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I. INTRODUCTION

Article III of the United States Constitution limits federal court jurisdiction to deciding "cases" and "controversies."[1] Federal courts ensure compliance with Article III in part by requiring the plaintiff bringing the lawsuit to possess standing.[2] Some federal courts of appeal hold that when an individual or entity seeks to intervene in an existing case under Rule 24 of the Federal Rules of Civil Procedure, the potential intervenor must also possess Article III standing. Other federal courts of appeal hold that potential intervenors need not have standing because the party that initiated the lawsuit already satisfied Article III.

While the courts and the legal scholarship have recognized the split in the circuits,[3] few conclusions have been reached as to *why* the circuits are split on the issue. The lack of a clear explanation for the divergence is not surprising; the standing doctrine is complicated. As the late Harvard Law Professor Paul Freund asserted, standing is "among the most amorphous [issues] in the entire domain of public law."[4] The U.S. Supreme Court has declared that "Art[icle] III . . . 'standing' . . . is perhaps the most important of [the Article III] doctrines."[5] Applying standing in the context of Rule 24 intervention only adds an additional layer of complexity to the analysis. In spite of the fact that standing in the interven-

1. U.S. CONST. art. III, § 2, cl. 1.

2. Article III imposes other jurisdictional requirements on federal courts, such as the mandate that every claim be ripe for adjudication. In this Comment, we will address only the standing requirement of Article III.

3. *See* Rio Grande Pipeline Co. v. Fed. Energy Regulatory Comm'n, 178 F.3d 538 (D.C. Cir. 1999); Ruiz v. Estelle, 161 F.3d 814, 830 (5th Cir. 1998); *see also* Joshua C. Dickinson, Note, *Standing Requirements for Intervention and the Doctrine of Legislative Standing: Will the Eighth Circuit "Stand" by Its Mistakes in* Planned Parenthood of Mid-Missouri & Eastern Kansas, Inc. v. Ehlmann*?*, 32 CREIGHTON L. REV. 983, 992 (1999); Amy M. Gardner, Comment, *An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenors*, 69 U. CHI. L. REV. 681, 699–700 (2002).

4. RONALD D. ROTUNDA & JOHN E. NOWAK, 1 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.13(f)(1) (3d ed. 1999).

5. Allen v. Wright, 468 U.S. 737, 750 (1984) (internal quotation marks omitted).

tion context has left many scholars (and, dare we say, courts) puzzled, it is an issue of extreme importance that must be resolved.

In this Comment, we identify why the circuits reach divergent conclusions—a reason that legal scholarship has not explicitly recognized. We argue that the courts that do not require intervenors to have Article III standing view standing as a requirement imposed on *all federal courts*, that is, that at least one party must have standing before the court can maintain jurisdiction; conversely, the courts that do require intervenors to have Article III standing view standing as a requirement imposed on *all parties that come before a federal court*. Thus, it is a subtle distinction in analytical approach that divides the circuits on this issue. We recognize that viewing standing as a requirement on the *court* still necessarily depends on *a party* having standing; however, we argue that the court need only ensure that the original party to bring suit has standing—not that every party before the court has standing. Under this approach, by ensuring that at least one of the parties before it has standing, the court satisfies its obligation under Article III and may properly take jurisdiction.

In Part II, we trace the origins and development of both Article III standing and Rule 24 intervention. In Part III, we analyze the case law of the federal circuits to demonstrate that the two groups of circuit courts approach standing in fundamentally different ways and thus reach different conclusions. In Part IV, we posit that federal courts should view standing as a requirement on the court, and we give three principle reasons in support of this assertion. First, while the Supreme Court has not yet answered this question, we suggest that the High Court does, in fact, approach standing as a requirement on the court. Second, viewing standing as a requirement on a federal court is consistent with the language and purpose of Article III. Finally, viewing standing as a requirement on the parties produces results inconsistent with the requirements and policies of intervention. Because standing is properly viewed as a requirement on the court, we conclude that a Rule 24 intervenor need not possess Article III standing to enter an existing case,[6] and we encourage

6. We note that the question whether an intervenor must possess standing to continue the case after the original party, which had standing to bring the suit in the first place, drops out of the proceedings is a wholly different question than that which we address in this Comment. The former question was answered in the affirmative by the Supreme Court in *Diamond v. Charles*, 476 U.S. 54 (1986). See *infra* Part IV.A for an in-depth discussion of *Diamond*. The question we address is whether an intervenor must possess standing to enter a case in which the original party that had standing to bring the suit remains in the case.

courts to hold accordingly. In Part V, we offer a brief conclusion.

II. ARTICLE III STANDING AND RULE 24 INTERVENTION

Article III standing and Rule 24 intervention are complex issues by themselves: standing is a constitutional doctrine but was created by the judiciary; intervention is a rule of court but was created with legislative authority; both doctrines contain multiple sub-requirements; and both doctrines have changed substantially during their history. In this Part, we will trace the development and describe the basic requirements of both standing and intervention.

A. The Constitution and Article III Standing

Article III, Section 2 of the U.S. Constitution limits the jurisdiction and judicial power of federal courts to resolving "cases" and "controversies." This restriction ensures that only specific cases invoke the jurisdiction of federal courts so that the federal courts do not engage in answering abstract questions that are better left to the representative branches of government.[7]

"Standing is a judicially-developed doctrine designed to ensure an Article III court is presented by parties before it with an actual case or controversy."[8] The Supreme Court holds that there are three elements to standing: (1) there must be an actual or threatened injury; (2) the injury must be traceable to the alleged conduct of the other party; and (3) the injury must be redressable by a court.[9] The injury is most important because it is part of all three elements of standing. To satisfy the injury requirement "a plaintiff must allege . . . that he has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendants."[10]

The "case" or "controversy" requirement, and thus the standing requirement, continues throughout the pendency of the case; therefore, federal courts must continue to insist on this requirement in order to maintain jurisdiction. As the Eleventh Circuit stated, "It is not enough that a real controversy existed when the lawsuit was filed, the contro-

7. *See, e.g.*, *Allen*, 468 U.S. at 750.

8. *Ruiz*, 161 F.3d at 829.

9. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

10. Chiles v. Thornburgh, 865 F.2d 1197, 1204 (11th Cir. 1989).

versy must be a 'live' controversy throughout all stages of the case."[11] In other words, at least one party in the case must possess Article III standing at all times for the federal court's jurisdiction to continue.

B. Congress and Rule 24 Intervention

In the Rules Enabling Act of 1934,[12] Congress delegated to the Supreme Court the power to prescribe rules of procedure, practice, and evidence for all federal courts.[13] The following year, the Supreme Court appointed an advisory committee to draft the Federal Rules of Civil Procedure.[14] Today, new rules and amendments to the rules must pass through several layers of review and approval to become final. The Advisory Committee on Civil Rules continually studies the operation of the rules, submits proposed changes to the Judicial Conference, and drafts explanatory committee notes to the rules.[15] The public is given the opportunity to review the proposed changes, after which the rules and amendments must be approved by the Advisory Committee, the Standing Committee, the Judicial Conference, and finally, the Supreme Court.[16] After the Supreme Court approves any amendments, it must send the amendments to Congress for review.[17] If Congress declines to reject, modify, or defer the rules during its review period,[18] the rules take effect as a matter of law.[19] The Advisory Committees are composed of federal judges, state chief justices, law professors and lawyers with expertise in the relevant area, and representatives of the Department of Justice.[20] Thus, in addition to the fact that all Rules are created by the members of the Advisory Committee, the final version of any Rule is explicitly approved by the Supreme Court and at least implicitly approved by Con-

11. *Id*. at 1202 (citing Burke v. Barnes, 479 U.S. 361, 362–64 (1987)).

