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Where Standing Closes a Door, May Intervention Open a Window? Article III, Rule 24(a), and Climate Change Solutions

by Melissa Waver

Melissa Waver is a third-year J.D. student at Suffolk University Law School.

Summary

The Article III standing doctrine is hindering judicial resolution of climate change harms. Imposing Article III standing requirements onto movants seeking to intervene in ongoing cases further narrows an increasingly narrow field of options for litigants to engage federal courts in implementing climate change solutions. A flexible application of intervention rules, which would not require all prospective intervenors to demonstrate their own Article III standing, could support efforts to systematically address the large-scale problem of climate change.

At the beginning of the last decade, state and federal legislatures were poised to launch a series of coordinated efforts to address global warming. States began forming regional partnerships to reduce greenhouse gases (GHGs),[1] and the U.S. House of Representatives proposed a nationwide GHG cap-and-trade program.[2] Then came the economic crisis in late 2008, and, as a result, legislative priorities shifted dramatically. States backed out of their reduction agreements[3] and the U.S. Congress faltered on enacting climate change legislation.[4] Consequently, the decade ended with few systematic, legislative solutions to global warming in place.

As momentum slowed, environmental groups, states, and private citizens looked to federal courts as an avenue for pushing forward with solutions to global warming.[5] The U.S. Supreme Court, with its landmark decision in *Massachusetts v. EPA*,[6] seemed to open federal courthouse doors to climate change plaintiffs. However, as such plaintiffs initiated suits in lower federal courts, it ultimately became apparent that the doors were not open as wide as

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1. *See* Center for Climate and Energy Solutions, *Multi-State Climate Initiatives*, http://www.c2es.org/states-regions/regional-climate-initiatives (last visited June 7, 2012) (providing a list of state-based climate change initiatives).
2. *See* OpenCongress, http://www.opencongress.org/bill/111-h2454/show (last visited June 7, 2012) (detailing legislative history of the American Clean Energy and Security Act).
3. *See* New Jersey State Department of Environmental Protection, *Regional Greenhouse Gas Initiative*, Sustainability and Green Energy, http://www.nj.gov/dep/sage/ce-rggi.html (last visited June 7, 2012) (explaining that as of January 1, 2012, New Jersey is no longer a part of the Northeast Regional Greenhouse Gas Initiative); Western Climate Initiative, *History*, http://www.westernclimateinitiative.org/history (last visited June 7, 2012) (explaining that Arizona, New Mexico, Oregon, and Washington have backed out of the Western Climate Initiative); Center for Climate and Energy Solutions, *Multi-State Climate Initiatives*, Midwest Greenhouse Gas Reduction Accord, http://www.c2es.org/states-regions/regional-climate-initiatives#MGGRA (last visited June 7, 2012) (explaining that in 2010, the six midwestern states that formed the Midwestern Greenhouse Gas Reduction Accord decided to put implementation of their reduction goals on hold).
4. *See* OpenCongress, http://www.opencongress.org/bill/111-h2454/show (last visited June 7, 2012) (showing that after the bill passed in the House, the U.S. Senate refused to take action to enact the American Clean Energy and Security Act).
5. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 37 ELR 20075 (2007); Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 39 ELR 20215 (2d Cir. 2009), *aff'd in part by an equally divided court, rev'd in part*, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011); Ctr. for Biological Diversity v. U.S. DOI, 563 F.3d 466, 39 ELR 20091 (D.C. Cir. 2009); Amigos Bravos v. U.S. BLM, 816 F. Supp. 2d 1118 (D.N.M. 2011); Sierra Club v. U.S. Def. Energy Support Ctr., 2011 WL 3321296 (E.D. Va. July 29, 2011); Native Village of Kivalina v. ExxonMobil, 663 F. Supp. 2d 863, 39 ELR 20236 (N.D. Cal. 2009).
6. *See generally Massachusetts*, 549 U.S. 497.

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many had hoped. Instead, most federal courts have put up Article III standing as a barrier to litigating climate change harms, even post-*Massachusetts*.[7] As the hurdles gradually and steadily increase for plaintiffs to obtain judicial resolution of climate change injuries, intervention under Federal Rule of Civil Procedure 24(a) (Rule 24(a)) may be a remaining effective option for environmental groups and private citizens to advocate for governmental solutions to global warming.[8]

The purpose of this Article is to explore how a flexible application of Rule 24(a) could promote effective development and implementation of climate change policy. Part I explains how the current application of the Article III standing doctrine undermines the federal courts' role in addressing the challenge of global warming and considers how Rule 24(a) could advance courts' fulfillment of that role. Part II looks at several recent federal court decisions to analyze the unique difficulties of applying the standing doctrine to climate change harms. Part III delves into the legal and policy ramifications of the circuit split over whether or not prospective Rule 24(a) intervenors must establish their own Article III standing. Finally, Part IV discusses why intervention, compared to other procedural mechanisms for advocating in federal court, is a critical tool for ensuring that the legislative and executive branches of government take appropriate and necessary measures to deal with global warming.

I. Intervention Under Rule 24(a)

A. *The Judiciary's Role in Addressing Climate Change*

The Supreme Court has acknowledged the substantial consensus in the scientific community that human activity is contributing to accelerated warming of our climate, which will lead to "serious" harms.[9] Yet, many members of the federal judiciary have expressed the view that the resolution of global warming, due to its widespread causes and large-scale effects, is a generalized grievance that does not fall within the narrow constitutional role of the federal courts.[10] Instead, these judges reason, climate change falls squarely in the purview of the executive and legislative branches.[11]

Any laws or regulations enacted by the executive or legislative branches, however, should be subject to review and enforcement by the courts. Yet, the current application of the standing doctrine is constraining federal courts' ability to carry out their role in enforcing laws and regulations that might address climate change. Although many states and Congress have recently ratcheted down efforts to address climate change, new laws and regulations are likely forthcoming. In fact, federal regulatory agencies have recently enacted some regulations aimed at reducing GHGs.[12] Furthermore, other government bodies may enact laws in the future to address climate change. The emerging trend in federal courts to disqualify climate change suits from judicial resolution,[13] however, could mean that courts are painting themselves into a corner from which they cannot fulfill their traditional role of providing both remedies for violations of the law and oversight for the actions of federal regulatory agencies.

Historically, the judiciary has played a unique and critical role in implementing federal laws and regulatory programs. Recognizing the courts' significance, Congress has specifically included citizen suit provisions in many federal statutes to allow citizens to bring suit for violations of environmental laws and regulations.[14] Indeed, use of the federal courts by states and citizens has been and continues to be critical to the development and enforcement of pollution and energy regulations targeted at climate change. It was, after all, a lawsuit initiated by several states and environmental organizations that led the U.S. Environmental Protection Agency (EPA) to begin regulating GHG emissions pursuant to its congressional mandate under the Clean Air Act.[15]

B. *Intervention as a Strategy for Climate Change Advocates*

Although relaxation of the current standing doctrine might be in order, a more realistic, although limited, option for those concerned about climate change might be to intervene in cases on issues of air pollution emissions, land use, energy policy, and other related matters, brought by plaintiffs that have standing by virtue of being a state sovereign or a member of the regulated community. Specifically, Rule 24(a), which allows interested outsiders to intervene as a matter of right in ongoing litigation, could provide a highly beneficial strategic means for states, citizens, and environmental groups to advocate for judicial enforcement of laws addressing climate change.[16] Standing is a bar for

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7. *See, e.g.*, *Ctr. for Biological Diversity*, 563 F.3d at 475; *Amigos Bravos*, 816 F. Supp. 2d at 1122; *Sierra Club v. U.S. Def. Energy Support Ctr.*, 2011 WL 3321296, at *1; *Native Village of Kivalina*, 663 F. Supp. 2d at 868.
8. *See* Fed. R. Civ. P. 24(a).
9. *See Massachusetts*, 549 U.S. at 506-09, 521.
10. *Id.* at 535-36 (Roberts, J., dissenting).
11. *See, e.g., id.*
12. For example, in recent years, the U.S. Environmental Protection Agency (EPA) has taken a number of actions, pursuant to its authority under the Clean Air Act (CAA), 42 U.S.C. §§7401-7671, ELR Stat. CAA §§101-618, aimed at reducing greenhouse gas (GHG) emissions, including the "Greenhouse Gas Endangerment Finding," 74 Fed. Reg. 66496 (Dec. 15, 2009); the "Tailpipe Rule," 75 Fed. Reg. 25324 (May 7, 2010); the "Tailoring Rule," 75 Fed. Reg. 31514 (June 3, 2010); and the "Renewable Fuel Standards," 77 Fed. Reg. 1320 (Jan. 9, 2012).
13. *See, e.g.*, *Ctr. for Biological Diversity*, 563 F.3d at 475; *Amigos Bravos*, 816 F. Supp. 2d at 1122; *Sierra Club v. U.S. Def. Energy Support Ctr.*, 2011 WL 3321296, at *1; *Native Village of Kivalina*, 663 F. Supp. 2d at 868; *cf. Massachusetts*, 549 U.S. at 520 (Court relaxed the ordinarily exacting standing analysis by allowing "special solicitude" to the plaintiff state sovereign).
14. *See, e.g.*, CAA §304, 42 U.S.C. §7604 (2006); Clean Water Act §505, 33 U.S.C. §1365 (2006).
15. *Massachusetts*, 549 U.S. at 533 (holding that EPA has a "clear statutory command" to either determine "that greenhouse gases do not contribute to climate change" or provide "some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do").
16. *See* Fed. R. Civ. P. 24(a).

