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WAITING FOR DIVINE INTERVENTION: THE FIFTH CIRCUIT TRIES TO GIVE MEANING TO INTERVENTION RULES IN SIERRA CLUB v. CITY OF SAN ANTONIO

I. PUBLIC LAW LITIGATION AND INTERVENTION

Although the United States Supreme Court's decision in Brown v. Board of Education is generally remembered for its mandate to end racial segregation in schools, it also marked an historic turning point in the American judicial system. Following the Brown decision, the courts began to see a new species of lawsuits known as public law litigation. While traditional litigation involves one private party suing a second private party for the infringement of an easily identifiable right, public law litigation


The Supreme Court's decision in Brown v. Board of Education stands as a benchmark in two great revolutions. The first was social: the forced integration of schoolchildren played a key role in the struggle for racial equality. The second was judicial: in Brown, the Supreme Court "committed the federal courts to an enterprise of profound social reconstruction."

Id. (quoting Chayes, supra, at 6).
3. See New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 464-65 (5th Cir. 1984) (acknowledging existence of public law cases); Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1283-84 (1976) (recognizing that public law litigation has overtaken "traditional conception of litigation" in federal district courts); Chayes, supra note 2, at 5 (stating that rise of new era of public law litigation can be traced to desegregation cases of mid-1950s); William A. Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635, 635 (1982) ("Federal courts have been asked with increasing frequency in recent years to grant injunctive decrees that would restructure public institutions in accordance with what are asserted to be the commands of the federal Constitution."); Carl Tobias, Public Law Litigation and the Federal Rules of Civil Procedure, 74 Cornell L. Rev. 270, 279 (1989) ("Between the mid-1960s and mid-1970s, numerous developments . . . significantly changed the nature of considerable federal civil litigation."); Vreeland, supra note 2, at 279-80 (acknowledging emergence of public law litigation after Brown); Note, Institutional Reform Litigation: Representation in the Remedial Process, 91 Yale L.J. 1474, 1474 (1982) [hereinafter Institutional Reform Litigation] ("Federal courts today systematically reform institutions in both the public and private sectors to redress unlawful employment discrimination, to improve prison conditions, to desegregate public schools, to reapportion electoral districts, and to remedy a host of other institutional wrongs.") (footnotes omitted). Other examples of public law litigation include suits in which plaintiffs challenge legislative districting, attack the practices of mental hospitals and police departments, seek enforcement of environmental regulations, and question the constitutionality of government spending and statutes. See Vreeland, supra note 2, at 279.
often involves one or more public entities as a party to a suit concerning less tangible rights. One scholar described public law litigation as litigation that centers on "a grievance about the content or conduct of policy—most often governmental policy, but frequently the policy of nongovernmental aggregates." Another writer noted that public law litigation often involves widespread impact and seeks to "vindicate significant social values affecting large numbers of people."

4. See Chayes, supra note 2, at 4 (stating that term "'public law litigation'" is meant to "emphasize that in such cases the federal courts are no longer called upon to resolve private disputes between private individuals according to the principles of private law"); cf. Fletcher, supra note 3, at 638 (stating that structure of institutional suits tends to be "sprawling, with a large number of parties, intervenors, and amici").

In public law litigation courts are asked to deal with "grievances over the administration of some public or quasi-public program and to vindicate the public policies embodied in the governing statutes or constitutional provisions." Chayes, supra note 2, at 4. Traditional private litigation has five distinctive characteristics: (1) it is bipolar, meaning there are two parties in a "winner-take-all" confrontation; (2) the suit is retrospective in that it determines the legal consequences of a discrete set of facts which occurred entirely in the past; (3) right and remedy are joined in a "close, mutually defining" relationship; (4) the lawsuit is bounded in time and effect, meaning that judicial involvement ends with a resolution of the dispute and its impact is limited to the two parties before the court; and (5) the entire suit is initiated and controlled by the two parties. See id. at 4-5.

In contrast to private litigation, public law litigation has an amorphous party structure that is "defined ad hoc as the proceedings unfold." Id. at 5. Public law litigation is also prospective in that it questions the effect of a governmental policy in the present and future. See id. The remedy in public law litigation frequently is not derived logically from the right asserted because it is designed to be corrective rather than compensatory. See id. A prospective, corrective remedy implies continuing judicial involvement, and because the remedy is directed at governmental policy, it will most likely impact persons not before the court. See id.; see also Tobias, supra note 3, at 280-81 (examining salient characteristics of public law litigation). In public law litigation, individuals frequently try to litigate their claims as class actions, and defendants are usually large, bureaucratic, governmental institutions or agencies. See id. (noting that many defendants are prisons or schools). The dispute generally revolves around the policy, practice, operation or decision-making of those defendants, and plaintiffs often seek nonmonetary, injunctive relief. See id. The remedial stage of public law litigation differs from that in private litigation because it is likely to involve a "long continuous relationship between the judge and the institution," lasting years after the entry of the initial decree. Id. at 281 (quoting Owen M. Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 HARV. L. Rev. 1, 27 (1979)). In assessing a remedy, courts may have to "assemble predictive and legislative facts to formulate, implement, and monitor complex affirmative decrees governing large bureaucracies." Id.

5. Chayes, supra note 2, at 5 ("In the contemporary model, the subject matter of the litigation is not a dispute between private parties, but a grievance about the content or conduct of policy—most often governmental policy, but frequently the policy of nongovernmental aggregates.").

6. Carl Tobias, Standing to Intervene, 1991 Wis. L. Rev. 415, 419. This commentator distinguished between two types of public law litigation, "institutional reform" litigation and "public interest" litigation. See id. at 419-20 (stating that former type of litigation experienced substantial growth between 1965 and 1975 while latter type continues to grow). In the former, plaintiffs seek to "improve the operation of substantial agencies or governmental institutions, such as prisons and

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In order to influence the outcome of these cases, which have the potential to affect a great number of people, public interest groups have sought to intervene in pending federal litigation under Rule 24 of the Federal Rules of Civil Procedure ("Rules"). Advantages of intervention by public interest groups include protecting the interests of large segments of the public, providing courts with a broader base of information, allowing judges to make more well-informed decisions, promoting judicial economy and increasing the legitimacy of court decisions in the public’s eye. Following the lead of public interests groups, many state and local schools."

7. Fed. R. Civ. P. 24; see, e.g., Diamond v. Charles, 476 U.S. 54, 57 (1986) (invoking intervention by anti-abortion advocate in suit challenging constitutionality of law regulating abortion); Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 838 (9th Cir. 1996) (denying intervention by environmental organization in suit between timber industry association and U.S. Department of Agriculture); Sierra Club v. Glickman, 82 F.3d 106, 110 (5th Cir. 1996) (allowing group representing farmers and State of Texas to intervene in suit between environmentalist group and U.S. Department of Agriculture); Jenkins v. Missouri, 78 F.3d 1270, 1276 (8th Cir. 1996) (affirming denial of intervention by parent’s group in school desegregation suit); Edwards v. City of Houston, 78 F.3d 983, 989 (5th Cir. 1996) (en banc) (invoking intervention by groups representing public officials of different racial and ethnic groups in employment discrimination action); United States v. Georgia, 19 F.3d 1388, 1395 (11th Cir. 1994) (dismissing appeal of order denying intervention by citizens group in school desegregation case); United States v. Stringfellow, 783 F.2d 821, 828-29 (9th Cir. 1986) (allowing citizens group to intervene in suit brought by United States against parties allegedly responsible for release of hazardous wastes), vacated sub nom. Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987); Keith v. Daley, 764 F.2d 1265, 1272 (7th Cir. 1985) (affirming denial of intervention by anti-abortion organization in suit brought by group of physicians challenging constitutionality of Illinois statute regulating abortion); United States v. 36.96 Acres of Land, 754 F.2d 855, 860 (7th Cir. 1985) (denying intervention to nonprofit, environmentalist corporation in condemnation action brought by United States); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 529 (9th Cir. 1983) (allowing nonprofit wildlife organization to intervene in suit between land development corporation and Secretary of Interior); see also Tobias, supra note 3, at 523 (discussing use of intervention by public interest groups); Ellyn J. Bullock, Note, Acid Rain Falls on the Just and the Unjust: Why Standing’s Criteria Should Not Be Incorporated into Intervention of Right, 1990 U. ILL. L. REV. 605, 605-06 (proposing that environmental organizations use intervention of right as alternative means of access to federal courts). One commentator also stated that “[m]ost public interest litigation today involves requests to intervene under Rule 24 filed by regulated entities, public interest litigants, or the government.” Tobias, supra note 3, at 319.


"Litigation increasingly involves claims arising out of public actions such as in school integration, employment discrimination, prison reform, and
governments are now attempting to intervene in suits brought by public law litigants that may affect either their citizens or their regulatory power.9

In public law cases, a number of federal judges have applied the Rules in ways that impede the public interest litigants' efforts.10 Although the Rules may have been originally drafted with private litigation in mind, they are compatible with public law litigation.11 In fact, some amendments to

environmental protection cases, which can have a significant impact on those outside the litigation. Several authors have argued that broad-based intervention of right should be recognized to protect those outside interests. Such intervention serves several additional functions as well. It provides courts with a broader base of information and a wider perspective on the issues before them; promotes judicial economy by resolving multiple claims at one time; and increases public acceptance of the court's decision as having taken into account the concerns of a broader base of actors.

Id. (citations omitted).

9. See, e.g., Sierra Club v. City of San Antonio, 115 F.3d 311, 315 (5th Cir. 1997) (reversing denial of intervention by State of Texas in suit brought by environmental group against municipal governments); Glickman, 82 F.3d at 110 (reversing denial of intervention by State of Texas and Farm Bureau in suit brought by environmental group against U.S. Department of Agriculture); Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1499 (9th Cir. 1995) (reversing denial of intervention by State of Arizona and Apache County in suit brought by environmental organizations against federal administrative agency); Sierra Club v. United States Envtl Protection Agency, 995 F.2d 1478, 1486 (9th Cir. 1993) (reversing denial of intervention by City of Phoenix in suit brought by environmental group against federal administrative agency); United States v. Texas E. Transmission Corp., 923 F.2d 410, 416 (5th Cir. 1991) (affirming denial of intervention by State of Pennsylvania in suit for civil penalties brought by U.S. Environmental Protection Agency (EPA) against operator of interstate gas pipeline); Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 304 (9th Cir. 1989) (involving intervention of eight Oregon counties and private contractors in suit by environmental group challenging U.S. Department of Interior's sale of timber).

10. See Tobias, supra note 3, at 270-72 (providing overview of application of Federal Rules of Civil Procedure in public law litigation); Bullock, supra note 7, at 632-33 (stating that some courts have used interpretations of Rule 24 to block intervention by third persons). One commentator noted that judicial treatment of the Rules has had “adverse implications for public interest litigants.” Tobias, supra note 3, at 328. This commentator also stated that “a number of judges has [sic] enforced numerous Rules in ways that adversely affect [public law litigants] and which now constitute a discernible pattern.” Id. at 270. He further stated:

Despite the pervasive presence of public interest litigants, the federal judiciary has accorded them a mixed reception, particularly when applying the Federal Rules of Civil Procedure. Many federal courts have applied numerous Rules in ways that disadvantage public interest litigants, especially in contrast to traditional litigants, such as private individuals, corporations, and the government.

Id.

11. See Tobias, supra note 3, at 270 (stating that disadvantageous interpretations of Rules were not inevitable). One commentator stated that “[m]ost of the Rules, as adopted originally in 1937 and as amended subsequently, did not anticipate, but were compatible with, public law litigation and public interest litigants' involvement in federal civil litigation.” Id. He also noted that “certain ideas underlying the Rules as a set of litigating principles” may have contributed to the expanding participation rights of public interest litigants in civil suits. Id. He fur-
the Rules seem to consider the interests of public interest litigants. Some judges have manipulated Rule 24, which grants third parties the right to intervene in a pending lawsuit, to keep public interest litigants out of the courtroom. Under Rule 24, applicants for intervention must demonstrate "an interest relating to the property or transaction which is the subject of the action" before they can join the lawsuit. Court deci-

ther asserted that judicial application of Rule 24(a) "reflects the private law phrasing of the provision and concomitant judicial thinking," and that some judges have applied the Rule to public law litigation as if it were a private lawsuit, employing a narrow, technical and rigid interpretation. Id. at 328.

12. See Fed. R. Civ. P. 19 advisory committee's note (1966) (stating that interests that are furthered by Rule 19 "are not only those of the parties, but also that of the public"); Fed. R. Civ. P. 23 advisory committee's note (1966) (noting that previous version of Rule 23 had been too restrictive in class actions); Fed. R. Civ. P. 24 advisory committee's note (1966) (stating that amendment is intended to broaden application of Rule 24); see also Benjamin Kaplan, A Prefatory Note, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (observing that amendment of Rule 23 was meant to increase use of class action device to condense lawsuits, promote judicial economy and vindicate interests of large numbers of people who individually would be unable to litigate); Tobias, supra note 3, at 286 (stating that Rules reflect transformation in conceptualization of certain litigation and many of its components, including interest needed to initiate and impose liability in lawsuit, subject matter of lawsuit, party structure, relief afforded and role of judges in resolving disputes); Tobias, supra note 6, at 430 ("Some courts and writers have contended that the drafters revised all three party joinder amendments or at least Rule 24 with public law cases in mind."). But see United States v. Hooker Chem. & Plastics Corp., 749 F.2d 968, 983-84 (2d Cir. 1984) (noting that Rule 24 was drafted for private litigation); Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967) (stating that Rule 24 was tailored for private actions and must be read differently in other contexts); Arthur R. Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem", 92 HARV. L. REV. 664, 669-70 (1979) (stating that importance of Rule 23's revision to public law litigation has been overstated and that drafters finished amendment of some Rules before public law explosion); Note, Intervention in Government Enforcement Actions, 89 HARV. L. REV. 1174, 1177 (1976) ("[Rule 24] was designed with the more traditional private action in mind.").

13. See Tobias, supra note 3, at 323 (discussing judicial application of Rule 24 in public law litigation). Some courts have created presumptions or judicial expansions of the Rule's requirements, "which do not appear in the rule's text or in the Advisory Committee Note." Id. This treatment of Rule 24 reflects an approach by the courts that disadvantages public law litigants, both as plaintiffs and as applicants for intervention. See id. Public law litigants seeking to intervene in a suit between a private party and the government have been less successful than private individuals seeking to intervene in suits between a public interest group and the government. See id. at 323 n.314.

14. Fed. R. Civ. P. 24(a)(2). For the text of Rule 24, see infra note 35 and accompanying text. Many courts and commentators have discussed the interest requirement under Rule 24. See, e.g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 154 (1967) (Stewart, J., dissenting) ("[A]n applicant is still required to have an 'interest' in the litigation . . . ."); Forest Conservation Council, 66 F.3d at 1493 ("To intervene as of right under [Rule 24] the applicant must claim an interest the protection of which may, as a practical matter, be impaired or impeded if the lawsuit proceeds without him."); United States Envtl. Protection Agency, 995 F.2d at 1481 (stating that applicant must claim interest relating to property or transaction that is subject of action); Texas E. Transmission Corp., 923 F.2d at 413 ("In order to show entitlement to intervention of right under Rule 24(a)(2), Penn-
sions have varied greatly on what interests are sufficient to satisfy this requirement. Some courts have interpreted Rule 24 broadly, allowing public interest litigants to intervene more easily, while other courts have interpreted Rule 24 very narrowly, requiring applicants to show a concrete interest in the pending action.

15. See Diamond v. Charles, 476 U.S. 54, 68 (1986) (acknowledging circuit split on interpretation of Rule 24); Conservation Law Found. of New England, Inc. v. Mosbacher, 966 F.2d 39, 41 (1st Cir. 1992) (stating that case law regarding interest requirement of Rule 24 varies substantially between courts); Texas E. Transmission Corp. v. Kinder Morgan Transco, L.P., 923 F.2d at 412 (noting that general rules and past precedents do not provide dependable guidance); League of United Latin Am. Citizens v. Clements, 884 F.2d 185, 187 (5th Cir. 1989) (noting that courts have not yet adopted uniform standard for determining who is real party in interest); United States v. 36.96 Acres of Land, 754 F.2d 855, 860 (7th Cir. 1985) (noting that majority's decision conflicts with past precedent and authority); Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969) (stating that "general rules and past decisions cannot provide uniformly dependable guides"); Moore et al., supra note 14, § 24.03[2][d] (describing lack of consensus regarding interest requirement between circuits); Greenbaum, supra note 8, at 914 ("Unfortunately, courts disagree significantly about the meaning of the interest requirement."); Tobias, supra note 3, at 323-25 (discussing different circuit court interpretations of interest requirement of Rule 24); Tobias, supra note 6, at 432 ("Numerous courts and commentators have recognized that the federal judiciary has experienced considerable difficulty in defining the interest necessary to satisfy Rule 24(a)(2) since the time of its 1966 amendment."); Vreeland, supra note 2, at 283 ("Intervention by public interest groups implicates two general splits in opinion among the federal courts of appeals.").

