup>377</sup> But the possibility allows for adversarial argument by entities who retain a democratic check on their representation in the public’s interest.

Fundamentally, this proposal is for a relatively modest limit on who can intervene. It places no restrictions on outsiders who wish to participate by adding arguments, evidence, claims, a new narrative framing, or standing. And it places no restrictions on those who assert that they have a personal interest, distinct from the public interest represented by the federal government, that justifies intervention. Courts who grant intervention for these purposes, however, should be mindful to prevent that participation from imposing on the government’s control of the suit, including its ability to end the litigation before appeal.<sup>378</sup>

## 2. Adopting the proposal.

There are two avenues for modifying the adequate-representation requirement. The first is through doctrine. Courts can streamline this proposal by clarifying that nonparties are not inadequately represented solely because the government has declined opportunities to defend federal policy. This perpetuates reliance on extratextual interpretations of the Rule, but with the salutary effect of curbing the normative concerns raised by intervention in nationwide-injunction cases.

The second avenue is through rulemaking by the Federal Civil Rules Advisory Committee.<sup>379</sup> The Supreme Court has explained that “rulemaking, ‘not expansion by court decision,’” is

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<sup>377</sup> For instance, the Solicitor General argued in *Windsor* that BLAG could not represent the interests of the United States and did not have standing because it was not authorized to litigate on behalf of the full House until a vote that occurred after the appeal. See Brief for the United States on Jurisdictional Questions at 28–37, *United States v. Windsor*, 507 U.S. 744 (2013) (No. 12-307). The Supreme Court’s majority opinion did not address this issue, though Justice Alito’s dissent suggested support. See *Windsor*, 570 U.S. at 803–04, 807 (Alito, J., dissenting) (noting that it was a “more difficult question” whether BLAG had standing, but accepting that the House had “authorized BLAG to represent its interests in this matter” and concluding that “in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so”).

<sup>378</sup> One additional benefit is that this proposal would largely negate difficult questions about the timeliness of intervention, especially on appeal, that often arise because the government has decided to stop defending a federal policy. See, e.g., *Huisha-Huisha v. Mayorkas*, 2022 WL 19653946, at \*1 (D.C. Cir. Dec. 16, 2022), *vacated and remanded sub nom.* *Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023).

<sup>379</sup> This is the rulemaking process provided in the Rules Enabling Act, 28 U.S.C. §§ 2071–2077.



the “preferred means” for amending how the federal rules operate in practice.<sup>380</sup> Ideally, the rulemaking process is better than case-by-case adjudication because it can provide a “full airing” of the “collective experience of bench and bar,” so that the amended rule reflects “measured, practical solutions.”<sup>381</sup> And it can provide a cohesive rule that will simultaneously apply across circuits, rather than individual circuits adopting varying rules over time.<sup>382</sup>

But there are drawbacks to the rulemaking process. Its rules are usually drafted to apply transsubstantively, and it is unclear that a rule specific to nationwide injunctions would benefit more common types of litigation.<sup>383</sup> The headline-grabbing nature of nationwide-injunction suits may also complicate a rulemaking process already subject to criticism for being plagued by political division and gridlock.<sup>384</sup>

Any amendment to Rule 24’s language to address the values compromised in nationwide-injunction cases would first need to account for the extrajudicial glosses read into the Rule, like the presumption of adequate representation. The Advisory Committee would also need to consider whether to include an exception for collusion or malfeasance, and at what level of particularity to define those exceptions to prevent unintentional loopholes.

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<sup>380</sup> *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 (2009) (quoting *Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 48 (1995)). And it has at times disclaimed the power to amend the federal rules through adjudication. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999) (“[W]e are bound to follow Rule 23 as we understood it upon its adoption, and [ ] we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.”).

<sup>381</sup> *Mohawk Indus.*, 558 U.S. at 114; see also *Miner v. Atlass*, 363 U.S. 641, 651 (1960) (explaining that the Judicial Conference is “left wholly free to approach the question of amendment . . . in the light of whatever considerations seem relevant to them, including of course the experience gained by the District Courts”).

<sup>382</sup> Cf. *Harris v. Nelson*, 394 U.S. 286, 306 (1969) (Harlan, J., dissenting) (“Their deliberations will be free from the time pressures and piecemeal character of case-by-case adjudication.”).

<sup>383</sup> See Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297, 1328–29 (2020) (cautioning against adopting general rules based on high-profile or unusual cases); Suja A. Thomas & Dawson Price, *How Atypical Cases Make Bad Rules: A Commentary on the Rulemaking Process*, 15 NEV. L.J. 1141, 1152 (2015).

