No. 16-605

In The
Supreme Court of the United States

TOWN OF CHESTER,

Petitioner,

v.

LAROE ESTATES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICI CURIAE* OF AMERICAN FOREST RESOURCE COUNCIL, AMERICAN FARM BUREAU FEDERATION, PUBLIC LANDS COUNCIL, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AND INTERNATIONAL ASSOCIATION OF GEOPHYSICAL CONTRACTORS IN SUPPORT OF RESPONDENT

SCOTT HORNGREN
Counsel of Record
CAROLINE LOBDELL
WESTERN RESOURCES
LEGAL CENTER
9220 SW Barbur Blvd.
Suite 327
Portland, Oregon 97219
(503) 768-8500
shorngren@wrlegal.org
clobdell@wrlegal.org

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are trade associations that represent companies and families that help grow and produce the nation's food, wood products, and energy from forests, farms, rangelands, and oil and gas fields. Impeding the production of these resources is one of the central objectives of environmental groups that litigate under statutes such as the Endangered Species Act, Clean Water Act, and National Environmental Policy Act which govern production of natural resources, particularly on federal land. *Amici* or their members often are defendant-intervenors as of right under Federal Rule of Civil Procedure ("Rule") 24(a)(2) in these lawsuits which frequently implicate *amici's* interests through specific projects or nationwide rules.

Amici are concerned that a decision by this Court requiring Article III standing for intervention of right under Rule 24(a)(2) will severely limit intervention to *defend* against cases seeking to halt production from the country's forests, farms, rangelands, and oil and gas fields. *Amici* agree with Respondent that Article III standing is not a threshold requirement for intervention when there is an existing case or controversy. Amici write separately to highlight how

[1] The Petitioner and Respondent have consented to the filing of this *amici* brief. Written consent has been obtained pursuant to Rule 37.3(a) and is lodged with the Clerk. Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that no party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

Petitioner's theory is an illogical and unduly restrictive interpretation of Rule 24(a)(2), particularly for defendant-intervenors in the context of environmental litigation over the use of natural resources involving projects and nationwide rules. There are also prudential standing issues. Although several Courts of Appeals have held that business interests have no standing as plaintiffs within the zone of interest of these statutes, they have found a right to intervene under Rule 24(a)(2) because of "an interest relating to the property or transaction that is the subject of the action" that "may as a practical matter" be impaired or impeded by the litigation.

The American Forest Resource Council ("AFRC") is a regional trade association whose purpose is to advocate for sustained yield timber harvests on public timberlands throughout the West to enhance forest health and resistance to fire, insects, and disease. AFRC promotes active management to attain productive public forests, protect adjoining private forests, and assure community stability. It works to improve federal and state laws, regulations, policies and decisions regarding access to and management of public forest lands and protection of all forest lands. AFRC represents over 50 forest product businesses and forest landowners throughout the West. Many of AFRC's members have their operations in communities adjacent to federal lands, and the management of these lands ultimately dictates not only the viability of their businesses, but also the economic health of the communities themselves.

AFRC and its members have been defendant-intervenors in nearly a hundred cases involving projects and regulations that threatened impairment of their interests in timber contracts, forest health, federal timber supply, and protection of their adjoining private forest land. An Article III standing requirement for intervention of right would significantly limit AFRC's ability to intervene as a defendant to protect these interests. AFRC's predecessors were members of the Northwest Forest Resource Council, the petitioner in one of the first cases to seek this Court's determination of the question now presented. *Northwest Forest Resource Council v. Portland Audubon Soc'y*, Petition No. 88-1751, 1989 WL 1174212 (1989).

The American Farm Bureau Federation ("AFBF") is a voluntary general farm organization with member state Farm Bureau organizations in all 50 states and Puerto Rico. As a grassroots organization, AFBF seeks to enhance and strengthen the lives of rural Americans and to build strong, prosperous agricultural communities. AFBF's members are farm and ranch families, who grow and raise every type of agricultural product in the nation, on private and federal lands. Both AFBF and its individual members have been directly affected by the interpretation of various environmental laws, in particular the Endangered Species Act and the Clean Water Act. Individually, AFBF's farm and ranch family members have intervened as of right under Rule 24(a)(2) in cases as defendants to defend their own water rights, federal grazing permits and use of private land intermingled with federal lands. As an organization, AFBF also intervenes as a defendant on behalf of

its members in cases challenging agency rules and interpretation of statutes. AFBF opposes any erosion of a defendant's right to intervene under Rule 24(a)(2).