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determining who may properly initiate a lawsuit,[17] whereas intervention is a means for an outsider to become a party in a case that has been started by someone else.[18] Conceivably, therefore, those who seek solutions to global warming could advocate in federal court without satisfying the rigorous standing test by intervening in existing cases on related matters instead of initiating them.

It should be mentioned that, in addition to intervening, concerned citizens and climate change advocates also have the option of asking the court for leave to participate as amicus curiae. The standard for participating in a case as an amicus is lower and easier to satisfy than the standard for intervention as of right,[19] and amici need not establish their standing under Article III. Amici, however, do not gain status as parties to the case, and therefore are not able to participate as meaningfully or as influentially as intervenors.[20] For reasons discussed more fully in Part IV, intervening is highly preferable to participating as amicus curiae when significant interests are at stake.

Undercutting the efficacy of Rule 24(a) as a climate change litigation tool is the ongoing split in the federal circuit courts over whether an absentee seeking to intervene under Rule 24(a) must also demonstrate Article III standing.[21] A number of legal principles underlie each circuit's decision to either require or not require standing for Rule 24(a) intervenors, and both camps have arguments to support their interpretation of the intervention rules.[22]

The enormity of the global warming problem and the importance of addressing it, however, cast the significance of this circuit split in a new light. Federal courts have accepted that anthropogenic emissions are causing accelerated warming of our climate and that dire consequences are likely to follow if nothing is done.[23] An important consideration for the judiciary is whether federal courts should have any role in addressing the challenge. Given how the modern Article III standing doctrine has limited plaintiffs' ability to initiate claims of global warming harms,[24] in determining whether Rule 24(a) intervenors should also be required to satisfy standing's high bar, circuit courts should consider whether Rule 24(a) should be used as another tool to close the door further or as a mechanism for giving the judiciary some role in implementing solutions to global warming.

II. Article III Standing in Climate Change Suits

Before considering how Rule 24(a) intervention might operate in climate change suits, it will be helpful to first examine the unique challenges that plaintiffs face in establishing standing for global warming harms. If the standing analysis is to be applied to Rule 24(a) intervenors, then any prospective intervenor hoping to raise climate change issues would first have to surmount the standing hurdle. The law of climate change standing is quickly evolving, and the current state of affairs is complex. A key question for courts is whether applying such a complex doctrine to Rule 24(a) intervention would further its policy purpose, which has been described by one court as "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."[25]

A. Climate Change Injuries and the Standing Analysis

The foundation of the standing doctrine as it applies today was established in *Lujan v. Defenders of Wildlife*.[26] In this case, the Supreme Court clearly defined three elements of the constitutional standing requirement: (1) "the plaintiff must have suffered an injury in fact," which the Court defined as "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of," meaning that "the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[27]

For a variety of reasons, global warming harms do not fall easily into the three prongs of standing as established in *Lujan*. Not only does global warming have the eventual capacity to cause some kind of injury to nearly every person on earth, but since there are "an unknowable multitude of GHG sources,"[28] courts are wary of pinning the blame, and therefore the damages, on just one individual or group of polluters. Similarly, some courts have had a great deal of difficulty understanding how injuries stemming from global warming could possibly be remedied by assessing

17. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982).
18. *See* Fed. R. Civ. P. 24.
19. *See* United States v. Brooks, 164 F.R.D. 501, 506, 507 (D. Or. 1995) (finding that movants did not satisfy the criteria for either permissive intervention or intervention of right under Rule 24 and granting leave to file briefs as amicus curiae instead); Beverly Hills Federal Sav. & Loan Assoc. v. Federal Home Loan Bank Bd., 33 F.R.D. 292, 294 (S.D. Cal. 1962) (finding that movants did not satisfy the criteria to intervene under Rule 24(a)(2) and granting leave to participate as amicus curiae instead).
20. *See, e.g.*, NGV Gaming, Ltd. v. Upstream Point Molate, LLC, 355 F. Supp. 2d 1061, 1068 (N.D. Cal. 2005) (explaining that "an amicus curiae is not a party and has no control over the litigation and no right to institute any proceedings in it, nor can it file any pleadings or motions in the case").
21. San Juan County v. United States, 420 F.3d 1197, 1204-05 (10th Cir. 2005) (noting circuit split and citing other circuits' cases), *rev'd on other grounds,* San Juan County v. United States, 503 F.3d 1163, 1167 (10th Cir. 2007).
22. *See, e.g.*, Mausolf v. Babbitt, 85 F.3d 1295, 1300-01, 26 ELR 21317 (8th Cir. 1996); Chiles v. Thornburgh, 865 F.2d 1197, 1212-13 (11th Cir. 1989).
23. *See, e.g.*, *Massachusetts*, 549 U.S. at 521.
24. *See, e.g.*, *Ctr. for Biological Diversity*, 563 F.3d at 475; *Amigos Bravos*, 816 F. Supp. 2d at 1122; *Sierra Club v. U.S. Def. Energy Support Ctr.*, 2011 WL 3321296, at *1; *Native Village of Kivalina*, 663 F. Supp. 2d at 868.
25. Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967).
26. 504 U.S. at 560-61.
27. *Id.* (internal quotation marks omitted).
28. *Amigos Bravos*, 816 F. Supp. 2d at 1135.

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damages or imposing an injunction on one or a handful of defendants.[29] As one court has framed it:

> Unlike pollution in a stream that can be easily traced to a few likely polluters, climate change is a global phenomenon whose manmade causes originated decades or centuries ago with the advent of the industrial revolution and continue today. Thus, . . . it is impossible to say with any certainty that Plaintiffs' alleged injuries were the result of any particular action or actions by Defendants.[30]

Courts are also cognizant of the prudential concerns that the standing doctrine has been developed to address, namely that courts would be "overwhelmed by a flood of lawsuits asserting generalized grievances against polluters large and small"[31] if they were to loosen the standing requirements for global warming claims. Thus, even though many judges have recognized global warming as a real and significant problem, in most cases, they have felt ill-equipped and unauthorized to deal with the enormity of the issue.[32]

B. *The Landmark Decision of* Massachusetts

With its 2007 decision in *Massachusetts*, the Supreme Court addressed many of the standing concerns stemming from the widespread nature of global warming causes and effects.[33] Significantly, the Court stated in unequivocal terms that, merely "because greenhouse gas emissions inflict widespread harm," the doctrine of standing does not present "an insuperable jurisdictional obstacle" to litigating injuries stemming from global warming.[34] In *Massachusetts*, the Court evaluated whether a state had standing to challenge EPA's determination that the Agency did not have statutory authority to regulate GHG emissions from new motor vehicles, and that even if it did have such authority, it was within the Agency's discretion to refrain from so regulating.[35]

Of paramount importance, the *Massachusetts* decision rejected the argument that global warming injuries cannot be litigated because, due to the vast number of past and present contributors, no blame can be ascribed to anyone in particular. Addressing the fairly traceable causation standard, the Court held that plaintiffs need not show that GHG emissions from any one particular source or group of sources, by themselves, have caused the alleged global warming injuries.[36] Rather, the Court held that a causal connection is sufficiently established if plaintiffs can show that the defendants' emissions "make a meaningful contribution to greenhouse gas concentrations and hence . . . to global warming."[37]

EPA had argued that reducing domestic motor vehicle emissions would not redress the petitioners' global warming injuries "because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease," and because "greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners' injuries that the Agency cannot be haled into federal court to answer for them."[38] The Court, however, rejected the notion that global warming could never be litigated simply because the emissions at issue in any given case do not comprise all, or substantially all, of the emissions causing global warming. Instead, the Court reasoned that "agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop"; rather, agencies can, and should, solve large-scale problems one incremental step at a time.[39]

The Supreme Court further held that redressability in global warming cases is satisfied if the plaintiffs can show that a favorable decision would lead to an abatement or slowing down of global warming.[40] Recognizing that the redressability and causation prongs are opposite sides of the same coin, the Court found that even though domestic vehicle emissions did not alone cause the entire global warming problem, a reduction in them would, at least partially, reduce the effects.[41] Thus, to satisfy the redressability prong, plaintiffs seeking some sort of legislative or injunctive relief from global warming harms need not show that a favorable decision from the court would reverse global warming altogether.[42]

The most complex part of the Supreme Court's standing analysis in *Massachusetts* was the Court's explanation that the state had satisfied the injury-in-fact requirement. The Court gave two reasons for finding an injury-in-fact. On the one hand, the Court discussed the particularized, actual, and imminent injuries from sea-level rise, induced by global warming, that Massachusetts had suffered and continued to suffer as a landowner of a significant amount of coastal property.[43] On the other hand, however, the Court explained that it was "of considerable relevance that the party seeking review here is a sovereign state and not . . . a private individual,"[44] and that as a "quasi-sovereign"[45] seeking to protect "all the earth and air within its domain,"[46] Massachusetts was entitled to "special solicitude in [the Court's] standing analysis."[47] The Court's suggestion that states deserve a less rigorous application of the standing test

29. *Id.*
30. *Id.*
31. *Id.* at 1133.
32. *See, e.g.*, *id.*; Ctr. for Biological Diversity v. U.S. DOI, 563 F.3d 466 (D.C. Cir. 2009); Native Village of Kivalina v. ExxonMobil, 663 F. Supp. 2d 863 (N.D. Cal. 2009).
33. *Massachusetts*, 549 U.S. at 524-26.
34. *Id.* at 517.
35. *Id.* at 505-06.
36. *Id.* at 524-25.
37. *Id.* at 525.
38. *Id.* at 523-24.
39. *Id.* at 524.
40. *Id.* at 525-26.
41. *Id.* at 524-25.
42. *Id.*
43. *Id.* at 522-23.
44. *Id.* at 518.
45. *Id.* (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907)).
46. *Id.* at 519 (quoting *Georgia* 206 U.S. at 237).
47. *Id.* at 520.