16. Compare United States v. Stringfellow, 783 F.2d 821, 826 (9th Cir. 1986) ("Rule 24 is broadly construed in favor of applicants for intervention."); vacated sub nom. Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987), Hooker Chem. & Plastics Corp. v. Wright, 749 F.2d at 983 ("As amended, Rule 24(a)(2) is a non-technical directive to courts that provides the flexibility necessary 'to cover the multitude of possible intervention situations.'" (quoting Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc., 725 F.2d 871, 875 (2d Cir. 1984))), Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983) ("This court stated that 'Rule 24 traditionally has received a liberal construction in favor of applications for intervention.'" (quoting Washington State Bldg. & Constr. Trades v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982))), and Nuese, 385 F.2d at 700 ("[O]bviously tailored to fit ordinary civil litigation, these provisions require other than literal application in atypical cases." (quoting Textile Workers Union v. Allendale Co., 226 F.2d 765, 767 (D.C. Cir. 1955) (en banc))), with Keith v. Daley, 764 F.2d 1265, 1268 (7th Cir. 1985) (holding that applicant must show "direct, significant and legally protectable interest"), 36.96 Acres of Land, 754 F.2d at 859 (requiring interest greater than that to fulfill standing requirement before intervention will be granted), and
In *Sierra Club v. City of San Antonio*, the United States Court of Appeals for the Fifth Circuit invoked a common interpretation of Rule 24 and held that the State of Texas satisfied the interest requirement, and thus could intervene in a pending action between an environmental organization and several municipal governments. Part II of this Note discusses the history of intervention in federal courts and the development of Rule 24, which grants the right to intervene in federal litigation. Next, Part III presents the facts and procedural history of *Sierra Club*. Thereafter, Part IV analyzes the Fifth Circuit's reasoning and decision. Part IV also explains how the court's interpretation of Rule 24 complies with Supreme Court precedent and the intentions of the Rule's drafters, and how the results of its application were appropriate for that case. Finally, Part V of this Note discusses the possible reverberations of the Fifth Circuit's holding upon future public law litigation.

II. Principles Governing Intervention of Right

A. Historical Development of Intervention

Generally, persons who are not parties to a suit are not able to take part in or control the proceedings of the suit, but through the process of intervention, a person may obtain the status of a party to an existing suit and thus be able to fully participate. Intervention is a unique procedure...
dural device that attempts to balance a number of competing interests. On one side of the balance is the existing parties’ interest in controlling the course of the litigation that they initiated. Other persons, however, have an interest in entering the litigation if the outcome will have an effect on them. In addition, the person seeking to intervene may have some expertise or additional information that could help lead the court to the best decision. Finally, the courts have an interest in resolving controver-

("Intervention is a statutorily governed procedural mechanism for entering ongoing lawsuits.").

25. See United States v. Texas East Transmission Corp., 923 F.2d 410, 412 (5th Cir. 1991) (stating that Rule 24 represents balance between conflicting goals); Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969) ("The decision whether intervention of right is warranted thus involves an accommodation between two potentially conflicting goals: to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending."); Raoul Berger, Intervention by Public Agencies in Private Litigation in the Federal Courts, 50 Yale L.J. 65, 65 (1940) ("The basic problem of intervention practice is the adjustment between the need [for protection of third parties] and the traditional view that a law suit is a private controversy in which outsiders have no place."); Douglas Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. Chi. Legal F. 103, 143 (discussing tension between possibility of applicant initiating separate suit and letting intervenor disrupt pending lawsuit that is near resolution); Bullock, supra note 7, at 627 (acknowledging potential conflict of interests between applicant and original parties); Vreeland, supra note 2, at 294 ("Rule 24(a) aims at a balance between the interests of the outsiders, the original parties, and the courts.").

26. See 7C Charles Alan Wright et al., Federal Practice and Procedure § 1901 (2d ed. 1986) ("Ordinarily those who are presently litigants will prefer that others not be brought in . . . ."). The authors also stated that "the notion that third persons might invite themselves into lawsuits between others ran counter to the Anglo-American notion that the plaintiff was master of the suit." Id. (quoting James & Hazard, Civil Procedure 549 (3d ed. 1985)); see also Jack B. Weinstein, Litigation Seeking Changes in Public Behavior and Institutions—Some Views on Participation, 13 U.C. Davis L. Rev. 231, 232 (1980) ("If the plaintiff is an individual with limited funds, interested only in his own rights, there may well be reason to try to limit the case so that the courts do not become too expensive for those who need them but are not poverty stricken or wealthy."); Bullock, supra note 7, at 623 (stating that intervention is contrary to tradition that plaintiff controls suit); Vreeland, supra note 2, at 298-99 (stating that courts usually defer to right of original parties to control lawsuit and that intervention threatens control because intervenors will probably introduce "new evidence, new issues, and new positions on existing issues").

27. See Tobias, supra note 3, at 329 (noting that without intervention "particular individuals or entities may be wholly unrepresented, while certain viewpoints may remain unarticulated"); Weinstein, supra note 26, at 232 ("[T]hose persons who may be affected by a court’s decision should have the right to be heard before their fate is sealed."); Bullock, supra note 7, at 627 ("[P]eople on the outside want to become parties if they believe that a decision may affect them."); Vreeland, supra note 2, at 295-98 (discussing interests that potential intervenors have in litigation). One commentator listed interests of the applicant as introducing information on the potential effects of the court’s decision, advising and controlling the formulation of a consent decree, and voicing concerns of people affected by the litigation but not parties to it. See id. at 295-98.

28. See Moore et al., supra note 14, § 24.03[5][a] ("[C]ourts look favorably on intervention petitions offering a unique perspective."); Tobias, supra note 3, at
sies efficiently and deciding related disputes in a single action.\textsuperscript{29} Recognizing these interests, some federal courts have used the Rules as a practical tool to strike the appropriate balance.\textsuperscript{30}

\textsuperscript{29} See Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 147-48 (1967) (Stewart, J., dissenting) (discussing interest of courts in judicial economy); Texas E. Transmission Corp., 923 F.2d at 412 (stating that court has goals of "achieving judicial economies of scale by resolving related issues in a single lawsuit, and preventing the single lawsuit from becoming fruitlessly complex or unending"); Smuck, 408 F.2d at 179 (acknowledging that courts have goal of "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process" (quoting Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967))); Laycock, supra note 25, at 143 (discussing effect of intervention on judicial economy); Weinstein, supra note 26, at 246 (stating that costs to courts "in terms of complexity" due to intervention are outweighed by "the advantage of access to the courts by those who may be affected by the judicial decisions"); Bullock, supra note 7, at 627 (stating that intervention can promote judicial economy "via expansion of the information available to the court, and consolidation of related issues"); Vreeland, supra note 2, at 299 ("Intervention affects the courts' interests in fair and efficient adjudication, both in the case at hand and in the court system as a whole."). One commentator noted that "[w]hen an outsider claims a litigable interest, intervention may promote economy at a systematic level by avoiding duplicative suits, which waste resources, clog dockets, and frequently introduce the possibility of inconsistent judgments and complex collateral estoppel issues." Id.

\textsuperscript{30} See Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1496 (9th Cir. 1995) (noting that interest test of Rule 24 is primarily practical guide to involve as many parties as is compatible with due process); Sierra Club v. United States Envtl. Protection Agency, 995 F.2d 1478, 1481 (9th Cir. 1993) (stating that Rule 24 is given broad construction in favor of granting intervention); Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 308 (9th Cir. 1989) (stating that interest requirement of Rule 24 is primarily practical guide and "is basically a threshold [criterion], rather than the determinative criterion for intervention"); United States v. Stringfellow, 783 F.2d 821, 826 (9th Cir. 1986) (stating that when court is applying Rule 24 it is "guided primarily by practical considerations"), vacated sub nom. Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983) ("Rule 24 traditionally has received a liberal construction in favor of applications for intervention."); (quoting Washington State Bldg. & Constr. Trades v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982))); Smuck, 408 F.2d at 179 ("[T]he 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."); Nuesse, 385 F.2d at 700 (noting that "these provisions [of Rule 24] require other than literal application in atypical cases"); Atlantis Dev. Corp. v. United States, 379 F.2d 818, 825 (5th Cir. 1967) (stating that Advisory Committee "deliberately set out on a more pragmatic course" when it revised Rule 24 and that narrow interpretation of Rule would undermine "painstaking work of the Advisory Committee"); MOORE ET AL., supra note 14, § 24.03[1][b] ("The inquiry required under Rule 24(a)(2) is a flexi-
Intervention is a relatively recent development in the law. The procedural device was not available at common law, and its origins in the United States lie in the civil law of Louisiana. Other states eventually began to allow intervention in suits in equity, especially where the decision in the case may have harmed the party seeking to intervene. Statutes granting a right to intervene began to appear when code pleading was adopted, but the right was very narrowly defined. Today, the right to intervene is usually granted by a court's rules of civil procedure, and in

31. See Wright et al., supra note 26, § 1901 (discussing historical evolution of intervention). The authors stated: Intervention . . . is a comparatively recent innovation in Anglo-American legal procedure. It was a familiar device in the Roman law and thus in the civil law generally and there had been rudimentary procedures of this kind available in admiralty, and occasionally at common law and equity, but these were not well developed nor of very general applicability. Id.; see also James W. Moore & Edward H. Levi, Federal Intervention: I. The Right to Intervene and Reorganization, 45 Yale L.J. 565, 568-74 (1936) (discussing origins of intervention practice).

32. See, e.g., United States v. Widen, 38 F.2d 517, 518-19 (N.D. Ill. 1930) (“At common law intervention was not recognized. Jurisdiction of intervening petitions came to be recognized only in courts of chancery.”) (citations omitted); Ex parte Gray, 47 So. 286, 288 (Ala. 1908) (“The practice of interventions, which has grown up in our equity courts, seems to have been borrowed from the civil law . . . .”); Fischer v. Hanna, 47 P. 303, 308 (Colo. Ct. App. 1896) (“[The statute granting intervention] comes from the civil law and Code Napoleon, and was taken from Louisiana. It is a proceeding unknown to courts of common law and equity in Great Britain and the United States.”); Gale v. Shillock, 30 N.W. 138, 143 (Dakota 1886) (“The law of intervention is first found in the Code of Procedure of Louisiana.”); Warshaw-Seattle, Inc. v. Clark, 85 So. 2d 623, 625-26 (Fla. 1956) (“[T]he right of one to intervene in an action, suit, or proceeding between others is generally regarded as a purely statutory right, or a right of statutory origin, and as one which is to be exercised according to the statute authorizing it. It was unknown to common-law procedure.”); Hyman v. Cameron, 46 Miss. 725, 726-27 (1872) (“It is a novel proceeding in chancery to allow a stranger to a suit to become a party for the purpose of amending a bill . . . . and then conduct the suit in his own name. Intervention is a civil law term, a pleading familiar in that system.”); see also Wright et al., supra note 26, § 1901 (stating that intervention was contrary to Anglo-American legal principles). See generally 59 Am. Jur. 2d Parties § 126 (1987) (stating that “[i]ntervention was unknown to common-law procedure”). Intervention was employed to a small extent in the English ecclesiastical courts. See id. § 126 n.93.

33. See, e.g., Leary v. United States, 224 U.S. 567, 576 (1912) (reversing denial of intervention by person who had interest in funds held by court and subject to its disposition); Widen, 38 F.2d at 518 (discussing motion to intervene by person who had deposited money with court as bail for defendant which United States wanted to levy); Duke v. Franklin, 162 P.2d 141, 144 (Or. 1945) (allowing third person to intervene when statute did not grant intervention because applicant sought same relief as plaintiff).

34. See Wright et al., supra note 26, § 1901 (“Statutory provisions for intervention became more common with the adoption of code pleading but even these were frequently narrow in scope and limited to actions for the recovery of specific real or personal property.”).
suits pending in federal courts, the right is granted by Rule 24 of the Federal Rules of Civil Procedure.\textsuperscript{35}

Since its inception, Rule 24 has contained two types of intervention: intervention of right and permissive intervention.\textsuperscript{36} The former is granted by section (a) of the Rule if either a statute grants an unconditional right to intervene or an applicant has an interest in the litigation that is not adequately represented by the parties and that could be impaired by disposition of the action.\textsuperscript{37} Under section (b) of the Rule, permissive inter-

\textsuperscript{35} See Fed. R. Civ. P. 24 (granting right to intervene). Rule 24 states: (a) Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

\textit{Id.}

\textsuperscript{36} See id. (creating two different rights to intervene); Moore et al., supra note 14, § 24 (recognizing two existing types of intervention, intervention of right and permissive intervention); Wright et al., supra note 26, § 1902 ("Rule 24 always has undertaken to distinguish between two kinds of intervention."); Institutional Reform Litigation, supra note 3, at 1480 ("Rule 24 authorizes certain persons, whose interests may diverge from those of the parties, to intervene in a lawsuit either as of right or permissively.") (footnote omitted).

\textsuperscript{37} See Fed. R. Civ. P. 24(a) (stating that applicant "shall be permitted to intervene" if he or she meets requirements of section (a)); Moore et al., supra note
Invention is granted at the court's discretion and can be allowed when there is a common question of law or fact between the litigation and the applicant's claim or defense. When deciding whether to seek intervention under section (a) or section (b), an applicant must consider three important differences. First, a court may still deny an application for permissive intervention even if the applicant satisfies the Rule's requirements, but intervention of right must be granted if the Rule's requirements are satisfied. Second, because granting or denying permissive intervention is within the discretion of the trial court, appellate courts are more likely to reverse a denial of intervention of right. Third and finally, some courts have required applicants for intervention of right to demonstrate standing under Article III of the United States Constitution, while permissive intervenors may not have to make such a showing. Because only section (a) of Rule 24 was at issue in Sierra Club, this Note will focus solely on intervention of right.

14, § 24.03 (discussing right to intervene granted by Rule 24(a)); Wright et al., supra note 26, § 1902 (discussing intervention of right).

38. See Fed. R. Civ. P. 24(b)(2) (stating that applicant "may be permitted to intervene in an action" when there is common question of law or fact); Moore et al., supra note 14, § 24.10 (discussing permissive intervention); Wright et al., supra note 26, § 1902 (describing when permissive intervention may be granted).

39. See Wright et al., supra note 26, § 1902 ("An application for permissive intervention is addressed to the discretion of the court, whereas an application for intervention of right seems to pose only a question of law.") (footnote omitted).

40. See id. ("The appealability of an order denying intervention—and quite possibly also the scope of review on that appeal—has been thought to turn on the subdivision of the rule that was appropriate.").

41. See City of Cleveland v. Nuclear Regulatory Comm’n, 17 F.3d 1515, 1517 (D.C. Cir. 1994) ("[A] movant for leave to intervene under Rule 24(a)(2) must have Article III standing to participate in proceedings before the district court."); Panola Land Buying Ass’n v. Clark, 844 F.2d 1506, 1509 (11th Cir. 1988) (discussing relation of standing to intervention under Rule 24); Keith v. Daley, 764 F.2d 1265, 1268 (7th Cir. 1985) (noting that interest must be so direct that applicant has right to maintain claim for relief sought); Cook v. Boorstin, 763 F.2d 1462, 1470 (D.C. Cir. 1985) ("[A]n intervenor of right, just like an ordinary plaintiff, must have standing."); Southern Christian Leadership Conference v. Kelley, 747 F.2d 777, 778 (D.C. Cir. 1984) (holding that applicant could not intervene because he "lack[ed] a protectable interest sufficient to confer standing"); New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 464 (5th Cir. 1984) ("[I]ntervention has been held subject to the prudential standing requirement that "the presence of harm to a party does not permit him to assert the rights of third parties in order to obtain redress for himself." (quoting DuPree v. United States, 559 F.2d 1151, 1153 (9th Cir. 1977))).

Numerous courts have demanded that applicants possess an interest equivalent to standing; see also Wright et al., supra note 26, § 1902 ("Whether intervention is of right or permissive only frequently has been regarded as decisive in deciding whether independent grounds of federal jurisdiction must exist with regard to the person who seeks to intervene . . . ."). Some commentators noted that "[t]he need for independent jurisdictional grounds depends on the extent to which the ‘ancillary jurisdiction’ of a federal court may go." Id. This question cannot be answered by only referring to Rule 24, for it requires analysis of each case's merits. See id.
When Rule 24 was originally enacted in 1937, the drafters intended it to codify a practice already existing in the federal courts.\textsuperscript{42} The language of that version is similar to the current version, but it granted intervention of right in slightly different circumstances.\textsuperscript{43} Unless a federal statute granted an unconditional right to intervene, applicants could only interve n of right under the 1937 Rule if they showed that they may be bound by a judgment and their interests may be inadequately represented or that they would be adversely affected by a disposition of property in the custody of the court.\textsuperscript{44} Problems with the language of the 1937 version were apparent from the start, and they culminated in \textit{Sam Fox Publishing Co. v.}...
when the United States Supreme Court stated that applicants must be legally bound by a judgment before they could intervene under Rule 24(a)(2). This interpretation seemed to make intervention of right under Rule 24(a)(2) impossible in all cases. If representation of an applicant's interests was inadequate, he or she could not be bound by the judgment in the action and thus could not intervene, but if his or her interests were adequately represented, the first half of Rule 24(a)(2) remained unsatisfied.