<sup>384</sup> See STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 109–120 (2017); Marcus, *The Collapse*, *supra* note 355, at 2497–98; Luke Norris, *Neoliberal Civil Procedure*, 12 U.C. IRVINE L. REV. 471, 511–22 (2022). But see Brooke Coleman, *Janus-Faced Rulemaking*, 41 CARDOZO L. REV. 921, 942 (2020) (“While there are valid critiques of the rulemaking process, it is still an excellent vehicle for rule reform.”).

Another question would be whether to amend both forms of intervention, as courts often consider the adequate-representation requirement under both Rule 24(a)(2) and Rule 24(b).

Finally, any consideration of this proposal should dovetail with amendments to the Federal Rules of Appellate Procedure. The current appellate rules do not include a rule for intervention, though the Advisory Committee on the Appellate Rules has recently noted it may consider one.<sup>385</sup> Any textual exclusion for non-government outsiders to intervene in government defenses of federal policies before the district court should align with rules for intervention on appeal.

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This Section outlined one proposal for ameliorating the institutional concerns caused by widespread discretionary intervention in nationwide-injunction suits: preventing nongovernment outsiders from demonstrating that they are inadequately represented by the government solely because it has declined to defend a federal policy. This would mitigate the institutional costs by reducing the opportunities for the court to choose who can defend a federal policy or which policies will reach a merits determination. It also diminishes judicial involvement in politically contentious cases by allowing the government to exercise its own discretion to appeal or settle. But this suggestion necessarily limits the participation rights of outsiders who wish to intervene in nationwide-injunction cases, including those who have a strong interest in the outcome of the case. The next Section addresses that separate problem.

## B. Remedial Intervention

A key refrain by critics of the nationwide injunction is that it enables judges to determine the rights of individuals who are not involved in the case.<sup>386</sup> This can be critical to those nonparties' interests, as they "may well have extremely dissimilar views on

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<sup>385</sup> ADVISORY COMM. ON APP. RULES, U.S. CTS., MINUTES OF SPRING 2022 MEETING 19 (2022).

<sup>386</sup> Morley, *De Facto Class Actions*, *supra* note 19, at 528; Young, *The Chancellors*, *supra* note 17, at 911–12; Linthorst, *supra* note 17, at 79; Trammell, *supra* note 17, at 74–78; Nicholas Bagley, *A Single Judge Shouldn't Have This Kind of National Power*, THE ATLANTIC (Apr. 14, 2023), <https://perma.cc/T9EW-RSAB>.

whether they are helped or harmed by a federal policy.”<sup>387</sup> As discussed in Part III, intervention is an ineffective panacea for that problem: inconsistent and conflicting readings of Rule 24’s requirements afford district courts wide discretion, frustrating the right of outsiders to meaningfully participate in cases that might affect their interests. And the solution proposed above addresses institutional concerns but does nothing to alleviate the participation objections.

To address that participatory harm, it is helpful to reflect on two components of the right to participate. The first is the right of every holder of a legal claim to participate in the adjudication of that claim.<sup>388</sup> That participation principle helps justify binding the individual to the court’s decision. When individuals have had an opportunity to present their reasoning and evidence to the court and lost, we expect them to comply with the court’s judgment.<sup>389</sup> That principle warps as soon as the court’s judgment purports to bind individuals who were not before the court and who had no opportunity to defend their claim.<sup>390</sup> The core focus, in other words, is on the scope of the judgment. A judgment that does not purport to bind nonparties diminishes the rights of nonparties to participate in the proceedings leading to that judgment.<sup>391</sup>

This feature highlights the second component: nonparties have a right to participate in the court’s determination of the scope of its judgment. When a court is considering a judgment that will affect the legal claims of individuals who did not participate on the merits, then that decision on its own—separate and apart from the merits of the underlying challenge—necessarily

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<sup>387</sup> *Georgia v. President of the U.S.*, 46 F.4th 1283, 1306 (11th Cir. 2022) (emphasis omitted).

<sup>388</sup> See *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008); *Richards v. Jefferson County*, 517 U.S. 793, 797–98, 797 n.4 (1996); *Martin v. Wilks*, 490 U.S. 755, 761–62 (1989).

<sup>389</sup> *Solum*, *supra* note 114, at 275.