The Public Lands Council ("PLC") is a national organization that represents ranchers who use public lands and preserve the natural resources and unique heritage of the West. PLC membership consists of state and national cattle, sheep, and grasslands associations. PLC members hold longstanding permits to graze on federal allotments and use roads across federal land to manage their private rangeland and vested water rights. PLC ranching families also own millions of acres of range and forest land. Litigation to halt public lands grazing and range improvements has proliferated during the last decade as have large fires on public rangeland that spread to private land. PLC and its members have been active as intervenors of right to defend against litigation challenging grazing and range management and do not support an interpretation of Rule 24(a)(2) that would require Article III standing for defendant-intervenors.

The National Cattlemen's Beef Association ("NCBA") is the national trade association representing the entire cattle industry. NCBA is an advocate for the economic, political, policy, and social interests of the United States cattle business. Many NCBA members own water rights, hold federal grazing permits, or own rangeland and forests intermingled with federal land and have intervened as of right to defend cases challenging these interests.

The International Association of Geophysical Contractors ("IAGC") is the global trade association representing all segments of the geophysical industry for both land and marine operations, essential to discovering and delivering the world's energy resources including oil and gas. IAGC strongly supports an interpretation of intervention of right under Rule 24(a)(2) that provides a right to defend a lawsuit that has the practical effect of attacking a contract, permit, or lease for energy production even though the contractor, permittee, or lessee would not technically have Article III standing if they were a plaintiff in the suit.

SUMMARY OF THE ARGUMENT

Petitioner Town of Chester makes the oversimplified, narrow, and unsupported contention that the only person that can ever appear in federal court as an intervenor of right under Fed. R. Civ. P. 24(a) is a person with Article III standing. The Town of Chester's interpretation of Rule 24 is not supported by the plain language of the Rule which provides a right to intervene if a person has "an *interest* relating to the *property* or *transaction* that is subject of the action" that "*may* as a *practical matter*" be impaired or impeded by the litigation. Rule 24(a)(2) (emphasis added). Petitioner ignores the broad range of interests that may suffice for a party to intervene as a defendant. Its simplistic view, if adopted, would endanger the ability of *amici* and others to defend their rights against plaintiffs aiming to extinguish those rights. The negative effects would

spread from *amici* to their employees, contractors, and surrounding communities.

Rule 24(a)(2) does not require a person to demonstrate, as does Article III, an actual or imminent injury from the challenged action because it is the outcome of the litigation a person seeks to join that may or may not impair the interest sought to be protected by intervention of right. Rule 24(a)(2) applies to litigation that has already been initiated and for which there is already a case or controversy. Neither the Constitution nor the Rule support a holding that an intervenor to an existing case must demonstrate Article III standing.

Petitioner entirely ignores the basic principle that a defendant in a lawsuit is not required to have standing to be sued. *Amici* are often intervenors of right as defendants in cases under environmental statutes that are filed against the federal government related to federal timber contracts, grazing permits, oil and gas leases, or intermingled private land in which *amici* have an interest. *Amici* also often intervene as of right as defendants in cases where broadly applicable environmental rules are challenged that affect *amici's* interests. The narrow interpretation of Rule 24(a)(2) urged by Petitioner would exclude a person from exercising a right to become a defendant-intervenor under Rule 24(a)(2) when a plaintiff files a suit challenging a federal rule, contract, permit, or lease for the use of federal natural resources. The interpretation will upend the commonly-held judicial interpretation of Rule 24(a)(2) that a person has a right to intervene to defend

a contract, permit, lease or a rulemaking affecting *amici's* regulated interests under a wide variety of environmental statutes such as the National Environmental Policy Act, even if the proposed defendant-intervenor may not have standing if it sought to be a plaintiff.