46. See id. at 694 (holding that showing by applicant that it will be legally bound by court's decision "is what must be made out before a party may intervene as of right"). In *Sam Fox Publishing*, the United States brought an antitrust suit under the Sherman Act, 15 U.S.C. §§ 1-7 (1994), against the American Society of Composers, Authors and Publishers (ASCAP), an unincorporated music licensing association to which the applicants belonged. See *Sam Fox Publishing* at 685. The government alleged two distinct types of antitrust violation:

1. Alleged restraint of trade arising out of ASCAP's mode of dealing with outsiders desiring licenses of compositions in the Society's catalogue; and
2. Alleged restraint of competition among the Society's members *inter sese*, resulting from the asserted domination of the Society's affairs by a few of its large publisher members who, it was claimed, were able to control the complexion of the Board of Directors and the apportionment of the Society's revenues.

*Sam Fox Publishing* at 685-86. As relief for the second type of violation, the United States asked the court to ensure that Board elections be by no method other than a membership vote in which all members shall have the right to vote and that the distribution of revenue to members be on a fair and nondiscriminatory basis. See *Sam Fox Publishing* at 686. The applicants' interests in the suit related solely to the second aspect of the government's charges, those involving the Society's internal affairs. See *Sam Fox Publishing* at 686. A consent decree was entered within a year of the suit's initiation, but the government pressed for modifications of the decree in 1959. See *Sam Fox Publishing* at 686-87. Before the district court had approved the modifications, the applicants moved to intervene. See *Sam Fox Publishing* at 687. The district court denied intervention and subsequently approved the modifications of the consent decree. See *Sam Fox Publishing* at 686. Finding that the applicant was not entitled to intervention of right and that it therefore lacked jurisdiction, the Supreme Court dismissed the appeal. See *Sam Fox Publishing* at 695. The Court stated that the effect of the lower court's decree was "not at all the equivalent of being legally bound, which is what must be made out before a party may intervene as of right." *Sam Fox Publishing* at 694; see also Fed. R. Civ. P. 24 advisory committee's note (1966) ("If the 'bound' language was read literally in the sense of res judicata, it could defeat intervention in some meritorious cases.").

47. See *Wright Et Al.*, supra note 26, § 1903 ("If the representation of an absent party was inadequate, he could not be bound by the judgment in the action, and could not intervene, but if he were adequately represented he could not meet the second half of the test of the former clause (2) and could not intervene."); *Laycock*, supra note 25, at 112 ("The Supreme Court held in effect that [Rule 24's] standard could never be met, because if the would-be intervenor were inadequately represented, he would not be bound."); see also Fed. R. Civ. P. 24 advisory committee's note (1966) (discussing problems with 1937 version in class action suits). The advisory committee wrote:

A member of a class to whom a judgment in a class action extended by its terms . . . might be entitled to show in a later action, when the judgment in the class action was claimed to operate as res judicata against him, that the "representative" in the class action had not in fact adequately represented him. If he could make this showing, the class-action judgment
In an attempt to remove this dilemma, Rule 24 was amended in 1966, resulting in the version that is currently used. The amendment replaced the troublesome "bound by" language with a four-prong test to determine whether a court should grant intervention of right. Under the new Rule 24(a), applicants can intervene if: (1) they submit a timely application; (2) they have an interest in the subject of the litigation; (3) they are so situated that disposition of the action may impair their ability to protect that interest; and (4) their interest may be inadequately represented by existing parties. Courts and scholars have stated that the Rule’s drafters intended the 1966 amendment to broaden the Rule and that courts decid-

might be held not to bind him. If a class member sought to intervene in the class action proper, while it was still pending, on grounds of inade-
quacy of representation, he could be met with the argument: if the repre-
sentation was in fact inadequate, he would not be "bound" by the
judgment when it was subsequently asserted against him as res judicata,
hence he was not entitled to intervene; if the representation was in fact
adequate, there was no occasion or ground for intervention.

Id. (citations omitted).

48. See FED. R. Civ. P. 24 advisory committee’s note (1966) (“In attempting to overcome certain difficulties which have arisen in the application of present Rule 24(a)(2) and (3), this amendment draws upon the revision of the related Rules 19 . . . and 23 . . . and the reasoning underlying that revision.”); WRIGHT ET AL., supra note 26, § 1903 (describing 1966 amendment and drafters’ efforts to correct problems with previous version); Tobias, supra note 6, at 429 (stating that Sam Fox Publishing Court’s interpretation of Rule’s language “was the major reason for the amendment of Rule 24 in 1966”).

49. See FED. R. Civ. P. 24(a)(2). The 1966 amendment states:

Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

Id. The 1966 amendment did not affect an applicant’s right to intervene when a statute of the United States grants an unconditional right to intervene. See FED. R. CIV. P. 24(a)(1); see also Sierra Club v. Glickman, 82 F.3d 106, 108 (5th Cir. 1996) (stating that Rule 24(a)(2) sets forth four requirements for intervention of right); Edwards v. City of Houston, 78 F.3d 983, 999 (5th Cir. 1996) (en banc) (stating that to intervene of right applicant must meet four requirements); Security Ins. Co. v. Schipporeit, Inc., 69 F.3d 1377, 1380 (7th Cir. 1995) (stating that applicant for intervention must satisfy four requirements); United States v. Georgia, 19 F.3d 1388, 1391 (11th Cir. 1994) (stating that district court applied four-part test to deny motion to intervene); Brody v. Spang, 957 F.2d 1108, 1115 (3d Cir. 1992) (stating that court construes Rule 24 as four-part test); Keith v. Daley, 764 F.2d 1265, 1268 (7th Cir. 1985) (“The Federal Rules of Civil Procedure set forth four requirements which a proposed intervenor must satisfy before intervention of right is allowed . . .”); United States v. 36.96 Acres of Land, 754 F.2d 855, 858 (7th Cir. 1985) (“Four requirements must be met before intervention will be granted as of right.”); WRIGHT ET AL., supra note 26, § 1903 (“Accordingly in the 1966 revision there is no longer any reference to being bound by a judgment.”); Tobias, supra note 6, at 429 (stating that 1966 amendment of Rule 24 collapsed previous version’s requirements into four-part test); Vreeland, supra note 2, at 282 (discussing what applicant must show to intervene under Rule 24(a)(2)).
ing motions to intervene should focus on practical issues and balancing competing interests.\textsuperscript{50} 

Despite the improvements made by the 1966 amendment, however, courts still disagree over the application of Rule 24(a)(2), especially the second prong.\textsuperscript{51} Court decisions have differed significantly on what con-

\begin{footnotesize}
\textsuperscript{50} See, e.g., \textit{Cascade Natural Gas Corp. v. El Paso Natural Gas Co.}, 386 U.S. 129, 153-54 (1967) (Stewart, J., dissenting) ("The purpose of the revision was to remedy certain logical shortcomings in the construction of the former 24(a)(2) . . . and to give recognition to decisions . . . which had expanded intervention under the former 24(a)(3) beyond the strict \textit{pro interesse suo} model it embodied."); Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1493 (9th Cir. 1995) (stating that court interprets Rule 24 broadly in favor of intervention); United States v. Stringfellow, 783 F.2d 821, 826 (9th Cir. 1986) (stating that application of Rule 24 is to be guided by practical considerations), \textit{vacated sub nom.} Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983) ("The rule was amended in 1966 in an effort . . . to permit courts to look at practical considerations in determining whether an absentee seeking intervention is being adequately represented."); Smuck v. Hobson, 408 F.2d 175, 178 (D.C. Cir. 1969) (stating that 1966 amendments were designed to eliminate scissoring effect whereby petitioner who could show inadequate representation was thereby thrust against blade that he would therefore not be bound by judgment, and to recognize decisions that had construed property so broadly as to make surplusage of adjective); Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967) ("We know from the recent amendments to the civil rules that in the intervention area the 'interest' test is primarily a practical guide to disposing of lawsuits . . ."; \textit{Atlantis Dev. Corp. v. United States}, 379 F.2d 818, 824-25 (5th Cir. 1967) ("[T]he Advisory Committee, unsatisfied with the former Rules which too frequently defined application in terms of rigid legal concepts . . . as well as court efforts in applying them, deliberately set out on a more pragmatic course."); \textit{Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.}, 105 F.R.D. 106, 109 (D.D.C. 1985) (recognizing that "the 1966 amendments to Rule 24 were designed to liberalize the right to intervene in federal actions"); \textit{see also Moore et al., supra note 14, § 24.03[1][b]} ("The inquiry required under Rule 24(a)(2) is a flexible one, and a practical analysis of the facts and circumstances of each case is appropriate."); \textit{Wright et al., supra note 26, § 1904} ("It frequently has been said of Rule 24, as it is of the Civil Rules generally, that it is to be given a liberal construction."); Benjamin Kaplan, \textit{Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure(I)}, 81 HARV. L. REV. 356, 405 (1967) (stating that revision of Rule 24 was intended to "drive beyond the narrow notion of an interest in specific property"); \textit{Laycock, supra note 25, at 112} (stating that Rule 24 was amended to permit courts to examine practical consequences of remedy chosen); Bullock, \textit{supra note 7}, at 629 ("This amendment broadened and made more flexible the 'unduly restrictive' original rule."). Although courts should "apply the rule with thoughtful consideration of the objectives it is intended to serve," courts should also take into account the interests of the parties in the prompt disposition of their action and of the public in the efficient administration of justice. \textit{Wright et al., supra note 26, § 1904.}

stitutes an “interest relating to the property or transaction which is the subject of the action” that is sufficient to allow an applicant to intervene.52

B. Lack of Clear Definition of “Interest in the Subject Matter of the Litigation”

The difficulty in defining what constitutes an interest relating to the property or transaction which is the subject of the action stems in part from a lack of clear Supreme Court precedent on the issue.53 In four

52. See, e.g., Diamond, 476 U.S. at 68 n.21 (“The Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must [her or] himself possess standing.”); Security Ins. Co., 69 F.3d at 1380 (“The ‘interest’ required by Rule 24(a)(2) has never been defined with particular precision.”); see also Moore et al., supra note 14, § 24.03[2][a] (“[T]here is no authoritative definition of precisely what kinds of interest satisfy the requirements of the rule.”); Wright et al., supra note 26, § 1908 (“There is not as yet any clear definition, either from the Supreme Court or from the lower courts, of the nature of the ‘interest relating to the property or transaction which is the subject of the action.’” (quoting Fed. R. Civ. P. 24(a)(2))); Tobias, supra note 6, at 432 (“Numerous courts and commentators have recognized that the federal judiciary has experienced considerable difficulty in defining the interest necessary to satisfy Rule 24(a)(2) since the time of its 1966 amendment.”).

Court decisions addressing the interest requirement of Rule 24(a)(2) have differed significantly. Compare Stringfellow, 783 F.2d at 826 (“Rule 24 is broadly construed in favor of applicants for intervention.”), United States v. Hooker Chem. & Plastics Corp., 749 F.2d 968, 983 (2d Cir. 1984) (“As amended, Rule 24(a)(2) is a nontechnical directive to courts that provides the flexibility necessary ‘to cover the multitude of possible intervention situations’.” (quoting Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc., 725 F.2d 871, 875 (2d Cir. 1984))), Sagebrush Rebellion, Inc., 713 F.2d at 527 (“This court stated that ‘Rule 24 traditionally has received a liberal construction in favor of applications for intervention.’” (quoting Washington State Bldg. & Constr. Trades v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982))), and Nuesse, 385 F.2d at 700 (“[O]bviously tailored to fit ordinary civil litigation, these provisions [of Rule 24] require other than literal application in atypical cases.”) (quoting Textile Workers Union v. Allendale Co., 226 F.2d 765, 767 (D.C. Cir. 1955) (en banc)), with Keith v. Daley, 764 F.2d 1265, 1268 (7th Cir. 1985) (holding that applicant must show “direct, significant, and legally protectable” interest), 36.96 Acres of Land, 754 F.2d at 859 (requiring interest greater than standing to sue before intervention will be granted), and Southern Christian Leadership Conference v. Kelley, 747 F.2d 777, 779 (D.C. Cir. 1984) (requiring interest equal to standing before intervention will be granted).

53. See Wright et al., supra note 26, § 1908 (noting that Supreme Court has not given clear definition of nature of “‘interest relating to the property or transaction which is the subject of the action’” (quoting Fed. R. Civ. P. 24(a)(2))); Tobias, supra note 6, at 432 (“The Supreme Court has rarely addressed Rule 24(a)(2), and
decisions dealing with Rule 24(a)(2), the Supreme Court has bounced between narrow constructions that require a strong interest and broad interpretations that require a less concrete interest.

In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*,54 the Supreme Court held that a private business with an interest in the solvency of a corporation to be formed pursuant to a consent decree in an antitrust suit could intervene in the district court action to approve that decree.55 Three years prior to the *Cascade* decision, the Supreme Court had directed a district court to order El Paso Natural Gas Company to divest itself of the Pacific Northwest Pipeline Corporation because its acquisition of that corporation violated the Clayton Act.56 After remand to the district court, Cascade sought to intervene, stating that Pacific Northwest had been its sole supplier of gas and that it had an interest in the ability of the company to be formed by divestiture to supply gas.57 After finding that the 1966 amendment to Rule 24 could be applied to the case, the Court held that Cascade could intervene under the new Rule 24(a)(2).58 Although the Court did not explicitly state why Cascade satisfied Rule 24's interest requirement, it seemed to imply that an intervenor does not have to demonstrate a concrete right conferred by law as an interest.59

when it has, the opinions have been peculiarly fact-bound, affording minimal guidance, especially as to the meaning of interest.”); Vreeland, supra note 2, at 283 (noting that “a paucity of Supreme Court decisions on intervention of right [has] resulted in widely varying interpretations of the Rule 24(a) requirements”).

54. 386 U.S. 129 (1967).

55. See id. at 136 (“[W]e conclude that the new Rule 24(a)(2) is broad enough to include Cascade also . . . .”). The Court also allowed the State of California and a private entity, Southern California Edison, to intervene under the old Rule 24, which was still in force during the proceeding, because they were “so situated” geographically as to be “adversely affected” within the meaning of Rule 24(a)(3) by a merger that reduced the competitive factor in natural gas available to residents of California. See id. at 135.

56. 15 U.S.C. §§ 12-27 (1994); see *Cascade*, 386 U.S. at 131 (“When this case was here the last time, we held that the acquisition of Pacific Northwest Pipeline Corporation by El Paso Natural Gas Company violated § 7 of the Clayton Act; and we directed the District Court ‘to order divestiture without delay.’” (quoting United States v. El Paso Natural Gas Co., 376 U.S. 651, 662 (1964))).

57. See *Cascade*, 386 U.S. at 133 (“Cascade Natural Gas is a distributor in Oregon and Washington, and its sole supplier of natural gas was Pacific Northwest and will be the New Company created under the divestiture plan.”). Cascade claimed that there had been an unfair division of gas reserves between El Paso and the New Company, that El Paso had set onerous prices and conditions on sales by the New Company, and that El Paso had sold stock held by Pacific Northwest that had given it access to the Canadian gas supply. See id.

58. See id. at 136 (holding that 1966 amendment of Rule 24(a)(2) was “broad enough to include Cascade also”). Even though the new Rule was enacted while the appeal was pending, the Court held that it applied to all “‘further proceedings' in pending actions.” *Id.*

59. See Tobias, supra note 6, at 432-33 (“In the 1967 case of *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, the Court read the Rule broadly and granted intervention of right, implying that a particular equitable or legal interest is unnecessary to satisfy the Rule.”).
Five years later, the Supreme Court narrowed its interpretation of the interest prong of Rule 24(a) (2) in Donaldson v. United States, holding that a taxpayer could not intervene of right in a proceeding to enforce subpoenas from the Internal Revenue Service (IRS) against a third person. In Donaldson, the IRS was investigating past tax returns of the applicant, and it served summonses on the applicant’s former employer, Acme, to provide records and testimony concerning the applicant’s tax liability. Donaldson obtained a preliminary injunction restraining his employer from providing the information until a court of competent jurisdiction ordered compliance, but the IRS quickly filed an action to enforce the summonses. Donaldson filed a motion to intervene in this action under Rule 24(a) (2), claiming an interest in the records of payments from Acme to him, but the court denied the motion. The Supreme Court affirmed the denial of intervention, finding that Donaldson did not have a sufficient interest in the subject of the litigation to intervene. The Court held that to satisfy the interest prong of Rule 24(a) (2), an applicant must have a “significantly protectable interest.”

