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In the (Court)Room Where It Happens: The Case for a More Expansive Standard for Intervention in the Federal Courts of Appeals

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Although Rule 24 of the Federal Rules of Civil Procedure governs intervention in federal district courts, no corresponding rule governs intervention in the courts of appeals. As a law and policy matter, this procedural void is troubling; some of the nation's highest profile, most politically contentious Supreme Court cases over the past four years involved motions to intervene at the circuit-court stage. Fortunately, recent meetings of the Advisory Committee on the Federal Rules of Appellate Procedure (FRAP) indicate that this body is in the initial stages of considering an FRAP amendment on this topic—a rulemaking process that usually takes two to three years. This relatively early stage of the deliberation process is an excellent time to harness the power of practical scholarship in offering reactions, proposing alternative visions, and sparking dialogue on a matter of critical importance in our federal appellate system. This Note presents the case for a more expansive standard governing intervention on appeal, and it offers a model rule that reifies an alternative—arguably more just and

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inclusive—vision that contrasts with the Advisory Committee's self-proclaimed "restrictive" draft proposal.

"No one else was in the room where it happened / The room where it happened / The room where it happened / . . . No one really knows how the parties get to yes / The pieces that are sacrificed in every game of chess / We just assume that it happens / But no one else is in the room where it happens."

– Aaron Burr in HAMILTON: AN AMERICAN MUSICAL[1]

INTRODUCTION

From the vantage point of the federal judiciary, one can make a compelling argument that the United States Courts of Appeals are "the room where it happens." Of course, the Supreme Court of the United States garners much of the media attention as the highest court in the land,[2] but the Supreme Court hears only a small fraction of the cases in the federal court system.[3] In contrast, the federal courts of appeals—divided into thirteen circuits—routinely handle upwards of 50,000 cases each year, setting legal precedents for millions of Americans on critical issues like education, health care, consumer protection, civil rights, and the environment.[4]

Much like Aaron Burr in the *Hamilton* musical, many nonparties in federal appellate proceedings would like to be in the room where it

1. LESLIE ODOM JR. ET AL., *The Room Where It Happens*, *on* HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atl. Recs. 2015).

2. *See* D. Brock Hornby, *Federal Judges and Public Attention*, 100 JUDICATURE 64, 66, 70 (2016) (observing that "Supreme Court justices [are] becoming public celebrities" with "intelligent commentators like . . . Nina Totenberg, and others[,] covering the Supreme Court in various media," whereas substantial coverage of federal appellate courts exists only "in some parts of the country" and coverage of federal trial courts is "regularly lacking" outside of major metropolitan areas).

3. *See FAQs – General Information*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/faq_general.aspx [https://perma.cc/EC6U-4T8K] ("The Court receives approximately 7,000-8,000 petitions for a writ of certiorari each Term. The Court grants and hears oral argument in about 80 cases.").

4. *See Appellate Courts and Cases – Journalist's Guide*, U.S. CTS., https://www.uscourts.gov/statistics-reports/appellate-courts-and-cases-journalists-guide [https://perma.cc/J4SS-2Z8E]; *U.S. Courts of Appeals – Civil and Criminal Cases Filed, by Circuit and Nature of Suit or Offense*, U.S. CTS., https://www.uscourts.gov/report-names/federal-judicial-caseload-statistics [https://perma.cc/4X7N-BD2G].

happens.[5] Indeed, some of the nation's highest profile, most politically contentious Supreme Court cases over the past four years involved motions to intervene at the circuit-court stage. This list includes the appellate cases that ultimately became *Bostock v. Clayton County* (LGBTQ workplace equality),[6] *California v. Texas* (Affordable Care Act),[7] *Cameron v. EMW Women's Surgical Center* (abortion),[8] *Arizona v. City & County of San Francisco* (immigration),[9] *Arizona v. Mayorkas* (immigration),[10] and *Haaland v. Brackeen* (indigenous rights).[11]

The increasing frequency of motions to intervene on appeal reveals a significant procedural void—although Rule 24 of the Federal Rules of Civil Procedure (FRCP 24) governs intervention in federal district courts, no corresponding rule in the Federal Rules of Appellate Procedure (FRAP) governs intervention in the courts of appeals. In *Cameron v. EMW Women's Surgical Center*, the Supreme Court called attention to this glaring gap in the law: "No statute or rule provides a general standard to apply in deciding whether intervention on appeal should be allowed. The Federal Rules of Appellate Procedure make only one passing reference to intervention, and

5. *See Advisory Committee on Appellate Rules: Meeting of October 19, 2023*, U.S. CTS. 17 (2023) [hereinafter *Advisory Committee on Appellate Rules*], https://www.uscourts.gov/sites/default/files/2023-10_appellate_rules_committee_agenda_book_final_0.pdf [https://perma.cc/ADE8-QZH9] ("[T]he issue [of intervention on appeal] arises a lot, particularly with changes in administration in the states and the federal government.").

6. Equal Emp. Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 570 (6th Cir. 2018), *aff'd sub nom.* Bostock v. Clayton County, 590 U.S. 644 (2020).

7. Texas v. United States, 945 F.3d 355, 373-74 (5th Cir. 2019), *rev'd and remanded sub nom.* California v. Texas, 593 U.S. 659 (2021).

8. EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 831 F. App'x 748 (6th Cir. 2020), *rev'd and remanded sub nom*. Cameron v. EMW Women's Surgical Ctr., P.S.C., 595 U.S. 267 (2022).

9. City & County of San Francisco v. U.S. Citizenship & Immigr. Servs., 992 F.3d 742 (9th Cir. 2021), *cert. dismissed as improvidently granted sub nom*. Arizona v. City & County of San Francisco, 596 U.S. 763 (2022).

10. Huisha-Huisha v. Mayorkas, No. 22-5325, 2022 WL 19653946 (D.C. Cir. Dec. 16, 2022), *vacated and remanded sub nom.* Arizona v. Mayorkas, 143 S. Ct. 1312 (2023).

11. Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), *aff'd in part, vacated in part, rev'd in part*, 599 U.S. 255 (2023).

that reference concerns the review of agency action."[12] *Arizona v. City & County of San Francisco* was supposed to address this question, but that case was dismissed as improvidently granted.[13] More recently, *Arizona v. Mayorkas* was similarly supposed to resolve this issue, but that case was dismissed as moot.[14]

The lack of a specific statute or rule governing appellate intervention, coupled with the difficulty faced by courts of appeals in developing a consistent standard, highlights the need for formal rulemaking in this area. Fortunately, recent meetings of the Advisory Committee on the Federal Rules of Appellate Procedure suggest that this body is in the initial stages of considering an FRAP amendment on this topic.[15] The Advisory Committee's rulemaking process usually takes two to three years.[16] This formal approach allows time for judicial decisions, practitioner insights, and academic research to inform a comprehensive guideline that can be applied uniformly across the courts of appeals.

This Note aims to contribute to the emerging dialogue surrounding the proper standard for intervention on appeal, proposing a more liberal approach—and a corresponding model rule—that contrasts with the FRAP Advisory Committee's self-proclaimed "restrictive" draft proposal.[17] In so doing, this Note joins a vast array of scholarship calling for liberal reforms to the procedural rules and related doctrines that shape access to justice in the nation's courts.[18] It also sits adjacent to a body of legal scholarship

12. 595 U.S. 267, 276 (2022) (citing FED. R. APP. P. 15(d)).

13. 596 U.S. at 765.

14. 143 S. Ct. at 1312.

15. *See Advisory Committee on Appellate Rules*, *supra* note 5, at 177-84.

16. *See About the Rulemaking Process*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process [https://perma.cc/6BGM-3TJG].

17. *See Advisory Committee on Appellate Rules*, *supra* note 5, at 182.

18. *See, e.g.*, Suzette M. Malveaux, *Clearing Civil Procedural Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621 (2011) (discussing the impact of procedural barriers on access to justice and advocating for reforms to enhance fairness in civil litigation); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989) (examining how the Federal Rules of Civil Procedure affect public law litigation and proposing modifications to facilitate public interest claims); Scott W. Stern, *Standing for Everyone:* Sierra Club v. Morton*, Justice Blackmun's Dissent, and Solving the Problem of*

calling for more expansive approaches to intervention in the federal *district* courts.[19] Astoundingly, there is no piece of legal scholarship that thoroughly theorizes what the standard should be for intervention on appeal, and whether it should differ from the FRCP 24 district-court standard. While no rule is perfect, this Note seeks to catalyze further discussion and offer a viable option to fill the existing void.

This Note is divided into three Parts. Part I delves into the current law and policy framework governing intervention on appeal. It examines the Supreme Court's rulings on the matter, and it attempts to glean relevant insights from the policies underlying intervention in the district courts. This Part concludes by addressing troubling trends in the courts of appeals' treatment of appellate intervention, shedding light on an underrecognized circuit split.

Part II of this Note discusses several reasons to favor a more liberal standard for intervention on appeal. It begins with doctrinal reasons that encourage adherence to Supreme Court precedent, and it proceeds with structural arguments rooted in respect for the principles of federalism and

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Environmental Standing, 49 ENV'T L. REP. 10063 (2019) (analyzing Justice Blackmun's dissent in *Sierra Club v. Morton* and suggesting approaches to broaden standing in environmental cases); Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 YALE L.J. 1378 (1978) (arguing for a more lenient interpretation of implied rights of action to better enforce civil rights protections).

19. *See, e.g.*, Note, *Institutional Reform Litigation: Representation in the Remedial Process*, 91 YALE L.J. 1474 (1982); Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 311-14 (1990); Cindy Vreeland, Comment, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279 (1990); Amy M. Gardner, Comment, *An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenors*, 69 U. CHI. L. REV. 681 (2002); Justin P. Gunter, *Dual Standards for Third-Party Intervenors: Distinguishing between Public-Law and Private-Law Intervention*, 66 VAND. L. REV. 645 (2013); *see also* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (setting the theoretical foundations for subsequent academic works); Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215, 216 (2000) (cataloguing a wide variety of scholarly contributions to the literature on intervention, spanning the spectrum from expansive "public law litigation" philosophies to more restrictive "traditional" philosophies). Although conservative stances in the literature are uncommon, for two of the leading pieces arguing in favor of more restrictive approaches, see Caleb Nelson, *Intervention*, 106 VA. L. REV. 271 (2020); and David L. Shapiro, *Some Thoughts on Intervention before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721 (1968).

state sovereignty. Lastly, it highlights three major policy considerations, emphasizing the need for judicial economy, a balanced consideration of outsider and insider interests, and a theoretical commitment to practicality over formalism, particularly in the context of "public law" or "institutional reform" litigation— that is, cases involving broad societal interests or efforts to reshape institutional practices, such as civil rights, environmental regulation, or governmental reform.

Part III of this Note presents two competing proposals for an FRAP amendment regarding appellate intervention. First, it analyzes the FRAP Advisory Committee's draft proposal from October 19, 2023, offering analysis and suggestions for improvement. Then, it prescribes a model rule that refines the Advisory Committee's draft, vindicating the considerations highlighted in Part II and aligning with a liberal, "interest representation" framework for intervention—one that seeks to broaden access for parties with a legitimate stake in the outcome, particularly in cases involving public interest or systemic reform.

This Note concludes by emphasizing the stakes of its normative and prescriptive contributions, offering a forward-looking perspective on the need for and impact of a reformed approach to appellate intervention. It particularly emphasizes the potential for a paradigm-shifting, expansive approach to this issue that will enhance the fairness and effectiveness of our federal judicial system.