ARGUMENT

A. The Requirement of Article III Standing for a Plaintiff to Sue in Federal Court Does Not Apply to a Defendant That Appears in Federal Court to Defend the Suit.[2]

For Article III standing a plaintiff must demonstrate an (1) "injury in fact," that is (2) "fairly traceable" to defendant's actions, and (3) the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). These threshold requirements to initiate a lawsuit simply do not apply to a defendant who becomes a party to the case through the complaint. Although a defendant does not have Article III standing, the defendant is entitled

[2] *Amici* are trade associations that commonly move to intervene on behalf of their members who often cannot afford to engage in litigation individually. An association has standing to sue on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

to file motions, engage in discovery, and participate in oral argument just like the plaintiff.

Litigation involving environmental statutes often involves federal agency rules or decisions to permit livestock grazing, harvest timber, or explore and produce oil, gas, and minerals. A private party seeking to defend a particular lawsuit brought under environmental statutes supporting agency action will never have an "injury in fact" for Article III standing but could have an interest relating to the property or transaction subject to the lawsuit that may be impaired and which is not adequately represented providing the right to intervene under Rule 24(a)(2). *Amici's* interests are often "interests in property" and therefore "the most elementary type of right that Rule 24(a) is designed to protect." 7C Charles Alan Wright et al., Fed. Prac. & Proc. Civ., § 1908.1 (3d ed.). The current rule poses a simple and direct question: "will the disposition of the action impair as a practical matter the absentee's ability to protect an interest in the property or transaction upon which the suit is based?" *Id.* § 1907. Petitioner's unduly narrow interpretation of the Rule is not consistent with this purpose.

The issue of what qualifies as a sufficient "interest" under Rule 24(a)(2) should not be governed by a

---

An association may intervene on behalf of its members so long as it shows "(1) members have a legally protectable interest sufficient for intervention; (2) the defense of the [decision is] germane to the associations' purposes; and (3) individual [members] are not necessary participants in the suit." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 n.3 (9th Cir. 2001).

bright-line Article III standing requirement. The Advisory Committee for the 1966 amendments explained that the amendments were designed in part to address the unduly restrictive view that intervention of right was limited to specific disposition of property such as a fund. The Committee noted the greater flexibility under amended Rule 24(a)(2) and that "if an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule be entitled to intervene and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of." Fed. R. Civ. P. 24 advisory committee's notes (1966) (Amendment), 28 U.S.C. App. at 822. This Court cited the Advisory Committee explanation in its first case applying Rule 24(a)(2) and concluded that "some elasticity was injected" by the amendment and the question was to determine how much in a particular case. *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 134 (1967).

In *San Juan Cty., Utah v. United States*, 503 F.3d 1163 (10th Cir. 2007) (*en banc*), the *en banc* Tenth Circuit also interpreted the interest inquiry as "intended to capture the circumstances in which the practical effect on the prospective intervenor justifies its participation in the litigation. Those factors are not rigid, technical requirements." *Id.* at 1195. The court held that environmental groups had a protectable interest in the County's quiet title action against the federal government regarding the use of a road entitling it to intervene as of right because if the County prevailed,

additional traffic might flow through Canyonlands National Park. The *en banc* court noted that if the County's claim was rejected, then the litigation would not injure the interests of the applicants for intervention. *Id.* at 1200. But the court found "this possibility is irrelevant. Otherwise, every application to intervene on the side of one of the parties would be rejected on the ground that the aligned party might win (and the applicant's interest would hence not be injured). The purpose of intervention is to increase the likelihood of that victory." *Id.* Similarly, *amici* often seek to intervene to increase the likelihood that their interests will be protected even though they do not necessarily meet the concrete, imminent injury requirement for Article III standing.

Petitioner Town of Chester's position that a right to intervene must always be supported by Article III standing would upend long-standing intervention law in environmental cases. A few examples are illustrative.