<sup>390</sup> For example, there is an extensive literature about when a litigant is in “privity” with a party so that they might be bound by the judgment, or when individuals can adequately represent the interests of others and preclude them from relitigating their claims. See, e.g., Robert G. Bone, *Rethinking the Day in Court Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 218–31 (1992); Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 BYU L. REV. 1079, 1098–1102.

<sup>391</sup> This does not mean that they have no right or interest in participating. As other scholars have noted, courts sometimes apply expansive notions of preclusion or stare decisis that can run up against due process principles when it forecloses future arguments by nonparties in the original case. See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1036–37 nn.99–105 (2003); Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 978–88 (2009).

implicates the participatory rights of nonparties.<sup>392</sup> This principle is reflected in the real-world actions of individuals and courts. Nonparties often seek to intervene to participate solely in the remedial stage of litigation. And courts recognize that outsiders may have a stake in the remedy they craft, justifying their participation.

Indeed, some nonparties have begun seeking limited intervention for the purpose of opposing nationwide injunctions that would affect their interests. But courts have so far been reluctant to grant these motions.<sup>393</sup> For example, in *Louisiana v. CDC*,<sup>394</sup> the federal government did not contest a nationwide injunction, so long as the plaintiff states satisfied certain factors.<sup>395</sup> Several individuals and an organization in California moved to intervene “to argue that, should the Court enter any injunctive relief, such relief should be geographically limited to run only in the Plaintiff States, rather than nationwide.”<sup>396</sup> The district court denied the motion.<sup>397</sup> In *Texas v. United States*,<sup>398</sup> the court issued a nationwide injunction barring the enforcement of Title IX, Title VII, and OSHA guidance on sex discrimination against transgender individuals.<sup>399</sup> An individual transgender woman had sought to intervene to prevent the court from issuing an injunction that would affect her and her ongoing Title VII case against her employer.<sup>400</sup>

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<sup>392</sup> See Appel, *supra* note 22, at 299; see, e.g., *Harris v. Pemsley*, 820 F.2d 592, 599 (3d Cir. 1987) (considering separate participatory interests—one “on the merits” and the second “in the formation of the remedy”).

<sup>393</sup> See, e.g., *Louisiana v. CDC*, 603 F. Supp. 3d 406, 441 (W.D. La. 2022); *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016) (deciding the case without ruling on an intervention motion by a woman who wanted to prevent the court from issuing a nationwide injunction that would affect her); see also *City of Chicago v. Sessions*, 2017 WL 5499167, at \*10 (N.D. Ill. Nov. 16, 2017) (rejecting an intervenor who wanted to participate to support a nationwide injunction).

<sup>394</sup> 603 F. Supp. 3d 406 (W.D. La. 2022).

<sup>395</sup> *Id.* at 441.

<sup>396</sup> Proposed Intervenor’s Motion for Limited Intervention at 2, *Louisiana v. CDC*, 603 F. Supp. 3d 406 (W.D. La. 2022) (No. 22-CV-00885).

<sup>397</sup> The district court’s intervention order is not on the docket, but proposed intervenors provided more detail of the procedural history in their brief challenging the decision (and the nationwide injunction) on appeal. See Opening Brief of Appellant Innovation Law Lab at 16, *Louisiana v. CDC*, No. 22-30303 (5th Cir. *dismissed* June 13, 2023) (noting that the district court denied the intervention motion “without issuing a written denial, instead orally explaining that Federal Defendants adequately represent Proposed Intervenor’s interests and declining to give Proposed Intervenor an opportunity to present argument on their motion”).

<sup>398</sup> 679 Fed. App’x 320 (5th Cir. 2017).

<sup>399</sup> *Id.* at 323.

<sup>400</sup> See Dr. Rachel Tudor’s Motion and Incorporated Memorandum of Law in Support of Motion to Intervene & Join Claim at 2, *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016) (No. 16-CV-00054).

The court never ruled on the motion.<sup>401</sup> She tried to participate on appeal but was dismissed from the case, as she was not a party to the judgment below.<sup>402</sup>

I propose that litigants should seek, and courts should broadly grant, intervention limited to whether a nationwide injunction is proper.<sup>403</sup> This practice would provide an avenue for outsiders to participate on the key issue affecting their interests: preventing the court from issuing a remedy that resolves their rights without providing them an opportunity to defend those rights on the merits. That gain in procedural benefits would come with few costs (or, at least, fewer costs) to the original parties than allowing those same nonparties to participate on the merits. True, remedial intervenors would likely present arguments and evidence, and the parties would then need to spend time and resources responding to those contributions. And the court would need to spend its own institutional resources processing and considering them. But limited intervention would strike a better balance than the current judicial practice of leaving affected outsiders in the cold.