I. CURRENT LAW AND POLICY GOVERNING INTERVENTION ON APPEAL

This Part explores the current legal framework surrounding appellate intervention. It begins by exploring the Supreme Court's rulings on the subject and highlighting how the Court has drawn upon district-court policies to inform its decisions. Next, it examines the federal district-court standard for intervention and demonstrates how it has evolved to become more expansive over time. Finally, it analyzes an important set of inconsistencies and troubling trends in how the federal courts of appeals have handled appellate intervention, revealing an oft-overlooked circuit split on this issue.

A. The Supreme Court's Rulings—Looking for Guidance in the "Policies Underlying Intervention" in the District Courts

The Supreme Court's initial foray into defining the standards for appellate intervention arrived in the 1965 case of *Automobile Workers v.*

Scofield.[20] The key issue in *Scofield* was whether parties that prevailed before the National Labor Relations Board had a right to intervene in subsequent appellate proceedings.[21] In a consolidation of two cases, the Court held that both parties at issue did in fact have a right to intervene on appeal, at least in appellate proceedings that review or enforce Labor Board orders. [22]

The *Scofield* Court offered four major reasons for its holding. First, the Court emphasized judicial economy, noting that "[t]o allow intervention to the charged party in the first appellate review proceeding is to avoid 'unnecessary duplication of proceedings,' and to adhere to the goal of obtaining 'a just result with a minimum of technical requirements.'"[23] In essence, the Court reasoned that intervention would ensure that the would-be intervenor is bound by the appellate decision, thus preventing them from initiating a separate suit and ensuring the finality of the judgment under res judicata. Second, the Court expressed a commitment to fairness and due process for the would-be intervenor. In the Court's view, intervenors deserved the opportunity "to present their arguments on the issues to a reviewing court which has not crystallized its views."[24] These same concerns about fairness and the would-be intervenors' full ability to present their case led the Court to view amici participation as an inadequate substitute for intervention, as amici generally lacked the ability "to participate in designating the record, to participate in prehearing conferences preparatory to simplification of the issues, to file a brief, to engage in oral argument, [or] to petition for rehearing in the appellate court or to the [Supreme] Court for certiorari.[25] Third, the Court asserted that such interventions would not hinder the Labor Board's functions or add undue complexity to the appellate proceedings. As such, prejudice to the

20. 382 U.S. 205 (1965).

21. *Id.* at 207.

22. *Id.* at 208.

23. *Id.* at 212.

24. *Id.* at 213.

25. *See id.* at 215-16 ("The rights typically secured to an intervenor in a reviewing court—to participate in designating the record, to participate in prehearing conferences preparatory to simplification of the issues, to file a brief, to engage in oral argument, to petition for rehearing in the appellate court or to this Court for certiorari—are not productive of delay nor do they cause complications in the appellate courts. . . . On the other hand, an amicus—with the exception of the right to file a brief—might be unable adequately to present all the relevant data to the court.").

original parties and inconvenience for the reviewing court would not arise.[26] Lastly, and most importantly, the Court saw parallels to FRCP 24's standards for intervention in district courts. This portion of the opinion set a precedent that appellate courts should look to "the policies underlying intervention" in the district courts when judging motions to intervene on appeal.[27] The issue would not be squarely addressed again for nearly sixty years.

The 2022 case of *Cameron v. EMW Women's Surgical Center* brought the issue of appellate intervention back into the spotlight.[28] *Cameron* involved a legal challenge by an abortion clinic and two of its physicians against Kentucky House Bill 454, which regulated the abortion procedure known as dilation and evacuation—the standard surgical technique used for abortion after about fourteen weeks.[29] During the course of litigation, plaintiffs agreed to dismiss claims against Kentucky's attorney general without prejudice, but the state's cabinet secretary for Health and Family Services remained in the case and defended the challenged law, with the attorney general still serving as counsel.[30] After a bench trial, the District Court held that HB 454 unconstitutionally burdened a woman's right to an abortion and issued a permanent injunction against the law's enforcement.[31] On appeal, a divided Sixth Circuit panel affirmed, at which point the attorney general's office learned that the secretary would not file a petition for rehearing en banc or a petition for a writ of certiorari challenging the Sixth Circuit's decision.[32] The attorney general moved to withdraw as counsel for the secretary and to intervene as a party on Kentucky's behalf, but the Sixth Circuit denied the attorney general's motion.[33]

The Supreme Court agreed to review the case specifically to address whether the Sixth Circuit made an error in rejecting the Kentucky attorney general's request for appellate intervention, and it held that the Circuit Court indeed erred.[34] Referencing *Scofield*, the *Cameron* Court noted that,

26. *See id.*

27. *Id.* at 217 n.10.

28. 595 U.S. 267 (2022).

29. *Id.* at 271.

30. *Id.*

31. *Id.* at 272.

32. *Id.* at 272-73.

33. *Id.* at 273.

34. *Id.* at 274.

"without any rule that governs appellate intervention, [the Court] ha[s] looked elsewhere for guidance" and "considered the 'policies underlying intervention' in the district courts."[35] Under this standard, the Court reasoned that the Sixth Circuit was flawed in its evaluation of several factors that bear on all applications for intervention, especially the timeliness of the intervention request and whether granting intervention would prejudice the original parties.[36] Additionally, the Court rejected the Sixth Circuit's analysis of the attorney general's interest in intervention, asserting that the panel should have recognized the importance of respecting state sovereignty by acknowledging that a state has a significant interest in upholding the validity of its statutes.[37]

Two subsequent cases—*Arizona v. City & County of San Francisco* in 2022 and *Arizona v. Mayorkas* in 2023—were poised to further address the intricacies of intervention on appeal, but the first was dismissed as improvidently granted and the second was dismissed as moot due to changes in the underlying policy.[38] This lack of updated guidance from the Supreme Court implies that federal courts of appeals are still advised to draw upon district-court standards when evaluating appellate-intervention motions. The following section delves deeper into these standards and assesses whether courts of appeals have properly adhered to them.

B. The District-Court Standard for Intervention

1. Modern Rule—Federal Rule of Civil Procedure (FRCP) 24

Intervention in federal district court proceedings is governed by Rule 24 of the Federal Rules of Civil Procedure.[39] Since its inception in 1938, FRCP 24 has distinguished between two types of intervention: (1) intervention of right; and (2) permissive intervention.[40] Amendments to FRCP 24 in 1966 established a four-part test for granting intervention of right, focusing on (a) timeliness, (b) an interest relating to the subject of the action, (c) potential impairment of the applicant's ability to protect that

35. *Id.* at 282.

36. *Id.* at 277 (quoting Auto. Workers v. Scofield, 382 U.S. 205, 217 n.10 (1965)).

37. *Id.* at 277-79.

38. *See* Arizona v. City & County of San Francisco, 596 U.S. 763 (2022); Arizona v. Mayorkas, 143 S. Ct. 1312 (2023).

39. FED. R. CIV. P. 24.

40. *Id.*

interest, and (d) the inadequacy of existing representation.[41] Courts have generally interpreted these elements liberally, resolving doubts in favor of intervention.[42] This liberal interpretation aligns not only with the overarching aim of the 1966 amendments to facilitate broader access to the courtroom for nonparties but also with a gradual liberalization of intervention rights over time, as described below.

2. The Historical Origins and Gradual Liberalization of FRCP 24

In the early 20th century, the standards for intervention in U.S. federal courts derived largely from equity and admiralty practice, which marked a departure from the more restrictive approach under English common law.[43] The introduction of FRCP 24 in 1938 signaled yet another shift toward a more inclusive and flexible standard for intervention, as it built upon and liberalized Equity Rule 37 rather than returning to the narrow scope of intervention under common law.[44] As described by the Advisory Committee responsible for drafting the rule, the original FRCP 24 had the intention of "amplif[ying] and restat[ing] the present federal practice at law and in equity."[45]

The text of the original FRCP 24 bears resemblance to the modern rule, but it allowed for intervention of right under slightly different conditions.[46] The earlier version of 24(a)(2) stipulated that intervention was contingent on whether "the applicant is or may be bound by a judgment in the action."[47] While some courts interpreted this clause generously to mean that negative

41. *Id.; see also* 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 . . . .").

42. *See, e.g.*, South Dakota *ex rel.* Barnett v. U.S. Dep't of Interior, 317 F.3d 783, 785 (8th Cir. 2003) ("Rule 24 should be liberally construed with all doubts resolved in favor of the proposed intervenor.").

43. *See* James WM. Moore & Edward H. Levi, *Federal Intervention: I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565, 569, 577-78 (1936).

44. *See* 7C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1903 (3d ed. 2007) ("[T]he limitation of Equity Rule 37, that intervention must be 'in subordination to, and in recognition of, the propriety of the main proceeding,' was not carried forward into Rule 24.").

45. FED. R. CIV. P. 24 advisory committee's note to 1937 adoption.

46. *See* WRIGHT & MILLER, *supra* note 44, § 1903.

47. *Id.*

practical consequences for a non-participant were sufficient to warrant intervention,[48] the Supreme Court adopted a far more rigid reading in the infamous 1961 case of *Sam Fox Publishing Co. v. United States*.[49] In *Sam Fox*, the Supreme Court seemed to assert that the right to intervene under the old clause (a)(2) was limited to situations where the non-participant would be legally bound by the judgment in terms of res judicata, not simply practically affected.[50] This strict interpretation might have been "linguistically justified," but the Advisory Committee found that it was still a "poor result[]," as it created many scenarios where intervention under the original FRCP 24(a)(2) was practically unattainable.[51] To address this issue, FRCP 24 was amended in 1966, replacing the troublesome "bound by" language with the current four-prong test.[52]

Courts and scholars have frequently argued that the 1966 amendments to FRCP 24 represented a significant liberalization of intervention procedure in favor of a more permissive, interest-balancing standard. Indeed, just one year after the amendments went into effect, the D.C. Circuit's landmark case of *Nuesse v. Camp* unequivocally stated that "[t]his alteration [was] obviously designed to liberalize the right to intervene in federal actions."[53] Equally expansive rulings by the D.C. Circuit followed just a few years later in *Smuck v. Hobson* and *Hodgson v. United Mine Workers*, with the former case quoting *Nuesse*'s now-canonical statement that "[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."[54] The latter case noted that "[t]he right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that . . . justice is best served when all parties with a real stake

48. *Id.*

49. 366 U.S. 683 (1961).

50. *See id.* at 694 (noting that negative practical consequences of a judgment "are not at all the equivalent of being legally bound, which is what must be made out before a party may intervene as of right").

51. FED. R. CIV. P. 24 advisory committee's note to 1966 amendment.

52. *See id.* ("[T]he deletion of the 'bound' language . . . frees the rule from undue preoccupation with strict considerations of res judicata."); WRIGHT & MILLER, *supra* note 44, § 1903.

53. 385 F.2d 694, 701 (D.C. Cir. 1967).

54. Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969) (quoting Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967)).

in a controversy are afforded an opportunity to be heard."[55] Collectively, these three influential cases have been cited in federal judicial opinions over six-hundred times.[56]

The Supreme Court endorsed the D.C. Circuit's expansive reading of the FRCP amendments in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, which recognized a broad right to intervene in district-court proceedings and set a trend that has been further refined by lower courts over the past five decades.[57] For instance, courts have often asserted that the requirements for district-court intervention are to be construed liberally or broadly in favor of proposed intervenors.[58] Similarly, adopting a broad interpretation of the holding in *Cascade*, courts have occasionally indicated that a more lenient standard for intervention as of right is appropriate in

55. Hodgson v. United Mine Workers, 473 F.2d 118, 130 (D.C. Cir. 1972).

56. *See e.g.*, San Juan County v. United States, 503 F.3d 1163, 1195 (10th Cir. 2007) (en banc) (quoting a Tenth Circuit opinion that itself had quoted *Nuesse*); County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980) (quoting *Nuesse* and citing *Smuck*).