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than non-sovereign plaintiffs has generated quite a bit of ideological confusion as to how lower courts should apply the injury-in-fact test to non-sovereign plaintiffs in global warming suits.[48] As discussed further below, this remains an outstanding question for environmental plaintiffs and federal courts.

Despite the "special solicitude" analysis, the Court quite notably stated that the injury-in-fact element of standing was not defeated merely because the injuries caused by global warming are "widely-shared" among many people and landowners.[49] Thus, an injury may be "particularized,"[50] as required under the *Lujan* standing test, even if it is also common.

C. *Inconsistency Among Lower Courts Post-* Massachusetts

The Supreme Court's decision in *Massachusetts*, while generating new questions over how non-sovereign plaintiffs may satisfy the injury-in-fact prong, clearly addressed how climate change injuries could satisfy the causation and redressability prongs of standing. As may be expected, lower courts have continued to reach differing and sometimes contradictory conclusions in determining whether private, non-sovereign plaintiffs may establish an injury-in-fact resulting from GHG emissions.[51] Somewhat surprisingly, however, lower courts have struggled to apply the relatively clear causation and redressability analyses outlined in *Massachusetts*.[52]

1. The Emerging Circuit Split

With its decision in *Ctr. for Biological Diversity (CBD) v. United States DOI*,[53] the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit held that the injury-in-fact analysis in *Massachusetts* did not apply in cases where there is no state sovereign seeking "to assert its own rights as a state."[54] In this suit, several environmental groups challenged the U.S. Department of the Interior's (DOI's) decision to lease areas of the Outer Continental Shelf for offshore oil and gas drilling.[55] The petitioners alleged that they would suffer harm from the DOI's actions because the offshore oil and gas leases would ultimately contribute to global warming, which would damage the ecosystems and wildlife of the Outer Continental Shelf.[56] This damage, petitioners alleged, would adversely affect their enjoyment of the area.[57] The court rejected this argument and, quoting *Lujan*, held that to establish standing, the petitioners must show that they have been harmed in a "personal and individual way."[58] Furthermore, the D.C. Circuit concluded that an assertion that "the environment in general has suffered an injury" is insufficiently particular to satisfy the injury-in-fact prong.[59]

The court, therefore, found that the petitioners lacked substantive standing because the climate change injury they claimed was too general.[60] The petitioners, in the court's view, had not alleged any injury from global warming that would be specific to them and the land they were concerned with, as compared to people and land anywhere else on the globe.[61] As the court framed the issue, "climate change is a harm that is shared by humanity at large, and the redress that Petitioners seek—to prevent an increase in global temperature—is not focused any more on these petitioners than it is on the remainder of the world's population."[62]

The D.C. Circuit's narrow, restrictive interpretation of the injury-in-fact prong may seem at odds with the more permissive approach taken by the Supreme Court in *Massachusetts*. The plaintiff in *Massachusetts* alleged a general harm to the environment that was causing injury of a kind that is widely shared by many.[63] However, the D.C. Circuit distinguished the *CBD* petitioner from the state petitioner in *Massachusetts*, holding that "where a harm is widely shared, a sovereign, suing in its individual interest, has standing to sue where that sovereign's individual interests are harmed. . . ."[64] Thus, even though the Supreme Court held in *Massachusetts* that "widely shared" injuries could satisfy the injury-in-fact prong,[65] the D.C. Circuit reached the opposite conclusion on the basis that the *CBD* petitioners were not state sovereigns.[66]

As a result of the *CBD* holding, the current law in the D.C. Circuit seems to be that non-sovereign plaintiffs cannot establish an injury-in-fact by alleging current and ongoing damage to land caused by the effects of global warming. This is so, even though the state of Massachusetts was successful with a similar argument in establishing its own concrete, particularized injury-in-fact caused by global warming. Alarmingly for environmental plaintiffs, reasoning similar to the D.C. Circuit's has taken hold in other jurisdictions as well.[67] Holdings like these have made the job much more difficult for non-sovereign plain-

48. *See*, *e.g.*, *Massachusetts*, 549 U.S at 536-37 (Roberts, J., dissenting); *Ctr. for Biological Diversity v. United States DOI*, 563 F.3d at 477; *Native Village of Kivalina*, 663 F. Supp. 2d at 882.
49. *Massachusetts*, 549 U.S. at 522.
50. *Lujan*, 504 U.S. at 560.
51. *See generally* Connecticut v. Am. Elec. Power Co. 582 F.3d 309 (2d Cir. 2009), *aff'd by an equally divided court in part, rev'd in part*, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011); Ctr. for Biological Diversity v. United States DOI, 563 F.3d 466 (D.C. Cir. 2009).
52. *See*, *e.g.*, *Sierra Club v. U.S. Def. Energy Support Ctr.*, 2011 WL 3321296, at **4-6.; *Native Village of Kivalina*, 663 F. Supp. 2d at 880-81.
53. 563 F.3d 466 (D.C. Cir. 2009).
54. *Id*. at 476.
55. *Id*. at 471-72.
56. *Id*. at 475-76.
57. *Id*.
58. *Id*. at 478 (quoting *Lujan*, 504 U.S. at 560 n.1).
59. *Ctr. for Biological Diversity*, 563 F.3d at 478.
60. *Id*.
61. *Id*. at 477.
62. *Id*. at 478.
63. 549 U.S. at 522-23.
64. *Ctr. for Biological Diversity*, 563 F.3d at 477.
65. 549 U.S. at 522.
66. *Ctr. for Biological Diversity*, 563 F.3d at 476-77.
67. *See*, *e.g.*, *Amigos Bravos*, 816 F. Supp. 2d at 1125 (plaintiffs who are not states or quasi-sovereigns are not entitled to the "deferential standing analysis" applied in *Massachusetts*); *Native Village of Kivalina*, 663 F. Supp. 2d at 882 (holding that the plaintiff was not entitled to the special solicitude in

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tiffs to surmount the common defendant's argument that individuals may not litigate global warming harms because individuals are not harmed in a way that is particular in comparison to every other person on earth.

Just a few months later, with its decision in *Connecticut v. Am. Elec. Power Co.* (*AEPC I*),[68] the U.S. Court of Appeals for the Second Circuit reached a conclusion in direct opposition to that of the *CBD* court on the question of whether non-sovereign plaintiffs may establish an injury-in-fact in climate change suits. In that case, the court found that three nonprofit land trusts had standing to bring a public nuisance suit against five large power plants for their GHG emissions.[69] In assessing the injury-in-fact question, the Second Circuit did not find the lack of state sovereignty dispositive. Instead, the court found that since the land trusts were suing as property owners for injuries occurring on their land, they were subject to the *Lujan* standing test, just like any other non-sovereign plaintiff in any other suit.[70] Finding that the land trusts satisfied the *Lujan* factors, the court held that they had established Article III standing.[71]

Here, it should be noted that the Supreme Court granted certiorari to review, among other questions, the legality of the standing holding in *AEPC I*.[72] The Court's decision in *AEPC II*, however, did nothing to resolve the injury-in-fact circuit split, as the Justices were equally divided on the standing question.[73] Thus, the *AEPC II* decision affirmed the Second Circuit's holding as to the standing issue,[74] but since no majority opinion was reached, the injury-in-fact analysis has precedential value only in the Second Circuit.

2. Causation and Redressability Analyses Post-*Massachusetts*

In the years immediately following the Supreme Court's decision in *Massachusetts*, the Eastern District of Virginia and the Northern District of California both ruled on standing in global warming cases brought by non-state plaintiffs. Despite the analysis of the causation and redressability prongs in *Massachusetts*, the district courts that decided *Sierra Club v. U.S. Def. Energy Support Ctr.*[75] and *Native Village of Kivalina v. ExxonMobil*[76] (*Kivalina*) appear to have struggled to conceptually fit a grievance of global warming's magnitude into the narrow confines of the *Lujan* standing doctrine.