First, consider a farmer who has a water right to take water from a creek on federal land that is inhabited by fish listed as endangered under the Endangered Species Act ("ESA"). 16 U.S.C. §§ 1531-44. The Forest Service is sued by an environmental group under the ESA arguing that the Forest Service is compelled to conduct Section 7 consultation with the National Marine Fisheries Service over whether the water withdrawal by the farmer will harm the endangered fish, jeopardize the species, or cause destruction or adverse modification of critical habitat. 16 U.S.C.

§ 1536. Although the farmer may not have an Article III injury, the farmer has an interest in the water right that may be impaired if plaintiffs prevail and a lengthy ESA consultation process ensues imposing conditions to benefit the fish. *See Western Watersheds Project v. Matejko*, 468 F.3d 1099 (9th Cir. 2006) (case seeking to compel consultation under the ESA for a water right).

Second, a case is filed against the Bureau of Land Management challenging a timber sale under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq*. and the Federal Land Policy and Management Act. 43 U.S.C. §§ 302 *et seq*. The purchaser of the timber sale does not have Article III standing because the company actually benefits, rather than is injured, by the harvest of its timber sale contract. However, if plaintiff prevails, the purchaser's interest in timber harvest will be impaired and it should have a right to intervene to defend its interest. *See Cascadia Wildlands v. Bureau of Land Mgmt.*, No. 6:12-CV-00095-AA, 2012 WL 6738275 (D. Or. Dec. 21, 2012).

Third, a rancher has a permit to run cattle on a Forest Service grazing allotment. A suit is filed by an environmental group arguing that the Forest Service needs to meet specific state water quality standards for each grazing allotment under the Clean Water Act ("CWA") before the cattle are allowed on the range for the upcoming grazing season. The rancher does not have Article III standing in the pending case because she is not raising the claim under the CWA and will not be injured if she can graze the number of cattle permitted for the season. However, her interest in

grazing the cattle will be impaired if plaintiff prevails; thus the rancher satisfies the interest and impairment prongs for intervention under Rule 24(a)(2). *See*, *e.g.*, *Oregon Wild v. U.S. Forest Serv.*, 193 F.Supp.3d 1156, 1169-71 (D. Or. 2016). Similarly, trade associations representing farmers and ranchers should be able to intervene as of right in defending a suit by environmental groups challenging an EPA amendment to relax nationwide regulations under the Clean Water Act which would affect interests in their farms and ranches even though the associations may not be "injured" under Article III by relaxation of the regulations.

Finally, a private landowner would benefit from a road improvement and fuel reduction project in a dying stand of timber on adjoining national forest land. The project would allow easier access to her land, provide a more rapid escape route in the event of a fire, and the removal of the dying timber on the national forest would reduce the risk that insects or wildfire would spread from the national forest onto her healthy, thinned forest. A lawsuit is filed claiming that the Forest Service did not survey for certain rare species on the national forest as required by the National Forest Management Act ("NFMA"). 16 U.S.C. §§ 1604-12. The landowner has no Article III injury resulting from the lack of species surveys under NFMA, but has an interest in maintaining the health of the neighboring national forest to protect her private land which will be impaired if plaintiff halts the fuel reduction project. *See* 16 U.S.C. § 1611(b) ("Nothing in subsection (a) of

this section shall prohibit the Secretary from salvage or sanitation harvesting of timber stands which are substantially damaged by fire, windthrow, or other catastrophe, or which are in imminent danger from insect or disease attack.").

Requiring proposed defendant-intervenors to demonstrate Article III standing to intervene as of right under Rule 24(a)(2) is not required by the plain language of the Rule. This is especially true for an individual or association with members with legitimate interests relating to the subject of the lawsuit that seeks to intervene as a defendant to prevent impairment of that interest. The Court should decline to impose a one-size-fits-all Article III standing requirement for all proposed intervenors under Rule 24.