60. 400 U.S. 517 (1971).
61. See id. at 531 ("We therefore hold that the taxpayer's interest is not enough and is not of sufficient magnitude for us to conclude that he is to be allowed to intervene.").
62. See id. at 518-19. The applicant, Kevin L. Donaldson, allegedly had worked as a performer for the Acme Circus Operating Company, Inc. under a different name. See id. at 518. The IRS was investigating Donaldson’s tax returns for the years 1964-1967, and pursuant to 26 U.S.C. § 7602, it summoned Acme and its accountant to provide, among other things, applications for employment, any other records containing background data including Social Security number, that Donaldson had given to Acme, all contracts between Donaldson and Acme, Forms 1099 and W-2 issued to Donaldson, and checks and vouchers relating to payments to Donaldson. See id. at 519.
63. See id. at 519-20. The United States District Court for the Middle District of Florida, through a temporary restraining order and preliminary injunction, restrained Acme and its accountant from complying with the summonses “until such time as an order of a court of competent jurisdiction has been issued requiring compliance.” Id. at 520. The IRS, pursuant to 26 U.S.C. §§ 7402(b) and 7604(a), filed petitions in the same court to enforce the summonses. See id.
64. See id. at 521. In his motion, Donaldson also alleged that the IRS was guilty of bad faith in conducting its investigation and that the summonses were not issued for any purpose within the scope of the statute authorizing them. See id. Donaldson also alleged that the summonses violated his rights to be free from unreasonable searches and seizures under the Fourth Amendment, but he did not argue this issue before the Supreme Court. See id.
65. See id. at 531 ("We therefore hold that the taxpayer's interest is not enough and is not of sufficient magnitude for us to conclude that he is to be allowed to intervene."); see also Wright et al., supra note 26, § 1908 (pointing out that records sought by subpoenas were employer’s routine business records in which Donaldson had no proprietary interest and regarding which he could make no claim of privilege, and that Donaldson only had interest because employer’s records presumably contained details of payments to him by Acme that would be significant for tax purposes).
66. Donaldson, 400 U.S. at 531 ("What is obviously meant [by Rule 24(a) (2)] is a significantly protectable interest."). The Court stated that taxpayers may have
The Supreme Court next dealt with Rule 24 in *Trbovich v. United Mine Workers of America*. The Court did not directly address the interest prong of Rule 24(a)(2), but it seemed to imply that an applicant does not need to show standing to sue to show an interest in the litigation sufficient to intervene. In *Trbovich*, the Secretary of Labor had instituted an action under section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) to set aside the election of officers of the United Mine Workers of America (UMWA). Trbovich, a member of UMWA, filed the grievance that led the Secretary to initiate the action and sought to intervene in the Secretary's action under Rule 24(a)(2). The lower court denied his motion to intervene, stating that the LMRDA gave the Secretary the exclusive right to bring an action challenging a union election. Even though Trbovich would not have had standing to sue under the LMRDA, the Supreme Court reversed the denial of intervention, stat-

significantly protectable interests in employers' records if they could claim a privilege or an abuse of process by the IRS. See id.


68. See id. at 539. The Secretary of Labor did not contest the sufficiency of Trbovich's interest before the Supreme Court. See id. at 538. Instead, he claimed that he adequately represented Trbovich's interests, and therefore Trbovich could not satisfy the fourth prong of Rule 24(a)(2). See id. The Supreme Court disagreed and held that Trbovich did satisfy the fourth prong because he might disagree with the Secretary's tactics and arguments. See id.


70. See *Trbovich*, 404 U.S. at 529. The Secretary alleged that the election violated the reporting and disclosure law by failing to use secret ballots, allowing campaigning at the polls, barring observers from monitoring polling places and the counting of ballots, subjecting members to retaliation for their election activities, failing to hold elections in some locales and promoting the campaigns of incumbents with union assets. See id. at 529 n.1. The Secretary sought an order requiring a new election under his supervision. See id. at 529.

71. See id. Trbovich sought to intervene for three reasons. He wanted to urge two additional grounds for setting aside the election, and he sought certain safeguards to be used in any new election that might be held. See id. at 529-30. He also wanted to present evidence and argument to support the Secretary's challenge to the election. See id. at 530.

72. See id. ("The District Court denied his motion for leave to intervene, on the ground that the LMRDA expressly stripped union members of any right to challenge a union election in the courts, and gave that right exclusively to the Secretary.").

The LMRDA states that after a union election has been held, a civil suit by the Secretary of Labor shall be the exclusive remedy for violations of the LMRDA. See 29 U.S.C. § 483. Prior to *Trbovich*, the Supreme Court held that 29 U.S.C. § 483 prohibited union members from initiating a private suit to set aside an election. See Calhoon v. Harvey, 379 U.S. 134, 140 (1964) ("Section 402 of Title IV . . . sets up an exclusive method for protecting Title IV rights, by permitting an individual member to file a complaint with the Secretary of Labor challenging the validity of any election because of violations of Title IV.").
ing that Trbovich had an interest in "free and democratic union elections."\textsuperscript{73}

After Trbovich, the Supreme Court next addressed Rule 24(a)(2) in Diamond v. Charles.\textsuperscript{74} In Diamond, the Court recognized the circuit split over whether an applicant needs standing to sue to intervene, but it refused to settle the disagreement.\textsuperscript{75} Instead, the concurring justices held that the "significantly protectable interest" required under Donaldson is a "direct and concrete interest that is accorded some degree of legal protection."\textsuperscript{76} In Diamond, a group of physicians filed a class action challenging the constitutionality of an Illinois abortion law.\textsuperscript{77} Dr. Diamond, a pediatrician, filed a motion to intervene as defendant, claiming his interest to be a conscientious objection to abortions as well as his status as a pediatrician and a parent of a minor daughter.\textsuperscript{78} The district court granted the motion.\textsuperscript{79} Eventually, the district court ordered a permanent injunction against enforcing the law, but only Diamond appealed to the circuit court and later to the Supreme Court.\textsuperscript{80} The Supreme Court held that an intervenor’s right to appeal a judgment "in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the [case or controversy] requirements of Art. III," but it found that Diamond could not make such a showing to maintain his

\textsuperscript{73.} Trbovich, 404 U.S. at 539 ("Such a complaint, filed by the member who initiated the entire enforcement proceeding, should be regarded as sufficient to warrant relief in the form of intervention under Rule 24(a)(2).").

\textsuperscript{74.} 476 U.S. 54 (1986).

\textsuperscript{75.} See id. at 68-69 ("[T]he precise relationship between the interest required to satisfy the Rule and the interests required to confer standing, has led to anomalous decisions in the Courts of Appeals. We need not decide today whether a party seeking to intervene . . . must satisfy . . . also the requirements of Art. III.").

\textsuperscript{76.} Id. at 75 (O’Connor, J., concurring) ("Clearly, Donaldson’s requirement of a ‘significantly protectable interest’ calls for a direct and concrete interest that is accorded some degree of legal protection.").

\textsuperscript{77.} See id. at 57-58. The physicians provided obstetric, gynecologic and abortion services in Illinois, and they alleged that enforcement of the abortion law deprived them of their rights in violation of 42 U.S.C. § 1983. See id.

The Illinois Abortion Law, 38 ILL. COMP. STAT. 81/21 to 81/34 (West 1983), prescribed the standard of care a physician must exercise when performing an abortion of a viable fetus and a possibly viable fetus. See Diamond, 476 U.S. at 59. It also required a physician to inform a patient whenever he prescribed an "abortifacient." See id. at 60.

\textsuperscript{78.} See Diamond, 476 U.S. at 57-58.

\textsuperscript{79.} See id. at 58 (noting that district court believed Diamond had satisfied requirements for intervention). The district court did not indicate whether the intervention was permissive or of right, and it did not describe how Dr. Diamond’s interests were sufficient to satisfy Rule 24(a)(2). See id. Dr. Diamond also filed a motion to be appointed as guardian ad litem for fetuses who survive abortion, but the court denied that motion. See id. at 57-58.

\textsuperscript{80.} See id. at 61. The State of Illinois did not appeal the injunction, and thus Diamond was the sole appellant. See id. Illinois did file a "letter of interest" with the Supreme Court. See id. Because Illinois did not appear as an appellant, the Court had to decide whether it had jurisdiction to entertain an appeal by Diamond. See id.
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appeal. In a concurring opinion, Justice O'Connor stated that Diamond should never have been allowed to intervene because he did not have an interest in the litigation that satisfied the second prong of Rule 24(a)(2). This is because the Illinois abortion law did not "vest physicians, parents, or daughters with 'significantly protectable interest[s]'". Thus, Diamond seems to stand for the proposition that applicants must be able to claim a right protected under some law before they can satisfy the interest requirement of Rule 24(a)(2).

The lack of consistent Supreme Court guidance has left lower federal courts to flesh out Rule 24(a)(2), and in struggling to define "interest," judges have used a wide range of interpretations. If the courts' different interpretations of the interest requirement have caused any confusion, it is that the Supreme Court has rarely addressed Rule 24(a)(2), and when it has, the opinions have been peculiarly fact-bound, affording minimal guidance, especially as to the meaning of interest. Justice O'Connor stated, "This Court's decision in Donaldson... establishes that Diamond's asserted interests in the provisions at issue in the Court of Appeals fall well outside the ambit of Rule 24(a)(2), and it is likewise apparent that he was not entitled to permissive intervention under Rule 24(b)(2)."

This relative dearth of Supreme Court precedent and its fact-intensive nature have meant that the lower federal courts have assumed primary responsibility for articulating the interest requirement and for applying Rule 24(a)(2). Circuit and district judges have exhibited great difficulty defining interest with significant clarity, despite the thousands of opportunities available to them.

The following are examples of contrasting interpretations of the interest requirement. Compare United States v. Stringfellow, 783 F.2d 821, 826 (9th Cir. 1986) ("Rule 24 is broadly construed in favor of applicants for intervention."). The court noted that Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987), United States v. Hooker Chem. & Plastics Corp., 749 F.2d 968, 983 (2d Cir. 1984) ("As amended, Rule 24(a)(2) is a nontechnical directive to courts that provides the flexibility necessary 'to cover the multitude of possible intervention situations.'" (quoting Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc., 725 F.2d 871, 875 (2d Cir. 1984))), Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 595, 527 (9th Cir. 1983) ("This court stated that 'Rule 24 traditionally has received a liberal construction in favor of applications for intervention.'" (quoting Washington State Bldg. & Constr. Trades v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982))), and Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967) ("[O]bviously tailored to fit ordinary civil litigation, these provisions [of Rule 24] require other than literal application in atypical cases." (quoting Textile Workers Union v. Al-
articulations of the interest requirement were placed on a spectrum, at one end would be those courts that characterize it as flexible or open ended. This interpretation has been expressed most frequently by the United States Courts of Appeals for the District of Columbia and Ninth Circuits. In their opinions, the judges often consider the practical consequences of granting or denying intervention, and they frequently state that the 1966 amendment to Rule 24 was intended to broaden the Rule’s application. Many of these judges also quote the decision in Nuesse v.

85. See, e.g., Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1496 (9th Cir. 1995) (recognizing that interest test is practical guide); Sierra Club v. United States Envtl. Protection Agency, 995 F.2d 1478, 1481 (9th Cir. 1993) (noting that Rule 24(a)(2) is construed broadly in favor of intervention); United States v. Texas E. Transmission Corp., 923 F.2d 410, 413 (5th Cir. 1991) (“Fifth Circuit precedent establishes that ‘the inquiry under subsection (a)(2) is a flexible one, which focuses on the particular facts and circumstances surrounding each application . . . [and] intervention of right must be measured by a practical rather than technical yardstick.’” (quoting United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 841 (5th Cir. 1975))); Portland Audubon Soc’y v. Hodel, 866 F.2d 302, 308 (9th Cir. 1989) (stating that interest test is practical guide to disposing of lawsuits as efficiently as possible); Sagebrush Rebellion, Inc., 713 F.2d at 527 (stating that Rule 24 is to be given liberal construction and court is to look at practical considerations in deciding motions to intervene of right); Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969) (“[A] more instructive approach is to let our construction of Rule 24 be guided by the policies behind the ‘interest’ requirement.”); Nuesse, 385 F.2d at 700 (“[T]he ‘interest’ test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.”); Atlantis Dev. Corp. v. United States, 379 F.2d 818, 824-25 (5th Cir. 1967) (stating that to effect intentions of Rule’s drafters court must examine practical considerations); Independent Petrochemical Corp. v. Actna Cas. & Sur. Co., 105 F.R.D. 106, 109 (D.D.C. 1985) (“[T]he approach taken by this jurisdiction in determining whether a potential intervenor as of right satisfies the ‘interest’ requirement . . . has been to look to the ‘practical consequences’ of denying intervention, rather than to ‘revert to a narrow formulation . . . .’” (quoting Nuesse, 385 F.2d at 700)).

86. See Tobias, supra note 6, at 435 (“[T]he principal proponents of these views have been the judges in the United States Courts of Appeals for the District of Columbia and the Ninth Circuits.”).

87. See Stringfellow, 783 F.2d at 826 (citing advisory committee note to 1966 amendment to support its holding that application of interest test is guided by practical considerations); Sagebrush Rebellion, Inc., 713 F.2d at 527 (“The rule was amended in 1966 in an effort, according to the advisory committee note, to permit courts to look at practical considerations in determining whether an absentee seeking intervention is being adequately represented.”); Smuck, 408 F.2d at 178 (“The 1966 amendments were designed to eliminate the scissoring effect [of the former rule] . . . and to recognize the decisions which had construed ‘property’ so broadly as to make surplusage of the adjective.”); Nuesse, 385 F.2d at 700 (stating
Camp, the seminal case for this interpretation, and state that “the interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” These judges also generally reject the notion that interest requires a specific right conferred by law.

Further down the spectrum towards narrower articulations of the interest requirement are those courts that require a “direct,” “substantial” or that amendments to Rule 24 suggest that interest requirement is practical consideration); Atlantis Dev. Corp., 379 F.2d at 824-25 (stating that in amending Rule 24 drafters “deliberately set out on a more pragmatic course”); see also Tobias, supra note 6, at 435 (“[The courts] examine the pragmatic implications of denying intervention and the policies underlying the 1966 amendment, occasionally stating that the Advisory Committee meant to liberalize intervention of right.”).

88. 385 F.2d 694 (D.C. Cir. 1967).
89. Id. at 700; see Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. United States Dep’t of the Interior, 100 F.3d 837, 839 (10th Cir. 1996) (being “mindful” of fact that interest test is practical guide); Forest Conservation Council, 66 F.3d at 1496 (noting circuit’s precedent incorporating Nuesse language); United States v. Union Elec. Co., 64 F.3d 1152, 1162 (8th Cir. 1995) (stating that court should be mindful of Nuesse interpretation of Rule 24); Ceres Gulf v. Cooper, 957 F.2d 1199, 1204 n.10 (5th Cir. 1992) (stating that property or transaction need not be defined narrowly); Worlds v. Department of Health and Rehabilitative Serv., 929 F.2d 591, 594 (11th Cir. 1991) (stating that court’s holding is consistent with Nuesse); Pujol v. Shearson Am. Express, Inc., 877 F.2d 132, 134 (1st Cir. 1989) (stating that Rules are intended to involve as many parties as is compatible with due process); Federal Deposit Ins. Corp. v. Jennings, 816 F.2d 1488, 1491 (10th Cir. 1987) (quoting opinion in Nuesse); Feller v. Brock, 802 F.2d 722, 729 (4th Cir. 1986) (stating that liberal interpretation of Rule 24 is preferable); Cook v. Boorstin, 763 F.2d 1462, 1466 (D.C. Cir. 1985) (quoting language from Nuesse); Security Exch. Comm’n v. Flight Transp. Corp., 699 F.2d 943, 949 (8th Cir. 1983) (relying on language from Nuesse); Rosebud Coal Sales Co. v. Andrus, 644 F.2d 849, 850 n.3 (10th Cir. 1981) (contrasting Nuesse interpretation with other decisions); Natural Resources Defense Council v. Costle, 561 F.2d 904, 909 (D.C. Cir. 1977) (noting Nuesse as leading case for practical interpretation); Smuck, 408 F.2d at 179 (quoting decision in Nuesse).

90. See, e.g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 132-36 (1967) (allowing private party to intervene in action under antitrust law between United States and defendant); Forest Conservation Council, 66 F.3d at 1496 (stating that no specific legal or equitable interest need be established); Union Elec. Co., 64 F.3d at 1162 (noting that court has rejected arguments that inchoate interests which have not yet vested are insufficient to intervene); Sierra Club v. Espy, 18 F.3d 1202, 1207 (5th Cir. 1994) (rejecting argument that interest of representatives of forest products industry in existing lumber contracts was "too speculative and generalized to satisfy Rule 24" where litigation involved potential bar on particular kind of forest management); Ceres Gulf, 957 F.2d at 1204 (stating that intervenor has interest in managing federal administrative program); Smuck, 408 F.2d at 178-80 (holding that parent’s interest in child’s welfare is sufficient to intervene); Nuesse, 385 F.2d at 700 (stating that state official’s interest in effectuating state’s public policy was sufficient to intervene); Independent Petrochemical Corp., 105 F.R.D. at 110 (noting that “the determination of whether or not a party should be allowed to intervene as of right should be guided not by ‘a myopic fixation upon interest’” (quoting Smuck, 408 F.2d at 179)); see also Tobias, supra note 6, at 435 ("Moreover, many of the courts expressly reject the notions that interest means a specific equitable or legal interest or connotes a ‘direct, substantial, legally protectable interest in the proceedings.’").
"legally protectable" interest in the subject of the litigation. The United States Courts of Appeals for the Fifth, Seventh and Eleventh Circuits have employed this interpretation most often. Although they do not require an applicant to possess standing, they generally require an interest that is recognized and protected by some specific law.