What's more, remedial intervention also may increase the quality and legitimacy of the court's judgment. Intervenors can provide the court with more information about the full scope of a nationwide injunction's effects, increasing confidence that when courts enjoin government actions nationwide, that remedy is truly tailored to avoid accidentally sweeping in related interests.<sup>404</sup> That information would also provide a fuller record for appellate review, potentially avoiding costly remands for district courts to develop the record justifying a nationwide injunction.<sup>405</sup>

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<sup>401</sup> See *Texas v. United States*, No. 7:16-CV-00054 (N.D. Tex. *dismissed* Mar. 3, 2017).

<sup>402</sup> *Texas*, 679 Fed App'x at 323–24.

<sup>403</sup> This proposal therefore also supports calls by other scholars for courts to hold hearings to determine the scope of a potential nationwide injunction. See Smith, *supra* note 171, at 2036–37; Frost, *supra* note 16, at 1116.

<sup>404</sup> See *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (Gorsuch, J., concurring in the grant of a stay) (criticizing nationwide injunctions for their tendency to be “rushed, high-stakes, low-information decisions” (citing Bray, *Multiple Chancellors*, *supra* note 16, at 461–62)); Smith, *supra* note 171, at 2036 (“More thorough explanations of a district court’s reasoning would help [appellate judges] evaluate challenges to the scope of an injunction.”).

<sup>405</sup> See, e.g., *FDA v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 10, 11 (2020) (remanding for “a more comprehensive record [that] would aid th[e] Court’s review” of the nationwide injunction); *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1245 (9th Cir. 2018) (vacating injunction “because the record is insufficiently developed as to the question of the national scope of the injunction”); *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018). One might read these cases as examples of judicial avoidance or delay

One might question whether outsiders can participate without the resulting costs to the parties and the court by submitting *amicus curiae* briefs. But it is not clear that this change in status would reduce those costs. The parties and the court would still need to consider and respond to the arguments raised by the nonparties as *amici*. Otherwise, the *amicus* process would fail to provide the nonparties with a meaningful opportunity to participate at a stage that affected their interests. *Amicus* status also does not guarantee that the nonparties will be able to supplement the existing record or appeal an overbroad injunction—two opportunities that are key to a meaningful defense of their interests.

Another fair objection might be logistical. First, nationwide-injunction cases are often fast moving. The stage that matters the most is frequently whether to issue a preliminary injunction or a temporary restraining order, and courts often consider the merits and the scope of the remedy simultaneously. It is unclear that this timeline would provide outsiders with a chance to discover the case or file motions to intervene before the court entered a consequential injunction. Second, if nonparties can file in time, it might be impracticable for courts to meaningfully consider each interest. A court flooded with individual intervention motions might find it exceedingly difficult to parse the various interests asserted, categorize who might be adequately represented by other individuals asserting the same interest, and still adjudicate the remedy as presented by the original parties.

As to the speed of the litigation, it is worth emphasizing that nothing about limited intervention requires nonparties to wait until the remedy stage occurs to express their interests in participating. Nor do they need to wait for a separate briefing schedule to articulate the arguments and evidence they want the court to consider in crafting a remedy; Rule 24(c) requires intervenors to attach a pleading that sets out their claim or defense for which intervention is sought.<sup>406</sup> And courts routinely accept early intervention by parties who then wait on the sidelines until the basis for their intervention is triggered.

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on the merits of the nationwide injunctions, rather than truly justified requests for necessary information. That might be right. But allowing nonparties to provide information about how an overbroad injunction would negatively affect their interests might also: (1) dissuade district courts from issuing the nationwide injunction in the first place, or (2) provide a principled basis for tailoring the injunction at the appellate level, rather than remanding to nudge the district court towards tailoring the injunction on its own.

<sup>406</sup> FED. R. CIV. P. 24(c).

The intervenors in *Louisiana* provide an example of how remedial intervention might be possible in fast-moving cases. The plaintiff states sought both a nationwide temporary restraining order<sup>407</sup> (TRO) and a nationwide preliminary injunction.<sup>408</sup> The court received the parties' briefs and granted a TRO for two weeks,<sup>409</sup> later extended to last just under a month.<sup>410</sup> The parties then submitted their briefs on the preliminary injunction, where the federal government defendants chose not to object to a nationwide injunction should the plaintiffs satisfy the requirements for injunctive relief. On the same day that the plaintiffs filed their reply, the intervening organization and individuals moved to join the case to oppose the nationwide scope of the injunction. Both original parties objected to their intervention, but neither one asserted that they would be prejudiced by the intervenors' participation or that they would slow down the litigation.<sup>411</sup> The court denied the intervention motion, but it invited the proposed intervenors to the scheduled hearing to present oral argument on the scope of the injunction as amici curiae. And the court responded to their objections in its opinion. This case thus demonstrates how outsiders can participate in fast-moving cases. Indeed, it is unclear what denying limited intervention accomplished, as the court gave the outsiders the same participation rights as amici that they had sought as intervenors.