12. 28 U.S.C. §§ 331, 2071–2077 (1934).

13. Leonidas Ralph Mecham, *Federal Rulemaking: The Rulemaking Process—A Summary for the Bench and Bar*, *at* http://www.uscourts.gov/rules/proceduresum.htm (last updated Nov. 8, 2002). The website www.uscourts.gov is the official website of the U.S. federal court system.

14. Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1658 (1995).

15. *Id.*

16. 28 U.S.C. § 2072; Mecham, *supra* note 13.

17. 28 U.S.C. § 2074; Mecham, *supra* note 13.

18. Congress is given a minimum of seven months to review the amendments. Mecham, *supra* note 13.

19. McCabe, *supra* note 14, at 1657.

20. *Id*. at 1664–65.

gress.[21]

Rule 24 was included in the first version of the Federal Rules of Civil Procedure, but it has since been amended six times.[22] The most recent amendments that affected subsection (a) or subsection (b) of Rule 24—the subsections relevant to our analysis—occurred in 1966, when the provisions for intervention "as of right" were substantially modified. Prior to 1966, intervention as of right was allowed only in very narrow circumstances,[23] but subsection (a) was modified to make the interest requirement less strict.[24] Subsections (a) and (b) of Rule 24 have not been changed since the 1966 amendments and read, in pertinent part:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

Under the language of Rule 24, intervention as of right has three requirements: an interest related to the subject of the action, likelihood that the interest be impaired in the intervenor's absence, and lack of adequate representation by the existing parties. However, courts typically condense those three requirements to two requirements: first, a potential intervenor as of right must claim a sufficient interest in the case,[25] and sec-

21. *Id*. at 1673; Mecham, *supra* note 13.

22. Rule 24 was amended in 1948, 1949, 1963, 1966, 1987, and 1991.

23. *See* Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 133–34 & n.3 (1967).

24. *See* FED. R. CIV. P. 24 advisory committee's note (1966) (finding the development of the previous version of Rule 24(a) to be "unduly restricted"); *Cascade Natural Gas Corp.*, 386 U.S. at 134 (noting that, with the 1966 amendments to Rule 24, "some elasticity was injected" into the practice of allowing intervention); *see also* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 6.10 (1985) (concluding that the "federal courts [that] have broadened the scope of intervention . . . heavily in favor of the applicant . . . are consistent with the thrust of the 1966 amendments").

25. Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 (1972). A sufficient interest

ond, that interest must not be adequately represented by existing parties.[26] Permissive intervention is more straightforward: if the potential intervenor's claim or defense has a question of law or fact in common with the main action, the trial court has discretion to grant or deny the motion to intervene.[27]

While intervention as of right and permissive intervention have different requirements, the analysis of whether standing is required applies equally to both types of intervention because if the Constitution requires all parties to satisfy Article III, then all intervenors must have standing.[28] With the basic stage set for Article III standing and Rule 24 intervention, we will now explore the judicial interpretation of the interplay between the two.

III. STANDING: A REQUIREMENT ON THE COURT OR A REQUIREMENT ON THE PARTIES?

Eight of the federal circuits have considered whether Article III standing is required of intervenors, and their holdings are split. This split is a result of two different approaches to standing: some courts view standing as a requirement on every party that comes before the court while other courts view standing as a requirement the court must ensure is satisfied by at least one party before it can maintain jurisdiction. The literature and the courts themselves have failed to recognize this distinction of approach. Understanding these fundamentally different approaches to the issue will ultimately assist in resolving the conflict. This Part catalogs the positions of the eight circuits that have decided whether standing is required of intervenors. [29]

in the case has been interpreted as a "significantly protectable interest." Donaldson v. United States, 400 U.S. 517, 531 (1971); Chiles v. Thornburgh, 865 F.2d 1197, 1212 (11th Cir. 1989).

26. *Trbovich*, 404 U.S. at 538; *see also* FRIEDENTHAL ET AL., *supra* note 24, § 6.10 (noting that "[a]dequacy of representation is a highly complex variable" and exploring the implications of the issue).

27. FRIEDENTHAL ET AL., *supra* note 24, § 6.10.

28. See Part IV.C for more discussion of the distinction between intervention as of right and permissive intervention.

29. The Second, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, and District of Columbia Circuits have reached the issue. The remaining circuits—the First, Third, Fourth, Tenth, and Federal—have yet to rule on the matter. Some lower courts in these circuits have produced conflicting results. *Compare* Capacchione v. Charlotte-Mecklenburg Schs., 80 F. Supp. 2d 557 (W.D.N.C. 1999) (permissive intervention allowed by district court in Fourth Circuit), *with* West Virginia v. Moore, 902 F. Supp. 715 (S.D.W.V. 1995) (intervention denied by district court in Fourth Circuit due to lack of standing).

A. Circuits Viewing Standing As a Requirement Imposed on the Court

Five federal circuits have concluded that a potential intervenor need not possess Article III standing to come before a federal court. While these five circuits may not explicitly identify standing as a requirement on the court or a requirement on every party, the holdings of all five circuits demonstrate that these courts generally view standing as a requirement that every court must ensure is satisfied throughout the case by at least one party—not as a requirement that every party must satisfy before entering the case.

1. The Fifth Circuit

The Fifth Circuit considered whether standing is required of intervenors in *Ruiz v. Estelle*.[30] The case involved two Texas legislators who attempted to intervene into a pending lawsuit dealing with the condition of Texas prisons.[31] The legislators argued that 18 U.S.C. § 3626(a)(3), which was part of the Prison Litigation Reform Act ("PLRA"),[32] afforded them the right to intervene under Rule 24.[33] Section 3626 provides, in relevant part:

> Any State or local official including *a legislator* or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and *shall have the right to intervene in any proceeding relating to such relief*.[34]

The court found that the legislators were within the purview of the PLRA, and thus the legislators were granted "an unconditional right to intervene" in the prison conditions case.[35] Following this determination, the court considered whether the PLRA violated Article III of the Constitution by granting the legislators an unconditional right to intervene

30. 161 F.3d 814 (5th Cir. 1998).
31. *Id.* at 816.
32. 18 U.S.C. § 3626 (1996).
33. *Ruiz*, 161 F.3d at 818.
34. 18 U.S.C. § 3626(a)(3)(F) (emphasis added).
35. *Ruiz*, 161 F.3d at 828.

without standing.[36]

In concluding that Article III does not require potential intervenors to have standing, the court clearly viewed standing as a requirement imposed on the court—not a requirement imposed on the parties.[37] After surveying the positions of other circuits, the court found that "the Article III standing doctrine serves primarily to guarantee the existence of a 'case' or 'controversy' appropriate for judicial determination,"[38] and therefore, "Article III does not require each and every party in a case to have such standing."[39] The court reasoned that "[o]nce a valid Article III case-or-controversy is present, the court's jurisdiction vests. The presence of additional parties, although they could not independently satisfy Article III's requirements, does not of itself destroy jurisdiction already established."[40] The court viewed standing as a requirement that the court—not all parties—had to satisfy, and once the court had satisfied the requirement by ensuring that the original parties possessed standing, potential intervenors could enter the case by simply complying with Rule 24.[41] In other words, a case or controversy had existed at the very least since the filing of the original motions.[42] Thus, the court found that the PLRA did not violate the Constitution.[43]

2. The Second Circuit

The Second Circuit considered the issue in *United States Postal Service v. Brennan*,[44] where the U.S. Postal Service sued to enjoin a couple from operating a small mail delivery business in competition with the Postal Service.[45] A labor union for postal workers, the National Association of Letter Carriers ("NALC"), sought to intervene as plaintiffs in the case under Rule 24.[46] The district court denied NALC's motion, and the

36. *Id.* at 828–33.