57. *See* Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 132-36 (1967) (noting that, even if Cascade would have been barred from intervening under the original FRCP 24, it was entitled to intervene under the amended rule because the adjudication of the antitrust suit at issue could *practically* impair its interests); *see also* Benjamin v. Dep't of Pub. Welfare, 701 F.3d 938, 951 (3d Cir. 2012) ("A proposed intervenor's interest need not be a legal interest, provided that he or she 'will be *practically* disadvantaged by the disposition of the action.'" (emphasis added) (quoting Benjamin v. Dep't of Pub. Welfare, 432 F. App'x 94, 98 (3d Cir. 2011))); California *ex rel.* Lockyer v. United States, 450 F.3d 436, 441 (9th Cir. 2006) ("[W]e have taken the view that a party has a sufficient interest for intervention purposes if it will suffer a *practical* impairment of its interests as a result of the pending litigation." (emphasis added)); *San Juan County*, 503 F.3d at 1193 ("The central concern in deciding whether intervention is proper is the *practical* effect of the litigation on the applicant for intervention." (emphasis added)).

58. *E.g.*, Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., No. 16-2424, 2017 WL 10350992, at *1 (6th Cir. Mar. 27, 2017) (quoting Purnell v. Akron, 925 F.2d 941, 950 (6th Cir. 1991)); W. Energy All. v. Zinke, 877 F.3d 1157, 1164 (10th Cir. 2017); Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173, 1179 (9th Cir. 2011) (en banc).

cases involving substantial public interests.[59] Courts have even asserted that several nonlegal interests can support intervention of right.[60] Hence, an economic interest will at times support intervention of right if it is concrete and related to the subject matter underlying the case,[61] and the same can be said of an interest in the "stare decisis" or precedent-setting effects of a case.[62]

Consider the fairly recent examples of *Gratz v. Bollinger* and *Grutter v. Bollinger*.[63] In these high-profile affirmative action disputes, white students who had been rejected from the University of Michigan—from the undergraduate school in *Gratz* and from the law school in *Grutter*—filed a lawsuit against university officials to contest the constitutionality of the institution's affirmative-action policies.[64] As potential beneficiaries of the disputed policies, prospective minority students sought to intervene in both cases and defend their practical interest "in gaining admission to the University."[65] Both district courts denied the minority applicants' request, with the *Gratz* court specifically reasoning that the students lacked the type of "significantly protectable" interest required for intervention "because [they did] not have any legally enforceable right to have the existing admissions policy continued."[66] On appeal, the Sixth Circuit overruled the district courts and asserted that potential intervenors need not establish a

59. *See, e.g.*, *San Juan County*, 503 F.3d at 1201 ("If the Supreme Court's one-sentence holding on present Rule 24(a)(2) in *Cascade* . . . tells us nothing else, it is that the requirements for intervention may be relaxed in cases raising significant public interests.").

60. *See, e.g.*, *Benjamin*, 701 F.3d at 951 ("A proposed intervenor's interest need not be a legal interest, provided that he or she 'will be practically disadvantaged by the disposition of the action.'").

61. *See* Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n, 834 F.3d 562, 568 (5th Cir. 2016) ("[E]conomic interests can justify intervention when they are directly related to the litigation.").

62. *See* Wineries of the Old Mission Peninsula Ass'n v. Township of Peninsula, 41 F.4th 767, 774 (6th Cir. 2022) ("This court has already acknowledged that potential stare decisis effects can be a sufficient basis for finding an impairment of interest." (quoting Mich. State AFL-CIO v. Miller, 103 F.3d 1240, 1247 (6th Cir. 1997))).

63. Gratz v. Bollinger, 183 F.R.D. 209 (E.D. Mich. 1998); Grutter v. Bollinger, 16 F. Supp. 2d 797 (E.D. Mich. 1998).

64. Grutter v. Bollinger, 188 F.3d 394, 396-97 (6th Cir. 1999).

65. *Id.* at 399.

66. *Gratz*, 183 F.R.D. at 214.

"legally enforceable right" in order to be granted intervention. The practical interests raised by the minority applicants were sufficient.[67]

Gratz and *Grutter* are not the only cases since 1966 to have taken an expansive reading of FRCP 24 in granting intervention as of right to minority beneficiaries of disputed affirmative-action policies.[68] Nor are they the only examples of expansive district-court intervention in high-profile, highly contentious cases.[69] This post-1966 trend toward expansive district-court intervention does not necessarily suggest that a similarly expansive approach was intended to apply at the circuit-court level. After all, the Federal Rules of Civil Procedure apply only to district-court proceedings.[70] Yet, in the absence of a corresponding rule in the Federal Rules of Appellate Procedure, the Supreme Court *has* instructed appellate courts to consider "the policies underlying intervention [in the district courts]" when judging motions to intervene on appeal.[71] The foregoing history and caselaw

67. *Grutter*, 188 F.3d at 398-99 (rejecting "the notion that Rule 24(a)(2) requires a specific legal or equitable interest" (quoting *Miller*, 103 F.3d at 1245)).

68. *See, e.g.*, *In re* Birmingham Reverse Discrimination Emp. Litig., 833 F.2d 1492, 1496 n.13 (11th Cir. 1987); Jansen v. City of Cincinnati, 904 F.2d 336, 342 (6th Cir. 1990); *cf.* Students for Fair Admissions Inc. v. Univ. of N.C., 319 F.R.D. 490, 497 (M.D.N.C. 2017) (granting permissive intervention under Rule 24(b) instead of intervention as of right under Rule 24(a)). *But see* Students for Fair Admissions, Inc. v. President of Harvard Coll., 807 F.3d 472, 475 (1st Cir. 2015) (affirming denial of intervention because Harvard adequately represented the would-be intervenors' interests).

69. *See e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010) (granting intervention to the official proponents of California's "Proposition 8," a controversial ballot proposition and state constitutional amendment intended to ban same-sex marriage, so that they could defend the proposition's constitutionality), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

70. *See* FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States *district courts* . . . ." (emphasis added)); *see also* STEVEN S. GENSLER, 1 FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY, Rule 1 (2024) ("The [Federal Rules of Civil Procedure] do not apply of their own force to practice in the United States Courts of Appeal. Indeed, the Federal Rules' operative force ends upon the proper filing of a notice of appeal. Thus, the Federal Rules of Appellate Procedure govern circuit court procedure.").

71. Auto. Workers v. Scofield, 382 U.S. 205, 217 n.10 (1965); Cameron v. EMW Women's Surgical Ctr., P.S.C., 595 U.S. 267, 277 (2022) (quoting *Scofield*, 382 U.S. at 217 n.10).

demonstrate that the policies underlying intervention in the district courts now embody a liberal emphasis on practical considerations and a flexible balancing of interests that favors the intervenor in many cases.

C. Troubling Trends and Inconsistent Applications in the Circuit Courts

Despite the Supreme Court's guidance and the liberal spirit of FRCP 24, federal appellate courts facing motions to intervene on appeal often deviate from the broader district court standard. Instead, many courts of appeals have adopted a heightened standard, frequently necessitating "exceptional" circumstances for granting intervention when it was not previously sought at the district-court level.[72] This rigid language derives from the 1962 case *McKenna v. Pan American Petroleum Corp.*, in which the Fifth Circuit held that "[a] court of appeals may, but only in an exceptional case for imperative reasons, permit intervention where none was sought in the district court."[73]

Although this departure from the more liberal district-court standard is not always without valid cause, there is a troubling trend of appellate courts declining intervention simply due to the advanced stage of the litigation, without much consideration for critical factors like (1) whether the nonparty had a valid interest that was inadequately represented and (2) when the party knew or reasonably should have known about that inadequately represented interest. For instance, in *Huisha-Huisha v. Mayorkas*—the precursor to the *Arizona v. Mayorkas* Supreme Court case—the D.C. Circuit based its timeliness assessment, in part, on the fact that proceedings had been pending for nearly two years without a motion to intervene in the district court.[74] Yet, Texas had argued—persuasively, some might believe—that "[its] absence in the district court proceedings [wa]s immaterial, and its motion to intervene within 30 days of the filing of appeal should [have] be[en] treated as presumptively timely, just as if it were made

72. *See, e.g.*, *In re* Grand Jury Investigation, 587 F.2d 598, 601 (3d Cir. 1978); Amalgamated Transit Union Int'l, AFL-CIO v. Donovan, 771 F.2d 1551, 1552 (D.C. Cir. 1985) (per curiam); Spring Constr. Co. v. Harris, 614 F.2d 374, 377 n.1 (4th Cir. 1980); Richardson v. Flores, 979 F.3d 1102, 1104 (5th Cir. 2020); Craig v. Simon, 980 F.3d 614, 618 n.3 (8th Cir. 2020); Hall v. Holder, 117 F.3d 1222, 1231 (11th Cir. 1997); Synqor, Inc. v. Artesyn Techs., Inc., 410 F. App'x 336, 337 (Fed. Cir. 2011).

73. 303 F.2d 778, 779 (5th Cir. 1962).

74. Huisha-Huisha v. Mayorkas, No. 22-5325, 2022 WL 19653946, at *1-2 (D.C. Cir. Dec. 16, 2022).

under [FRAP] Rule 15(d)."[75] Similarly, the Eighth Circuit in *Craig v. Simon* denied a motion to intervene on appeal principally because the request was "filed after expedited briefing was completed."[76]

Since its introduction in 1962, the "exceptional case for imperative reasons" standard has been resilient, but it has hardly been consistent. First, it is important to note an underrecognized circuit split in approaches. Although it is true that several circuits have at one point or another asserted that appellate courts may permit intervention on appeal only "in an exceptional case for imperative reasons," neither the Second Circuit nor the Seventh Circuit has ever used this language,[77] and the First Circuit consistently seems to favor a more permissive standard that applies the FRCP 24 district-court framework in ways that allow intervention on appeal more often than average.[78] Moreover, even in circuits where the heightened standard arises more frequently—such as the Fifth Circuit and the D.C. Circuit—one can find at least a few cases where the "exceptional case for

75. The State of Texas' Motion to Intervene as Intervenor-Defendant at 14, Huisha-Huisha v. Mayorkas, No. 21-5200 (D.C. Cir. Oct. 11, 2021). For comparison, FRAP Rule 15(d) governs motions to intervene in appellate courts' review of agency orders and allows such motions to be filed within 30 days of the petition for review. FED. R. APP. P. 15(d).

76. 980 F.3d at 618 n.3.

77. These circuits have noted their authority to permit appellate intervention but have not specified the relevant standard for assessing such motions, opting for an approach that—at least in some cases—has been more permissive than McKenna v. Pan American Petroleum Corp, 303 F.2d 778 (5th Cir. 1962), and granted the nonparty's motion to intervene. *See, e.g.*, Park & Tilford v. Schulte, 160 F.2d 984, 987-89 (2d Cir. 1947) (granting motion to intervene on appeal); Hurd v. Ill. Bell Tel. Co., 234 F.2d 942, 944 (7th Cir. 1956) (granting motion to intervene on appeal). *But cf.* Drywall Tapers & Pointers of Greater N.Y. v. Nastasi & Assocs. Inc., 488 F.3d 88, 94 (2d Cir. 2007) (recognizing "authority for granting a motion to intervene in the Court of Appeals" but nevertheless denying the motion).