B. Courts Have Rejected Unfounded Hurdles to Intervention as a Defendant.

In resolving the issue presented about whether Article III standing is required for intervention of right under Rule 24(a)(2), *amici* urge the Court to avoid imposing a new groundless threshold for a person to intervene as a defendant. A defendant has a fundamentally different role in litigation and by which it becomes a party to a lawsuit. To bring suit, a plaintiff must have Article III standing and prudential standing under the statute that is the basis for the claim for relief. In contrast, standing is a concept that does not apply to a defendant unless the defendant raises a new claim. A defendant is commonly brought into the case

based on federal court jurisdiction through diversity of citizenship and the amount in controversy (28 U.S.C. § 1332(a)) or the presence of a federal question. *Id.* § 1331. Federal question jurisdiction is commonly cited by plaintiffs for suits under environmental statutes such as NEPA, the ESA, and the CWA. A plaintiff-intervenor must file a complaint in intervention to support its motion while a defendant-intervenor files an answer in intervention. Rule 24(c) ("The motion must . . . be accompanied by a pleading that sets out the claim or defense for which intervention is sought."). A plaintiff often sues under an environmental statute through the Administrative Procedure Act ("APA"), where it must demonstrate that it is "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702; *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882-83 (1990). In contrast, the defendant-intervenor is not aggrieved by the agency action but has an interest benefited by the action.

The issue of a jurisdictional requirement for permissive intervention under Rule 24(b) is instructive in assessing whether Article III standing should be required under Rule 24(a). In the context of permissive intervention, courts formerly held that an independent basis for jurisdiction was required. For example, the Ninth Circuit long held that permissive intervention "requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Beckman Indus., Inc. v. Int'l Ins. Co.*,

966 F.2d 470, 473 (9th Cir. 1992). However, nearly 20 years later, the court clarified that the independent ground for jurisdiction does not apply to proposed intervenors, such as a defendant-intervenor in federal-question cases where the proposed intervenor is not raising new claims. *Freedom from Religion Foundation, Inc. v. Geisler*, 644 F.3d 836, 844 (9th Cir. 2011); *see* 7C Charles Alan Wright et al., § 1917 (3d ed.) ("In federal-question cases there should be no problem of jurisdiction with regard to an intervening *defendant* nor is there any problem when one seeking to intervene as a plaintiff relies on the same federal statute as does the original plaintiff.") (emphasis added).

Another example involving a defendant-intervenor formerly being subjected to an intervention requirement that goes beyond the plain language of Rule 24(a)(2) was the "none but the federal defendant rule" imposed by the Ninth Circuit. *Wilderness Society v. United States Forest Service*, 630 F.3d 1173 (9th Cir. 2011) (*en banc*). In *Wilderness Society*, the court addressed whether persons seeking to intervene as defendants in a NEPA case were prohibited from intervening as of right under the theory that NEPA is a procedural statute that only binds the federal government so that a private party could never have a right to intervene in a NEPA case. *Id.* at 1177. The *en banc* panel rejected the argument that the federal defendant rule precluded intervention of right in NEPA cases. The court explained that it was joining its sister circuits that also held private parties could be intervenor-defendants in a NEPA case. *WildEarth*

Guardians v. U.S. Forest Serv., 573 F.3d 992 (10th Cir. 2009); *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964 (3rd Cir. 1998); *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994); *Wilderness Soc'y v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972) (per curiam). The Third Circuit in *Kleissler* explained that "[t]he reality is that NEPA cases frequently pit private, state, and federal interests against each other. Rigid rules in such cases contravene a major premise of intervention – the protection of third parties affected by pending litigation." *Kleissler*, 157 F.3d at 971. Intervention jurisprudence has previously recognized unsupported roadblocks to intervene as a defendant and this Court should reject imposing Article III standing as yet another unsupported new threshold for intervention not found in the plain language of Rule 24(a)(2).

C. If Article III Standing Is Required for Intervention Under Rule 24(a)(2), Then Prudential Standing Would Also Be Required and Could Eliminate *Amici's* Right to Intervene in Cases Involving NEPA and Many "Environmental" Statutes.

The question of standing is not limited to Article III and "involves both constitutional limitations on federal-court jurisdiction and prudential limits on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (citation omitted). Prudential standing addresses the "zone of interests" under the particular statutes comprising the claims in the complaint. *See Nat'l Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S.