37. *See id.* at 828.

38. *Id.* at 832 (citing Allen v. Wright, 468 U.S. 737 (1984)).

39. *Id.* (citing David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 726 (1968)).

40. *Id*.

41. *Id.*

42. *Id.* at 833.

43. *Id*.

44. 579 F.2d 188 (2d Cir. 1978).

45. *Id.* at 190.

46. *Id.*

union appealed.[47]

The Second Circuit affirmed the lower court's decision but clarified that intervention was denied not because NALC lacked Article III standing but rather because NALC did not satisfy the requirements of Rule 24.[48] The court viewed standing as a requirement imposed on the court that was satisfied before the question of NALC's intervention even arose.[49] Thus the court viewed the standing analysis as separate and inapplicable to the intervention analyses: "The existence of a case or controversy having been established as between the Postal Service and the [couple that ran the mail business], there was no need to impose the standing requirement upon the proposed intervenor."[50]

3. The Sixth Circuit

The Sixth Circuit addressed the requirements imposed on an intervenor in dicta in *Associated Builders & Contractors v. Perry*.[51] In *Perry*, multiple members of a trade association brought suit against the State of Michigan in an attempt to enjoin the director of the Michigan Department of Labor from enforcing Michigan's laws regulating trade apprenticeship programs.[52] The Michigan chapter of the National Electrical Contractors Association ("NECA") successfully intervened in the suit.[53] The district court granted the plaintiffs' motion for summary judgment, and the State of Michigan declined to appeal the order.[54] In spite of the fact that the State did not pursue an appeal, NECA sought to appeal the district court's order on its own.[55] The Sixth Circuit found that "[a]n intervenor need not have the same standing necessary to initiate a lawsuit in order to intervene in an existing district court suit where the plaintiff has standing," but on appeal, an intervenor "must have standing under Article III of the Constitution entitling it to have the court decide the merits of the dispute."[56]

While the Sixth Circuit did not explicitly identify standing as a re-

47. *Id.*
48. *Id.* at 190–91.
49. *Id.* at 190.
50. *Id*.
51. 16 F.3d 688 (6th Cir. 1994).
52. *Id.* at 689.
53. *Id.* at 690.
54. *Id*.
55. *Id*.
56. *Id*.

quirement on the court, it implicitly did so by stating that "standing [is] necessary to *initiate a lawsuit*."[57] Thus the court satisfied Article III by ensuring that at least one party had standing to bring the suit, and the court need not consider standing when parties seek to intervene into a case in which standing has already been satisfied. However, when the party with standing drops out of the case, as occurred in *Perry*, any party that seeks to continue the case must satisfy the standing requirements.[58] Because NECA could not satisfy those requirements, the court dismissed the appeal.[59]

4. The Ninth Circuit

In *Yniguez v. Arizona*,[60] the Ninth Circuit addressed a fact pattern similar to that in *Perry*. In this case, a state employee sued the governor of Arizona in an attempt to invalidate an amendment to the Arizona Constitution that made English the official language of the state.[61] The district court held that the amendment was unconstitutional under the First Amendment to the U.S. Constitution, and the Governor declined to appeal the decision.[62] Shortly thereafter, Arizonans for Official English ("AOE") moved to intervene in the case in order to appeal the judgment.[63] The district court denied the motion, and AOE appealed.[64]

The court cited *Sagebrush Rebellion, Inc. v. Watt*[65] in interpreting the intervention rule: "Rule 24(a) . . . require[s] the granting of a motion to intervene at the outset of litigation if four criteria are met: (1) timeliness; (2) an interest in the subject matter of the litigation; (3) absent intervention the party's interest may be practically impaired; (4) other parties inadequately represent the intervenor."[66] The court then made clear that a potential intervenor did not need to satisfy any other requirements: "In order for an individual to intervene in ongoing litigation between

57. *Id.* (emphasis added).

58. *Id.*

59. *Id.* at 693.

60. 939 F.2d 727 (9th Cir. 1991).

61. *Id.* at 729.

62. *Id.* at 730. The Governor's decision not to appeal was not surprising. Governor Rose Mofford publicly opposed the adoption of English as Arizona's official language in her election campaign of 1988. *Id*.

63. *Id*.

64. *Id.*

65. 713 F.2d 525 (9th Cir. 1983).

66. *Yniguez*, 939 F.2d at 731 (citing *Sagebrush Rebellion*, 713 F.2d at 527).

other parties, he need only meet the *Sagebrush Rebellion* criteria."[67] The court indicated that standing was not required for intervention by contrasting intervention in "an ongoing litigation between other parties"—where only the *Sagebrush Rebellion* requirements need to be met—with intervention in a case that was no longer ongoing: "where no party appeals, the 'case or controversy' requirement of Article III also qualifies an applicant's right to intervene post-judgment."[68] The court extended this reasoning to a logical conclusion: "[A]n interest strong enough to permit intervention with parties at the onset of an action under Rule 24(a) is not necessarily a sufficient basis for intervention after judgment for the purpose of pursuing an appeal which all parties have abandoned."[69] Thus, while AOE likely could have intervened in the district court case without satisfying Article III standing requirements, it was not permitted to appeal the district court's judgment by itself without possessing Article III standing.[70]

The Ninth Circuit evidently did not view standing as a doctrine imposed on all parties because in *Yniguez*, the court would not require a potential intervenor to have standing if attempting to intervene into a case in which an original party has already satisfied standing.[71] Indeed, the court's conclusion that an intervenor attempting to appeal on its own must have standing is consistent with the view that standing is a requirement imposed on the court. Specifically, the court lost its "case or controversy" when the party with standing declined to appeal. Therefore, the case could not proceed until the intervenor satisfied the standing requirement and restored the "case or controversy."

5. The Eleventh Circuit

In *Chiles v. Thornburgh*,[72] a U.S. senator sued multiple Florida state officials challenging as illegal the operation of a detention facility.[73] A group of detainees attempted to intervene as of right, but the district court denied the motion.[74] The Eleventh Circuit reversed the district

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id* at 734. It should be noted that the court found that AOE did have standing to continue the case. *Id.*

71. *Id*. at 731.

72. 865 F.2d 1197 (11th Cir. 1989).

73. *Id.* at 1200–01.