A number of courts have gone one step further and required that an applicant have an interest equivalent to standing to satisfy Rule 24(a)(2).

91. See, e.g., Donaldson v. United States, 400 U.S. 517, 531 (1971) (requiring intervenor to demonstrate "significantly protectable interest"); Sierra Club v. City of San Antonio, 115 F.3d 311, 315 (5th Cir. 1997) (requiring interest to be direct, cognizable and legally protectable); Ozee v. American Council on Gift Annuities, Inc., 110 F.3d 1082, 1096 (5th Cir. 1997) (requiring applicant to have direct, substantial and legally protectable interest); Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1246 (6th Cir. 1997) (approving of denial of intervention based on lack of direct, substantial, and legally protectable interest); Edwards v. City of Houston, 78 F.3d 983, 1004 (5th Cir. 1996) (stating that to demonstrate interest relating to property or subject matter of litigation sufficient to support intervention of right, applicant must have direct, substantial, and legally protectable interest in proceedings); Forest Conservation Council, 66 F.3d at 1495 (stating that applicant has sufficient interest if remedy sought will have direct, immediate and harmful effect on applicant's legally protectable interest); Espy, 18 F.3d at 1207 (stating that applicant must have "direct, substantial, legally protectable" interest); Panola Land Buying Ass'n v. Clark, 844 F.2d 1506, 1509 (11th Cir. 1988) (holding that interest relating to transaction required for intervention is direct, substantial and legally protectable in proceedings); New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 463 (5th Cir. 1984) (noting that intervention of right still requires direct, substantial and legally protectable interest in proceedings); Athens Lumber Co., Inc. v. Federal Election Comm'n, 690 F.2d 1364, 1366 (11th Cir. 1982) ("Intervention of right must be supported by a 'direct, substantial, legally protectable interest in the proceeding.'"); Meridian Homes Corp. v. Nicholas W. Prassas & Co., 683 F.2d 201, 204 (7th Cir. 1982) (holding that applicant did not have "direct and substantial, and therefore legally protectable, interest"); Heyman v. Exchange Nat'l Bank of Chicago, 615 F.2d 1190, 1194 (7th Cir. 1980) (hesitating to recognize remote possibility of "direct and substantial" interest under Rule 24).

92. See Greenbaum, supra note 8, at 916 (stating that Fifth and Eleventh Circuits allow only real party of interest to intervene); Tobias, supra note 6, at 435 (noting that Fifth, Seventh and Eleventh Circuits' treatment of interest requirement "lies at the more restrictive end of the spectrum").

93. See, e.g., Ozee, 110 F.3d at 1096 (stating that interest of applicant must be "one that the law recognizes as his"); United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1185 (3d Cir. 1994) (holding that applicant must possess more than mere economic interest in outcome of litigation); League of United Latin Am. Citizens v. Clements, 884 F.2d 185, 188 (5th Cir. 1989) (requiring applicant for intervention to demonstrate legally cognizable interest); Getty Oil Co. v. Department of Energy, 865 F.2d 270, 275 (Temp. Emer. Ct. App. 1988) (noting that court looks to substantive law to determine if applicant has necessary interest); Baker v. Wade, 743 F.2d 236, 241 (5th Cir. 1984) (stating that applicant's interest must be "one which the substantive law requires as belonging to or being owned by the applicant"); New Orleans Pub. Serv., Inc., 732 F.2d at 464 (stating that Rule 24 requires interest of applicant to be "one which the substantive law recognizes as belonging to or being owned by the applicant"); Greenbaum, supra note 8, at 916 (noting that some courts require applicant to be real party in interest "who, according to the governing substantive law, is entitled to enforce the right").

94. See, e.g., City of Cleveland v. Nuclear Regulatory Comm'n, 17 F.3d 1515, 1517 (D.C. Cir. 1994) ("[A] movant for leave to intervene under Rule 24(a)(2)
In justifying its requirement that an applicant have standing, one court stated that "because a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he [or she] must satisfy the standing requirements imposed on those parties." Another court stated that standing case law helps to "define the type of interest that the intervenor must assert." Critics of these courts, however, have contended that standing is irrelevant and that equating the interest in Rule 24(a)(2) with standing is contrary to Supreme Court precedent.

must have Article III standing to participate in proceedings before the district court."); Panola Land Buying Ass'n, 844 F.2d at 1509 (discussing relation of standing to intervention under Rule 24); Keith v. Daley, 764 F.2d 1265, 1268 (7th Cir. 1985) (stating that interest must be so direct that applicant would have right to maintain claim for relief sought); Cook, 763 F.2d at 1470 ("[A]n intervenor of right, just like an ordinary plaintiff, must have standing."); Southern Christian Leadership Conference v. Kelley, 747 F.2d 777, 779 (D.C. Cir. 1984) (holding that applicant could not intervene because he lacked protectable interest sufficient to confer standing); New Orleans Pub. Serv., Inc., 732 F.2d at 464 (stating that intervention has been held subject to standing requirement that presence of harm to party does not permit him or her to assert rights of third parties in order to obtain redress for her or himself); see also Greenbaum, supra note 8, at 916 (stating that Seventh and Eighth Circuits require applicant to have right to maintain claim for relief sought).

95. City of Cleveland, 17 F.3d at 1517. In City of Cleveland, several owners of a nuclear power plant asked the Nuclear Regulatory Commission (NRC) to suspend the antitrust conditions included in the plants' operating licenses on the grounds that the actual cost of electricity from the plants was higher than the cost of electricity from alternative sources. See id. at 1516. The NRC denied their requests, and the owners subsequently filed a petition in the district court. See id. The Alabama Electric Cooperative (AEC) filed a motion to intervene of right, claiming that the court's decision might set a precedent that would adversely affect a court order the AEC had previously obtained. See id. The court of appeals, finding that Article III of the United States Constitution placed a "gloss" upon Rule 24, denied intervention because the AEC lacked a claim that it had standing to assert. See id. at 1517.

96. Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989) ("The standing cases, however, are relevant to help define the type of interest that the intervenor must assert."). Although it found standing cases helpful, the Chiles court did not require the applicant to demonstrate standing to satisfy the interest requirement. See id. The court acknowledged the disparate treatment of Rule 24 by the circuit courts, and it attributed the confusion to the fact that standing concerns the subject matter jurisdiction of a court. See id. The court stated:

The standing doctrine ensures that a justiciable case and controversy exists between the parties. Intervention under Rule 24 presumes that there is a justiciable case into which an individual wants to intervene. The focus therefore of a Rule 24 inquiry is whether the intervenor has a legally protectable interest in the litigation. It is in this context that the standing cases are relevant, for an intervenor's interest must be a particularized interest rather than a general grievance.

Id.

97. See Tobias, supra note 6, at 441 ("[T]he sheer volume of cases that do not allude to standing may testify to the minimal relevance that standing should receive 

. . . ."). This commentator also noted that the Supreme Court has implied that standing is not necessary to intervene:

Trbovich . . . could be read as an implicit rejection by the Supreme Court of the application of standing to intervention of right, and an analogous
At the most restrictive end of the spectrum, one court has required an applicant to show an interest greater than standing to intervene. In United States v. 36.96 Acres of Land, Congress had authorized the Secretary of the Interior to condemn a power company's land for inclusion in a National Lakeshore. The Seventh Circuit affirmed an order denying intervention to a public interest group that sought to challenge the condemnation, stating that the applicant's interest "must be greater than the interest sufficient to satisfy the standing requirement."

The disparate treatment of Rule 24(a)(2) by the circuit courts has made adjudication of motions to intervene of right difficult. Unfortunately, the confusion is likely to remain unless the Supreme Court hands down an authoritative definition of the Rule's interest prong.

III. FACTS AND HISTORY OF SIERRA CLUB V. CITY OF SAN ANTONIO

The Sierra Club's lawsuit against the City of San Antonio centered around the Edwards Aquifer, a natural underground water supply located

allusion appears in the Court's 1980 decision, Bryant v. Yellen. Similarly, in Diamond, the majority's phrasing of the relevant question as whether applicants "must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Article III," and its observation that Dr. Diamond might have relied on the state's standing, had Illinois chosen to appeal, could be endorsements of intervention at the trial court level by entities without standing.

Id. (footnotes omitted) (quoting Diamond v. Charles, 476 U.S. 54, 69 (1986)).

98. See United States v. 36.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985) ("The interest of a proposed intervenor, however, must be greater than the interest sufficient to satisfy the standing requirement."). The dissenting opinion stated that the majority's holding was contrary to the Supreme Court's decision in Trbovich. See id. at 860-61 (Cudahy, J., dissenting).

99. 754 F.2d 855 (7th Cir. 1985).

100. See id. at 858 (citing statutes that gave Secretary of Interior power to acquire and preserve for public use certain portions of land known as Indiana Dunes).

101. Id. at 859. The court stated that this requirement was consistent with the "significantly protectable interest" language in the Supreme Court's decision in Donaldson. See id. The court also stated that the applicant's aesthetic and environmental interests were not direct, substantial or legally protectable, and therefore did not warrant intervention. See id.

102. See, e.g., Conservation Law Found. of New England, Inc. v. Mosbacher, 966 F.2d 39, 42 (1st Cir. 1992) (noting "lack of a clear standard" to guide court when judging sufficiency of applicant's interest); Public Serv. Co. v. Patch, 173 F.R.D. 17, 25 (D.N.H. 1997) (stating that "no bright line of demarcation" exists and that court must decide motions on case by case basis); Greenbaum, supra note 8, at 914 (acknowledging disagreement among courts over meaning of interest requirement); Tobias, supra note 6, at 432 ("The Supreme Court has rarely addressed Rule 24(a)(2), and when it has, the opinions have been peculiarly fact-bound, affording minimal guidance, especially as to the meaning of interest."); Vreeland, supra note 2, at 283 ("[A] paucity of Supreme Court decisions on intervention of right [has] resulted in widely varying interpretations of the Rule 24(a) requirements.").
near San Antonio. The City of San Antonio receives its water supply exclusively from the Edwards Aquifer, and other parts of central Texas rely on the aquifer as a primary source of water. At two locations, the San Marcos Springs and the Comal Springs, the aquifer discharges water into the Guadalupe River Basin. In the San Marcos Springs and Comal Springs areas, the aquifer is home to several plant and animal species which are designated as endangered or threatened under the Endangered Species Act.


104. See Sierra Club, 112 F.3d at 791 (stating that San Antonio relies exclusively on Edwards Aquifer for its water). The court also pointed out that the Edwards Aquifer supplies water to over one million people in San Antonio alone. See id.; see also Sierra Club, 115 F.3d at 313 (noting that more than one million San Antonio residents receive water from Edwards Aquifer). In addition to the City of San Antonio, seven political subdivisions of the State of Texas who own water utilities in central Texas also rely on the Edwards Aquifer for water. See id. See generally Court Nullifies Pumping Limits on Water from Edwards Aquifer, FORT WORTH STAR-TELEGRAM, May 2, 1997, at 3, available in 1997 WL 4838990 [hereinafter Court Nullifies Pumping Limits] (“The aquifer is the sole source of drinking water for the city of San Antonio, and other towns and counties in the region that also rely on it.”); Haurwitz, supra note 103, at B13 (“The aquifer furnishes well water for . . . agricultural lands and military bases. Its primary natural outlets . . . provide much of the flow for the Guadalupe River, also a major source for municipal, industrial and agricultural purposes.”); Needham, supra note 103, at 86 (“Along with sustaining the [protected] species, downstream users and San Antonio, the aquifer also supplies irrigation farmers in Medina and Uvalde counties west of the city.”).

105. See Sierra Club, 112 F.3d at 791; see also Ralph K.M. Haurwitz, Court Blocks Order to Trim Use of Aquifer, AUSTIN AMERICAN-STATESMAN, Sept. 11, 1996, at B1, available in 1996 WL 3443864 (noting that aquifer feeds springs at San Marcos); Haurwitz, supra note 103, at B13 (stating that one of aquifer’s natural outlets is San Marcos Springs).

106. 16 U.S.C. §§ 1531-1544 (1994) (establishing protection of endangered and threatened species and describing procedure for designating species as endangered or threatened); see Sierra Club, 115 F.3d at 313 (“The springs provide a home to four ‘endangered species’ . . . and one ‘threatened species’. . . .”); Sierra Club, 112 F.3d at 791 (“In the area of the San Marcos and Comal Springs, the aquifer is home to five plant and animal species designated as endangered or threatened . . . .”)
The Sierra Club filed its suit against the City of San Antonio and several other defendants during June 1996 in the United States District Court for the Western District of Texas. In its complaint, the Sierra Club alleged that the defendants were "taking" endangered and threatened species in violation of the Endangered Species Act by reducing springflows from the Edwards Aquifer below levels needed to sustain the species. This action was actually one in a series of lawsuits filed since 1991 by the Sierra Club in an effort to protect the Edwards Aquifer.

In its lawsuit, the Sierra Club asked the court to enjoin the City of San Antonio and several other aquifer users from reducing the water supply.

The Edwards Aquifer contains three endangered animal species, one threatened animal species and one endangered plant species. See Sierra Club, 115 F.3d at 313. The San Marcos gambusia, the Texas blind salamander and the fountain darter are endangered animal species, and the San Marcos salamander is a threatened species. See id. The Texas wild-rice is an endangered plant species. See id. See generally 50 C.F.R. § 17.11 (1997) (designating animal species as endangered or threatened); 50 C.F.R. § 17.12 (1997) (designating plant species as endangered or threatened).

Interestingly, the Sierra Club's lawsuit was financed by the Guadalupe Blanco River Authority (GBRA). See David A. Richelieu, Not All Aquifer Issues Can Be Settled in Court, SAN ANTONIO EXPRESS-NEWS, Dec. 3, 1996, at 1B, available in 1996 WL 11507795 (reporting on funding and chronology of Sierra Club's litigation). The GBRA sells water flowing from the San Marcos Springs and Comal Springs to customers downstream from the springs, including a chemical plant.

In a prior action, Sierra Club v. Babbitt, 81 F.3d 155 (5th Cir. 1995), the Sierra Club claimed that the Fish and Wildlife Service had failed to adopt an "adequate recovery plan" as required by the Endangered Species Act. See id. The Act provides that "the Secretary shall develop and implement plans (hereinafter in this subsection referred to as 'recovery plans') for the conservation and survival of endangered species and threatened species listed pursuant to this section ... take any such species within the United States or the territorial sea of the United States." 16 U.S.C. § 1533(f). After several appeals, the Fifth Circuit dismissed the suit as moot after the Fish and Wildlife Service published a revised recovery plan. See Sierra Club, 112 F.3d at 792.
below certain levels that are harmful to the protected species. The Sierra Club claimed that the annual input of water to the Edwards Aquifer had been less than the annual discharge of water for several years, causing the water level of the aquifer to fall. The Sierra Club also claimed to have direct evidence of the deaths of protected species and emaciation of other plant and animal life due to the low spring flows, and it alleged that a causal link existed between the low spring flows and the defendants' pumping of water from the aquifer.

After filing its complaint, the Sierra Club moved for a preliminary injunction to limit the defendants' pumping while the trial was pending, and on August 23, 1996, the district court granted the injunction.

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110. See Sierra Club, 115 F.3d at 313 ("In the instant action, the Sierra Club seeks to enjoin various parties who pump water from the aquifer . . . from reducing the springflows below certain levels that the Sierra Club deems harmful to the spring dwellers."); Sierra Club, 112 F.3d at 792 ("The complaint seeks to enjoin defendants 'to reduce withdrawals from the Edwards by such levels as are necessary to maintain minimum natural springflows from the Comal and San Marcos Springs for the conservation and survival of the endangered and threatened species living at and downstream from those springs.'").

111. See Sierra Club, 112 F.3d at 791 (discussing evidence presented at trial regarding water level of aquifer). Discharge from the aquifer is calculated by adding water withdrawals by pumpers and springflows from the aquifer. See id. In 1996, a severe drought affected the aquifer area, and as a result, the springflow at Comal Springs fell steadily from April to June before leveling off. See id. The lack of rainfall contributed to the low input of water into the aquifer. See id.; see also Needham, supra note 103, at 86 (noting that 18 month drought caused significant drop in water level).