78. *See, e.g.*, Alstom Caribe, Inc. v. George P. Reintjes Co., 484 F.3d 106, 111 (1st Cir. 2007) (granting intervention on appeal); Mangual v. Rotger-Sabat, 317 F.3d 45, 62 (1st Cir. 2003) (same); Ruthardt v. United States, 303 F.3d 375, 386 (1st Cir. 2002) (same).

imperative reasons" language was entirely absent and the court utilized the standard district-court analysis.[79]

The rigidity and inconsistency in the courts of appeals' approaches to appellate intervention not only raise concerns about the equitable administration of justice but also might be objected to on doctrinal, structural, and prudential grounds. Part II discusses some of the arguments in support of a more liberal, expansive standard for intervention on appeal.

II. NORMATIVE ARGUMENTS FOR A MORE EXPANSIVE, LIBERAL STANDARD FOR INTERVENTION ON APPEAL

This Part outlines the normative reasons for adopting a more liberal standard for appellate intervention. First, it addresses the doctrinal reasons, highlighting the need to respect Supreme Court precedent while moving beyond outdated, pre-*Scofield* appellate caselaw. Second, it explores structural reasons grounded in federalism and state sovereignty. Third, it considers several prudential reasons, emphasizing the importance of judicial economy, fairness, and broader participation in cases involving public law or institutional reform.

A. Doctrinal Reasons—Respecting Supreme Court Precedent and Disavowing an Anachronism from the Pre-*Scofield*, Pre-1966 FRCP Amendments Era

The courts of appeals' "exceptional case for imperative reasons" standard for appellate intervention faces two doctrinal challenges. First, as noted earlier, this heightened standard stems primarily from the Fifth Circuit's 1962 decision in *McKenna*, which itself relied largely on the Fifth Circuit's 1939 decision in *Morin v. City of Stuart*.[80] Yet, both opinions offered unsatisfyingly brief analyses that belied the importance of the procedural questions under review. Also, more critically, both cases were decided before the 1966 amendments to FRCP 24, which were intended to facilitate

79. *See e.g.*, Supreme Beef Processors, Inc. v. U.S. Dep't of Agric., 275 F.3d 432, 437 (5th Cir. 2001); Raspanti v. Caldera, 34 F. App'x 151 (5th Cir. 2002); Mass. Sch. of L. at Andover, Inc. v. United States, 118 F.3d 776, 779 (D.C. Cir. 1997) ("[W]e have held that intervention *in* the court of appeals is governed by the same standards as in the district court." (citing Bldg. & Constr. Trades Dep't v. Reich, 40 F.3d 1275, 1282-83 (D.C. Cir.1994))).

80. *See McKenna*, 303 F.2d at 779.

greater access to intervention.[81] This discrepancy raises questions about the appropriateness of *McKenna* and *Morin*'s continued influence, especially considering the Supreme Court's instruction in cases like *Scofield* and *Cameron* to apply the FRCP 24 district-court standard when evaluating appellate intervention.[82] That FRCP-24 standard focuses on whether the nonparty, as a practical matter, timely expressed an inadequately represented interest in the litigation, not on whether there are unenumerated "imperative reasons" for intervention.

As Judge Neomi Rao noted in her dissent from a recent D.C. Circuit case that applied the heightened standard, the "exceptional case for imperative reasons" requirement for appellate intervention is "no longer good law" in light of the Supreme Court's decision in *Cameron*.[83] If appellate judges are truly supposed to look to the "policies underlying intervention" in the district courts for guidance, they seem to be missing the mark by relying on pre-1966, unduly cursory opinions that set a heightened standard rather than being fairly permissive in the spirit of the 1966 FRCP 24 amendments.

Second, the courts of appeals' troubling tendency to assess appellate intervention's timeliness based on the stage of litigation is contrary to the approach mandated by the Supreme Court. Although several appellate cases focus on the duration of proceedings, the Supreme Court in *Cameron* rejected such reasoning by the Sixth Circuit.[84] In that case, "[t]he [Sixth Circuit] found that the attorney general's motion was not timely because it came after years of litigation in the District Court and after the panel had issued its decision." [85] Yet, in reviewing the Sixth Circuit's analysis, the Supreme Court found that "its assessment of timeliness was mistaken."[86] Citing its 1977 decision in *United Airlines, Inc. v. McDonald*, the Court instead

81. *See* discussion *supra* Section I.B.2.

82. *See* discussion *supra* Section I.B.1.

83. Humane Soc'y of the U.S. v. U.S. Dep't of Agric., 54 F.4th 733, 737 n.1 (D.C. Cir. 2022) (Rao, J., dissenting) ("Despite the obvious applicability of *Cameron*, the concurring opinion maintains that under circuit law, an entirely different standard applies, and that we may grant a motion to intervene at the appellate stage only in 'exceptional cases for imperative reasons.' This approach mirrors that taken by the Sixth Circuit in the opinion reversed by the Supreme Court in *Cameron*. . . . To the extent that [this heightened standard] is inconsistent with *Cameron*, it is no longer good law." (citation omitted)).

84. *See* Cameron v. EMW Women's Surgical Ctr., P.S.C., 595 U.S. 267, 279-81 (2022).

85. *Id.* at 279.

86. *Id.*

emphasized that timeliness should be determined from all circumstances, particularly focusing on when it becomes clear to the potential intervenor—when they knew or reasonably should have known—that their interests were no longer represented by the parties in the case.[87] Faithfulness to Supreme Court precedent as a doctrinal matter would favor more liberal approaches to timeliness assessments in appellate intervention.

B. Structural Reasons—Federalism and State Sovereignty

The principles of federalism and state sovereignty provide additional, structural reasons to favor a more liberal approach to appellate intervention. Fundamentally, any rule governing intervention on appeal must account for the fact that states—either in their own capacity or through their duly authorized representative officials—are frequently the nonparties pursuing such motions.[88] As noted in *Massachusetts v. Environmental Protection Agency*, "[s]tates are not normal litigants for the purposes of invoking federal jurisdiction."[89] To the contrary, they are complex, quasi-sovereign entities that play a special role in our federal framework.[90] As such, they receive "special solicitude" in traditional

87. *Id.* at 279-80 (quoting United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 (1977)).

88. *See, e.g.*, *id; see also* Leonard Ray & Rorie L. Spill, *The States in Federal Appellate Court: Litigation Trends Over Time*, 23 JUST. SYS. J., 97, 97-98 (2002) (noting that states are becoming "repeat players" in appellate cases, largely because appellate courts are increasingly becoming "venues for policymaking" that implicate states' interests).

89. 549 U.S. 497, 518 (2007).

90. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 237 n.2 (1985) ("The Framers believed that the states played a vital role in our system and that strong state governments were essential to serve as a counterpoise to the power of the Federal Government." (internal quotation marks omitted)); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1552-53 (2012) ("Federalism is thought to promote choice, competition, experimentation, and the diffusion of power. The Supreme Court reels off these arguments as easily as scholars do. . . . One major view of state power is conventionally labeled a sovereignty account."); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466 (1987) ("[T]he Federalist Constitution preserved the independent lawmaking authority of state governments. . . . Wherever authorized by its own state constitution, a state government can enact any law not inconsistent with the federal Constitution and constitutional federal laws.").

standing analysis,[91] and, through the doctrine of *parens patriae*, they are able to access the federal courts to vindicate their quasi-sovereign interest—which the Court has recognized includes "a quasi-sovereign interest in the health and well-being[,] both physical and economic[,] of its residents in general."[92] In this regard, appellate intervention raises substantial questions about the constitutional balance of powers and the need to ensure that states can adequately defend their laws or advocate for their residents' interests within the federal judicial system.

Recall that the Supreme Court in *Cameron* strongly suggested that states should receive special solicitude in the analysis of interests for appellate intervention.[93] Notably, the Court framed this point not only as an important judicial commitment to federalism and state sovereignty, but also as a mandate from Congress: "The importance of ensuring that States have a fair opportunity to defend their laws in federal court has been recognized by Congress[u]nder 28 U.S.C. § 2403(b) . . . [and] Fed. Rule Civ. Proc. 24(a)(1). . . . These provisions reflect[] the weighty interest that a State has in protecting its own laws."[94] Similarly, the Supreme Court in *Berger v. North Carolina State Conference of the NAACP* warned that courts' intervention analyses should avoid "turning a deaf federal ear to voices the State has deemed crucial to understanding the full range of its interests."[95] Hence, even if a rule governing appellate intervention is not liberal in its treatment of all potential intervenors, it must at least take an analogous approach to standing doctrine in providing a more liberal standard for states. The "exceptional case for imperative reasons" heightened standard fails to recognize fundamental, structural principles of the Constitution.

C. Prudential (Policy) Reasons—Recognizing and Expanding on the Theoretical Underpinnings for an Expansive Standard in the District Courts

Scholars have observed that the evolution toward a more liberal intervention standard at the district-court level was driven by three

91. *Massachusetts v. Env't Prot. Agency*, 549 U.S. at 518.

92. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982).

93. *See* Cameron v. EMW Women's Surgical Ctr., P.S.C., 595 U.S. 267, 277-79 (2022).

94. *Id.* at 278.

95. 597 U.S. 179, 191 (2022).

overarching policy concerns: (1) efficient resolution of lawsuits (judicial economy), (2) balancing the interests of original parties against the potentially compelling interests of intervenors, and (3) favoring practicality over formalism.[96] These considerations are equally pertinent in the context of appellate intervention.

First, regarding judicial economy, the Supreme Court in *Scofield* emphasized the benefits that appellate intervention provides in obviating duplicative proceedings and achieving just outcomes with minimal technicalities.[97] The *Scofield* Court's approach champions more liberal appellate intervention standards as a lever for promoting judicial efficiency, consolidating controversies for swift resolution, and achieving judicial economies of scale. At the same time, the Court recognized the need to balance these benefits against the risk of overly complex litigation. This balancing involves ensuring that intervention does not unduly complicate proceedings by introducing new issues or parties that would disrupt the efficiency of the case. In this way, the Court supports intervention when it enhances judicial economy but guards against excessive procedural burdens that could overwhelm the appellate process.

Second, regarding the balance between the interests of the original parties and the would-be intervenors, many scholars have noted that procedural rule changes have often curtailed access to justice for society's least powerful.[98] More liberal appellate intervention standards could help eliminate judicial roadblocks for the most vulnerable. For these groups, the Supreme Court's point in *Scofield* about appellate intervention serving to ensure "fairness to the would-be intervenor" might resonate more deeply.[99] Indeed, Stephen Yeazell analogized the equity-promoting function of liberal intervention standards to John Hart Ely's concept of representation reinforcement, which argues that courts should actively protect the interests of groups that are marginalized in the political process by ensuring that they are properly represented in judicial proceedings.[100] In addition, Yeazell cites *Carolene Products* footnote 4, in which the Supreme Court

96. *See* Gunter, *supra* note 19, at 653.

97. Auto. Workers v. Scofield, 382 U.S. 205, 212 (1965).

98. *See* Malveaux, *supra* note 18, at 621.

99. *Scofield*, 382 U.S. at 213.

100. *See* Stephen C. Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 UCLA L. REV. 244, 249 n.25 (1977) (citing John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 933-43 (1973)).

emphasized the role of the judiciary in protecting "discrete and insular minorities," as another plausible inspiration for broader intervention rights.[101] Yeazell clarified that he was "not contending that there is one law of intervention for the powerful and another for the weak," but he did note that "sensitivity to the problems of 'discrete and insular minorities' may underlie the relaxation of intervention requirements in the 1966 amendments to Rule 24 of the Federal Rules of Civil Procedure."[102] A commitment to following the "policies underlying intervention" in the district courts when assessing motions to intervene on appeal might favor a similarly expansive approach, at least in cases involving discrete and insular minorities.