That leaves the question whether remedial intervention in nationwide-injunction cases will overwhelm the court with non-party participation. One straightforward solution would be for the court to decline to consider an injunction that applies to nonparties, negating the interests outsiders might have. But even if rare, there are some situations that might require a broader injunction.

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<sup>407</sup> See generally Plaintiff States' Motion for a Temporary Restraining Order and to Compel Production of Information, *Louisiana v. CDC*, 603 F. Supp. 3d 406 (W.D. La. 2022) (No. 6:22-CV-00885).

<sup>408</sup> See generally Plaintiff States' Motion for Preliminary Injunction and to Expedite, *Louisiana v. CDC*, 603 F. Supp. 3d 406 (W.D. La. 2022) (No. 6:22-CV-00885).

<sup>409</sup> See generally Order Granting Temporary Restraining Order, *Louisiana v. CDC*, 603 F. Supp. 3d 406 (W.D. La. 2022) (No. 6:22-CV-00885).

<sup>410</sup> See generally Order Extending Temporary Restraining Order, *Louisiana v. CDC*, 603 F. Supp. 3d 406 (W.D. La. 2022) (No. 6:22-CV-00885).

<sup>411</sup> The defendants asserted that it would "interfere with the Department of Justice's prerogative to control [the case]" to give the intervenors "full party rights." Defendants' Opposition to Proposed Intervenors' Motion for Limited Intervention at 8–9, *Louisiana v. CDC*, 603 F. Supp. 3d 406 (W.D. La. 2022) (No. 22-CV-00885) (quoting *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984)). But the motion said nothing about the limited intervention actually requested, which was cabined to arguments over the scope of the remedy. See *id.*

Courts should experiment with managerial controls that have been effective for hearing numerous interests in other types of litigation. Those mechanisms might include: appointing a special master to provide a report to the court of the arguments and evidence submitted, requiring intervenors to confer and consolidate their filings, or creating a specialized filing system to streamline motions. Without that experience, however, it is difficult to assert that intervention would be too cumbersome or costly to provide a meaningful opportunity for outsiders to participate in consequential decisions affecting their interests.

Finally, this proposal, like the one before it, relies on extrajudicial glosses on Rule 24. Nothing in the Rule's text empowers courts to limit intervention, especially when sought as a matter of right. Perhaps remedial intervention should be exercised as a matter of permissive intervention. But those same individuals may meet the requirements for intervention of right, raising questions about whether their participation should be cabined to arguments over the remedy. The better practice may therefore be for the Advisory Committee to provide a rule explicitly allowing for remedial intervention. In the absence of such a rule, courts should mitigate the participation concerns raised by nationwide injunctions to allow for limited intervention over the scope of the remedy.

#### CONCLUSION

Public law litigation is changing. Litigants are asking for—and courts are granting—an increasing number of universal remedies. These cases can resolve high-profile and politically salient questions for everyone in the country, regardless of ongoing democratic debates.

This Article has shown that whether a court allows an intervenor into these cases can make the difference between whether a federal policy stands or falls, and whether it stands or falls by court order or electoral consequences. It alters the voices the court hears, the evidence and arguments the court considers, whether the public can control the litigation through its elected representatives, and whether the court's decision is seen as the result of neutral deliberation or political and ideological bias.

There are certain changes to the doctrine and text of the federal rules that can help resolve those tensions. This Article proposes two. Courts should reject intervention by nongovernment outsiders whose sole interest is defending a federal policy after



the government has settled or declined to continue the litigation. And courts should broadly grant intervention to hear arguments and evidence on whether the scope of a proposed nationwide injunction would be proper.

More broadly, this Article challenges assumptions about how procedural rules operate in an era when litigants are asking federal courts to exercise broad remedial authority. The federal rules were designed as guardrails for judicial discretion. They provide neutral principles in the hopes of displacing politics and ideology. But the federal rules were never designed with nationwide injunctions in mind. And absent reform, they appear to be ill-equipped to cabin current assertions of judicial power.