74. *Id.*

court and found that the detainees were entitled to intervene as a matter of right.[75] In considering the detainees' motion to intervene, the court found that "standing concerns the subject matter jurisdiction of the court," and that "[i]ntervention under Rule 24 presumes that there is a justiciable case into which an individual wants to intervene."[76] Thus, the court approached standing as a separate requirement from intervention, and as such, it saw standing as a requirement the court had to satisfy before it ever considered the motion to intervene.[77] Its conclusion was therefore expected: "We therefore hold that a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit."[78]

Despite this holding, the *Chiles* court did find the standing cases helpful to the intervention analysis in one aspect: "The focus . . . of a Rule 24 inquiry is whether the intervenor has a legally protectable interest in the litigation. It is in this context that the standing cases are relevant, for an intervenor's interest must be a particularized interest rather than a general grievance."[79] Thus, according to the court, the standing analysis is relevant to the intervention analysis.[80] Whether the Eleventh Circuit equates the intervention interest to the standing interest is not clear, but there is some indication that the court considers the two interests to be identical.[81] While the court's usage of the standing analysis to define the interest required for intervention is by no means conventional, it did not harm the logic of its conclusion that standing is not required of intervenors. Even assuming that the Eleventh Circuit effectively requires standing of intervenors as of right (by equating the two interests), the *Chiles* court did not require any such interest of permissive intervenors.[82] In considering whether another group of potential intervenors satisfied the requirements of Rule 24, the court stated that a party seeking to inter-

75. *Id.* at 1215.

76. *Id.* at 1212.

77. *Id.* at 1213.

78. *Id.*

79. *Id.* at 1212 (footnote omitted) (citing Howard v. McLucas, 782 F.2d 956 (11th Cir. 1986)).

80. *Id.* at 1213.

81. The *Chiles* court analogized the interest of the intervening detainees to "prisoners who have standing to sue over the conditions of the institution where they are detained." *Id*. at 1214. Thus the detainees' interest likely would also satisfy Article III standing.

82. *Id.*

vene permissively need only show that his application is timely and that his claim or defense has a question of law or fact in common with the main action.[83] At that point, a district court has discretion to grant or deny the motion.[84] By not requiring any interest at all of permissive intervenors, the Eleventh Circuit affirmed its position that the Constitution does not require potential intervenors to have Article III standing.[85]

B. Circuits Viewing Standing As a Requirement Imposed on All Parties

In contrast to the five circuits discussed above, three federal circuits have concluded that a potential intervenor must have Article III standing to enter a case. As we show in this section, these circuits generally view standing as a requirement that every party must satisfy throughout the case—not as a requirement that the court may satisfy by finding that at least one party has standing.

1. The District of Columbia Circuit

The District of Columbia Circuit was the first circuit to expressly require Article III standing of potential intervenors.[86] This circuit first suggested that conclusion in *Southern Christian Leadership Conference v. Kelley*,[87] where a U.S. senator sought to intervene in two cases dealing with the FBI's surveillance of Dr. Martin Luther King, Jr.[88] Facing a vote to make Dr. King's birthday a national holiday, the senator attempted to obtain access to FBI tapes of Dr. King that became sealed upon a court order.[89]

The D.C. Circuit found that "Rule 24(a)(2) requires [an] intervenor to demonstrate . . . a legally protectable [interest]."[90] The court then stated that "[s]uch a gloss upon [Rule 24] is in any case required by Article III of the Constitution."[91] In addition, the court expressed in a foot-

83. *Id.*

84. *Id*.

85. *Id.*

86. *See* Bldg. & Constr. Trades Dep't. v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994); S. Christian Leadership Conference v. Kelley, 747 F.2d 777 (D.C. Cir. 1984).

87. 747 F.2d 777 (1984).

88. *Id.* at 778.

89. *Id.*

90. *Id.* at 779 (citing Donaldson v. United States, 400 U.S. 517, 531 (1971)).

91. *Id*. (citing Allen v. Wright, 468 U.S. 737 (1984)).

note that it explicitly found the senator "lacked a protectable interest and thus lacked standing."[92] In spite of the court's apparent finding that the senator lacked standing, its holding is arguably narrower. The court's finding that the senator lacked any protectable interest was sufficient to deny the motion to intervene, since Rule 24 does require some protectable interest.[93] Thus the court's language about standing arguably can be viewed as dicta.

Even though one D.C. Circuit case acknowledged *Kelley* as holding that intervenors must satisfy Article III standing as well as the requirements of Rule 24,[94] some dispute regarding the circuit's position on the matter later arose and was recognized in *Rio Grande Pipeline Co. v. Federal Energy Regulatory Commission*.[95] In *Rio Grande*, a pipeline company sought review of a decision by the Federal Energy Regulatory Commission ("FERC") that denied a request by the company to include the cost of pipeline in its rate base.[96] A third-party pipeline company that had received a similar denial attempted to intervene in the suit under 28 U.S.C. § 2348.[97] The lower court denied the motion, and the company appealed.[98]

In considering whether intervenors require standing, the D.C. Circuit found that two lower courts had "produc[ed] precedent that can be read as in direct conflict" with each other—one case supporting the imposition of a standing requirement on intervenors and one case opposing such a requirement.[99] The court followed *Kelley*'s holding that intervenors must have standing.[100] In arriving at that conclusion, the court viewed Article III standing as a doctrine applicable to *every party* coming before a federal court rather than to *every federal court* hearing a case. In *Rio Grande*, the court looked to the rationale underlying the *Kelley* decision:

92. *Id.* at 781 n.3.

93. *Id.*

94. *See* Bldg. & Constr. Trades Dep't. v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994) (citing *Kelley* as support for the proposition that "we have held that because an intervenor participates on equal footing with the original parties to a suit, a movant for leave to intervene under Rule 24(a)(2) must satisfy the same Article III standing requirements as original parties").

95. 178 F.3d 533 (D.C. Cir. 1999).

96. *Id.* at 535.

97. *Id.* at 537.

98. *Id.*

99. *Id.* at 537–38. The two cases are, respectively, *City of Cleveland v. Nuclear Regulatory Commission*, 17 F.3d 1515 (D.C. Cir. 1994), and *American Train Dispatchers Ass'n v. Interstate Commerce Commission*, 26 F.3d 1157 (D.C. Cir. 1994).

100. *Rio Grande*, 178 F.3d at 538.

"[B]ecause a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he must satisfy the *standing requirements imposed on those parties*."[101] The court concluded that "[b]ecause a prospective § 2348 intervenor similarly seeks to participate like a party, . . . it should be treated like a party. Accordingly, as we had held in *Kelley*, it must satisfy the *standing requirements imposed on parties*."[102] Thus any notions that the D.C. Circuit might allow intervention without standing were dispelled.