Third, regarding the push for practicality over formalism, the influence of writings by legal luminaries like D.C.-Circuit Judge Harold Leventhal and Professor Abram Chayes cannot be overstated. Recall that Judge Leventhal's opinion in the 1967 case of *Nuesse v. Camp* had asserted that "the 'interest' test [in FRCP 24(a)] is primarily a *practical* guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."[103] In a similar vein, Chayes, in his seminal article "The Role of the Judge in Public Law Litigation," advocated for a shift in civil litigation toward more inclusive participation in cases with wide-reaching public policy implications—what he termed "public law litigation" and others have at times referred to as "institutional reform litigation."[104] In Chayes's view, this liberal approach was not only supported by the 1966 amendments to FRCP 24 but it also was justified as a way to uphold democratic principles. By allowing for broader participation, a more expansive intervention framework was thought to help ensure that judicial decision-making is enhanced through the incorporation of diverse viewpoints. This inclusive, public-oriented vision of intervention has come to be known as the "interest representation" model, and it is often contrasted with more restrictive, private-dispute-focused notions of litigation in an adversarial system.[105]

Considering that appellate cases often involve high-stakes decisions that shape broader legal and political landscapes, they frequently comport

101. *See id.* (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

102. *Id.*

103. Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967) (emphasis added).

104. *See* Chayes, *supra* note 19, at 1289-91, 1307-10.

105. *See id.* at 1289, 1310; Nelson, *supra* note 19, at 351-63.

with Chayes's vision of public law litigation and plausibly might benefit from an "interest representation" framework for appellate intervention. As such, extrapolating from the theoretical foundations set by Leventhal and Chayes in the district-court context, a liberal approach to intervention on appeal seems similarly equipped to enhance the quality of judicial decision-making, increase public confidence, and ensure that a range of interests are adequately vindicated.

III. PROPOSALS FOR AN FRAP RULE ON APPELLATE INTERVENTION

This Part presents two competing proposals for an FRAP rule on appellate intervention. First, it analyzes the Advisory Committee's draft proposal from October 19, 2023, providing critiques and suggestions for improvement. Then, it offers a model rule that advocates for a more inclusive and expansive standard for intervention, aligning with the principles discussed earlier in this Note. That Section also responds to potential criticisms and objections, including concerns about overly complex litigation or procedural gamesmanship.

A. Advisory Committee's Draft Proposal (October 19, 2023)

In October 2023, the Advisory Committee on the Federal Rules of Appellate Procedure convened to discuss a draft rule for intervention on appeal.[106] Influenced by recent Supreme Court decisions—particularly *Cameron*'s emphasis on a gap in this area of law—and guided by a memorandum from the "Intervention on Appeal Subcommittee," the Advisory Committee deliberated the pros and cons of a proposed FRAP Rule 7.1. The Subcommittee's memo noted that "[o]ne reason to adopt a more demanding standard for intervention on appeal is that [this restrictive framework] appears to be the dominant approach in the courts of appeals."[107] Of course, the memo was referring to the "exceptional case for imperative reasons" heightened standard set by *McKenna* "[o]ver sixty years ago . . . in a one paragraph opinion,"[108] with little consideration of how that pre-*Scofield*, pre-1966-FRCP-amendments standard seems both doctrinally invalid and inconsistently followed, even by circuits that have cited it occasionally. Ultimately, the memo noted that the Subcommittee

106. See *Advisory Committee on Appellate Rules*, *supra* note 5, at 177-84.

107. *Id.* at 181.

108. *Id.*

"favors consideration of a restrictive rule for appellate intervention,"[109] and it offered the draft rule that appears in the ensuing Section.

1. Proposed Rule

The Advisory Committee's proposed Rule 7.1, "Intervention on Appeal," outlines a stringent framework for appellate intervention. For instance, it suggests amicus briefs as the preferred method for nonparties to contribute at the appellate level, reserving intervention for "truly exceptional cases"—an apparent endorsement of the *McKenna* heightened standard.[110] The rule sets out detailed criteria for intervention in such exceptional cases, including demonstrating a compelling reason for not seeking earlier intervention, a legal interest, and assurance that existing parties cannot "adequately protect"—presumably distinct from "adequately represent"—that interest.[111] Furthermore, it specifies a limited range of legal interests supporting intervention and includes provisions for governmental entities.[112] The full draft rule is reproduced below.

* * *

Rule 7.1 Intervention on Appeal

(a) Motion to Intervene. The preferred method for a nonparty to be heard is by filing an amicus brief under Rule 29. Intervention on appeal is reserved for truly exceptional cases. A person may move to intervene on appeal by filing a motion in accordance with Rule 27. The motion must

(1) be filed promptly;

(2) show that the movant meets the requirements of (b); and

(3) specify and explain the movant's legal interest required by (c).

109. *Id.* at 182.

110. *Id.*

111. *Id.* at 182-83.

112. *Id.* at 183.

(b) Criteria. A court of appeals may permit a movant to intervene on appeal who:

(1) demonstrates a compelling reason why intervention was not sought previously or, if it was sought previously, provides a compelling explanation of how circumstances have changed;

(2) has a legal interest as described in (c);

(3) is so situated that disposing of the appeal in the movant's absence may as a practical matter impair or impede the movant's ability to protect that interest;

(4) shows that existing parties will not adequately protect that interest;

(5) shows that submission of an amicus brief would be insufficient to protect that interest;

(6) shows that existing parties will not be unfairly prejudiced by permitting intervention; and

(7) in any civil action of which the district courts have original jurisdiction founded solely on section 1332 of title 28, shows that intervention would be consistent with the jurisdictional requirements of section 1367(b) of title 28.

(c) Legal Interests. The following legal interests support intervention on appeal:

(1) a claim or defense, including one that could be asserted in an action for a declaratory judgment, that could be currently asserted against an existing party;

(2) a claim, including one that could be asserted in an action for a declaratory judgment, that could be asserted against an existing party if the current case resulted in a judgment sought by an existing party;

(3) a claim that is being litigated on behalf of the proposed intervenor by a party acting in a representative capacity; and

(4) a claim to a property interest in the property that is the subject of the action.

(d) Governments, Agencies, and Officials.

(1) The United States or a State may also move to intervene to defend the legality of any law it has enacted or action it or one of its agencies or officers has taken.

(2) An agency or officer of the United States or of a State may also move to intervene to defend the legality of any law it has enacted or action it or one of its agencies or officers has taken, if that agency or officer is empowered by the law of the United States or that State to do so.

(3) A motion under (d) need not comply with (a)(2), (a)(3), (b), or (c).

(e) Disposition of Motion. The court may grant the motion, deny the motion, or transfer the motion to the district court. If the court grants the motion, the intervenor becomes a party for all purposes, unless the court orders otherwise. Denial of a motion to intervene does not preclude the filing of an amicus brief under Rule 29.[113]

* * *

2. Analysis of the Advisory Committee's Proposed Rule

Despite offering a solid starting point, the Advisory Committee's proposed Rule 7.1 falls short of what appellate intervention should look like in the federal judicial system. Below I provide some core critiques of and suggested improvements for the Rule. Later, in Section III.B., this Note offers an alternative, less restrictive model rule that incorporates these considerations.

Subsection (a), "Motion to Intervene"

One key concern with the Advisory Committee's draft rule is its apparent preference for amicus participation over intervention. Several sources, including the Supreme Court in *Scofield*, have noted how amicus participation is no substitute for the direct involvement of intervenors who otherwise meet the general requirements of timeliness, sufficient interest, practical effect, and inadequacy of representation.[114] The FRAP amendment

113. *Id.* at 182-84.

114. Auto. Workers v. Scofield, 382 U.S. 205, 215-16 (1965).

should focus on ensuring access to justice for nonparties who meet those critical criteria rather than adopting a self-proclaimed "restrictive standard" that echoes, or even amplifies, *McKenna*—indeed, the draft rule's insistence on "*truly* exceptional cases" seems even more rigid than *McKenna*'s unadorned "exceptional case" language.

Also, it is notable that subsection (a)(1) states that "[a] person may move to intervene on appeal by filing a motion in accordance with [FRAP] Rule 27" but "[t]he motion must be filed *promptly*," whereas the district-court standard is that the motion be "*timely*." It is unclear whether the Advisory Committee intended to establish a different, more rigorous standard with this "promptly" language. The Subcommittee should consider mimicking FRCP 24's "timely" standard, and it should specify that—as emphasized by the Supreme Court in *Cameron*—"the most important circumstance relating to timeliness is that the [nonparty] sought to intervene 'as soon as it became clear' that [its] interests 'would no longer be protected' by the parties in the case."[115]

Subsection (b), "Criteria"

From the perspective of those favoring a more liberal standard, all the criteria in subsection (b) seem overly burdensome. As suggested at various points in this Note, all that should really matter is (1) timeliness, under the *Cameron* and *McDonald* standard (i.e., when it becomes clear to the potential intervenor—when they knew or reasonably should have known—that their interests were no longer represented by the parties in the case),[116] not relative to the stage of litigation; (2) a valid interest; (3) inadequate representation; and (4) potential impairment of that valid interest. To these four factors, which reflect the traditional FRCP 24 district-court standard, one might add two additional considerations articulated by the Supreme Court in *Scofield*: (5) concerns for prejudice to the interest of the original parties relative to the valid interests of the intervenors; and (6) safeguards against unmanageable complexity for the judge, as balanced against the plausible gains in efficiency generally associated with granting intervention. These theoretical commitments weigh in favor of *Nuesse*'s "as many [interested parties] as is compatible with due process and efficiency" standard,[117] which counsels for less preclusive qualifying criteria.

115. Cameron v. EMW Women's Surgical Ctr., P.S.C., 595 U.S. 267, 279-80 (2022) (quoting United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 (1977)).

116. *Id.*

117. Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967).

In addition, similar to the "promptly"/"timely" discrepancy in subsection (a), the Committee should resolve the "adequately protect"/"adequately represent" discrepancy in favor of the latter, as it mimics the district-court standard. In so doing, the Committee should also specify the circumstances under which a nonparty's interests are inadequately represented, ideally codifying the Supreme Court's permissive stance that a nonparty's "burden of making that [inadequate-representation] showing should be treated as minimal."[118]

Subsection (c), "Legal Interests"

The framing of the requisite interest in Rule 7.1 as "legal" in nature is yet another indication that the Advisory Committee was intentionally restrictive, considering that the text of FRCP 24, in contrast, uses the unqualified word "interest."[119] Indeed, FRCP 24 requires the would-be intervenor to show that the disposition of the case in their absence could impair an interest "as a *practical* matter," not as a legal matter.[120]

The Advisory Committee's more rigid language appears to be an endorsement of the novel, conservative idea—championed by Professor Caleb Nelson—that "the word 'interest' in [FRCP] Rule 24(a) refers to some type of *legal* interest (not just a practical 'injury in fact')", such that "[t]he most natural alternative [to the current trend of liberal, practical interpretations] would read Rule 24(a) as referring to the sort of 'interest' that the law recognizes as the basis for a claim or defense."[121] It is important to recognize just how unconventionally narrow Nelson's views are. Not only is his "claim or defense" theory counter to positions that the United States has taken in past cases,[122] but he also seems to believe that the "interest"

118. Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10. (1972); *accord* Berger v. N.C. State Conf. of the NAACP, 597 U.S. 179, 195-96 (2022) (reiterating *Trbovich*'s "minimal burden" standard for demonstrating inadequate representation).

119. FED. R. CIV. P. 24(a)(2).

120. *Id.* (emphasis added).