In *Sierra Club*, for example, the Eastern District of Virginia found that the plaintiffs, nonprofit organizations alleging various injuries related to climate change, could not establish fairly traceable causation.[77] In an effort to establish their standing, the plaintiffs claimed that their members suffered "an increased risk of harm to their health, recreational, economic, and aesthetic interests due to increased greenhouse gas emissions caused by" the U.S. Department of Defense entering into contracts to purchase a considerable amount of fuel derived from Canadian oil sands.[78] The court, however, found that the climate change harm experienced by plaintiffs could not be sufficiently attributed to the emissions caused by the defendant's actions.[79]

Finding that "[p]laintiffs' alleged injuries are the result of the independent actions of [among others] emitters of greenhouse gases around the world whose emissions will continue regardless of what happens in this case,"[80] the *Sierra Club* court failed to apply a seminal tenet underpinning the *Massachusetts* decision. The defendant in *Massachusetts* asserted an argument similar to the reasoning of the *Sierra Club* court, and the Supreme Court patently rejected it.[81] In *Massachusetts*, EPA asserted that the plaintiff could not establish that EPA's actions had caused the alleged injuries because the emissions at issue were an insignificant component of worldwide emissions, all of which mix in the atmosphere and collectively cause global warming.[82] However, the Supreme Court did not accept that since GHGs from one source mix with those from other sources, no individual source could ever be held responsible for its own role in contributing to climate change.[83] Yet, in contravention of the Supreme Court's reasoning, the *Sierra Club* court declined to find causation without considering whether the emissions from the defendant's activities contributed meaningfully to the plaintiffs' injuries.[84]

The *Sierra Club* court also broke from the redressability analysis outlined in *Massachusetts*. Finding that the plaintiffs had not shown that favorable court action would resolve their grievances, the *Sierra Club* court explained that "a reduction of greenhouse gas emissions in one area or from one source may have no effect on global greenhouse gas levels because other sources (including those in other countries) may increase their own emissions."[85] Thus, the court concluded that the plaintiffs' alleged injuries could not be redressed through their lawsuit because, even if the defendant were to stop purchasing fuel from oil sands, there are so many other sources of GHGs in the world that the plaintiffs' injuries would be totally unmitigated, no matter what the defendant did.[86]

This argument, too, was made and rejected in *Massachusetts*. There, the Supreme Court specifically stated:

establishing standing that was afforded to the state plaintiff in *Massachusetts*, in part because the plaintiff was not a state).

68. 582 F.3d 309, 315 (2d Cir. 2009), *aff'd in part by an equally divided court, rev'd in part*, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011).
69. *Id*. at 314-15.
70. *Id*. at 340.
71. *Id*. at 349.
72. *Am. Elec. Power Co.*, 131 S. Ct. at 2535.
73. *Id*. at 2535, 2540 (Justice Sonia Sotomayor recused herself).
74. *Id*. at 2535.
75. 2011 WL 3321296 (E.D. Va. July 29, 2011).
76. 663 F. Supp. 2d 863 (N.D. Cal. 2009).
77. 2011 WL 3321296, at *4.
78. *Id*. at *2.
79. *Id*. at *4.
80. *Id*. at *5.
81. 549 U.S. at 523-24.
82. *Id*.
83. *See id*.
84. 2011 WL 3321296, at *5.
85. *Id*.
86. *Id*.

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"Nor is it dispositive [on the question of redressability] that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century."[87] Rather, the Supreme Court explained that the appropriate redressability inquiry in climate change cases is whether judicial relief could "slow or reduce"[88] global warming; thus, the *Sierra Club* court employed the wrong standard in finding that the plaintiffs could not show redressability.

Like the *Sierra Club* court, the district court in *Kivalina* also found that the plaintiffs could not establish the causation prong of standing.[89] The *Kivalina* plaintiffs brought a nuisance claim against 24 oil, energy, and utility companies, seeking damages for injuries caused by global warming.[90] Specifically, the plaintiffs alleged that their village would have to be relocated because it was being destroyed by sea-level rise and the melting of sea ice along the coast.[91]

The *Kivalina* court, like the court in *Sierra Club*, but unlike the Supreme Court in *Massachusetts*, was convinced by the defendants' argument that the plaintiffs could not make out fairly traceable causation because they were unable to state with any certainty which emissions caused their injuries.[92] The court explained its reasoning:

> Significantly, the sources of the greenhouse gases are undifferentiated and cannot be traced to any particular source, let alone defendant, given that they "rapidly mix in the atmosphere" and "inevitably merge[ ] with the accumulation of emissions [from] the rest of the world." . . . [T]he pleadings make clear that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time.[93]

Failing to apply the meaningful contribution standard articulated in *Massachusetts*,[94] the *Kivalina* court held that merely showing contribution to global warming is insufficient for the causation element of standing, particularly given that global warming is a problem that has been slowly worsening since the Industrial Revolution.[95] In fact, the *Kivalina* court's strong language seems to indicate that the fairly traceably causation standard could never be established by any plaintiff suing for climate change harms. But, this proposition conflicts with the Supreme Court's conclusion in *Massachusetts*.

It is worth noting that the causation and redressability analyses from *Massachusetts* have not posed problems for all lower federal courts or proven impracticable to apply in other global warming suits.[96] In *AEPC I*, for example, the Second Circuit concluded that as long as the defendants' emissions contributed to the kinds of injuries alleged by the plaintiff, the causation element could be satisfied for purposes of establishing standing.[97] As to redressability, the *AEPC I* court held that "the proposed remedy need not address or prevent all harm from a variety of other sources."[98]

If the difficulty in extending the analysis from *Massachusetts* does not stem from the applicability of the reasoning from that case, it would appear that courts are struggling with the paradigm shift ushered in by the *Massachusetts* decision. For two decades, standing jurisprudence has required that harms be "particularized"[99] not "generalized grievances"[100] and that the plaintiff's requested relief have the ability to fix the plaintiff's problem. Perhaps recognizing that the inflexibility of such requirements could bar legitimate cases or controversies from judicial resolution, the Supreme Court widened the standing analysis with its decision in *Massachusetts*. Some lower courts, however, are failing to apply this more permissive standing analysis in deciding questions of Article III standing in climate change suits.

Given that no majority was reached on the standing question in *AEPC II*, the Supreme Court has not yet had the opportunity to review any lower court's application of the *Massachusetts* holding. For this reason, the appellate trajectory of the *Kivalina* case, which is currently pending review before the U.S. Court of Appeals for the Ninth Circuit,[101] could be key to clarifying the *Massachusetts* decision and resolving its lingering uncertainties. Because there is already a split of opinion between the Second and D.C. Circuits on several aspects of climate change standing, the Ninth Circuit's decision in *Kivalina* will deepen this split, no matter how it rules, and the Supreme Court may be motivated to weigh in if the *Kivalina* litigants seek certiorari.

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87. *Massachusetts*, 549 U.S. at 525-26.
88. *Id*. at 525.
89. 663 F. Supp. 2d at 881-82.
90. *Id*. at 868.
91. *Id*. at 869.
92. 663 F. Supp. 2d at 881.
93. *Id*. at 880 (internal citations omitted).
94. 549 U.S. at 524-25.
95. 663 F. Supp. 2d at 880.
96. *See, e.g.*, *Amigos Bravos*, 816 F. Supp. 2d at 1134-35 (acknowledging that it would be impossible for any plaintiff to trace its injuries directly to a particular defendant's emissions and holding that the court need only determine whether a defendant's emissions have contributed meaningfully to climate change); Comer v. Murphy Oil USA, 585 F.3d 855, 865, 39 ELR 20237 (5th Cir. 2009), *vacated, reh'g granted en banc*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010). In *Comer*, the defendants argued that the causal link between emissions and climate change effects are too attenuated and that their "actions are only one of many contributions to greenhouse gas emissions, thereby foreclosing traceability." *Id*. However, the U.S. Court of Appeals for the Fifth Circuit cited the *Massachusetts* opinion and rejected the defendants' standing arguments for the same reasons articulated by the Supreme Court. *Id*.
97. 582 F.3d at 346-47. The court went on to explain that whether or not such contribution is sufficient to find tort liability is a question to be determined on the evidence at trial, not on the pleadings during an initial determination of standing. *Id*. Rather, the court held that at the pleading stage, plaintiffs need not establish such causation as would be sufficient to show that the defendant is liable for a tort. *Id*.
98. *Id*. at 348.
99. *Lujan*, 504 U.S. at 560.
100. *Id*. at 575 (quoting United States v. Richardson, 418 U.S. 166, 176 (1974)).
101. *Native Village of Kivalina v. ExxonMobil*, No. 09-17490, Doc. 7980023 (argued and Submitted to Sidney R. Thomas, Richard R. Clifton, and Philip M. Pro. Nov. 28, 2011).

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III. The Relationship Between Article III Standing and Intervention

Rule 24(a) establishes a right for an absentee, who meets the rule's criteria, to intervene in an ongoing lawsuit.[102] Unless "given an unconditional right to intervene by a federal statute,"[103] an absentee may only intervene as of right if it can show that (1) it has "an interest relating to the property or transaction that is the subject of the action," (2) "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) no party already in the litigation would "adequately represent [the movant's] interest."[104]

A. Sources of the Circuit Split

Despite the fact that Rule 24(a) does not mention "standing" or "Article III,"[105] a minority of circuit courts—the D.C. Circuit, the U.S. Court of Appeals for the Seventh Circuit, and the U.S. Court of Appeals for the Eighth Circuit—have taken a restrictive approach to Rule 24(a) intervention by requiring intervenors to establish Article III standing.[106] Conversely, at least six other circuits have held that Rule 24(a) intervenors need not establish their own standing.[107] Various circuit court opinions suggest that there are several reasons for the disagreement over whether Rule 24(a) intervenors must make a separate showing of standing.