479, 503-04 (1998). Prudential standing is of particular concern to *amici* if it also becomes a requirement to intervene as of right as a defendant. *See* Public Natural Resource Law § 8:22 (2d ed.) ("Economic and developmental interests face perhaps the most difficulty in meeting the zone of interest test in public natural resource litigation, at least when the statutes at issue are viewed as environmental and natural resource protection measures.").

If this Court requires Article III standing for intervention, it implies that prudential standing should also be required. A prudential standing requirement would eliminate *amici's* right to intervene in the multitude of NEPA cases designed to halt management of federal lands involving livestock grazing, timber sales, and oil and gas leases. *See Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 5 Harv. L. & Pol'y Rev. 289, 291 (2011) ("business cases challenging NEPA rulings to injuries to the business' economic interests are often dismissed under the zone-of-interest test."). Many of the projects being challenged involve forest health projects to avoid the spread of insects, disease, and wildfire which can harm the quality of water used by the ranchers and farmers downstream of the national forests. A prudential standing requirement for intervention of right is of great concern to *amici* in cases brought under NEPA.

First, NEPA is the statute of choice for environmental litigants challenging management of federal lands including the national forests. *See Miner et al.,*

Twenty Years of Forest Service Land Management Litigation, 112 J. Forestry 32 (2014). Over 70% of the cases involving national forest management involved NEPA claims. *Id.* at 37.

Second, many courts have held that economic interests are not within the zone of interests of NEPA and that "the purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions." *Nevada Land Action Ass'n v. United States Forest Service*, 8 F.3d 713, 716 (9th Cir. 1993) (holding that an association comprised of ranchers that grazed livestock on Forest Service lands did not have standing to challenge a forest plan for failure to comply with NEPA); *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 937 (9th Cir. 2005); *see Lower Arkansas Valley Water Conservancy District v. United States*, 578 F.Supp.2d 1315, 1338 (D. Colo. 2008) (noting that "it is well established that purely economic injuries do not fall within the 'zone of interest' protected by NEPA."); *see also County of St. Louis v. Thomas*, 967 F. Supp. 370, 377 (D. Minn. 1997) (denying standing to plaintiffs to raise NEPA claim for economic losses); *Gunpowder Riverkeeper v. F.E.R.C.*, 807 F.3d 267, 274 (D.C. Cir. 2015).[3]

[3] The court in *Gunpowder* also held that economic harm "does not fall within the zone of interests that Congress sought to protect in enacting the CWA [Clean Water Act]." *Gunpowder*, 807 F.3d at 275 (internal quotation marks omitted) (quoting *BP Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 803 (6th Cir. 1995)). Thus, *amici* would have no right to intervene as defendants in litigation

Third, as explained above, NEPA cases challenge agency actions that if halted will impair *amici's* interests in permits, leases, contracts, and adjoining private land in which courts have granted intervention of right under Rule 24(a)(2). This Court has emphasized that NEPA is a procedural statute that does not dictate substantive environmental results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). However, in assessing prudential standing, courts have incorrectly viewed NEPA as a substantive environmental statute that prohibits standing for a person with an economic interest. This leads to the unsupported legal result that a person with an economic interest that has exercised the right to engage in agency NEPA procedures during the public comment period, is precluded from later advancing in court its concern as a plaintiff over inadequate NEPA procedures. In contrast, environmental groups have access to both the administrative and judicial forums. This creates an inequitable dichotomy under NEPA and other environmental laws where there is equal access to the administrative process but not equal access to the courts. So, if this Court holds that Rule 24(a)(2) requires Article III and prudential standing, *amici* may no longer have a right to intervene as defendants in these cases even if their contract or lease is the subject of the NEPA claim. The outcome of NEPA cases greatly influence the production of natural resources from public lands. *See Cascadia Wildlands v. U.S. Forest Serv.*, 937

---

challenging a CWA rule benefiting their members' farms and forests.

F.Supp.2d 1271 (D. Or. 2013) (halting multiple timber sale contracts from the Willamette National Forest in Oregon representing the entire annual timber supply of the Forest). In the context of environmental statutes, an Article III standing requirement could eliminate the right to intervene of businesses which often have the most direct stake in the outcome of litigation. To the extent that the litigation involves injunctive relief requiring a balance of the equities, economic interests will be excluded from the balance of harm.