2. The Eighth Circuit

In the Eighth Circuit case *Mausolf v. Babbit*,[103] multiple snowmobile enthusiasts brought suit against the Secretary of the Interior and others to enjoin the enforcement of snowmobiling restrictions in Voyageurs National Park.[104] The Voyageurs Region National Park Association and other conservationist groups moved to intervene under Rule 24.[105] The Park Association sought to secure vigorous enforcement of the restrictions on snowmobiling in the Park, and the Eighth Circuit,[106] while holding that the Park Association had standing and satisfied the requirements of Rule 24(a), concluded that an intervenor must satisfy Article III standing.[107]

In considering whether the Park Association needed Article III standing to intervene, the Eighth Circuit first noted that "Rule 24(a) says nothing about standing."[108] The court then surveyed the "diverse, sometimes 'anomalous' approaches"[109] taken by the federal courts of appeals and concluded that it could not identify a "majority view" on the question.[110] Faced with the Park Association's argument that Article III only required the original parties to have standing, the court nevertheless found that Article III required all parties in the case to have standing: "In our view, an Article III case or controversy, once joined by intervenors who lack standing, is—put bluntly—no longer an Article III case or contro-

101. *Id.* (emphasis added) (quoting *City of Cleveland*, 17 F.3d at 1517).
102. *Id.* (emphasis added).
103. 85 F.3d 1295 (8th Cir. 1996).
104. *Id.* at 1296.
105. *Id*.
106. *Id.* at 1296–97.
107. *Id.* at 1300.
108. *Id.* at 1299.
109. *Id.* (quoting Diamond v. Charles, 476 U.S. 54, 68 (1986)).
110. *Id.* at 1299.

versy."[111] The court demonstrated that it viewed standing as a requirement on the parties, and it stated this view in much more explicit language than other circuits that agree: "An Article III case or controversy is one where *all parties have standing*, and a would-be intervenor, because he seeks to participate as a party, must have standing as well."[112]

3. The Seventh Circuit

The Seventh Circuit's treatment of standing in the intervention context has not been consistent, and questions still remain as to that circuit's position on the issue. In *United States v. 36.96 Acres of Land*,[113] the Secretary of the Interior attempted to acquire property on Lake Michigan in a condemnation action.[114] A not-for-profit corporation sought to protect the property for public use by intervening in the case.[115] In affirming the district court's decision to disallow the corporation from intervening, the Seventh Circuit did not determine whether the corporation needed standing to intervene.[116] Rather, the court found that "[t]he interest of a proposed intervenor . . . must be greater than the interest sufficient to satisfy the standing requirement."[117]

Based on this standard, a court would not need to determine if an intervenor should comply with Article III standing because any party that satisfied the interest requirement of intervention would necessarily satisfy the interest requirement of standing. Likewise, any party that did not satisfy the interest requirement of intervention would be denied intervention, making the question of standing irrelevant. By making compliance with the intervention interest more difficult than compliance with the standing interest, the *36.96 Acres* court effectively rendered moot the question of whether standing is required of intervenors. Under the *36.96 Acres* court's reasoning, the Seventh Circuit would never need to decide if standing is required of intervenors.[118]

Eleven years after *36.96 Acres*, the Seventh Circuit revisited the is-

111. *Id.* at 1300.

112. *Id.* (emphasis added).

113. 754 F.2d 855 (7th Cir. 1985).

114. *Id.* at 857.

115. *Id.*

116. *Id.* at 859.

117. *Id*.

118. Alternatively, a court could use the *36.96 Acres* decision to avoid deciding whether a party had an interest sufficient to intervene. If it concluded that the party did not satisfy Article III standing, it would not need to consider the interest required to intervene.

sue and decided that all intervenors must satisfy Article III standing.[119] In *Solid Waste Agency*, several Illinois municipalities brought suit challenging the denial of a permit to build a landfill near the town of Bartlett, Illinois.[120] The residents of Bartlett moved to intervene under Rule 24 to keep the landfill from being built.[121]

In considering whether the Bartlett residents should be allowed to intervene, the court discussed a hypothetical property owner whose property right might be destroyed as the result of a lawsuit by an environmental agency.[122] The court noted that "[t]he threatened injury would give [the property owner] the minimal standing required by Article III, which *our court requires of any intervenor*."[123] In support of its conclusion, the court cited its own *36.96 Acres* decision,[124] even though that case simply stood for the proposition that the intervention interest is greater than the standing interest.[125] However, the *Solid Waste Agency* court made its assertion clear by stating that "[s]ome other courts do not require [Article III standing in the intervention context]"[126] and citing the Sixth Circuit's *Perry* decision, which held that an intervenor need not have the same interest necessary to initiate a lawsuit in order to intervene in a suit where the plaintiff has standing.[127] The *Solid Waste Agency* court further bolstered its inclusion of standing in the requirements for intervention by reasoning that a "would-be intervenor [should] not be permitted to push out the already wide boundaries of Article III standing."[128] The court denied the Bartlett residents' motion to intervene as of right.[129] Regardless of whether it interpreted its earlier *36.96 Acres* decision correctly, the *Solid Waste Agency* court was clear in declaring that the Seventh Circuit requires standing of all intervenors as of right.[130]

The *Solid Waste Agency* court's treatment of the Bartlett residents'

119. *See* Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 101 F.3d 503 (7th Cir. 1996).

120. *Id.* at 504.

121. *Id.*

122. *Id.* at 507.

123. *Id.* (emphasis added).

124. United States v. 36.96 Acres of Land, 754 F.2d 855 (7th Cir. 1985).

125. *Id.* at 859.

126. *Solid Waste Agency*, 101 F.3d at 507.

127. Associated Builders & Contractors v. Perry, 16 F.3d 688, 690 (6th Cir. 1994).

128. *Solid Waste Agency*, 101 F.3d at 507.

129. *Id.* at 509.

130. *Id.* at 507.

motion to intervene permissively[131] is problematic. The court reprimanded the district court for denying intervention based on the residents' lack of a sufficient interest because, according to the Seventh Circuit, "'interest' does not appear in Rule 24(b). All that is required for permissive intervention, so far as bears on this case, is that the applicant have a claim or defense in common with a claim or defense in the suit."[132] Because the district court misapplied the law, the Seventh Circuit remanded the case for proper consideration of permissive intervention.[133] This part of *Solid Waste Agency* is highly problematic because if the court were correct in asserting that Article III applies to all intervenors as of right, then Article III must logically also apply to all permissive intervenors.[134] The court's treatment of permissive intervention seems to indicate that when it considered intervention as of right, it meant to conclude, like the *36.96 Acres* court did, that the interest required for intervention as of right is simply a greater interest than the interest required for standing.[135] Whatever the intention, the *Solid Waste Agency* court left the Seventh Circuit's position on standing in the intervention context far from clear.

The Seventh Circuit declined to untangle the issue four years later in *Sokaogon Chippewa Community v. Babbit*,[136] where several American Indian tribes attempted to convert a racing track into a casino and gaming facility.[137] The American Indian tribes' application was denied, and the tribes sought review of the decision.[138] Another American Indian tribe, the St. Croix Indians, sought to intervene as defendants because the St. Croix operated existing gambling facilities in the same area in which the other Indian groups wanted to start their casino.[139]

In denying the St. Croix's motion to intervene, the court again considered standing in the context of intervention.[140] The court observed that "[f]rom a pragmatic standpoint, . . . '[a]ny interest of such magnitude [as to support Rule 24(a) intervention as of right] is sufficient to satisfy

131. *Id.* at 509.

132. *Id*.

133. *Id.*

134. *See* discussion *infra* Part IV.C (reasoning that if the Constitution applies to any intervenors, it must apply to all intervenors, whether as of right or permissive).

135. *Solid Waste Agency*, 101 F.3d at 507; *see also* United States v. 36.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985).

136. 214 F.3d 941 (7th Cir. 2000).

137. *Id.* at 943.

138. *Id*. at 945.

139. *Id.* at 943.