1. Balancing Competing Interests

Underlying the current Rule 24(a) split is a fundamental disagreement between the circuits over how to apply the rule in a way that both maintains the integrity and manageability of the central case or controversy and is fair to interested absentees.[108]

Thus, in deciding how to apply Rule 24(a), courts must balance the concerns, rights, and expectations of both the original parties to the suit and absentees who might be affected by the outcome of the suit. On the one hand, allowing all relevant groups to be heard in one proceeding is a fair and pragmatic way for courts to reach the best result in resolving cases. Recognizing that some cases have ripple effects that extend beyond the plaintiffs and defendants, the Advisory Committee to the 1966 Amendments to the Federal Rules of Civil Procedure explained that "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene. . . ."[109] On the other hand, courts have expressed concern for protecting the primary parties from having their cases hijacked by outsiders who might take the case in a direction unanticipated and undesired by the primary parties.[110]

A minority of jurisdictions have found that applying the narrow confines of the Article III standing test to all movant-intervenors is an efficient way to weed out intermeddlers and thereby balance these competing concerns in every case. In contrast, a majority of courts have chosen not to apply the restrictive Article III analysis and have instead preferred to weigh the interests of the parties against those of movant-intervenors on a case-by-case basis.

2. Applying Rule 24(a)'s Imprecise "Interest Requirement"

The legislative history of Rule 24 indicates that the drafters intended the rule to give courts flexibility to efficiently and equitably deal with complex litigation.[111] Perhaps in an effort to foster this flexibility, the Rule 24(a) "interest requirement"—comprised of an "interest relating to the property or transaction that is the subject of the action" and a showing that disposition of the case could "impair or impede" the movant in protecting that interest[112]—is open-ended. As a result, the text of the rule does not offer a lot of guidance for courts to determine whether movants have demonstrated a sufficient interest in the litigation to merit intervening in it. Desiring more explicit direction, many federal courts have bemoaned the "inescapable vagueness"[113] of the interest requirement, which "has largely evaded a generally accepted precise definition."[114]

By requiring movant-intervenors to demonstrate their own standing, some courts have avoided the difficult task of defining the Rule 24(a) interest requirement and have relied instead on the much better-defined standing test to determine whether a movant is a proper intervenor.[115] In doing so, these courts have melded the standing test with

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102. Fed. R. Civ. P. 24(a)(2) (providing that "the court must permit anyone to intervene who" satisfies the elements of the rule).
103. Fed. R. Civ. P. 24(a)(1).
104. Fed. R. Civ. P. 24(a)(2).
105. *See* Fed. R. Civ. P. 24(a).
106. *See*, *e.g.*, Roeder v. Islamic Republic of Iran, 333 F.3d 228, 233 (D.C. Cir. 2003); *Mausolf*, 85 F.3d at 1300; Solid Waste Agency v. United States Army Corps of Eng'rs, 101 F.3d 503, 507 (7th Cir. 1996).
107. *See*, *e.g.*, *San Juan County*, 503 F.3d at 1167; United States v. Tennessee, 260 F.3d 587, 595 (6th Cir. 2001); Ruiz v. Estelle, 161 F.3d 814, 832 (5th Cir. 1998); Yniguez v. Arizona, 939 F.2d 727, 731 (9th Cir. 1991), *rev'd on other grounds*, Arizonans for Official English v. Arizona, 520 U.S. 43 (1997); *Chiles*, 865 F.2d at 1213; United States Postal Service v. Brennan, 579 F.2d 188, 190 (2d Cir. 1978).
108. *See generally San Juan County*, 420 F.3d at 1204-05 (explaining circuit split over whether Article III standing is required for Rule 24(a) intervention).
109. Fed. R. Civ. P. 24, Advisory Committee Note to the 1966 Amendments.
110. *See*, *e.g.*, *Mausolf*, 85 F.3d at 1301 (explaining that "a federal case is a limited affair, and not everyone with an opinion is invited to attend").
111. *See* Fed. R. Civ. P. 24, Advisory Committee Note to the 1966 Amendments; *see also* United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 983 (2d Cir. 1984) (explaining that Rule 24 was designed to get rid of "formalistic restrictions" and instead allow courts to focus on "practical considerations").
112. Fed. R. Civ. P. 24(a)(2).
113. City of Chicago v. FEMA, 660 F.3d 980, 985 (7th Cir. 2011).
114. *Ruiz*, 161 F.3d at 831.
115. *See*, *e.g.*, S. Christian Leadership Conference v. Kelley, 747 F.2d 777, 779 (D.C. Cir. 1984) (explaining that Rule 24(a) has a "gloss" of Article III standing on it, as the rule "impliedly refers not to *any* interest the applicant can put forward, but only to a legally protectable one"). The Seventh Circuit, for its part, has largely avoided analyzing whether a movant-intervenor has satisfied the interest requirement. *See* Sokaogon Chippewa Cmty. v. Babbitt, 214 F.3d 941, 946 (7th Cir. 2000) (seemingly treating the interest requirement as a requirement for Article III standing).

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the interest requirement, such that only the more well-defined standing analysis need be carried out. To illustrate, in *Jones v. Prince George's County*,[116] the D.C. Circuit grappled a great deal with the difference between the interest requirement and standing, yet ultimately failed to articulate a clear distinction. In the end, the court relied on an analysis of whether the movant had standing, concluding that since the proposed intervenor had "suffered a cognizable injury sufficient to establish Article III standing, she also has the requisite interest under Rule 24(a)(2)."[117]

The Eighth Circuit engaged in similar reasoning in *Mausolf v. Babbitt*.[118] In that case, snowmobile enthusiasts challenged the DOI's restrictions on snowmobiling in a national park.[119] The movant-intervenors were conservation groups who sought to intervene on behalf of the DOI to support the restrictions.[120] Carrying out the standing analysis first, the court found that, since the movants' "enjoyment of the park's tranquility and beauty" would be diminished by snowmobile traffic if the restrictions were not enforced, the movants had established their Article III standing.[121] Turning to the interest requirement, the court largely reiterated its standing analysis by explaining that the movants had "an interest in preventing unrestricted snowmobiling and in vindicating a conservationist vision for the Park."[122] Thus, through subtler means than the D.C. Circuit in *Jones*, the Eighth Circuit also relied on the standing analysis to answer the question of whether the *Mausolf* movants satisfied the interest requirement.

In contrast, the majority of courts have not depended on standing to avoid defining the Rule 24(a) interest requirement. Instead, those courts have treated the interest requirement as broader and more abstract than the kind of case or controversy required for standing. For instance, the U.S. Court of Appeals for the Sixth Circuit has held that the interest requirement is a "rather expansive notion," and the rule should be applied liberally in favor of proposed intervenors.[123] Similarly, the U.S. Court of Appeals for the Eleventh Circuit has looked to the policy purpose behind Rule 24(a) to justify a liberal approach to applying the rule, stating that "any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action."[124]

Indeed, one of the main differences between the minority and majority jurisdictions has been the latter courts' embrace of Rule 24(a)'s vagueness, which has led these courts to approach the rule with greater flexibility. To illustrate, the U.S. Court of Appeals for the Tenth Circuit has explained in *San Juan County v. United States* that "[t]he central concern in deciding whether intervention is proper" is not whether the movant satisfies certain "wooden formulations," but is rather "the practical effect of the litigation on the applicant for intervention."[125] Relying on the legislative history of the rule,[126] the court reasoned that "Rule 24(a)(2) . . . is not a mechanical rule"; rather it "requires courts to exercise judgment based on the specific circumstances of the case."[127]

In *San Juan County*, a county government sought to quiet title to a right-of-way in a national park after the National Park Service (NPS) began to limit motorized traffic on the right-of-way.[128] The movant, a conservation group, sought to intervene on the side of the defendant, NPS, to support the limit on vehicle traffic through the park.[129] Although the court denied the motion to intervene on the grounds that NPS would sufficiently represent the conservation group's interests,[130] the court did find that the movant satisfied the interest requirement under Rule 24(a) because the movants' use and enjoyment of the land at issue would be impaired, as a practical matter, if the plaintiffs were to prevail.[131]

The court was further persuaded that the movant had a sufficient interest because the conservation group sought to protect public, as opposed to private, interests.[132] In fact, the court indicated that public interest movant-intervenors should be subject to a "relaxed" standard in establishing their interest in the litigation.[133] Other circuits have also given favorable treatment to movant-intervenors that seek to promote the public good.[134] This has been particularly true in cases where the movant has had prior involvement in the legal process leading up to the litigation, such as participation in the administrative process to develop a law or rule that is being challenged.[135]

Thus, courts that do not require intervenor standing have generally taken a case-by-case, fact-specific approach to determine whether intervenors satisfy the interest requirement.[136] In contrast, courts that require intervenor standing have traded some of the flexibility provided by Rule 24(a)'s open-ended text for a more restrictive rule that is easier to apply. Consequently, courts that do not require intervenor standing have been much more flexible in allowing absentees to intervene by showing a substantial

116. Jones v. Prince George's County, 348 F.3d 1014, 1017-18 (D.C. Cir. 2003).
117. *Id*. at 1018.
118. 85 F.3d at 1302.
119. *Id*. at 1296.
120. *Id*.
121. *Id*. at 1302.
122. *Id*.
123. Michigan State v. Miller, 103 F.3d 1240, 1245-46 (6th Cir. 1997).
124. Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993).
125. *San Juan County*, 503 F.3d at 1193.
126. *Id*. at 1188 (explaining that "the 1966 changes to Rule 24(a) were intended to refocus the rule on the practical effect of litigation on a prospective intervenor rather than legal technicalities, and thereby expand the circumstances in which intervention as of right would be appropriate").
127. *Id*. at 1199.
128. *Id*. at 1167.
129. *Id*.
130. *Id*.
131. *San Juan County*, 503 F.3d at 1199-1201.
132. *Id*. at 1201.
133. *Id*.
134. *See*, *e.g.*, Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995) (explaining that "a public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported).
135. *Id*.
136. *See*, *e.g.*, *San Juan County*, 503 F.3d at 1199-1201; *Idaho Farm Bureau Fed'n*, 58 F.3d at 1397.