D. Article III Standing for Intervention Under Rule 24(a) Is Not Necessary for Courts to Control the Scope of Litigation and Manage Cases with Multiple Parties.

There is no merit to Respondent's argument that without the Article III limits on Rule 24(a)(2) intervention, the judicial system will be significantly burdened by intervenors. Brief for Petitioner at 45-46. First, Rule 24(a) sets forth requirements of (1) timeliness, (2) an interest relating to the property or transaction, (3) that as a practical matter will be impaired or impeded, and (4) is not adequately represented by existing parties. These are sufficient threshold requirements that have precluded, and will continue to preclude, intervention of right.

Second, this Court has suggested that reasonable limits may be imposed on an intervenor of right to control the litigation in the same manner as an original

party. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 383 (1987) (Brennan, J., concurring); Fed. R. Civ. P. 24 advisory committee's note (1966) (Amendment), 28 U.S.C. App. at 823 ("An intervention of right under the amended rule [24(a)] may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of proceedings."); 7C Charles Alan Wright et al., Fed. Prac. & Proc. Civ., § 1920 (3d ed.). For example, courts often require multiple intervenors to coordinate briefing or share the fixed oral argument time with federal defendant.

Finally, the United States acknowledges that a bright-line rule of Article III standing for intervention is not appropriate. It may apply in some instances where a proposed intervenor attempts to expand the litigation to inject a new claim, seek additional damages, or seek injunctive relief broader than the original plaintiff. Brief of the United States as *Amicus Curiae* Supporting the Petitioner at 16. It makes no sense to require a separate showing of Article III standing when the proposed intervenor pursues the same claims and relief as a party whose standing is undisputed.

E. The United States Is Not a Neutral Party Regarding Whether Article III Standing Is Required for Intervention Under Rule 24(a).

There are ulterior motives to the United States' support for an Article III intervention requirement. The government is the most frequent defendant

involving environmental lawsuits under federal question jurisdiction where private parties seek to intervene as defendants. The United States supports a narrow scope of intervention to further its interests in having complete control of the defense and in advancing only its interpretation of the federal statutes. The government is also the party that brings enforcement actions under environmental statutes and seeks to be the only party to a case interpreting the statutory enforcement provisions. Rule 24(a)(2) provides that if a court finds that an existing party will adequately represent a proposed intervenor's interest, there is no right to intervene. In many cases, courts hold that if the federal government is already a defendant, there is a presumption of adequacy of representation. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (the presumption of adequate representation that arises when the government is acting on behalf of a constituency it represents must be overcome by a "very compelling showing").[4] The existing framework of the Rule establishes a hurdle to a proposed defendant-intervenor to intervene as of right when the United States is a defendant. Therefore, there is not a need to impose an Article III standing requirement to protect

[4] The growth of the government presumption in the Courts of Appeals appears to have little basis in this Court's jurisprudence. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972), held the burden is "minimal." Ninth Circuit caselaw, including *Arakaki*, developed from *Com. of Pa. v. Rizzo*, 530 F.2d 501, 505 (3rd Cir. 1976), which relied on dictum from *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689 (1961), decided before the 1966 amendments to Rule 24.

the desire of the United States to control the defense of the litigation.

CONCLUSION

The Court should reject the Town of Chester's interpretation of Rule 24(a)(2) that requires any person moving to intervene as of right to have Article III standing. A more nuanced interpretation of Rule 24(a)(2) is called for, particularly when it involves a person moving to intervene as of right as a defendant who cannot demonstrate standing, but who satisfies the plain language of the Rule and claims an interest relating to the property or transaction that may as a practical matter be impaired or impeded by the outcome of the litigation.

Respectfully submitted,

SCOTT HORNGREN
Counsel of Record
CAROLINE LOBDELL
WESTERN RESOURCES
LEGAL CENTER
9220 SW Barbur Blvd.
Suite 327
Portland, Oregon 97219
(503) 768-8500
shorngren@wrlegal.org
clobdell@wrlegal.org

Counsel for Amici Curiae

April 2017