140. *Id.* at 946.

the Article III standing requirement as well.'"[141] However, the court concluded by dodging the issue: "Because it is enough here to decide [that] the St. Croix has [not] satisfied the requirements of the rule, we do not explore further what the outer boundaries of standing to intervene might be."[142] Thus the *Sokaogon* court did not determine whether the Seventh Circuit requires intervenors to have standing.

In summary, *36.96 Acres*, *Solid Waste Agency*, and *Sokaogon* are all consistent with the notion that the Seventh Circuit requires intervenors as of right to have an interest that is greater than the interest required in the standing analysis, but beyond that statement, little is clear. The Seventh Circuit must still deal with *Solid Waste Agency*'s inconsistent assertions that standing is required of intervenors as of right and that no interest is required of permissive intervenors.

Whether the Seventh Circuit views standing as a requirement on the court or a requirement on the parties is difficult to determine, considering the circuit's complicated analysis of the issue. Because *36.96 Acres* and *Sokaogon* simply stated that a potential intervenor's interest must be greater than the standing interest, those courts' approach to standing is inconclusive. *Solid Waste Agency*'s language offers evidence supporting both approaches. In stating that "our court requires [Article III standing] of any intervenor," the court viewed standing as a requirement on the parties.[143] However, by concluding that permissive intervention does not require any interest at all, the court shied away from the view that standing applied to parties and left open the conclusion that standing was already satisfied in the case before the permissive intervention.

IV. STANDING IS PROPERLY VIEWED AS A REQUIREMENT THE COURT MUST ENSURE IS SATISFIED

We argue that standing should be approached as a requirement on every federal court—not as a requirement on every party coming before a federal court. This conclusion is supported by the Supreme Court's approach to standing in an intervention context as well as the language and purpose of Article III. In addition, viewing standing as a requirement on all parties produces results inconsistent with Rule 24 intervention.

141. *Id.* (quoting Transamerica Ins. Co. v. South, 125 F.3d 392, 396 n.4 (7th Cir. 1997)).

142. *Id.*

143. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 101 F.3d 503, 507 (7th Cir. 1996).

A. Supreme Court Treatment of Standing in the Context of Intervention

The Supreme Court has not explicitly decided whether Rule 24 intervenors must possess Article III standing.[144] The Court has, however, addressed a closely related issue, and in that context, the Court provided guidance to the resolution of standing in the framework of intervention.

Diamond v. Charles[145] is the most relevant Supreme Court case regarding standing in the intervention context. While the Court did not address whether an intervenor must have standing to enter an ongoing case at the trial court level, the Court did discuss standing and intervention at the appellate level.[146] Although *Diamond* has been read to support either conclusion,[147] we argue that the proper reading of *Diamond* indicates that standing is a requirement on the court, not on every party. In-depth consideration of *Diamond* is thus appropriate.

In 1979, the Illinois Legislature amended its abortion law to increase state regulations regarding abortions.[148] The law imposed criminal liability on persons that performed abortions in certain circumstances; in other circumstances, the law required physicians to provide women with information related to abortions.[149] Upon passage of the amendments to the abortion law, seven physicians and two abortion clinics filed a class action suit against the State of Illinois seeking to enjoin the enforcement of the abortion law.[150] Another physician, Eugene F. Diamond, moved to intervene in the case as a party defendant based on his "conscientious objection to abortions" as well as on his "status as a pediatrician and as a

144. Diamond v. Charles, 476 U.S. 54, 68–69, 69 n.21 (1986) (recognizing that "[t]he Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing" but concluding that "[w]e need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III").

145. *Id.*

146. *Id*. at 62–71.

147. *Compare Solid Waste Agency*, 101 F.3d at 507 (acknowledging that *Diamond* did not resolve the conflict, asserting that "there is less to it than meets the eye, since *Diamond* makes clear that a case must be dismissed if the only party on one side of the suit is an intervenor who lacks standing," and concluding that standing is required of all intervenors), *with* Ruiz v. Estelle, 161 F.3d 814, 830–31 (5th Cir. 1998) (acknowledging that the *Diamond* Court's discussion of the standing interest and the intervention interest "created confusion" among the circuits and asserting that *Diamond* supports a conclusion that standing is not required of intervenors).

148. *Diamond*, 476 U.S. at 56.

149. *Id*. at 57 n.3.

150. *Id*. at 57.

parent of an unemancipated minor daughter."[151] The district court granted Diamond's motion to intervene.[152]

After a series of preliminary injunctions and appeals, the district court permanently enjoined the enforcement of several sections of the abortion law.[153] After the Seventh Circuit affirmed the permanent injunction, the State of Illinois chose not to appeal the decision, but Diamond did file a notice of appeal to the Supreme Court.[154] The Court found that Diamond did not possess Article III standing, and with no "case" or "controversy," the Court dismissed Diamond's appeal.[155] In more generic terms, the Supreme Court held that an intervenor that lacks standing may not appeal a judgment if no party that possesses standing chooses to appeal the decision.[156] In so concluding, the Court viewed the standing doctrine as a requirement on the court—not as a requirement on every party to come before the court.

The Court first acknowledged that Article III "limits the power of federal courts to deciding 'cases' and 'controversies.'"[157] The Court then discussed the policy of requiring the complaining party to have suffered an injury to prevent federal courts from becoming involved in the "vindication of value interests" or the resolving of vague concerns.[158] Turning to the facts of the case, the Court stated, "Had the State of Illinois invoked this Court's appellate jurisdiction . . . and sought review of the Court of Appeals' decision, the 'case' or 'controversy' requirement would have been met, for a State has standing to defend the constitutionality of its statute."[159] In other words, the Court reasoned that once one party possessing standing had appealed, Article III would be satisfied. The Court made clear that Article III applies to the *court* by declaring that "[the State of Illinois's] failure to invoke our jurisdiction leaves *the Court* without a 'case' or 'controversy.'"[160]

The Court went so far as to note that, even though Diamond did not have standing, Diamond could have appealed if the State of Illinois had

151. *Id.* at 57–58.
152. *Id.* at 58.
153. *Id.* at 59–61.
154. *Id.* at 61.
155. *Id.* at 64.
156. *Id.* at 71.
157. *Id.* at 61.
158. *Id.* at 62 (quoting United States v. Scrap, 412 U.S. 669, 687 (1973)).
159. *Id.*
160. *Id.* at 63–64 (emphasis added).

also appealed because Article III would already be satisfied.[161] In a telling passage, the Court hypothesized:

> Had the State sought review, this Court's [r]ule . . . makes clear that Diamond, as an intervening defendant below, also would be entitled to seek review, enabling him to file a brief on the merits, and to seek leave to argue orally. But this ability to ride "piggyback" on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for Diamond to join.[162]

The Court clearly viewed the two analyses—standing analysis and intervention analysis—as distinct; if the State had appealed, the Court's Article III standing obligation would have been satisfied, and it could have maintained jurisdiction.[163] Only after its jurisdiction was certain could it properly enter into an analysis of intervention. Therefore if the State had appealed, Diamond would have been entitled to remain in the proceedings also, even though he clearly lacked standing. Only when there is no party before the court that possesses standing is there "no case for Diamond to join."[164] In further evidence of the Court's approach to standing as a requirement on a federal court, the Court stated that "Diamond's status as an intervenor below, whether permissive or as of right, does not confer *standing sufficient to keep the case alive* in the absence of the State on this appeal."[165] The Court put standing in its proper perspective—as a requirement on the court *to keep the case alive*—not as a requirement on every party.