112. See Sierra Club, 112 F.3d at 791 (describing evidence offered by Sierra Club). In June 1996, an expert zoologist working for the Sierra Club studied the Springs areas, and he observed "five or six 'very thin' fountain darters in the uppermost spring run of Comal Springs." Id. A hydrology expert working for the City of San Antonio stated that he believed the decline in the water level would stop in August 1996 and that the water level would rise in the fall of 1996. See id. at 791-92. See generally Court Nullifies Pumping Limits, supra note 104, at 3 (stating that drought conditions and increased water pumping were draining aquifer); Haurwitz, supra note 103, at B13 ("The Sierra Club contends that without reductions in well pumping, flow from the springs will be insufficient to sustain the rare species."); Needham, supra note 103, at 86 ("[G]rowing and competing demands across the region threaten to draw down the Edwards Aquifer faster than rainfall can replenish it."); Jerry Needham & Stefanie Scott, State Joining S.A. in Water Fight—AG's Office to File Motion in Sierra Club Suit, SAN ANTONIO EXPRESS-NEWS, Aug. 28, 1996, available in 1996 WL 11494973 (stating that testimony from both Sierra Club's and San Antonio's experts indicated cause-and-effect relationship between city's pumping and reductions in springflow).

113. See Sierra Club, 112 F.3d at 792 (discussing preliminary injunction received by Sierra Club). The Fifth Circuit noted that in granting the injunction, the district court stated "an emergency presently exists and takes [sic] of endangered species are occurring," and that "[w]ithout a fundamental change in the value the region places on fresh water, a major effort to conserve and reuse Aquifer water, and implemented plans to import supplemental supplies of water, the region's quality of life and economic future is imperiled." Id. In its order granting the injunction, the court limited defendants' pumping from the aquifer to the water use of 1.2 times the amount used in winter months. See id. The order also required the parties to supply the court and a special master with monthly reports on
April 30, 1997, the United States Court of Appeals for the Fifth Circuit concluded in an interlocutory appeal that the district court erred in granting the injunction and vacated the district court's order.114

While the suit was still pending, the Attorney General of Texas filed a motion on behalf of the State to intervene in four separate and distinct water usage and other information to keep the court informed. See id. at 793. The injunction was to remain in effect until the defendants could show that a critical management plan that would preserve endangered species was operative. See id.

On September 10, 1996, the Fifth Circuit stayed the injunction while the appeal was pending. See id. at 792 n.7 (“This court has stayed the injunction pending appellate review.”); Haurwitz, supra note 105 (discussing stay of injunction).

114. See Sierra Club, 112 F.3d at 798 (discussing reasons for vacating preliminary injunction). The Fifth Circuit decided that the Sierra Club failed to prove one of the four requirements for a preliminary injunction, a substantial likelihood of success on the merits. See id. at 793; see also Court Nullifies Pumping Limits, supra note 104 (“Limits on pumping water from the Edwards Aquifer ordered by a federal judge have been struck down by a higher court.”). The Sierra Club requested a rehearing en banc of the circuit court’s decision, but its request was denied on June 20, 1997. See Jerry Needham, U.S. Appeals Court Rejects Sierra Club Rehearing Bid, SAN ANTONIO EXPRESS-NEWS, June 24, 1997, at 1B, available in 1997 WL 3177917 (reporting denial of rehearing en banc).

Interestingly, parts of the majority opinion in the first Sierra Club foreshadow the Fifth Circuit’s decision in the second Sierra Club. In reaching its decision in the first case, the court identified a number of interests that the State of Texas had in the regulation of its water resources. See Sierra Club, 112 F.3d at 794-95. The court stated that “[c]onservation of water has always been a paramount concern in Texas, especially in times, like today, of devastating drought,” and that “the State has the responsibility under the Texas Constitution to preserve and conserve water resources for the benefit of all Texans.” Id. at 794 (citing Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 626 (Tex. 1996)). It also pointed out that the Edwards Aquifer “is vital to the general economy and welfare of the State of Texas.” Id. (citing Barshop, 925 S.W.2d at 623). In addition to the state’s interests, the court noted that the citizens of Texas had an interest in the action. See id. The president of the San Antonio Water System testified that compliance with the district court’s order would likely force the city to maintain water pressures below what state law required for fighting fires. See id. Another expert testified that the order would necessitate a complete ban on outside watering, which could result in damage to one half of the building foundations in the city. See id. The court also stated that Texas clearly had an interest in uniform decisionmaking regarding management of “this finite amount of water.” Id. at 794-95.

As early as August 1996, the Texas Attorney General was considering involvement in the suit against the City of San Antonio. See Needham & Scott, supra note 112 (discussing State’s plans to intervene in suit). On August 29, 1996, the State of Texas became involved in the suit by filing an amicus curiae brief with the Fifth Circuit that urged the court to vacate the preliminary injunction. See Sierra Club, 112 F.3d at 796 (noting portions of State’s brief); Michael Holmes, Texas Joins San Antonio’s Side in Edwards Aquifer Court Fight, AUSTIN AMERICAN-STATESMAN, Aug. 30, 1996, at B6, available in 1996 WL 3442444 (discussing brief filed by Texas Attorney General). In its brief, the State argued that federal courts were interfering in a matter that the state is trying to regulate and that the district court’s ruling infringed on state and local authority and on private property rights. See id. The brief stated, “[t]his contrived scheme will not only diminish the value of vast amounts of private property of Texas citizens, it will damage the self-governing powers of the state of Texas and local governments.” Id.
capacities: (1) as the State *qua* the State of Texas; (2) on behalf of three of its agencies that regulate state water and wildlife rights; (3) on behalf of the Texas Department of Criminal Justice (TDCJ); and (4) on behalf of its citizens as *parens patriae*. The district court allowed the State to intervene on behalf of the TDCJ, but it denied intervention in the other capacities. The State of Texas sought an interlocutory appeal of the district court decision, and the Fifth Circuit, finding that the decision was a collateral order, allowed the appeal. On June 9, 1997, the Fifth Circuit reversed the partial denial of intervention and remanded the case, directing the district court to grant the state’s motion for intervention in its entirety.

IV. THE REASONING AND VALIDITY OF THE FIFTH CIRCUIT’S DECISION

A. The Court’s Legal Analysis and Reasoning

In *Sierra Club*, the Fifth Circuit considered whether the State of Texas could intervene as of right under Rule 24 in a suit between an environmental group and several municipal governments. The court began its inquiry with an examination of its jurisdiction to hear the appeal under 28

115. *See Sierra Club*, 115 F.3d at 313 (discussing Texas Attorney General’s motion to intervene). The three water and wildlife agencies are the Texas Natural Resources Conservation Commission (TNRCC), the Texas Parks and Wildlife Department (TPWD) and the Texas Department of Agriculture (TDA). *See id.* The TDCJ pumped water from the Edwards Aquifer to a nearby prison in Hondo, Texas. *See Texas Allowed to Defend Aquifer Users in Lawsuit, DALLAS MORNING NEWS*, June 12, 1997, at 38A, *available in* 1997 WL 2676393 (discussing reversal of judge’s decision keeping State of Texas from helping defend San Antonio and other Edwards Aquifer pumpers in lawsuit brought by Sierra Club).

The term *parens patriae* literally means “parent of the country.” Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600 (1982). The ability of a state to bring a *parens patriae* action has its roots in the common law concept of the “royal prerogative,” which included the right or responsibility to take care of persons who are legally unable, on account of mental incapacity, to take proper care of themselves and their property. *See id.* American courts recognized this common law concept as an inherent part of state power, but in the form of a legislative prerogative. *See id.* Today, the term refers to the role of the state as sovereign and guardian of persons under a legal disability. *See id.* at 600 n.8.

116. *See Sierra Club*, 115 F.3d at 313 (discussing lower court’s ruling).

117. *See id.* at 314 (“The denial of intervention is therefore a collateral order that is immediately appealable.”).

118. *See id.* at 315 (“[W]e reverse the partial denial of intervention and remand with direction to the district court to grant the state’s motion for intervention as of right.”) (emphasis omitted); *see also Court Lets State Join Edwards Aquifer Case, AUSTIN AMERICAN-STATESMAN*, June 12, 1997, at B4, *available in* 1997 WL 2827241 (discussing circuit court’s opinion and its possible impact on lawsuit).

119. *See Sierra Club*, 115 F.3d at 312 (“The State of Texas appeals a denial of its motion to intervene filed pursuant to FED. R. CIV. P. 24.”).
U.S.C. § 1291. It then considered whether Texas satisfied the requirements for intervention of right under Rule 24(a)(2).

Before it reviewed the district court's order denying intervention, the Fifth Circuit first determined that it had jurisdiction to hear the interlocutory appeal under the collateral order doctrine. It noted that, in general, a district court's orders are appealable under 28 U.S.C. § 1291 only when they end the litigation on its merits. The court also noted, however, that certain orders, known as collateral orders, are reviewable under § 1291 before a final judgment on the merits has been rendered by the district court. To be considered a collateral order, an order must: (1) conclusively decide the disputed issue; (2) decide an issue that is entirely separable from the underlying cause of action; (3) be effectively unreviewable after a final judgment; and (4) be too important to be denied review.

The court next noted that according to its previous rulings, an

120. See id. at 313 (“Before reaching the merits of the intervention, we must determine whether we have jurisdiction to entertain the appeal.”).

121. See id. at 314 (addressing district court’s denial of intervention and noting requirements of Rule 24).

122. See id. at 313-14 (deciding that court could hear Texas’s interlocutory appeal).

123. See id. at 313 (“[A] district court order is appealable under 28 U.S.C. § 1291 if it ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’” (quoting Catlin v. United States, 324 U.S. 229, 233 (1945))). Congress granted the circuit courts jurisdiction over appeals from the district courts in 28 U.S.C. § 1291 (1994). The relevant portion states:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.


124. See Sierra Club, 115 F.3d at 313 (“Certain collateral orders are reviewable immediately under § 1291. . . .

125. See id. at 313. In Abney v. United States, the Supreme Court held that because 28 U.S.C. § 1291 does not limit appellate jurisdiction to those final judgments that terminate an action, but only to “final decision[s],” the statute allows for a collateral order exception to the final judgment rule. 431 U.S. 651, 658 (1977). In Cohen v. Beneficial Industrial Loan Corp., the Court stated that an order must possess four characteristics to fall within the collateral order exception: (1) it must determine claims of right separable from, and collateral to, rights asserted in the action; (2) it must be a final decision of that claim of right; (3) it must be so independent of the cause itself that appellate consideration cannot be deferred until the whole case is adjudicated; and (4) it must be too important to be denied review. 337 U.S. 541, 546 (1949). The lower courts have refined the collateral order exception to a three-prong test to determine when an interlocutory order may be appealed: (1) it must conclusively determine the disputed issue; (2) it must resolve an important issue completely severable from the merits of the action; and (3) it must be effectively unreviewable upon appeal from a final judgment. See, e.g., Jones v. Goodyear Tire & Rubber Co., 967 F.2d 514, 516 (11th Cir. 1992) (listing three criteria that must be present for order to fall under collateral order exception); Rosenstein v. Merrell Dow Pharm., Inc., 769 F.2d 352, 354 (6th Cir.
order denying intervention of right will be considered a collateral order and thus can be the subject of an interlocutory appeal.\textsuperscript{126}

In defense, the Sierra Club contended that pursuant to \textit{Stringfellow v. Concerned Neighbors in Action},\textsuperscript{127} the district court's decision to permit Texas to intervene as the TDCJ only was not "effectively unreviewable on appeal from a final judgment" and, therefore, was not a collateral order.\textsuperscript{128} The Fifth Circuit rejected this argument and distinguished the facts underlying the \textit{Stringfellow} decision.\textsuperscript{129} The court pointed out that the intervening party in \textit{Stringfellow} was granted permissive intervention with several conditions, but in all other respects it could fully participate in the trial.\textsuperscript{130} Therefore, the intervening party had the same rights on ap-

\textsuperscript{126} See \textit{Sierra Club}, 115 F.3d at 313 ("We have recognized previously that an order denying intervention of right under Rule 24(a) is appealable as a collateral order."); \textit{see also} Edwards v. City of Houston, 78 F.3d 983, 992 (5th Cir. 1996) (en banc) ("The denial of a motion to intervene of right is an appealable final order under 28 U.S.C. § 1291."); Ceres Gulf v. Cooper, 957 F.2d 1199, 1202 n.5 (5th Cir. 1992) (stating that denial of intervention of right is appealable before final judgment); Jones v. Caddo Parish Sch. Bd., 704 F.2d 206, 217-18 (5th Cir. 1983) (stating that denial of intervention of right is appealable but that denial of permissive intervention is not unless there is abuse of discretion), \textit{aff'd in part on reh'g}, 735 F.2d 925 (1984).

\textsuperscript{127} 480 U.S. 370 (1987).

\textsuperscript{128} See \textit{Sierra Club}, 115 F.3d at 313-14 (discussing Sierra Club's argument that court lacked jurisdiction to hear appeal of district court's order denying intervention).

In \textit{Stringfellow}, a group of citizens sought to intervene in an action brought by the United States and the State of California against parties allegedly responsible for the release of hazardous wastes at an abandoned hazardous waste disposal site. \textit{See Stringfellow}, 480 U.S. at 372 (discussing group's claims of substantial interest in action). The district court granted permissive intervention with three conditions: (1) the group "could not assert any claim for relief that had not already been requested by one of the original parties;" (2) the group "could not intervene in the Government plaintiffs' claim for recovery of the clean-up costs;" and (3) the group "could not file any motions or conduct its own discovery unless it first conferred with all the original parties, and then obtained permission to go forward from at least one of [the parties]." \textit{Id.} at 373. The circuit court initially dismissed the group's appeal, stating that the lower court's order was not final and thus could not be appealed, but it later withdrew that opinion after finding it was inconsistent with circuit precedent. \textit{See id.} at 374. The circuit court then reversed the denial of intervention of right and remanded. \textit{See id.} The Supreme Court, however, held that the district court order was not immediately appealable under the collateral order exception because the group would have the same rights of the parties on appeal and could challenge the limitations on its intervention before the appellate court. \textit{See id.} at 375.

\textsuperscript{129} See \textit{Sierra Club}, 115 F.3d at 314 (rejecting Sierra Club's argument based on \textit{Stringfellow} that district court's order was not appealable).

\textsuperscript{130} \textit{See id.} The court noted that in \textit{Stringfellow}:

\textit{[T]he district court denied the petitioner's motion to intervene as of right but granted its application for permissive intervention with the following conditions: (1) the petitioner could not assert any claims for relief that had not already been requested by one of the original parties; (2) it}
peal as all other parties, and the limitations on intervention were review-
able on appeal.\textsuperscript{131} To contrast \textit{Stringfellow} with the case before it, the Fifth Circuit pointed out that in \textit{Stringfellow} the district court limited a single party's rights, while the order allowing intervention only as the TDCJ completely denied the rights of different parties.\textsuperscript{132} The fact that the different parties were represented by one person in the application to intervene, the Attorney General of Texas, did not combine them into one whole.\textsuperscript{133} Therefore, the court concluded that \textit{Stringfellow} did not preclude it from hearing Texas's interlocutory appeal.\textsuperscript{134}

Concluding that it had jurisdiction to hear the appeal under the collateral order doctrine, the Fifth Circuit turned to the issue of whether could not intervene in the State of California's claim for recovery of clean-up costs; and (3) it could not file any motions or conduct its own discovery without first conferring with one of the original parties and obtaining its permission so to proceed. In all other respects, however, the petitioner had full participation rights in the trial: It could attend all depositions, participate in all hearings to the extent not duplicative of other parties, and receive copies of all discovery materials produced.

\textit{Id.} (citation omitted).

\textsuperscript{131} See \textit{id.} ("CNA will have the same rights on appeal . . . as all other parties . . . ." (citing \textit{Stringfellow}, 480 U.S. at 377)).

\textsuperscript{132} See \textit{id.} ("The district court did not, as did the \textit{Stringfellow} court, place limitations on a single party's rights to participate in a legal proceeding, but rather denied completely the rights of various different parties to participate in the instant litigation."). Contrasting the decision in \textit{Stringfellow}, the court stated, "Under the court's order, other than the TDCJ, none of the other State constituencies will be able to attend depositions, participate in any court hearings, receive copies of court documents or discovery materials, or otherwise exercise participatory rights in the litigation." \textit{Id.}

\textsuperscript{133} See \textit{id.} The court stated:

That the Attorney General serves as the common legal representative of each of the various state agencies (and of the state \textit{qua} state and as \textit{parens patriae}) does not fuse the varied interests of each of the diverse parts into the whole. In fact, as this action evinces, the constituent parts have different, and at time divergent, goals and interests.

\textit{Id.} The court noted that under Texas law, the Texas Attorney General held the exclusive right to represent state agencies and that other attorneys who are permitted to assist the Attorney General are subordinate to his or her authority. See \textit{id.} (citing Hill v. Texas Water Quality Bd., 568 S.W.2d 738, 741 (Tex. Civ. App. 1978, writ denied)).