121. Nelson, *supra* note 19, at 385-86.

122. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 14 n.2., Town of Chester v. Laroe Ests., Inc., 581 U.S. 433 (2017) (No. 16-605), 2017 WL 908860 (acknowledging that the Supreme Court in *Trbovich* established that "a person [may] intervene as a plaintiff even when no statute authorized him to initiate his own cause of action, as long as he limited his claims to those asserted by a plaintiff that did have a cause of action").

required by FRCP 24 involves a showing *higher* than Article III standing.[123] This argument is in conflict with many scholars who believe that reading Article III standing requirements into FRCP 24 beyond the special circumstances of *Town of Chester v. Laroe Estates, Inc.*[124] would be incorrect as a legal matter and undesirably restrictive as a policy matter.[125]

In *Town of Chester*, the Supreme Court held that "an intervenor must meet the requirements of Article III if the intervenor wishes to pursue relief not requested by a plaintiff" but not otherwise.[126] That case only created a heightened standard for the limited set of situations when intervenors seek a distinct form of relief. Applying Article III standing requirements more broadly to all intervention cases would limit access to justice unnecessarily. Rather than extrapolating Nelson's conservative, restrictive views on district-court intervention, one might favor a broader, more liberal handling of the "interest" requirement for FRAP Rule 7.1. This alternative approach would mimic FRCP 24—and expansive interpretations of that rule by many courts—in requiring a "practical" rather than a "legal" interest.

Moreover, even if one were to favor a "legal" interest over a "practical" interest for appellate intervention, the Committee describes the cognizable set of legal interests too narrowly. By focusing on "a claim or defense"—again, a tacit endorsement of Nelson's views—the Committee does not give proper weight to interests that might plausibly arise from a case's precedent-setting effects. Yet, the *Scofield* Supreme Court noted that "fairness" required consideration of such effects,[127] and many courts of appeals have duly deemed the potential for adverse precedent as a valid "interest" weighing in favor of intervention.[128]

123. *See* Nelson, *supra* note 19, at 289 ("[S]o little is required for Article III standing that if no more were required for intervention as a matter of right, intervention would be too easy and clutter too many lawsuits with too many parties." (alteration in original) (quoting City of Chicago v. FEMA, 660 F.3d 980, 985 (7th Cir. 2011))).

124. 581 U.S. at 435.

125. *See* Zachary N. Ferguson, Note, *Rule 24 Notwithstanding: Why Article III Should Not Limit Intervention of Right*, 67 DUKE L.J. 189 (2017).

126. *Town of Chester*, 581 U.S. at 435.

127. Auto. Workers v. Scofield, 382 U.S. 205, 213 (1965).

128. *See* Ferguson, *supra* note 125, at 197 n.47 (cataloguing several cases in which courts of appeals "have recognized the potential for adverse precedent as a cognizable interest under Rule 24(a)(2)").

Subsection (d), "Governments, Agencies, and Officials"

One concern with subsection (d) is that it does not demonstrate enough deference for the *parens patriae* and state sovereignty issues that *Cameron* clearly prioritized and that related doctrines like standing recognize.[129] Subsection (d) permits states "to intervene to defend the legality of any law it has enacted or action it or one of its agencies or officers has taken," but there is no mention of whether states should otherwise receive special solicitude in intervention's interest analysis, particularly when they are seeking to advocate in public matters that affect the health, safety, and welfare of their residents or that substantially implicate their state treasuries.

In addition to recognizing a less exacting standard for states, either subsection (d) or a related subsection might also consider providing deference to two other categories of "representation-reinforcing interests"— (1) discrete and insular minorities and (2) "public law" or "institutional reform" litigation.[130]

Subsection (e), "Disposition of Motion"

This subsection should be more specific in noting that dispositions of motions to intervene on appeal can involve granting "limited intervention." For instance, this option might involve permitting a nonparty to intervene on the condition that they are not allowed to expand the scope of litigation by introducing issues that were not originally raised by the main parties.[131] The Committee seems to be gesturing at this possibility by noting, "If the court grants the motion, the intervenor becomes a party for all purposes, *unless the court orders otherwise*." But the Committee could be more explicit; it might even consider enumerating the range of acceptable limitations for intervenors who are not granted full-party status.

129. *See* discussion *supra* Section II.B.

130. *See* discussion *supra* Section II.C.

131. *See, e.g.*, Trbovich v. United Mine Workers, 404 U.S. 528, 537 (1972) (limiting intervention to arguments already brought by the original parties).

B. Refining the Advisory Committee's Proposal—A Model Rule to Achieve a More Inclusive Policy Vision

1. Model Rule

This Section offers a revised version of FRAP Rule 7.1 for intervention on appeal, aiming for a more expansive, liberal approach while maintaining essential safeguards against unnecessary complexity, delay, or other complications that may arise when adding parties to a case. This model rule aims to challenge the paradigm set by the Advisory Committee's draft proposal and spark critical dialogue. The Rule remains a work in progress that would benefit from further commentary and refinement by additional practitioners.

* * *

FRAP Rule 7.1 Intervention on Appeal

(a) Motion to Intervene. A nonparty may move to intervene on appeal by filing a motion in accordance with Rule 27. The motion must:

(1) demonstrate the movant's interest in the proceedings;

(2) be timely, meaning that the movant sought to intervene as soon as it became clear—in the sense that the movant knew or reasonably should have known—that its interests would no longer be adequately represented by the parties in the case;

(3) explain why the movant's interest may not be adequately represented by the existing parties, judged under the standard that the movant's burden of showing inadequate representation should be treated as minimal; and

(4) indicate why an amicus brief is not a sufficient mechanism to convey the movant's interest.

(b) Broad Criteria for Granting Intervention. A court of appeals should engage in an interest-balancing, totality-of-the-circumstances analysis when deciding whether to permit intervention on appeal, favoring intervention when the movant, either in full or in part:

(1) provides a compelling reason why intervention was not sought previously or, if it was sought previously, provides a compelling explanation of how circumstances have changed;

(2) has a legal or practical interest as described in (c);

(3) demonstrates that their interest aligns with promoting fairness and comprehensive adjudication of the issues on appeal;

(4) shows that their participation would provide beneficial information or perspectives that may assist the court in the resolution of complex legal questions, especially in cases with broad public impact;

(5) verifies that intervention will not unduly delay the proceedings or impose an unreasonable burden on the court or the parties;

(6) asserts an interest of such a nature that only direct participation, rather than as amicus curiae, can adequately safeguard it; or

(7) demonstrates that the intervention would serve judicial economy by potentially obviating the need for future litigation.

(c) Interests Justifying Intervention. The following legal and practical interests, among others that are deemed cognizable within the discretion of the presiding court, may support intervention:

(1) a claim or defense, including one that could be asserted in an action for a declaratory judgment, that could be currently asserted against an existing party;

(2) a claim, including one that could be asserted in an action for a declaratory judgment, that could be asserted against an existing party if the current case resulted in a judgment sought by an existing party;

(3) a claim that is being litigated on behalf of the proposed intervenor by a party acting in a representative capacity;

(4) a claim to a property interest in the property that is the subject of the action;

(5) interests related to the broader implications of the appellate decision, including potential precedent-setting or policy-shaping outcomes; and

(6) interests related to enhancing the representative nature of the litigation, particularly in cases of significant public interest.

(d) Special Provisions for Governments, Agencies, and Officials. A government, agency, or official seeking to intervene to protect its interests or defend the legality of governmental action may do so under a relaxed standard.

(e) Equitable Considerations. The court may permit intervention for parties demonstrating an interest in the outcome of the appeal based on equitable considerations. This provision is to ensure that, subject to the court's discretion, other movants with representation-reinforcing interests might be granted intervention under a relaxed standard. Cognizable representation-reinforcing interests under this provision might include the vindication of rights for discrete and insular minorities.

(f) Discretionary and Flexible Disposition of Motion. The court has discretion to dispose of the motion in any manner that it deems will best advance a policy of involving as many apparently concerned persons as is compatible with efficiency and due process, including but not limited to:

(1) Granting the motion in full;

(2) Granting the motion in part—for example, by allowing a limited form of intervention that prohibits the intervenor from introducing issues that were not already raised by the original parties;

(3) Transferring the motion to the district court; or

(4) Denying the motion, while acknowledging that denial of a motion to intervene does not preclude the filing of an amicus brief under Rule 29.

* * *

This revised FRAP Rule 7.1 aims to offer a more liberal, inclusive alternative to the Advisory Committee's "restrictive" draft proposal. Each subsection was designed not only to align with the doctrinal, structural, and prudential considerations noted in Part II and Section III.A.2. of this Note, but also to maintain key safeguards that balance the interests of potential intervenors against the practicalities of avoiding prejudice to original parties or undue complexity in appellate proceedings.

2. Explaining the Model Rule

Subsection (a), "Motion to Intervene"

The model rule's alternative version of subsection (a) refines the requirements for a nonparty's motion to intervene on appeal, focusing on the key elements of timeliness, sufficient interest, practical effect, and inadequacy of representation. In so doing, the provisions in subsection (a) carefully frame the standards for timeliness and inadequate representation in accordance with the judicial precedents discussed earlier. In particular, the model rule codifies *Cameron* and *McDonald*'s requirement that timeliness should be determined from all circumstances—not simply based on the stage of litigation—with a focus on when the movant knew or reasonably should have known that their interests were no longer represented by the parties in the case.[132] It also adopts *Berger* and *Trbovich*'s permissive stance that a nonparty's "burden of making [an inadequate representation] showing should be treated as minimal."[133] These modifications improve upon the Advisory Committee's draft by more effectively reflecting the normative commitments expressed earlier and by serving to ensure that the rule does not unfairly disadvantage potential intervenors who become aware of their inadequately represented interests at a later stage.

In a similar vein, subsection (a) of the model rule removes the Advisory Committee's endorsement of the unduly restrictive—and in many ways anachronistic—*McKenna* standard by eliminating the draft proposal's insistence that "intervention on appeal is reserved for truly exceptional cases" and that "the preferred method for a nonparty to be heard is by filing an amicus brief under Rule 29." At the same time, however, the model rule is careful not to open a pandora's box that tips the scales totally away from amici participation in cases where it can serve as a proper substitute. Indeed, subsection (a)(4) of the model rule still requires that a nonparty "indicate why an amicus brief is not a sufficient mechanism to convey the movant's interest." The intention is that judges consider the putative insufficiency of amici participation alongside the broad set of

132. *See* Cameron v. EMW Women's Surgical Ctr., P.S.C., 595 U.S. 267, 279-80 (2022) (quoting United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 (1977)).

133. *See* Berger v. N.C. State Conf. of the NAACP, 597 U.S. 179, 195-96 (2022) (reiterating *Trbovich*'s "minimal burden" standard for demonstrating inadequate representation).

complementary qualifying criteria outlined in subsection (b), rather than simply defaulting to amici participation as a general standard.

Subsection (b), "Broad Criteria for Granting Intervention"

One of the most significant ways in which the model rule expands upon the draft proposal is by noting in subsection (b)(2) that a movant could demonstrate a "legal *or practical* interest as described in [subsection] (c)" rather than maintaining the Advisory Committee's strict focus on legal interests. It also takes the expansive approach of empowering courts to "engage in an interest-balancing, totality-of-the-circumstances analysis when deciding whether to permit intervention on appeal." This discretionary, interest-balancing approach is facilitated by replacing the Advisory Committee's use of the coordinating conjunction "and" (which typically accompanies an all-encompassing, exclusive list of criteria—e.g., "A court of appeals may permit a movant to intervene on appeal who: . . . (1) . . . (2) . . . *and* . . .) with the coordinating conjunction "or" (which gives the judge discretion to favor intervention when the movant satisfies the list of criteria "either in full *or in part*").