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connection to the property or transaction at issue, even if that connection falls short of standing.

3. Differing Interpretations of Article III's Purpose

The Rule 24(a) circuit split also appears to be rooted in a fundamental disagreement over the purpose of the Article III "case or controversy" limitation. The circuits that require intervenors to have standing interpret the Article III limitation on federal court jurisdiction as a device to restrict who has access to the courts, whereas circuits that do not require intervenor standing interpret the Article III language as a way of ensuring that a court is presiding over a justiciable claim. For example, the Eighth Circuit has explained that intervenors must show their standing because "a lawsuit in federal court is not a forum for the airing of interested onlookers' concerns, nor an arena for public policy debates," but is rather "a limited affair."[137] On the other hand, the Fifth Circuit has explained that intervenors need not establish their own standing where the primary plaintiff has standing because Article III exists "primarily to guarantee the existence of a 'case' or 'controversy' appropriate for judicial determination."[138]

B. The Implications of Requiring Standing of All Intervenors

No matter what the underlying rationale, courts that require intervenor standing have run into practical problems in both applying and justifying their interpretation of the relationship between Rule 24(a) and standing. As the D.C. Circuit has acknowledged, "requiring prospective intervenors to establish Article III standing gives rise to several thorny issues."[139]

1. Justifications Are Inconsistent With Other Rules

The circuits that require intervenor standing have been much less consistent in articulating a rationale for that rule than the circuits that do not require intervenor standing. The circuit courts that do not require intervenors to show standing have all offered the same rationale for that holding: The text of Rule 24(a) does not mention standing, so there is no statutory reason to require it; furthermore, as long as there is a case or controversy between the primary parties in the litigation, Article III is satisfied, and so there is no constitutional justification either.[140] In contrast, the three circuits that subscribe to the minority rule requiring intervenor standing have offered several different rationales for their holding, none of which withstands close logical scrutiny.

a. The Constitutional Justification

Circuits requiring Rule 24(a) intervenors to make a separate showing of standing have maintained that such a rule is a constitutional necessity under Article III. In the Eighth Circuit's decision in *Mausolf*,[141] for example, the movant intervenors tried to convince the court to adopt the majority rule that "once an Article III case or controversy is underway, anybody who satisfies Rule 24's requirements may then join in." But the court disagreed, holding instead that "an Article III case or controversy, once joined by intervenors who lack standing, is—put bluntly—no longer an Article III case or controversy."[142] This language suggests that every party must have a justiciable case or controversy against at least one other party on the other side of the dispute, otherwise the whole litigation falls apart for lack of jurisdiction.

However, as other commentators have pointed out, federal courts have noticeably not applied this same standing requirement to other rules that allow outsiders to become parties to a suit, such as joinder under Rule 19.[143] Thus, it would appear that allowing absentees who cannot demonstrate standing to join a lawsuit under Rule 19 does not remove the court's jurisdiction. Why, then, are Rule 24(a) intervenors subject to such a significantly higher standard?

In a more recent case, *City of Chicago v. FEMA*,[144] the Seventh Circuit advanced an argument similar to the Eight Circuit's in *Mausolf*. Responding to the majority jurisdiction rule of not requiring intervenors to show their standing, the Seventh Circuit noted:

> [E]ven if a case is securely within federal jurisdiction by virtue of the stakes of the existing parties, an intervenor may be seeking relief different from that sought by any of the original parties. His presence may turn the case in a new direction—may make it really a new case . . . and no case can be maintained in a federal court by a party who lacks Article III standing.[145]

This explanation is more satisfying than that offered in *Mausolf* for two reasons. First, the *City of Chicago* decision makes clear that the court's requirement of standing is meant to prevent an intervenor from taking over someone

137. *Mausolf*, 85 F.3d at 1301.
138. *Ruiz*, 161 F.3d at 832 (quoting U.S. Const. art. III, §2).
139. *Jones*, 348 F.3d at 1018.
140. *See, e.g.*, *San Juan County*, 503 F.3d at 1172; *Ruiz*, 161 F.3d at 832; *Chiles*, 865 F.2d at 1213; *United States Postal Service*, 579 F.2d at 190.
141. 85 F.3d at 1300.
142. *Id.*
143. *See, e.g.*, Juliet Johnson Karastelev, *On the Outside Seeking in: Must Intervenors Demonstrate Standing to Join a Lawsuit?*, 52 Duke L.J. 455, 470, 472-73 (2002).
144. 660 F.3d 980, 985 (7th Cir. 2011).
145. *Id.* (internal citations omitted); *see also Ruiz* 161 F.3d at 833. The *Ruiz* court held that the movant-intervenors did not need to establish their own standing, even to advance arguments based on different constitutional provisions than the arguments advanced by either of the parties, because the intervenors sought the same ultimate relief as the party on whose side they intervened. *Id.* The court did, however, suggest that the analysis might be different if intervenors sought to block a proposed settlement or sought alternative injunctive relief. *Id.*

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else's case by essentially asserting its own separate case.[146] A second, related reason is that the movants in *City of Chicago* sought to intervene on the plaintiff's side and asked the court to interpret a different contractual provision than the one at issue between the primary parties.[147] In this contextual setting, it makes sense why the court was concerned that intervenors, admitted to the litigation under loose and overly permissive standards, might unfairly overtake the plaintiff's case.

Even so, the Seventh Circuit's reasoning falls short as a justification for the broad and expansive application of the standing analysis to all Rule 24(a) intervenors. Neither *Mausolf* nor *City of Chicago* addressed why an intervenor who does not seek relief different from that sought by one of the original parties should have to establish its own standing.

b. The Equitable Justification

Somewhat related to the constitutional rationale, at least two circuits have explained that requiring Rule 24(a) intervenors to show standing is a matter of fairness. In short, these courts have explained that it would be unfair and irrational to allow an intervenor to have all of the rights of a party without first subjecting that intervenor to the same rigorous test that parties must pass. For example, the Eighth Circuit has reasoned that "[b]ecause an intervenor seeks to become a 'suitor,' and asks the court to 'decide the merits of the dispute,' he must not only satisfy the requirements of Rule 24, he must also have Article III standing."[148] The D.C. Circuit has also explained that "because a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he must satisfy the standing requirements imposed on those parties."[149]

In initiating a suit, however, only plaintiffs must meet the three prongs of the standing analysis; defendants, on the other hand, are never asked to prove to the court that they are proper litigants. Yet, the D.C. and Eighth Circuits require all intervenors—those who wish to enter the litigation on the side of the defendant as well as those wishing to enter on the plaintiff's side—to establish their standing.[150] If the aim of these courts is to subject intervenors to the same standards "imposed on"[151] their party counterparts, then defendant-intervenors should not be required to establish standing because the defendants in the litigation are not subject to that requirement. Once again, the breadth with which the minority courts apply the Rule 24(a) standing requirement is overbroad.

146. *City of Chicago*, 660 F.3d at 985.
147. *Id.* at 984.
148. *Mausolf*, 85 F.3d at 1300.
149. City of Cleveland v. NRC, 17 F.3d 1515, 1517 (D.C. Cir. 1994).
150. *See, e.g.*, *Roeder*, 333 F.3d at 233-34; Fund for Animals, Inc. v. Norton, 322 F.3d 728, 730-31, 732-33 (D.C. Cir. 2003); *Mausolf*, 85 F.3d at 1296, 1300.
151. *City of Cleveland*, 17 F.3d at 1517.

c. Grappling With the Standing Analysis Post-*Lujan*

Finally, in explaining that Rule 24(a) intervenors must make a separate showing of standing, the D.C. and Seventh Circuits have suggested that the Rule 24(a) interest requirement is a higher or equal bar that somehow encompasses the standing requirement. Thus, according to this line of reasoning, if an intervenor satisfies the Rule 24(a) interest requirement, the intervenor automatically satisfies the standing test. Realizing the uselessness of requiring intervenors to separately demonstrate their standing if the interest requirement alone would establish standing, the Seventh Circuit has asked, "why bother to require Article III standing at all? What work does the requirement do?"[152] In its analysis, however, the court did not resolve these questions.[153]

Tracing the development of the Seventh Circuit's requirement that Rule 24(a) intervenors make a separate showing of standing sheds some light on this rationale, which the Seventh and D.C. Circuits have recently relied on in deciding Rule 24(a) questions.[154] The idea that standing is lesser than or equal to the elements of Rule 24(a) shows up in a 1997 case from the Seventh Circuit, *Transamerica Ins. Co. v. South*.[155] In that opinion, the court unequivocally stated that any interest sufficient to satisfy the Rule 24(a) interest requirement "is sufficient to satisfy the Article III standing requirement as well."[156] In support of that proposition, the court cited several pre-*Lujan* cases that stated that the interest required for Rule 24 must be stronger than that required for standing.[157]

Indeed, in the pre-*Lujan* era, the standing analysis was weaker than it is currently, post-*Lujan*.[158] There is little doubt that the *Lujan* decision, with its three exacting prongs of standing, represented a significant tightening up of the standing test.[159] In fact, in his dissenting opinion in the *Lujan* case, Justice Harry Blackmun described the newly developed standing prongs as so restrictive as to amount to a "slash-and-burn expedition through the law of environmental standing."[160] One law professor has described the *Lujan* standing test as "particularly narrow and demanding."[161] Thus, because the *Lujan* prongs significantly raised the bar for standing and made the test more rigorous, it is now inaccurate to say that the Rule 24(a) elements require more of intervenors than is required of plaintiffs under the Article III standing test. Yet, even

152. *City of Chicago*, 660 F.3d at 985.
153. *Id.*
154. *See id.*; *Roeder*, 333 F.3d at 233-34.
155. 125 F.3d 392, 396 n.4 (7th Cir. 1997).
156. *Id.*
157. *Id.*
158. *See, e.g.*, Gregory Bradford, *Simplifying State Standing: The Role of Sovereign Interests in Future Climate Litigation*, 52 B.C. L. Rev 1065, 1071-72 (2011).
159. Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizens, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 165-66 (1992).
160. *See Lujan*, 504 U.S. at 606 (Blackmun, J., dissenting).
161. Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 Case W. Res. L. Rev. 1061, 1065 (2009).