B. The Policy of Article III Standing

We do not discount the important purpose of Article III standing, which is to ensure that federal courts do not engage in making abstract policy decisions. However, the policy behind Article III indicates that standing is a requirement on the federal courts—not a requirement on all who seek to come before those courts. If, at the outset, a federal court has correctly determined that it has an actual concrete "case" or "controversy" before it, the purpose of Article III is not frustrated by allowing intervenors to subsequently participate in the proceedings.

161. *Id*. at 64.
162. *Id*.
163. *Id*. at 62.
164. *Id*. at 64.
165. *Id*. at 68 (emphasis added).

The policy that guided the judiciary in creating the doctrine of Article III standing was largely a concern for separation of powers between the three branches of government. If the federal courts are not limited to hearing only "cases" and "controversies," then there is no assurance that they will not engage in making abstract policy decisions that are better left to the representative branches of government. In *Frothingham v. Mellon*,[166] an early case dealing with standing, the Supreme Court explained:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws, to the executive the duty of executing them, and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other. . . . We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional.[167]

The Court further explained that it may only review an act of Congress if there is "some direct injury" to a particular party.[168] The injury requirement ensures that the court is addressing a specific wrong rather than making an abstract policy decision as to whether a law enacted by Congress was appropriate. Standing, therefore, is best viewed as a requirement on federal courts to make certain they are acting within their separable power.[169]

Admittedly, the party bringing the action has the burden of persuading the federal court that the court has the authority to hear the case. That burden, however, does not fall upon all parties. As the Supreme Court in *Frothingham* stated, "*The party who invokes the power* [(the jurisdiction of the court)] must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some

166. *Frothingham* was consolidated with *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

167. *Id.* at 488.

168. *Id*.

169. *See also* Flast v. Cohen, 392 U.S. 83 (1968). The *Flast* Court expounded on the separation of powers:

> Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.

Id. at 94–95.

direct injury as the result of its enforcement . . . ."[170] By expressly distinguishing which party bears the burden, the Court implicitly indicated that it is not a burden that all parties coming before it must bear. When the party invoking the power of the court satisfies the standing requirement, that party has already established the jurisdiction of the court for that particular "case" or "controversy." Once the court's jurisdiction is established, it is difficult to imagine how allowing others to participate in the proceedings would change a concrete "case" or "controversy" into an abstract policy question that federal courts are forbidden to hear. Even with other participants in the proceedings, the court would still only be deciding one specific case.

A comparison of standing to supplemental jurisdiction is particularly illustrative of the fact that once Article III is satisfied, a court's jurisdiction is vested. In a helpful footnote in *Ruiz v. Estelle*,[171] the Fifth Circuit observed that in the supplemental jurisdiction context, "the presence of additional claims which could not have been filed in federal court does not necessarily divest a federal court of jurisdiction so long as the Article III requirements remain intact."[172] Similarly, once the court establishes jurisdiction through the standing of the original parties, the court can hear the intervenor's case, even though the intervenor lacks standing, "so long as the Article III requirements remain intact," or, in other words, so long as the original parties continue in the proceedings or the intervenor can meet the standing requirements independently.[173]

The policy of Article III standing to ensure that federal courts do not overstep their apportioned function indicates that standing is a requirement on federal courts and not a requirement on every applicant that

170. *Mellon*, 262 U.S. at 488 (emphasis added); *see supra* note 166; *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) ("[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to [show standing]."); Liverpool, N.Y. & Phila. Steamship Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885) ("[The Supreme Court] has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.").

171. 161 F.3d 814 (5th Cir. 1998).

172. *Id.* at 833 n.27 (citations omitted).

173. *See* Diamond v. Charles, 476 U.S. 54 (1986). Though standing is a requirement on the court that is satisfied at the outset of a particular case, it is a requirement that must be maintained throughout the proceedings of the case. *See, e.g.*, Chiles v. Thornburgh, 865 F.2d 1197, 1202 (11th Cir. 1989). Hence, if the original parties on which the court relied to satisfy Article III drop out of the proceedings, the court will be required to ensure that what is left constitutes a "case" or "controversy" in order to continue the proceedings. In *Diamond*, the Court was unable to maintain jurisdiction without the original parties that invoked such jurisdiction.

seeks to influence the outcome of a particular case.

C. Viewing Standing As a Requirement on All Parties Is Inconsistent with Rule 24

In this Part, we argue that approaching standing as a requirement on all parties produces results inconsistent with the language and purpose of Rule 24. We certainly realize that if a requirement is imposed by the Constitution, then a Rule of Civil Procedure—or anything else, save a constitutional amendment, for that matter—cannot override it. Furthermore, that a constitutional requirement conflicts with the language and purpose of a rule only indicates that the rule is out of harmony with the intent of the Constitution—not vice versa. We do not suggest here that a Rule of Civil Procedure trumps the Constitution; rather, we suggest that the process by which rules are created provides evidence of the proper interpretation of Article III. The Federal Rules of Civil Procedure are drafted by the Advisory Committee, which is composed of judges, prominent lawyers, and law professors. The Supreme Court approves the rules, and Congress is given an opportunity to reject the rules. Thus the Federal Rules of Civil Procedure represent the view of the Advisory Committee, the Supreme Court, and Congress. While the rules are clearly not an official interpretation of the Constitution, they were not drafted nor are they amended on a whim.[174] Thus, the conclusion of these groups—the rule itself—is at least persuasive evidence as to the groups' likely interpretation of the law.

The circuits that require standing of intervenors generally reason that, as the Eighth Circuit put it, "an Article III case or controversy, once joined by intervenors who lack standing, is—put bluntly—no longer an Article III case or controversy."[175] The courts that have required standing of intervenors typically have done so in the context of Rule 24(a), which deals with intervention as of right. However, the logic of that position also requires that permissive intervenors under Rule 24(b) possess Article III standing. If the Constitution demands standing of all parties that come before a federal court, then all intervenors—whether as of right or permissive—must possess Article III standing. Adopting the position that standing applies to both intervenors as of right and permissive intervenors, however, necessarily produces three results that are inconsis-

174. *See supra* Part II.B (reviewing the rigorous amendment process).

175. Mausolf v. Babbitt, 85 F.3d 1295, 1300 (8th Cir. 1996).

tent with Rule 24. First, the requirement in Rule 24(a) that intervenors as of right possess an interest in the outcome of the case is rendered meaningless. Second, the requirement in Rule 24(b) that permissive intervenors have a claim or defense with a question of law or fact in common with the main action is also rendered meaningless. Third, the distinction between Rule 24(a) and Rule 24(b) becomes practically useless.

1. Rule 24(a)'s "interest" requirement

If standing is interpreted as a requirement on all parties, the language in Rule 24(a) requiring an interest in the outcome of the action is superfluous. If a party has such an interest in the case to satisfy standing, it automatically satisfies the intervention interest. This assertion presupposes that the standing interest is greater than or equal to the intervention interest. Thus, defining the interest levels of Rule 24 and the standing doctrine is necessary.