Subsection (c), "Interests Justifying Intervention"

Subsection (c) builds upon the previous subsection by expanding the Advisory Committee's notion of "legal" interests to include "practical" interests. As such, it preserves subsections (c)(1) through (c)(4) as presented in the draft proposal but also adds "(5) interests related to the broader implications of the appellate decision, including potential precedent-setting or policy-shaping outcomes; and (6) interests related to enhancing the representative nature of the litigation, particularly in cases of significant public interest." This expansion acknowledges the reality that many potential intervenors are affected by appellate cases in practical ways that may not fit a narrowly defined set of legal interests. In addition, the revised rule notes that "the following legal and practical interests, *among others that are deemed cognizable within the discretion of the presiding court*, may support intervention." This language recognizes the diverse and unpredictable nature of legal interests that may warrant intervention.

By considering a broader range of factors—legal and practical alike—judges are equipped to make more nuanced decisions that reflect the complexities of modern appellate litigation. Though scholars more aligned with Caleb Nelson's conservative view of intervention might disfavor this

approach,[134] others aligned with an "interest representation"[135] or "equity-promoting"[136] vision of intervention might find it persuasive that—as noted earlier—the *Scofield* Supreme Court insisted that "fairness" required consideration of such practical effects[137] and that many courts of appeals have duly deemed the potential for adverse precedent as a valid "interest" weighing in favor of intervention.[138]

Subsection (d), "Special Provisions for Governments, Agencies, and Officials"

Subsection (d) addresses the *parens patriae* interests of states and the federal government by relaxing standards for governments, agencies, and officials. This modification respects the principles of federalism and state sovereignty, ensuring that governmental interests are adequately represented in appellate litigation. This provision should be viewed as a complement to 28 U.S.C. § 2403, which permits the "United States or a State" to intervene in cases where the constitutionality of their laws "is drawn in question."[139] But—unlike that statute—subsection (d) of the model rule is intentionally drafted to favor intervention when a governmental entity seeks to broadly "protect its interests," not simply to defend the validity of its laws. As such, it takes a more permissive stance than the Advisory Committee's draft proposal on whether states should receive special solicitude in intervention's interest analysis, particularly when they are seeking to advocate in public matters that affect the health, safety, and welfare of their residents or that substantially implicate their state treasuries.

Subsection (e), "Equitable Considerations"

Subsection (e) improves upon the Advisory Committee's draft by introducing equitable considerations into the criteria for appellate

134. *See supra* text accompanying notes 121-125.

135. *See* Chayes, *supra* note 19, at 1289-91, 1307-10.

136. *See* Yeazell, *supra* note 100, at 244, 249 n.25.

137. *See* Auto. Workers v. Scofield, 382 U.S. 205, 213 (1965).

138. *See* Ferguson, *supra* note 125, at 197 n.47 (cataloguing several cases in which courts of appeals "have recognized the potential for adverse precedent as a cognizable interest under Rule 24(a)(2)").

139. 28 U.S.C. §§ 2403(a)-(b) (2018).

intervention. As stated, "[t]his provision is to ensure that, subject to the court's discretion, other movants with representation-reinforcing interests [—such as discrete and insular minorities—] might be granted intervention under a relaxed standard." As such, it acknowledges the judiciary's responsibility to ensure that its processes do not inadvertently exclude or marginalize groups with important stakes in legal outcomes. It also represents an explicit commitment to Stephen Yeazell's equity-promoting function of liberal intervention and to the *Scofield* Court's point about appellate intervention serving to ensure "fairness to the would-be intervenor."[140]

Subsection (f), "Discretionary and Flexible Disposition of Motion"

Finally, subsection (f) provides courts with the flexibility to manage interventions effectively, while formalizing Judge Leventhal's vision of "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."[141] By formalizing the option for limited or conditional intervention, the rule enables courts to tailor their approach to the specifics of each case, facilitating participation without impeding the efficiency, efficacy, or manageability of appellate proceedings.

3. Responding to Potential Criticisms and Objections

This Section responds to a few of the major counterarguments that skeptics might offer against a more expansive standard for appellate intervention. In each of the areas outlined below, this Note's model rule seeks to uphold the integrity of the appellate process, fostering a system that is both just and efficient.

Overburdened Caseload and Judicial Economy

Any court confronting a motion to intervene must fundamentally "attempt[] to accommodate two competing policies: [1] efficiently administrating legal disputes by resolving all related issues in one lawsuit, on the one hand, and [2] keeping a single lawsuit from becoming

140. *See* Yeazell, *supra* note 100, 244, 249 n.25; *Scofield*, 382 U.S. at 213.

141. Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967).

unnecessarily complex, unwieldy or prolonged, on the other hand."[142] This delicate balance acquires particular salience in light of the well-documented "litigation explosion" and corresponding "crisis in volume" that has disproportionately afflicted appellate courts over the past five decades.[143] Staggeringly, depending on the method of calculation, researchers report that the standard appellate caseload has increased at least fourfold and perhaps as much as tenfold since the 1970s.[144]

With this backdrop in mind, concerns about an overburdened judiciary and the appellate system's capacity to handle increased interventions are certainly understandable. But these challenges are far from insurmountable. Rather, there are three compelling reasons why these concerns do not justify rejecting a more expansive approach to appellate intervention.

First, the procedural rights afforded to appellate intervenors, far from complicating or delaying appellate review, contribute to a more informed, efficient, and meaningful judicial process. By allowing parties with diverse or specialized perspectives to participate fully, appellate courts gain access to a broader range of insights, which can help clarify complex issues and ensure that all relevant aspects of a case are thoroughly considered. The Supreme Court in *Scofield* cogently underscored the procedural benefits and efficiencies of direct intervention in appellate courts.[145] As noted earlier, because amici are not bound by final judgements, the *Scofield* Court viewed appellate intervention as a means of obviating duplicative proceedings and achieving just outcomes with minimal technicalities.[146] Under this view, rather than being a harbinger of inefficiency, there is potential for appellate intervention to be harnessed as a lever for consolidating controversies and promoting judicial economies of scale while nonetheless balancing against the risk of creating overly complex litigation.

Second, the Supreme Court's perspective in *Berger* suggests that even at the more hands-on trial level—where the burdens of intervention are higher than on appeal, as trial intervenors gain access to the powerful,

142. United States v. Pitney Bowes, Inc., 25 F.3d 66, 69 (2d Cir. 1994) (citing United States v. Tex. E. Transmission Corp., 923 F.2d 410, 412 (5th Cir.1991)).

143. *See* Martin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2388-89 (2014); DANIEL MEADOR, THOMAS E. BAKER & JOAN STEINMAN, APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL vi (2d ed. 2006).

144. Levy, *supra* note 143, at 2388; MEADOR et al., *supra* note 143, at vi.

145. *See Scofield*, 382 U.S. at 212-13.

146. *Id.*

complex tool of discovery—increasing the number of parties does not inherently compromise case management.[147] As noted by the majority in that case, "federal courts routinely handle cases involving multiple officials sometimes represented by different attorneys taking different positions."[148] According to the Court, "[w]hatever additional burdens adding [intervenors] . . . may pose, those burdens fall well within the bounds of everyday case management."[149] If this is true at the trial level, it is certainly true at the appellate level, where motions to intervene are rarer and likely indicative of significant divergences in interests or gaps in representation. Under the model rule presented in this Note, judges retain the discretion to deny interventions that do not serve the efficiency or fairness of proceedings.

Third, the challenges posed by increasing caseloads are not unique to the question of intervention; they reflect broader systemic issues that require comprehensive reforms. Thus, the appropriate response to appellate courts' "crisis in volume" lies in structurally addressing the growing demands on the federal judiciary, rather than maintaining procedurally deficient or even unfair standards for appellate intervention. Expanding the number of appellate judges is perhaps the most plausible option for alleviating existing caseload pressures, considering that various forms of this proposal have garnered support in political and legal circles recently.[150] Additionally, investing in technological advancements, such as enhanced electronic case-management systems and predictive analytics,

147. *See* Berger v. N.C. State Conf. of the NAACP, 597 U.S. 179, 199-200 (2022).

148. *Id.*

149. *Id.*

150. *See, e.g.*, Admin. Off. of the U.S. Cts., *Federal Judiciary Seeks New Judgeship Positions*, U.S. CTS. (Mar. 14, 2023), https://www.uscourts.gov/news/2023/03/14/federal-judiciary-seeks-new-judgeship-positions [https://perma.cc/3GW6-E7XJ] ("The Judicial Conference of the United States today agreed to recommend to Congress the creation of new district and court of appeals judgeships . . . to meet workload demands in certain courts."); Maggie Jo Buchanan & Stephanie Wylie, *It Is Past Time for Congress To Expand the Lower Courts*, CTR. FOR AM. PROGRESS (July 27, 2021), https://www.americanprogress.org/article/past-time-congress-expand-lower-courts [https://perma.cc/JL69-P9SK] ("An expansion of the appellate courts by approximately the same rate that occurred in 1978—30 percent—would mirror the growth of the U.S. population since the 1990 law [that increased the number of federal appellate judges].").

can streamline case processing and reduce administrative burdens.[151] These structural reforms are far more appropriate responses to the judiciary's workload constraints than limiting access to the appellate process through restrictive intervention standards, which risks undermining the fairness and inclusivity of the judicial system.

Broad District-Court Intervention or Appellate Amicus Participation as Potential Substitutes

Given the trend toward more liberal district-court intervention as discussed in Section I.B.2., some may question why nonparties that have otherwise been afforded an expansive opportunity to intervene in the district court should still be provided with a robust opportunity to intervene on appeal. Additionally, critics might contend that the general availability of amicus curiae participation at the appellate level could serve as a sufficient alternative, allowing parties to present their perspectives without the need for direct intervention. Upon closer examination, neither broader district-court intervention nor generous amicus curiae participation at the appellate level can adequately substitute for the rights secured through direct intervention. Each of these alternatives falls short in ensuring that all relevant interests are fully represented and that the appellate process remains fair and comprehensive.

Why District-Court Intervention Is an Inadequate Substitute

Despite broad intervention opportunities at the district-court level, appellate intervention remains critical. This necessity arises largely because litigation is dynamic, and the full implications of a case might not be apparent to a would-be intervenor until it reaches the appellate stage. For example, a district-court ruling might raise new legal questions or highlight broader policy implications that were not evident earlier. Additionally, nonparties may only become aware of their inadequately represented interests as the case progresses and the original parties shift litigation strategies or modify their core legal arguments.

Recall that these were the circumstances motivating appellate intervention in *Cameron v. EMW Women's Surgical Center*.[152] In that case, Kentucky's attorney general felt compelled to intervene on appeal soon

151. *See* James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 278-304 (2012).