The following statutes provide examples of the divergent interests the Attorney General may have to represent. \textit{See, e.g., TEX. AGRIC. CODE ANN.} § 12.002 (West 1997) (requiring TDA to encourage development of agriculture and related industries); \textit{TEX. PARKS \\& WILD. CODE ANN.} § 12.0011 (West 1997) (requiring TPWD to protect Texas's fish and wildlife resources); \textit{TEX. WATER CODE ANN.} § 5.013 (West 1997) (granting TNRCC jurisdiction over matters concerning Texas surface water rights and quality); Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982) (explaining that states have right to represent their citizens as \textit{parens patriae}); Sierra Club v. Glickman, 82 F.3d 106, 110 (5th Cir. 1996) (stating Texas has right to represent state \textit{qua} state).

\textsuperscript{134} See \textit{Sierra Club}, 115 F.3d at 314 ("The denial of intervention is therefore a collateral order that is immediately appealable.").
Texas could intervene of right in the Sierra Club’s lawsuit. It began by stating that to intervene, applicants must show that their application is timely, that they have an interest relating to the subject of the action, that their ability to protect that interest may be impaired by disposition of the action and that no existing party adequately represents their interests. Because the Sierra Club did not raise the issues of timeliness and impairment of interest, the court only addressed whether Texas had a sufficient interest to intervene and whether any of the parties adequately represented its interests.

The Fifth Circuit next proceeded to apply a “direct, cognizable legal interest” standard and concluded that Texas had a sufficient interest to intervene under Rule 24(a)(2). It found that the State qua State had an interest in enforcing its own legislation protecting the Edwards Aquifer, and it also found that the State as representative of the Texas Natural Resources Conservation Commission (TRNCC) had an interest in the regulation of entities pumping water from the aquifer. The court held that the State as representative of the Texas Parks and Wildlife Division (TPWD) had an interest in protecting fish and wildlife and that the State as representative of the Texas Department of Agriculture (TDA) had an

135. See id. (turning to issue of intervention under Rule 24(a)).
136. See id. (defining requirements of Rule 24(a)(2)). The court stated that it reviews the timeliness requirement for abuse of discretion and the other requirements de novo. See id. (citing Sierra Club v. Espy, 18 F.3d 1202, 1205 n.2 (5th Cir. 1994)).
137. See id. at 315 (“Because the Sierra Club has not contested on appeal the timeliness of the state’s application nor whether the disposition may impair the state’s ability to protect its interests in the subject matter, we deem requirements (1) and (3) satisfied.”) (citing Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 260 n.9 (5th Cir. 1995)).
138. See id. (finding that Texas in its various capacities had interests which were “several and important”). The court revealed the standard it used to identify an interest sufficient to intervene under Rule 24(a)(2) when it stated that “we are at a loss to understand [the Sierra Club’s] insistence that these above-named constituencies do not have a direct, cognizable legal interest in the subject matter of the litigation.” Id.
139. See id. (noting that state qua state had interest in enforcing its own legislation protecting Edwards Aquifer and that state as representative of TRNCC had interest in regulation of entities pumping water from aquifer).

interest in agricultural activities related to the aquifer. Finally, it found that the State as *parens patriae* had an interest in the welfare of citizens affected by changes in the water level of the aquifer. After identifying these interests represented by Texas, the court held that the State had a sufficient interest in the subject matter of the litigation to satisfy the second requirement of Rule 24(a)(2).

Finding that Texas satisfied the interest prong of Rule 24(a)(2), the Fifth Circuit next concluded that none of the existing parties adequately represented the State’s interests. Representation was inadequate because the interests of the existing parties diverged from the interests represented by the State. The court stated that the interests of the defendants, who were local entities that depended on the aquifer for water, could not coincide with the interests of the state agencies, who were charged with managing water resources on a statewide level. It also stated that the defendants’ interests necessarily could not coincide with the interests of the State *qua* State and of the State as *parens patriae*. Because of these divergent interests, the court found that the inadequate representation prong of Rule 24(a)(2) was satisfied.

140. See *Sierra Club*, 115 F.3d at 315 (“[T]he state as legal representative of the TPWD has an interest in the protection of the state’s fish and wildlife resources.”) (citing *Tex. Parks & Wild. Code Ann.* § 12.0011 (West 1997)). The court noted that the State had an interest in various agricultural activities related to the Edwards Aquifer. See id. (“[T]he state as legal representative of the TDA has an interest in maintaining and regulating agricultural interests affected by the aquifer, including the financial assistance programs that support some of the pumper farmers.”) (citing *Tex. Agric. Code Ann.* § 12.002 (West 1997); *Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996)).

141. See id. (“[T]he state as *parens patriae* has an interest in the physical and economic health and well-being of the citizens directly affected by changes in the water level draw-downs at the aquifer.”) (citing Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982)).

142. See id. (“[W]e are at a loss to understand [the Sierra Club’s] insistence that these above-named constituencies do not have a direct, cognizable legal interest in the subject matter of the litigation.”).

143. See id. (“We similarly reject the Sierra Club’s argument that the state’s various interests are represented adequately by the existing parties.”).

144. See id. (stating that interests of local pumpers would not be same as interests of state agencies).

145. See id. The court stated:

It is axiomatic that the interests of the pumpers, who are local cities, businesses, and governmental entities that rely on the aquifer’s water supply for their immediate subsistence, will diverge from those of the various state agencies who are charged with taking a state-wide view of the aquifer as it affects wildlife, water resources and quality, and the agricultural industry.

Id.

146. See id. (stating that interests of existing defendants “will diverge from those of . . . the state *qua* state and as *parens patriae*”).

147. See id. (“Plainly, the pumpers will not represent adequately the interests of these state constituencies and, under Texas law, may not do so.”) (citing *Hill v. Texas Water Quality Bd.*, 568 S.W.2d 738, 741 (Tex. Civ. App. 1978, writ denied)).
In conclusion, the Fifth Circuit held that Texas had satisfied the four requirements of Rule 24(a)(2) and was therefore entitled to intervention of right. Thus, the court reversed the order partially denying intervention and remanded the case to the district court.

B. The Propriety of the Fifth Circuit’s Interpretation of the Interest Requirement

1. Compliance with Supreme Court Precedent and Intentions of Drafters of Rules

By requiring Texas to show a “direct, cognizable legal interest,” the Fifth Circuit applied Rule 24 in a manner that is consistent with Supreme Court precedent. In Donaldson, the Supreme Court stated that an applicant for intervention must possess an interest in the litigation that is “significantly protectable.” In Diamond, the concurring justices stated that an applicant must show “a direct and concrete interest that is accorded some degree of legal protection.” In Sierra Club, the Fifth Circuit required Texas to show a “direct, cognizable legal interest.” The Fifth Circuit had previously employed similar language to mean an interest that the substantive law recognizes as belonging to the applicant, a meaning that is consistent with the Supreme Court’s interpretation of the interest requirement.

148. See id.
149. See id. (“[W]e reverse the partial denial of intervention and remand with direction to the district court to grant the state’s motion for intervention as of right.”) (emphasis omitted).
150. See Donaldson v. United States, 400 U.S. 517, 531 (1971) (“What is obviously meant [by Rule 24(a)(2)] is a significantly protectable interest.”).
152. See Sierra Club, 115 F.3d at 315 (“[W]e are at a loss to understand [plaintiff’s] insistence that these above-named constituencies do not have a direct, cognizable legal interest in the subject matter of the litigation.”).
153. See Edwards v. City of Houston, 78 F.3d 983, 1004 (5th Cir. 1996) (stating that interest prong of Rule 24(a)(2) requires “that the interest asserted be one that the substantive law recognizes as belonging to or being owned by the applicant”); New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 464 (5th Cir. 1984) (stating that direct, substantial, legally protected interest is one which “substantive law recognizes as belonging to or being owned by the applicant”); see also Valley Ranch Dev. Co. v. Federal Deposit Ins. Corp., 960 F.2d 550, 556 (5th Cir. 1992) (stating that interest prong of Rule 24(a)(2) requires “‘direct, substantial, [and] legally protectable’ interest (quoting New Orleans Pub. Serv., Inc., 732 F.2d at 464)); League of United Latin Am. Citizens v. Clements, 884 F.2d 185, 187 (5th Cir. 1989) (“To prove the requisite interest, an intervenor must demonstrate a ‘direct, substantial and legally protectable’ interest in the property or transaction that is the subject of the suit.”).

In a series of cases, the Fifth Circuit has developed terminology that it consistently uses in intervention cases. It has stated that the necessary “direct, substantial and legally protectable” interest is usually demonstrated if an applicant is a “real party in interest.” See Sierra Club v. Glickman, 82 F.3d 106, 109 (5th Cir. 1996) (holding that applicant had sufficient interest to intervene because it was “real party in interest”); League of United Latin Am. Citizens, 884 F.2d at 187 (“A movant found to be a ‘real party in interest’ generally establishes sufficient interest.”); New...
In addition to complying with the Supreme Court’s treatment of Rule 24, the Fifth Circuit also effected the intention of the Rule’s drafters to broaden the application of the Rule. Language that required an applicant to be “bound by” a court decision had prevented application of the original Rule in cases where intervention was justified. Recognizing this shortcoming, the drafters of the 1966 Amendment intended to liberalize the Rule so that intervention could be granted in more instances.

_Orleans Pub. Serv., Inc.,_ 732 F.2d at 464 (stating that requirement that interest be recognized by substantive law is “reflected by the requirement that the claim the applicant seeks intervention in order to assert be a claim as to which the applicant is the real party in interest”). The court has stated that “the real party in interest requirement of Rule 17(a), ‘applies to intervenors as well as plaintiffs . . . .’” _Id._ (quoting United States v. 936.71 Acres of Land, 418 F.2d 551, 556 (5th Cir. 1969)). It has also stated that “[t]he ‘real party in interest’ is the party who, by substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery.” _Id._ (quoting _936.71 Acres of Land_, 418 F.2d at 556). The Fifth Circuit has acknowledged that there is no uniform standard for determining who is a “real party in interest,” but it has adopted a causation test to identify such parties. _See_ _League of United Latin Am. Citizens_, 884 F.2d at 187 (adopting causation test used by district court). Under this test, “a ‘real party in interest’ may be ascertained by determining whether that party caused the injury and, if so, whether it has the power to comply with a remedial order of the court.” _Id._

154. _See_ _Fed. R. Civ. P. 24_ advisory committee’s note (1966) (stating that Rule was amended to “overcome certain difficulties which have arisen in the application of [the original] Rule 24(a)(2) and (3) and that original Rule was “unduly restricted”); _see also_ _Moore et al., supra_ note 14, § 24.05[1][b] (“The inquiry required under Rule 24(a)(2) is a flexible one, and a practical analysis of the facts and circumstances of each case is appropriate.”); _Wright et al., supra_ note 26, § 1904 (“It frequently has been said of Rule 24, as it is of the Civil Rules generally, that it is to be given a liberal construction.”) (footnote omitted); _Kaplan, supra_ note 6, at 430 (stating drafters of Rule 24 contemplated modification of interest requirement); _Bullock, supra_ note 7, at 629 (“This amendment broadened and made more flexible the ‘unduly restrictive’ original rule.”); _Institutional Reform Litigation, supra_ note 3, at 1492 (“The provisions for necessary joinder and intervention were amended in 1966 to meet the changing needs of the judicial system.”).

155. _See_ _Fed. R. Civ. P. 24_ advisory committee’s note (1966) (“If the ‘bound’ language was read literally in the sense of res judicata, it could defeat intervention in some meritorious cases.”).

156. _See id._ (“[T]he deletion of the ‘bound’ language similarly frees the rule from undue preoccupation with strict considerations of res judicata.”); _see also_ _Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,_ 386 U.S. 129, 153-54 (1967) (Stewart, J., dissenting) (“The purpose of the revision was to remedy certain logical shortcomings in the construction of the former 24(a)(2) . . . and to give recognition to decisions . . . which had expanded intervention under the former 24(a)(3) beyond the strict _pro interesse suo_ model it embodied.”); _Forest Conservation Council v. United States Forest Serv._, 66 F.3d 1489, 1493 (9th Cir. 1995) (stating that court interprets Rule 24 broadly in favor of intervention); United States v. Stringfellow, 783 F.2d 821, 826 (9th Cir. 1986) (stating that application of Rule is to be guided by practical considerations), _vacated sub nom._ _Stringfellow v. Concerned Neighbors in Action_, 480 U.S. 570 (1987); _Sagebrush Rebellion, Inc. v. Watt_, 713 F.2d 525, 527 (9th Cir. 1983) (“The rule was amended in 1966 in an effort . . . to permit courts to look at practical considerations in determining whether an absen-
In contrast to courts that interpret the interest requirement more narrowly, the Fifth Circuit's "direct, legally cognizable" standard does not require a party to be bound by the court's decision and thereby makes intervention available in more situations.157

157. Compare Ozee v. American Council on Gift Annuities, Inc., 110 F.3d 1082, 1096 (5th Cir.) (requiring applicant to have "direct, substantial, [and] legally protectable interest in the proceedings"), vacated sub nom. American Council on Gift Annuities v. Richie, 118 S. Ct. 597 (1997), Edwards, 78 F.3d at 1004 ("To demonstrate an interest relating to the property or subject matter of the litigation sufficient to support intervention of right, the applicant must have a 'direct, substantial, legally protectable interest in the proceedings.'"), Sierra Club v. Espy, 18 F.3d 1202, 1207 (5th Cir. 1994) (stating that applicant must have "direct, substantial, [and] legally protectable" interest), and New Orleans Pub. Serv., Inc., 732 F.2d at 463 ("[I]ntervention [of right] still requires a 'direct, substantial, legally protectable interest in the proceedings.'"), with City of Cleveland v. Nuclear Regulatory Comm'n, 17 F.3d 1515, 1517 (D.C. Cir. 1994) ("[A] movant for leave to intervene under Rule 24(a)(2) must have Article III standing to participate in proceedings before the district court.").
2. The Interpretation's Effect on the Flow of Information to the Court

In addition to being consistent with the principles underlying Rule 24(a)(2), the court's decision to allow the State of Texas to intervene in this suit was appropriate because the Attorney General of Texas can provide important information regarding the State's interests.\textsuperscript{158} One reason for liberalizing the prerequisites for intervention, especially in public law cases, is that intervenors are often able to offer additional information that will enable the court to make a more informed decision.\textsuperscript{159} In \textit{Sierra Club}, the Attorney General of Texas will be able to introduce evidence concerning the citizens' dependence on the Edwards Aquifer and the legislative scheme enacted by the Texas Legislature to regulate the aquifer.\textsuperscript{160} This information will enable the district court to fashion a remedy that addresses the interests of all entities affected by the aquifer's management.

Although the Fifth Circuit's "direct, legally cognizable" standard allowed the Attorney General of Texas to bring important evidence into the \textit{Sierra Club} litigation, its use in other public law cases may exclude sources of important information, resulting in less informed judicial decisions.\textsuperscript{161} While courts are experts in legal principles, they rely on the parties for factual information, and public interest litigants are often experts in the

\begin{itemize}
\item \textsuperscript{158} See \textit{Sierra Club v. City of San Antonio}, 115 F.3d 311, 314-15 (5th Cir. 1997) (listing interests of Texas that Attorney General would represent before district court).
\item \textsuperscript{159} See Bullock, \textit{supra} note 7, at 627 (stating that court's job is to reach correct legal decision and that it can only do so "with full and complete information"); Vreeland, \textit{supra} note 2, at 296 (stating that courts rely on litigants for "evidentiary foundation" of factual issues). One commentator stated that "[i]ntervention by a public interest group may also reduce the pressure on the judge to fill gaps in proposed decrees that fail to account for the full range of interests affected by the litigation." \textit{Id.} at 296-97.
\item \textsuperscript{160} See \textit{Sierra Club v. City of San Antonio}, 112 F.3d 789, 794-96 (5th Cir. 1997) (discussing concerns Texas wished to represent in pending lawsuit). After intervening, the Texas Attorney General would be able to protect the interests of the State in regulating and conserving its water resources, including its need for unified management and decisionmaking regarding the Edwards Aquifer. \textit{See id.} He would also be able to introduce evidence demonstrating the importance of the aquifer to the state's citizens. \textit{See id.}
\item \textsuperscript{161} See Fletcher, \textit{supra} note 3, at 656-57 (stating that during remedial process district court has need for information and "[a]n obvious way to obtain the information is to permit the people affected to participate in the suit"); Tobias, \textit{supra} note 3, at 329 (stating that denial of intervention by public law litigants "may deprive the federal judiciary of information, arguments, or perspectives it needs to make the best decisions"); \textit{Institutional Reform Litigation}, \textit{supra} note 3, at 1477 ("[L]acking the information [applicants] could contribute, a court may choose a remedy that ameliorates the plaintiffs' injury less fully and efficiently than would other remedial alternatives."); Vreeland, \textit{supra} note 2, at 296 (providing examples of how public interest litigants can add pertinent information in pending action). Public interest litigants have expertise and motivation which can ensure that shared societal values are considered. \textit{See id.} (noting successful efforts of groups in sex and race discrimination lawsuits).
\end{itemize}
subject of the litigation they want to enter.162 The United States Supreme Court has stated that such "organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack."168 By expanding the amount of information before the court, a public interest litigant can contribute to consent decrees or court decisions that would otherwise fail to consider the variety of interests affected by the lawsuit.164 A court that narrowly interprets the interest prong of Rule 24(a)(2) risks excluding this information.