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though *Transamerica* was decided five years after *Lujan*, the Seventh Circuit relied on outdated case law. Now, the reasoning from *Transamerica* has permeated subsequent case opinions and led to several confused analyses of the relationship between standing and Rule 24(a).

For example, in *Sokaogon Chippewa Cmty. v. Babbitt*,[162] the Seventh Circuit struggled to make sense of the holding from *Transamerica*. Despite stating that it was unnecessary to "explore further what the outer boundaries of standing to intervene might be" because "it is enough here to decide whether the [movant] has satisfied the requirements of the rule," the court ultimately determined that the movants could not satisfy Rule 24(a) because their claimed interest was insufficient for standing.[163] In reaching this conclusion, the *Sokaogon* court followed *Transamerica*'s explanation for the relationship between standing and Rule 24(a), stating: "From a pragmatic standpoint, this court has observed that 'any interest of such magnitude [as to support Rule 24(a) intervention of right] is sufficient to satisfy the Article III standing requirement as well.'"[164]

The D.C. Circuit has followed the Seventh Circuit down this path. Citing the Seventh Circuit's reasoning, the D.C. Circuit stated in its 2003 opinion in *Roeder v. Islamic Republic of Iran* that "any person who satisfies Rule 24(a) will also meet Article III's standing requirement."[165] Yet, this is contrary to another 2003 opinion from the D.C. Circuit, *Fund for Animals v. Norton*,[166] in which the court required intervenors to establish their standing as a separate requirement that was "in addition" to the Rule 24(a) elements. Adding to the confusion, in the same year that the D.C. Circuit decided *Roeder* and *Fund for Animals*, it explained in *Jones* that if a proposed intervenor satisfies Article III standing, it automatically demonstrates a sufficient interest to satisfy Rule 24(a).[167] This is the inverse of the court's interpretation of the relationship between standing and Rule 24(a) as explained in *Roeder*: The *Jones* explanation suggests that the standing hurdle is equal to or higher than the interest requirement, whereas the *Roeder* explanation suggests that the standing hurdle is equal to or lower than the interest requirement.

These decisions undermine the validity of the minority jurisdiction rule requiring intervenors to have standing. The contradictory statements from these circuit opinions are confusing and give the impression that the Seventh and D.C. Circuits are uncertain about how or why they are applying the standing analysis to Rule 24(a).

2. Standing and the Policy Purpose of Rule 24(a)

In addition to suffering from several logical inconsistencies, a rule requiring all movant-intervenors to demonstrate their own standing may be too restrictive to allow courts to effectively balance the rights of the original parties with the rights of absentees who have a demonstrable legal interest in the case. This is particularly true where intervenors seek to protect the public interest.[168] Indeed, the Supreme Court "has recognized that certain public concerns may constitute an adequate interest within the meaning of Federal Rule of Civil Procedure 24(a)(2)."[169] If standing is used as a bar to prevent such public interest groups from intervening in cases between litigants representing only their own private interests, courts might not have the opportunity to fully consider how the resolution of a particular case would affect broad segments of the population.

Indeed, the rigors and rigidities of the standing analysis raise the question of whether it is good judicial policy to use the standing doctrine as a bar to allowing litigants with climate change grievances to achieve party status in court. As indicated in the above discussion of standing in climate change cases, the weight of recent federal case law has been largely against finding substantive standing for non-sovereign plaintiffs in climate change suits. Moreover, climate change plaintiffs and the judges hearing their cases face a confusing array of conflicting precedent in navigating the standing doctrine. An underlying question is whether individuals harmed by climate change have anything valuable to add as parties to court proceedings where some other entity does have standing to bring suit on a related issue. The history and underlying policy concerns of the statutory right to intervene in an ongoing lawsuit support the idea that courts should approach this question with flexibility on a case-by-case basis.[170]

3. A Suggestion for Moving Forward

Courts that require intervenor standing could address the issues they have faced by implementing two changes to their analysis of Rule 24(a). First, courts should note that the standing analysis has evolved significantly over the decades, with the decision in *Lujan* representing the culmination of a much stricter standing test than had previously been implemented. Thus, any decisions suggesting that the Rule 24(a) interest requirement is or must be stronger than the requirements to establish standing are based on outdated case law and should not be relied on in analyzing the relationship between the Rule 24(a) interest requirement and Article III standing.

162. *Sokaogon Chippewa Cmty.*, 214 F.3d at 946.
163. *Id.* at 948.
164. *Id.* at 946 (quoting *Transamerica*, 125 F.3d at 396 n.4).
165. 333 F.3d at 233.
166. 322 F.3d at 731-32.
167. *Jones*, 348 F.3d at 1018-19.
168. *See* Amy M. Gardner, *An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenors*, 69 U. Chi. L. Rev. 681, 687 (2002) (discussing the history and policy goals of intervention).
169. Diamond v. Charles, 476 U.S. 54, 68 (1986).
170. *See, e.g.*, Int'l Union v. Scofield, 382 U.S. 205, 216-17 (1965) (the Court promoted a very liberal application of intervention rules in favor of allowing in more interested outsiders, finding that "Congress has exhibited [in Rule 24] a concern that interested private parties be given a right to intervene and participate . . ."); Gardner, *supra* note 168, at 687; Karastelev, *supra* note 143, at 461-62 (discussing the purpose behind the 1966 amendments to the Federal Rules of Civil Procedure, which resulted in the current language of Rule 24).

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Second, if a court does not accept the majority rule that jurisdiction "vests" as soon as "a valid Article III case-or-controversy is present,"[171] the court should only apply the standing test to proposed intervenors who seek to act in the litigation as a plaintiff would. That is, if standing is to be applied to intervenors at all, it should only be applied to intervenors who are seeking different relief—i.e., their own separate remedy—than the primary parties in the suit.[172] Such a rule would make much more sense than the current rule employed by the minority jurisdictions because it is in line with the standing doctrine itself, which only applies to plaintiffs.

Furthermore, applying the standing test only to movant-intervenors who seek different relief would limit Rule 24(a) intervention to only those absentees that either would not "turn the case in a new direction"[173] or that would be able to bring their own separate suit if they were not allowed to intervene. As a result, a narrower application of the standing requirements to Rule 24(a) intervenors would allow courts to achieve the two competing judicial concerns surrounding intervention—promoting fairness and judicial economy by allowing all those concerned to participate as parties in one action, and maintaining the integrity of the original parties' suit by not allowing in unnecessary outsiders.

IV. Using Intervention to Solve Climate Change Issues

The climate change crisis casts the importance of the Rule 24(a) circuit split in a new light. The circuit courts have been divided over whether Rule 24(a) intervenors must make a separate showing of standing since at least the 1980s[174]; yet, it has not been until fairly recently that the issue of intervenor standing has implicated a truly far-reaching and critical societal matter. Up until now, the discussion of whether intervenors of right must show their own standing has been largely an academic one in which courts have considered the fairness to the primary parties and the ultimate meaning of the Article III case or controversy limitation. As standing decisions in federal courts continue to stack against environmental advocates and private citizens who are concerned about the potentially devastating effects of global warming, intervening pursuant to Rule 24 may be one of the last remaining viable options for these groups to participate meaningfully in judicial resolution of cases that affect the systemic sources of climate change problems.

A. *Amicus Curiae Status Compared With Intervenor Status*

Citizens and environmental groups who wish to participate in cases involving climate change issues are not left entirely out in the cold, even where they are not permitted to bring their own case or intervene in someone else's. Courts have frequently offered amicus status as a sort of consolation prize to movants whose attempts to intervene have failed.[175] Status as an amicus, however, usually confers far fewer rights and a far less substantial role in the litigation than status as an intervenor.