152. 595 U.S. 267 (2022).

after learning that the state's secretary of health and human services did not intend to file a petition for rehearing en banc or a petition for a writ of certiorari challenging the Sixth Circuit's adverse ruling.[153] Similarly, the Ninth Circuit in *Peruta v. County of San Diego* granted the State of California's motion to intervene at the appellate stage because it was filed soon after San Diego County's sheriff declined to petition for rehearing en banc of a surprisingly broad, adverse ruling that would have substantially impaired California's ability to regulate firearms.[154] Lastly, consider the Sixth Circuit case of *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, which later became the landmark Supreme Court case known as *Bostock v. Clayton County*.[155] There, a transgender woman was allowed to intervene and pursue her Title VII employment discrimination claims because she reasonably and timely argued that "changes in policy priorities within the U.S. government might prevent the EEOC from fully representing her interests."[156] Prior to that shift in policy priorities—which only occurred at the appellate stage—she previously "had no reason to question whether the EEOC would continue to adequately represent her interests."[157]

Still, readers may wonder why intervention should not be treated like other procedural rights that become constrained after the district court has rendered final judgment. Here, it is important to keep in mind (1) how intervention and these other procedural rights differ in purpose, and (2) the extent to which they comport with the distinct functions of trial and appellate courts. Appellate courts are not designed to be fact-finding bodies; their role is to interpret and apply the law.[158] Thus, evidentiary rights, such as the right to confront and cross-examine witnesses, are fundamental at

153. *Id.* at 272-73.

154. 824 F.3d 919, 940 (9th Cir. 2016).

155. Equal Emp. Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom.* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

156. *Id.* at 570.

157. *Id.*

158. *See About the U.S. Courts of Appeals*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals [https://perma.cc/U9JZ-AE9E] ("[A]ppellate courts do not retry cases or hear new evidence. They do not hear witnesses testify. There is no jury. Appellate courts review the procedures and the decisions in the trial court to make sure that the proceedings were fair and that the proper law was applied correctly.").

the trial level but are unavailable on appeal.[159] The same goes for discovery rights that allow parties to gather evidence and engage in fact-finding before trial.[160] In contrast, intervention is not about gathering new facts but instead about ensuring that the legal implications of those facts are fully explored and that the court's decision both reflects and accommodates all the major interests at stake. By ensuring that all legal perspectives are adequately represented without disrupting the established factual record, expansive rights to intervene on appeal can help promote fairer, more thorough appellate judgements while nonetheless preserving the integrity of the separate, trial-level fact-finding process.

Why Amicus Curiae Participation Is an Inadequate Substitute

The fundamental distinction between the rights of an intervenor and the limitations of an amicus curiae in appellate proceedings underscores the invaluable role of direct intervention. As the Supreme Court insightfully noted in *Scofield*, the array of rights secured to intervenors—including but not limited to participating in designating the record, engaging in prehearing conferences, filing more fulsome briefs, partaking in oral argument, accessing a wider range of motions, and petitioning for rehearing or certiorari—facilitates a comprehensive and active engagement in the appellate process.[161] These rights enable intervenors to contribute substantively to the court's understanding of the case, ensuring that all relevant materials and arguments are thoroughly considered. This level of participation, inherently linked to the direct stakes an intervenor has in the outcome, enriches the appellate court's deliberations, promotes a sense of procedural fairness for those with inadequately represented interests, and increases the probability of a just resolution in complex legal disputes.

Procedural Gamesmanship and Tactical Uses

Finally, skeptics of a broader right to intervene on appeal may raise concerns about the potential for "procedural gamesmanship" and tactical abuses. Though valid, these concerns are manageable through careful judicial oversight and clearly established standards for review.

159. *Id.*

160. *Id.*

161. *See* Auto. Workers v. Scofield, 382 U.S. 205, 215-16 (1965).

First, consider objections to the tactic known as "sandbagging."[162] As framed by the D.C. Circuit, it "would be entirely unfair, and an inexcusable waste of judicial resources, to allow a potential intervenor to lay in wait until after the parties and the trial and appellate courts have incurred the full burden of litigation before deciding whether to participate in the judicial proceedings."[163] Few would argue against that proposition; surely, any party that knows or has reason to know of its inadequately represented interests should not be allowed to delay intervention and "lay in wait" for more disruptive or otherwise strategic timing. As noted by the Ninth Circuit, however, such objections are based predominately "on an alleged lack of timeliness,"[164] which can be overcome by simply defining the standard for timeliness in ways that prevent "sandbagging" and related forms of tactical abuse. Hence, the model rule in this Note is careful to stipulate that "[t]he motion [to intervene] must . . . be timely, meaning that the movant sought to intervene as soon as it became clear—in the sense that the movant knew or reasonably should have known—that its interests would no longer be adequately represented by the parties in the case . . . ."[165]

Second, there is a concern that allowing intervention after appellate argument and decision would deprive both the judicial panel and the existing parties of a meaningful opportunity to address new arguments introduced by the intervenor.[166] An objection of this sort was raised unsuccessfully in the foregoing case of *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, as the funeral home had argued that allowing the transgender woman to intervene would unfairly introduce untested legal arguments and

162. *See, e.g.*, Bates v. Jones, 127 F.3d 870, 873 (9th Cir. 1997) ("The state bases its objection regarding the criteria for intervention solely on an alleged lack of timeliness. The state contends that if we allow these applicants 'casual[ly]' to intervene now, we will open the door for future litigants to 'sandbag' other parties by waiting to intervene until a favorable ruling seems likely.").

163. Amalgamated Transit Union Int'l, AFL-CIO v. Donovan, 771 F.2d 1551, 1553 (D.C. Cir. 1985) (per curiam).

164. *Bates*, 127 F.3d at 873; *see also* Day v. Apoliona, 505 F.3d 963, 965 (9th Cir. 2007) ("A would-be intervenor's delay in joining the proceedings is excusable when the intervenor does not 'know[] or ha[ve] reason to know that his interests might be adversely affected by the outcome of litigation.'" (quoting United States v. Alisal Water Corp., 370 F.3d 915, 919 (9th Cir. 2004))).

165. *See* Model Rule *supra* p. 317.

166. *Amalgamated*, 771 F.2d at 1553.

facts.[167] Yet, as the intervenor correctly pointed out, such concerns are misguided because appellate rules generally prevent parties from expanding the scope of litigation beyond issues raised at the district court level.[168] The intervenor in that case sought only to present arguments already within the appeal's scope, ensuring no unfair prejudice to the existing parties.[169] Thus, the Sixth Circuit granted the transgender woman's motion for limited intervention, recognizing these safeguards.[170] This Note's proposed rule includes similar constraints to ensure that intervention does not unfairly disrupt the appellate process by improperly expanding the scope of litigation.[171]

Lastly, opponents of a less restrictive rule might fear that expansive appellate intervention would create a path for de novo review of district-court intervention decisions.[172] Of course, in many circumstances, circuit courts already use a de novo standard when reviewing denials of motions

167. *See* R.G. & G.R. Harris Funeral Homes Inc.'s Memorandum of Law in Opposition to Charging Party's Motion to Intervene as Plaintiff-Appellant at 7, Equal Emp. Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 2017 WL 10350992 (6th Cir. Mar. 27, 2017) (No. 16-2424).

168. *See* Reply in Support of Motion to Intervene as Plaintiff-Appellant at 8, *R.G. & G.R. Harris*, 2017 WL 10350992 (citing Thomas v. Arn, 474 U.S. 140, 148 (1985)).

169. *Id.*

170. *See* Equal Emp. Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 570 (6th Cir. 2018).

171. *See* Model Rule *supra* p. 319 ("The court has discretion to . . . [g]rant[] the motion [only] in part—for example, by allowing a limited form of intervention that prohibits the intervenor from introducing issues that were not already raised by the original parties . . . .").

172. *See, e.g.*, Richardson v. Flores, 979 F.3d 1102, 1105 (5th Cir. 2020) ("If we analyzed motions to intervene on appeal using the same framework district courts use to address motions to intervene there, litigants would effectively have de novo review of their intervention motion."). *But cf.* City of Houston v. Am. Traffic Sols., Inc., 668 F.3d 291, 293 (5th Cir. 2012) ("[When] the motion to intervene is not argued to have been untimely, this court reviews the standards for intervention of right de novo." (citing Edwards v. City of Houston, 78 F.3d 983, 992 (5th Cir. 1996) (en banc))).

to intervene as of right,[173] but it is understandable that critics would be wary of opening the door to procedural gamesmanship that might further expand these circumstances. Regardless, just as before, establishing clear standards within the rule itself can prevent such misuse of the intervention process, ensuring that it serves as a means to enhance, rather than evade, justice. For instance, under the model rule presented in this Note, a movant must "provide[] a compelling reason why intervention was not sought previously or, if it was sought previously, provide[] a compelling explanation of how circumstances have changed . . . ."[174] Fundamentally, the model rule is designed to ensure that appellate courts are largely confronting situations in which intervention was *not* sought in the district court and is now being pursued for reasons deemed legitimate—not purely strategic or otherwise disruptive—on appeal.

Essentially, criticisms of expanding appellate intervention frequently overlook the judiciary's capability and discretion to manage such interventions effectively. By implementing clear standards and maintaining judicial oversight, the proposed rule enhancements in this Note serve to improve the appellate process's fairness and efficacy without succumbing to the potential pitfalls identified by critics.

CONCLUSION

"The history of American freedom is, in no small measure, the history of procedure."[175]

This observation by Justice Frankfurter aptly captures the essence of our federal judicial system, where the procedural "rules of the game" are often just as consequential as the substantive doctrines that they complement. Indeed, the seemingly obscure, technical questions surrounding intervention in federal appellate proceedings actually implicate many of our judicial system's most fundamental law and policy values. As demonstrated in this Note, formulating a standard for appellate

173. *See, e.g.*, *Am. Traffic Sols.*, 668 F.3d at 293; Bost v. Ill. State Bd. of Elections, 75 F.4th 682, 686 (7th Cir. 2023); Blount-Hill v. Zelman, 636 F.3d 278, 283 (6th Cir. 2011); U.S. v. Aerojet Gen. Corp., 606 F.3d 1142, 1148 (9th Cir. 2010); Wildearth Guardians v. U.S. Forest Serv., 573 F.3d 992, 995 (10th Cir. 2009); Sierra Club, Inc. v. Leavitt, 488 F.3d 904, 910 (11th Cir. 2007); Little Rock Sch. Dist. v. N. Little Rock Sch. Dist., 378 F.3d 774, 780 (8th Cir. 2004).

174. Model Rule *supra* p. 317.

175. Malinski v. New York, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

intervention requires grappling with such lofty concepts as the proper role of the courts, access to justice, state sovereignty, representation reinforcement for discrete and insular minorities, judicial economy, and whether structures of litigation should be tailored toward expansive, public-oriented notions of "interest representation" or more "traditional," private-oriented adversarialism.

Embarking on a task as ambitious as amending the procedural framework governing our nation's federal appellate system is undoubtedly challenging, and no rule in this domain can ever achieve perfection. That is why Arthur Vanderbilt, former Chief Justice of the New Jersey Supreme Court, once remarked that "[j]udicial reform is no sport for the short winded."[176] Rather, it is an intricate, iterative process that must incorporate a wide array of perspectives—including practical scholarship like this Note—en route to developing a cohesive, effective framework that applies across the judiciary.

It is with these considerations in mind that this Note has sought to contribute to the ongoing and still nascent discourse on the proper standard for appellate intervention. By critiquing the FRAP Advisory Committee's draft rule on this topic and presenting a revised, liberalized version of that rule, the aim is to provide a starting point for further dialogue and debate. The hope is that this contribution will not only add substantial value to the scarce body of work on how to regulate and adjudicate appellate intervention, but also ignite continued reflection on how best to adapt our appellate system writ large to the evolving demands of justice and effective interest representation. Otherwise, we risk perpetuating a system in which fundamental questions of American law and policy are shaped by only a small subset of interested parties—many of whom do not adequately represent the practical or legal interests of others—with "no one else . . . in the room where it happens."[177]

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176. Arthur T. Vanderbilt, *Brief for a Better Court System*, N.Y. TIMES MAG., May 5, 1957, at 9, 9.

177. LESLIE ODOM JR. ET AL., *supra* note 1.