162. See Tobias, supra note 3, at 329 ("Judges are generalists, and courts and government litigants may not have adequate resources or the requisite expertise in certain fields . . . ."); Bullock, supra note 7, at 627 ("A court can reach [a correct] decision only with full and complete information."); Vreeland, supra note 2, at 296 (stating that courts rely on litigants for "evidentiary foundation" of factual issues).

163. International Union v. Brock, 477 U.S. 274, 289 (1986) (quoting Note, From Net to Sword: Organizational Representatives Litigating Their Members' Claims, 1974 U. ILL. L.F. 663, 669 [hereinafter From Net to Sword]). In International Union, an action was brought challenging a Department of Labor policy that did not permit the week in which an employee draws nonregular wages to be considered a week of employment for purposes of determining eligibility for trade readjustment allowance benefits. See id. at 276-77. The United States District Court for the District of Columbia entered judgment for the employees and union, and an appeal was taken. See id. at 279-80. The District of Columbia Circuit reversed and remanded. See id. at 280. The Supreme Court held that the union had standing to litigate the action on behalf of its members, that the Secretary of Labor failed to meet his burden of presenting reasons to depart from principles of associational standing and that the state agencies that determined the entitlement to benefits were not "indispensable parties" so that their absence mandated dismissal. See id. at 292-93. Concerning the importance of information provided by outsiders, the Court stated:

The Secretary's presentation, however, fails to recognize the special features, advantageous both to the individuals represented and to the judicial system as a whole, that distinguish suits by associations on behalf of their members from class actions. While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital. "Besides financial resources, organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack." These resources can assist both courts and plaintiffs. As one court observed of an association's role in pending litigation: "[T]he interest and expertise of this plaintiff, when exerted on behalf of its directly affected members, assure 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.'" Id. at 289 (quoting From Net to Sword, supra, at 669); Harlem Valley Transp. Ass'n v. Stafford, 360 F. Supp. 1057, 1065 (S.D.N.Y. 1973).

164. See Tobias, supra note 3, at 329 (stating that information and expertise provided by intervenors "have special significance when the courts perform the exceedingly complex and delicate task of fashioning relief in institutional reform litigation"); Bullock, supra note 7, at 628 ("Often an intervenor has access to specialized information which it is best able to present; information that for some reason the parties have not presented.") (footnote omitted); Institutional Reform Litigation, supra note 3, at 1474 ("Those persons and groups [who are affected by the court's decision but not represented by the parties] are frequently in a position to provide the court with information critical to the formulation of an effective
V. THE POSSIBLE IMPACT OF THE FIFTH CIRCUIT’S DECISION ON PUBLIC LAW LITIGATION

Although the Fifth Circuit’s use of the “direct, cognizable legal interest” standard is legally sound and appropriate in *Sierra Club*, it may fail to address issues peculiar to public law litigation that a less stringent standard could accommodate.165 For example, by requiring an applicant to show an interest protected by some specific law, the court may deny an opportunity to be heard to parties who will be adversely affected by the litigation, notwithstanding the lack of such an interest.166 A public interest litigant’s inability to demonstrate a specific, legally protected interest does not necessarily prove that the litigant will not be adversely affected by the court’s decision.167 Public interest litigants often guard broad societal interests...
held by large numbers of people, and the significance of their interests stems from the breadth of interests that they represent. As an example, consider an anti-abortion advocacy group seeking to intervene in a suit challenging the constitutionality of a law that it sponsored. A court could deny the group's motion to intervene, holding that because only a state is charged with defending the constitutionality of its laws, the group has no legally protected interest. If the court subsequently declared the law unconstitutional, it would undermine the group's advocacy activities and efforts, as well as the interests of the individuals it represents. Although public interest litigants have alternatives to intervention, such as amicus curiae status, these are often inadequate because they do not allow the litigant to conduct discovery, participate in the negotiation of a consent decree or introduce evidence supporting their position. A court should recognize that the interests of public interest intervenors are different.

168. See Tobias, supra note 3, at 323 ("The concept of interest is important to public interest litigants because they represent large numbers of unorganized people, such as the poor, who individually have interests that may appear relatively insubstantial, or they seek to vindicate comparatively intangible interests like that of the general public in clean air."). One commentator stated that public law litigation evolved from "the need of large numbers of people who individually lack the economic wherewithal or the logistical capacity to vindicate important social values or their own specific interests through the courts." Id. at 270. In their haste to conclude complex litigation expeditiously, some courts have inadequately considered other important considerations, such as giving potential parties an opportunity to be heard. See id. at 336; see also Vreeland, supra note 2, at 295 (noting that significance of public interest group's interests "lies in the breadth of interests represented by the organization as a whole"). Public interest litigants generally represent two types of interests when seeking to intervene. See id. at 303. They represent the interests of their members as individuals, and they represent their own interests as an organization. See id.

169. Cf Vreeland, supra note 2, at 287 (discussing example of lobbying group appearing before court that requires standing before granting intervention and noting that although group has no cause of action, decision could undermine group's lobbying activities).

170. See Vreeland, supra note 2, at 297 (discussing use of alternatives to intervention in public law litigation); see also Laycock, supra note 25, at 128 (stating that basic principles of due process require notice, hearing and adjudication before court can deprive person of legal rights).

Amicus curiae status and reliance on government parties to represent the public's interest, the traditional alternatives to intervention, are insufficient in public law cases. See Vreeland, supra note 2, at 297 (discussing limitations of alternatives to intervention). When factual conclusions are crucial to the court's decision, a participant in the litigation is in a better position to ensure that the evidence presented supports its viewpoint. See id. One commentator noted that "[t]he very willingness of a public interest group to incur large court costs in order to intervene in a suit indicates the limits of amicus status in serving its interests." Id.; see also Weinstein, supra note 26, at 241 (discussing advantages that intervention provides to applicants). Interestingly, this commentator stated that "responsible and competent" amici should be allowed to participate in evidentiary hearings by calling witnesses, cross-examining and introducing documents. See id. at 237. An amicus who is well financed will be able to hire necessary expert witnesses and conduct statistical studies which could contribute to the evidence. See id. at 258.
than those of private intervenors and adjust their application of Rule 24(a)(2)'s interest requirement accordingly.\textsuperscript{171}

In addition, use of a strict interpretation in public law litigation may undermine the court's interest in judicial economy.\textsuperscript{172} Although granting intervention would increase the scope of one lawsuit, it would preclude the possibility of multiple lawsuits.\textsuperscript{173} One federal judge doubted that a relaxed application of Rule 24 "will produce costs in terms of complexity that outweigh the advantage of access to the courts by those who may be affected by the judicial decisions."\textsuperscript{174} Exclusion of a public interest liti-

\textsuperscript{171}. See Tobias, \textit{supra} note 3, at 346 (stating that federal judges should apply Rules "with considerably more solicitude for public interest litigants" in future cases); Vreeland, \textit{supra} note 2, at 301 ("[Because] the interests of public interest group intervenors in public law litigation differ from those of individual intervenors in private disputes, a construction of Rule 24(a) that treated both situations the same would defeat the drafters' emphasis on practicality."); \textit{see also} Laycock, \textit{supra} note 25, at 128 (stating that courts should either refuse to approve any consent decree that limits legal rights of third person who is not party to suit or hold third person not bound by consent decree).

One commentator stated that courts should be more sensitive to the special characteristics of public law cases and should recognize how the consequences of applying the Rules differ between private and public litigation. \textit{See} Tobias, \textit{supra} note 3, at 337. This commentator even suggested that a separate set of Rules be written for public law litigation if the federal judiciary is not more receptive to the concerns of public interest litigants. \textit{See id.} at 345.

\textsuperscript{172}. \textit{See} MOORE ET AL., \textit{supra} note 14, § 24.03[5][b][i] ("Economies of scale may be achieved by involving as many concerned parties as is compatible with efficiency and due process."); Tobias, \textit{supra} note 3, at 335-36 (stating that problems of judicial interpretation of Rules involve issues of judicial economy); Weinstein, \textit{supra} note 26, at 246 (concluding that benefits of broader application of intervention would outweigh any additional costs); \textit{Institutional Reform Litigation, supra} note 3, at 1477 (stating that court which chooses inappropriate remedy "may then need to supplement its decree until an effective remedy is discovered through trial and error"); \textit{see also} Vreeland, \textit{supra} note 2, at 299 (discussing impact of intervention on judicial economy). One author stated:

Intervention affects the courts' interests in fair and efficient adjudication, both in the case at hand and in the court system as a whole. When an outsider claims a litigable interest, intervention may promote economy at a systematic level by avoiding duplicative suits, which waste [judicial] resources, clog dockets, and frequently introduce the possibility of inconsistent judgments and complex collateral estoppel issues.

\textit{Id.}

\textsuperscript{173}. \textit{See} Bullock, \textit{supra} note 7, at 629 ("[O]ne of the broad purposes of intervention under Rule 24 is to discourage piecemeal litigation."); Vreeland, \textit{supra} note 2, at 302 (discussing how denial of intervention can lead to multiple lawsuits involving same issues).

\textsuperscript{174}. Weinstein, \textit{supra} note 26, at 246. This commentator stated: My experience \ldots in handling at least a score of cases that might be characterized as public litigations is that granting an opportunity to be heard in such cases at the district court level is entirely practicable. The number of those who will want to appear in court is generally quite small in proportion to those who might be affected. Moreover, most people are quite sensible—they understand the burdens on court time and will accede to reasonable requests to limit participation.

\textit{Id.}
gant may result in duplicative suits, inconsistent results and impairment of the litigant's ability to pursue its own claims. If an applicant that is denied intervention initiates its own action, judicial resources will be wasted on a claim that could have been resolved earlier. Furthermore, a second suit may force a court to choose between reaching conflicting judgments or allowing a previous decision to control the outcome of a later one.

With the different interpretations of Rule 24 firmly entrenched in each circuit's precedent, only a clear pronouncement on the interest requirement from the Supreme Court will resolve the disparity. Some commentators have suggested that a new rule regarding intervention by public law litigants should be enacted, but application of such a rule would be frustrated by the attempt to clearly distinguish between private and public litigants. Instead, the Supreme Court should declare that

175. See Bullock, supra note 7, at 629 (stating that intervention can prevent complicated issues of collateral estoppel); Vreeland, supra note 2, at 302 ("Public interest groups have demonstrated both the willingness and the ability to initiate litigation; thus, denying their motions for intervention risks duplicative suits and possibly inconsistent results, or impeding the group's ability to pursue its own legal or constitutional claims.").

176. See Vreeland, supra note 2, at 302 (stating that denying motions for intervention risks duplicative suits). In public law litigation, the costs of multiple suits are especially significant because multiple issues and other complexities strain court resources. See id. (noting especially troublesome aspects of duplicative suits in public law arena).

177. See Bullock, supra note 7, at 629 (stating that intervention can prevent inconsistencies in fact finding and law determination); Vreeland, supra note 2, at 302 (discussing how denial of intervention raises possibility of inconsistent results). One commentator noted that "a second suit poses a great risk of inconsistent and conflicting decrees . . . ." Id. As an example, she wrote that "a court cannot desegregate a school or structure a hazardous waste program under two different plans." Id. Therefore, the result of the first suit may "establish the remedial scheme for all practical purposes." Id.

178. See generally Tobias, supra note 3, at 335-46 (suggesting solutions to problems arising from application of Rules to public law litigation). One commentator, however, believes that "we know too little to formulate definitive conclusions" about the Rule's application to public law litigation. Id. at 338. This commentator stated, "It would be helpful to have a clearer understanding of, and more information about, numerous considerations relating to the Federal Rules and to public law litigation." Id.

179. See id. at 345 ("If . . . the problems are more structural or systemic, in that the Rules . . . fail to accommodate effectively public law litigation . . . more fundamental change, such as promulgating a separate set of Rules for public law litigation, may be indicated."); Institutional Reform Litigation, supra note 3, at 1492 ("The emergence of institutional reform litigation has created the need for yet another amendment of the Rules."). But see Vreeland, supra note 2, at 309 ("Rule 24(a) as written can accommodate public interest group intervention if courts are willing to construe its requirements flexibly in the public law context.").

Application of a separate set of public law rules, however, would be difficult because public law litigants cannot always be clearly identified. See Tobias, supra note 3, at 340 (stating that public law should be defined in terms of its "numerous salient characteristics"). One commentator admitted that "[b]ecause one definition cannot encompass the diverse forms that are included within the rubric of
the interest requirement of Rule 24 is flexible and adjustable to the practical consequences of granting intervention. This would allow district courts to examine the unique facts of each case, acknowledge the differences between private and public litigation and strike an appropriate balance between competing interests. Perhaps the best approach was public law litigation, it is preferable to speak of salient or defining characteristics of that litigation."

180. See Tobias, supra note 6, at 432 (discussing Supreme Court’s treatment of Rule 24(a)(2)). Interestingly, the Supreme Court, through its actions rather than its words, may have demonstrated that Rule 24 is to be applied with concern for the facts of each case. One commentator has stated that the Court’s treatment of Rule 24 has been “peculiarly fact-bound.” See id. In Cascade Natural Gas Corp. v. El Paso Natural Gas Co., the Court read Rule 24 broadly and did not require the applicant to possess a particular legal interest. See Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 132-36 (1967). Critics have stated that the Court, which was displeased with the lower court’s handling of an antitrust case, used its interpretation of Rule 24 as a means of achieving compliance with its previous decree. See Wright et al., supra note 26, § 1908 (stating that Court had to allow intervention to correct lower court’s mishandling of consent decree); Tobias, supra note 6, at 432-33 (stating that critics ascribed Court’s determination in Cascade to its displeasure with federal government’s handling of antitrust case).

In contrast, the Supreme Court read Rule 24 narrowly in Donaldson v. United States, when it denied intervention by a taxpayer in an action initiated by the Internal Revenue Service to obtain payroll records from the taxpayer’s former employer. See Donaldson v. United States, 400 U.S. 517, 531 (1971). Writers have criticized the Donaldson interpretation by stating that the Court manipulated procedure to protect the government’s interest in effective enforcement of the tax statutes. See Wright et al., supra note 26, § 1908 (discussing Supreme Court’s decision in Donaldson); Tobias, supra note 7, at 433 (reviewing critical interpretations of Court’s opinion in Donaldson).

181. See Tobias, supra note 3, at 346 (concluding that federal courts should apply Rules with “considerably more solicitude” for public law litigants); Weinstein, supra note 26, at 246 (“The federal courts should nourish remedial approaches characterized by the greatest feasible amount of general participation, fact finding, and negotiation.” (quoting Robert E. Buckholz, Jr. et al., The Remedial Process in Institutional Reform Litigation, 78 Colum. L. Rev. 784, 929 (1978))); Vree-land, supra note 2, at 305 (stating that when deciding motions to intervene, “courts should evaluate the group’s interest with reference to the nature of the particular controversy”).

One commentator concluded that many of the problems created by application of the Rules to public law litigation can be solved without “strain[ing] either the language of the Rules or judicial credibility.” Tobias, supra note 3, at 336. This commentator stated that “[j]udges can and should accord flexible and pragmatic interpretations to the Rules in public law cases,” and that “[c]ourts should also be sensitive to the special characteristics of public law litigation in contrast to private law litigation and should recognize the implications of applying the Rules to both types of suits.” Id. at 337.

After granting intervention of right to a public law litigant, a court can further tailor its participation to the case’s unique facts by placing restrictions on those litigants. See Fed. R. Civ. P. 24 advisory committee’s note (1966) (stating that courts may subject intervention of right to “appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings”). Courts have conditioned a public law litigant’s intervention by limiting the issues it can raise, denying it the right to a jury trial, limiting its participation to a particular phase of the trial and requiring it to consolidate discovery and
suggested by a federal judge who stated that Rule 24(a)(2) must be given the flexibility necessary "'to cover the multitude of possible intervention situations.'"182

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182. United States v. Hooker Chem. & Plastics Corp., 749 F.2d 968, 983 (2d Cir. 1984) (quoting Restor-A-Dent Dental Lab., Inc. v. Certified Alloy Prod., Inc., 725 F.2d 871, 875 (2d Cir. 1984)). In his opinion, Judge Friendly also stated that Rule 24(a)(2) requires "consideration of all of the competing and relevant interests raised by an application for intervention." Id. (citing United States v. City of Jackson, 519 F.2d 1147, 1150-51 (5th Cir. 1975)).