The level at which an amicus curiae is permitted to participate in and shape the course of the litigation is largely at the court's and the parties' discretion. For example, with the exception of governmental entities, amici are only allowed to participate in an appellate proceeding if the court grants leave or if all of the parties consent.[176] If an appellate court grants leave to participate as an amicus, such leave confers only the opportunity to file an initial brief, which must be significantly shorter than the parties' briefs.[177] Amicus curiae must seek special permission from the appeals court to file a reply brief or to participate in oral argument.[178] Furthermore, amicus curiae do not have guaranteed authority to shape settlement agreements at the trial level. Rather, they may participate in settlement discussions if the parties or the court allow, and they may make objections to proposed settlement agreements; however, the parties or the court may chose to ignore their input.[179]

In contrast, intervenors become parties to the litigation and enjoy most, if not all, of the same rights as the primary parties to the suit, from the trial stage up through appellate proceedings.[180] Litigants who satisfy the Rule 24(a) criteria have a statutory right to intervene,[181] unlike amicus curiae whose request is granted or denied at the discretion of the court or the parties.[182] Furthermore, intervenors may make motions, including motions to dismiss the action,[183] challenge settlement agreements and consent decrees,[184] file briefs (including reply briefs) of the same length as the primary parties,[185] and participate in appellate oral argument with the consent of the primary party that they support.[186] These rights give intervenors a great deal more control over the direction in which a suit proceeds and, ultimately, over the end result of the case.

171. *Ruiz*, 161 F.3d at 832.
172. A similar idea was put forth in Karastelev, *supra* note 143, at 480-81.
173. *City of Chicago*, 660 F.3d at 985.
174. *See Diamond*, 476 U.S. at 69 n.21.
175. *See*, *e.g.*, *Diamond*, 476 U.S. at 78; *City of Cleveland*, 17 F.3d at 1518; *United States v. Brooks*, 164 F.R.D. at 507; *Beverly Hills Federal Sav. & Loan Assoc.*, 33 F.R.D. at 294.
176. Fed. R. App. P. 29(a).
177. Fed. R. App. P. 29(d), (f).
178. Fed. R. App. P. 29(f), (g).
179. *See* Ariz. v. Cal., 530 U.S. 392, 419 n.6 (explaining that the court would not consider the objections of the amicus curiae to the proposed settlement agreement).
180. *See*, *e.g.*, Kristensons-Petroleum, Inc. v. Sealock Tanker Co., 304 F. Supp. 2d 584, 590 (S.D.N.Y. 2004).
181. Fed. R. Civ. P. 24(a)(1)-(2).
182. *See* Fed. R. App. P. 29(a).
183. *See*, *e.g.*, Borkowski v. Fraternal Order of Police, 155 F.R.D. 105, 110 (E.D. Pa. 1994) (holding that a motion to intervene, filed for the sole purpose of moving to dismiss a complaint, could be properly granted).
184. *See*, *e.g.*, Loyd v. Alabama Dep't of Corrections, 176 F.3d 1336, 1338, 1343 (11th Cir. 1999).
185. *See*, *e.g.*, *City of Cleveland*, 17 F.3d at 1517; Utility Air Regulatory Group v. EPA, No. 11-1037, Doc. 1345134 (D.C. Cir., briefing schedule filed Dec. 1, 2011).
186. *See*, *e.g.*, *City of Cleveland*, 17 F.3d at 1517.

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In addition, unlike intervenors, amicus curiae cannot be awarded attorneys fees if their side prevails in the litigation.[187] The prospect of recovering attorneys fees is likely a key factor in many public interest groups' decisions to participate in litigation, as the individuals whose interests they represent are often not paying clients, but are rather nonpaying members of a nonprofit organization.

B. Ensuring an Effective Legislative Solution to Global Warming

The significant degree of control over the litigation conferred by intervenor status is highly useful to ensure that regulatory agencies are carrying out congressional mandates to promote sound, progressive environmental and energy policies and that members of regulated industries are complying with environmental laws. Because the policy development and enforcement priorities of federal regulatory agencies can be affected by political forces, competing goals, and limited resources, it is critical that courts allow citizens and public interest groups to intervene in cases in which rules and regulations that affect climate change are at stake. Allowing such absentees to intervene would ensure that the courts become aware of all relevant facts and that all legally significant public interests are represented. As Justice William O. Douglas expressed in his dissenting opinion in *Sierra Club v. Morton*, government agencies are not always the best advocates for their own policy objectives and sometimes do not subject regulated communities to sufficiently rigorous standards:

> [T]he problem is to make certain that the inanimate objects, which are the very core of America's beauty, have spokesmen before they are destroyed. It is, of course, true that most of them are under the control of a federal or state agency. The standards given those agencies are usually expressed in terms of the "public interest." Yet "public interest" has so many differing shades of meaning as to be quite meaningless on the environmental front. . . . [T]he pressures on agencies for favorable action one way or the other are enormous. . . . [F]ederal agencies . . . are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.[188]

Justice Douglas was concerned that regulatory agencies may be distracted from their duty to protect our natural resources by the "enormous pressures"[189] coming from various interested factions. This concern applies with equal force to regulatory agencies' ability to advocate for clean air, progressive energy policy, and meaningful climate change solutions in the face of significant resistance from private business interests and political forces. Yet, if climate change is a "generalized grievance" requiring a legislative and executive solution, courts have an essential role in bringing about this solution by making sure that the agencies in charge of regulating our nation's air pollution and energy policies are not overwhelmed by special interests.

Case law has demonstrated that Rule 24(a) intervenors can counterbalance the risk that regulatory agencies might not give adequate consideration to public interests in making policy decisions and enforcing environmental laws. In *United States v. 36.96 Acres of Land*,[190] for example, the DOI was authorized by Congress to purchase a privately owned tract of land, through an eminent domain condemnation action, to be added to a government-owned conservation area. After some time, the DOI abandoned the condemnation action and entered into a settlement agreement with the landowner.[191] The Seventh Circuit denied a nonprofit land conservation organization's motion to intervene under Rule 24(a), holding that the organization did not satisfy the interest requirement because the movant did not have a property interest in the land.[192]

Expressing frustration with the majority's denial of the motion to intervene, the dissent explained that, by denying the motion, the court was allowing the DOI to get away with not representing the public interest and not carrying out Congress' mandate to acquire the land for public use.[193] The dissenting opinion stated: "The government has been profoundly dilatory in pursuing acquisition of the land for the public benefit and has reached an agreement with [the defendant landowner] to desist from" pursuing the suit.[194] With the government willing to walk away from pursuing the public interest goal of acquiring more land for natural resource preservation and public use, the movant-intervenor nonprofit organization was the only entity left to assert the public interest, and should have, in the dissent's view, been permitted to participate in the suit as an intervenor.[195]

The Ninth Circuit dealt with a similar concern in *Sagebrush Rebellion, Inc. v. Watt*.[196] In that case, Sagebrush, an organization whose mission was to advocate for multiple uses on public land (such as grazing and mining), brought suit against the DOI, which planned to set aside 500,000 acres of land as a wildlife refuge.[197] The court permitted the Audubon Society to intervene under Rule 24(a) on the side of the DOI in order to advocate for conservationist and environmental values.[198]

Even though the DOI exists, in part, to promote similar values, the court explained that the environmental group was necessary to promote the congressional objectives that the DOI was supposed to be advancing.[199] Factoring into

187. *See Moore's Federal Practice*, §54.173 (Matthew Bender 3d ed.).
188. Sierra Club v. Morton, 405 U.S. 727, 745-46 (1971) (Douglas, J. dissenting).
189. *Id*. at 745.
190. 754 F.2d 855, 857 (7th Cir. 1985).
191. *Id*. at 857-58.
192. *Id*.
193. *Id*. at 861 (Cudahy, J., dissenting).
194. *Id*. at 862.
195. *Id*.
196. 713 F.2d 525 (9th Cir. 1983).
197. *Id*. at 526.
198. *Id*. at 526-27.
199. *Id*. at 528.

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the court's decision was its doubt that the DOI was adequately protecting environmental interests in defending the suit against Sagebrush because the then-Secretary of the Interior had previously been the head of the organization representing the plaintiffs in this suit.[200] Thus, while the court stressed that it found no wrongdoing in the litigation of the suit, it concluded that allowing Audubon to intervene would be key to ensuring that the court heard a balanced and complete presentation of the environmental issues.[201]

As was the case with the movants in *36.96 Acres of Land* and *Sagebrush Rebellion*, intervention is an important avenue for public interest groups and concerned citizens to ensure that climate change issues are adequately considered and properly resolved in cases between federal agencies and members of the regulated community.

V. Conclusion

Citizens and public interest groups are essential to making the federal regulatory system work. By engaging in litigation to challenge flawed policy decisions and hold polluters accountable, concerned citizens and environmental groups contribute considerably to protecting public health and natural resources.[202] Rule 24(a) intervention is a key litigation tool for citizens and public interest groups to thus participate in the federal regulatory system. Intervenors, particularly intervenors representing the public interest, promote fair and well-reasoned resolution of disputes and thereby bring a great deal of value to the litigation process. For this reason, the public interest would be best-served if all federal courts applied Rule 24(a) flexibly, rather than requiring all Rule 24(a) movants to surmount the external hurdle of Article III standing.

200. *Id.*
201. *Id.*

202. *See*, *e.g.*, Concerned Citizens Around Murphy v. Murphy Oil USA, Inc., 686 F. Supp. 2d 663 (E.D. La. 2010) (public interest group successfully brought a CAA citizen suit against an oil refinery for illegal emissions of air pollution); Greater Yellowstone Coalition v. Kempthorne, 577 F. Supp. 2d 183 (D.D.C. 2008) (environmental and conservation groups successfully challenged a National Park Service rule that would have allowed excessive motor vehicle traffic in a conservation area).