While the standing interest has been fairly well defined, the interest required for intervention could certainly use clarification by the courts.[176] In short, courts have reached very different conclusions regarding the level of interest required by Rule 24(a). However, all that is necessary for our purposes is that we establish that the standing interest is equal to or greater than the intervention interest. First, we note that every circuit except one that has considered the level of interest required by intervention has concluded either that the intervention interest is less than the standing interest or that the intervention interest and the standing interest are equal. Only the Seventh Circuit has held that the intervention interest is a greater interest than the standing interest,[177] but that circuit's interpretation is likely improper under dicta in *Diamond*. In *Diamond*,[178] the Supreme Court dismissed the appeal of Diamond, the physician who supported enforcement of the Illinois abortion law, because he lacked standing to continue the case.[179] In considering what interest Diamond possessed, the Court found that "Diamond's status as an intervenor below, whether permissive or as of right, does not confer standing suffi-

176. *See* FRIEDENTHAL ET AL., *supra* note 24, § 6.10.

177. *See* Transamerica Ins. Co. v. South, 125 F.3d 392, 396 n.4 (7th Cir. 1997) (noting that "[a]ny interest of such magnitude [so as to satisfy Rule 24(a)] is sufficient to satisfy the Article III standing requirement as well"); United States v. 36.96 Acres of Land, 754 F.2d 855 (7th Cir. 1985) (same).

178. *Diamond*, 476 U.S. 54.

179. *Id.* at 68.

cient to keep the case alive in the absence of the State on this appeal."[180] In other words, even if Diamond had met the requirements to intervene as of right, he would not necessarily possess standing. The Court certainly could have found that an intervenor as of right possesses sufficient interest so as to necessarily confer standing, but instead it found that the status of an intervenor as of right does not confer standing on the party.[181] While the Court did not expressly hold that the intervention interest is less than the standing interest, it appeared to view standing as more stringent than intervention.[182]

Furthermore, even assuming that the Supreme Court had not discussed the issue in dicta or otherwise, it makes little sense to make the intervention interest more stringent than the standing interest because if a party has standing, it can bring its own suit. To suggest that with intervention Congress intended to make it more difficult for a party to join a case than to initiate its own case wholly ignores not only the language of Rule 24(a), but also the Advisory Committee's notes encouraging courts to apply intervention liberally.[183] Simply put, viewing standing as a requirement on the parties renders meaningless Rule 24(a)'s requirement of an interest in the outcome of the case.

2. Rule 24(b)'s "question in common" requirement

If standing is interpreted as a requirement on all parties, the language in Rule 24(b) requiring a claim or defense with a question of fact or law in common with the main action is rendered even more superfluous than the language in Rule 24(a). Under the same reasoning, the interest required by Rule 24(b) is certainly less than the standing interest. In fact, no courts raise the interest for permissive intervention to the level of the standing interest based solely on the language of Rule 24(b). Thus, imposing standing on potential permissive intervenors as a matter of consti-

180. *Id.*

181. *Id.*

182. This conclusion is consonant with the advisory committee's 1966 amendment to the Rule allowing for intervention more liberally.

183. *See* FED. R. CIV. P. 24 advisory committee's note (1966) (finding the development of the previous version of Rule 24(a) to be "unduly restricted"); Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 134 (1967) (noting that, with the 1966 amendments to Rule 24, "some elasticity was injected" into the practice of allowing intervention); *see also* FRIEDENTHAL ET AL., *supra* note 24, § 6.10 (concluding that the "federal courts [that] have broadened the scope of intervention . . . heavily in favor of the applicant . . . are consistent with the thrust of the 1966 amendments").

tutional law effectively invalidates the "question in common" language of Rule 24(b).

3. The distinction between the language of Rule 24(a) and Rule 24(b)

Approaching standing as a requirement on all parties virtually nullifies the distinction between subsection (a) and subsection (b) of Rule 24 as a practical matter. If Rule 24(a)'s protectable interest is less than or equal to the standing interest, then Rule 24(b)'s requirement of a claim or defense with a question of law or fact in common is certainly less stringent than the standing interest. That Congress employed such different language in the two subsections of Rule 24 suggests that different meanings were intended. The two subsections of the rule are parallel in structure, and the language preceding each of those phrases is virtually identical. Subsection (a) begins as follows:

> Upon timely application anyone *shall* be permitted to intervene in an action: (1) when a statute of the United States confers *an unconditional* right to intervene; or (2) when the *applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest . . . .*[184]

The comparable portion of subsection (b) states:

> Upon timely application anyone *may* be permitted to intervene in an action: (1) when a statute of the United States confers *a conditional* right to intervene; or (2) when an *applicant's claim or defense and the main action have a question of law or fact in common.*[185]

The emphasized portion of each subsection above demonstrates that subsection (a) and subsection (b) are identical—with the exception of the words "shall" and "may"—until the point at which they identify what interest is required to intervene. At that point, subsection (a) and subsection (b) differ dramatically. Such a dramatic change of verbiage in the two subsections could not have been coincidental; if the drafters intended the interest requirement to be the same in both subsections, they would not have used such different language. Thus, the structure of Rule 24 strongly indicates that the drafters intended a different interest for per-

184. FED. R. CIV. P. 24(a) (emphasis added).

185. FED. R. CIV. P. 24(b) (emphasis added).

missive intervention than for intervention as of right. If standing is required of all parties, the two interest requirements are equated—they both would have to rise to the level of standing.

In addition to the fact that requiring standing of intervenors nullifies the distinction between permissive intervention and intervention as of right, requiring standing of intervenors will also greatly narrow the scope of applicability of Rule 24(b) and will almost completely eliminate the need for Rule 24. If standing is a requirement of both methods of intervention, then an applicant with standing may intervene as of right if the parties in court do not adequately represent its interests. Furthermore, an applicant with standing that seeks to intervene permissively need not show anything; its standing will ensure that it has a question of law or fact in common. The applicant may intervene merely if the court grants it permission to do so. The consequences of this analysis are as follows: first, an applicant without Article III standing will never be permitted to intervene in a case; second, applicants with standing are highly unlikely to enter the case permissively because intervention as of right only requires an applicant with standing to demonstrate that its interests are not adequately represented. This standard is not a high one, and courts infrequently deny intervention based on adequate representation. Thus, an applicant will only be able to intervene permissively when it has standing, when its interests are fully represented in court, and when the district court judge is nevertheless willing to permit the applicant to enter the case. This combination of factors will not occur often, and it is unlikely that the Rule 24 drafters intended this result in including the possibility of permissive intervention.

Interpreting standing as a requirement on the parties is not consistent with the language and policy of Rule 24 intervention, but again, we readily acknowledge that this fact does not foreclose the issue. We argue, however, that the illogical result of that approach is at least persuasive evidence that the Advisory Committee, the Supreme Court, and Congress enacted Rule 24 with the understanding that potential intervenors would not need to possess Article III standing.[186] This evidence, coupled with the Supreme Court's approach to standing in *Diamond* and the purpose of Article III, indicates that standing should be viewed as a requirement on the court—not a requirement on the parties.

186. Accordingly, we predict that when the U.S. Supreme Court addresses this issue, it will hold that Rule 24 intervenors need not possess Article III standing to enter an existing case.

V. CONCLUSION

Eight circuits are split on whether an intervenor must have standing before it enters an existing case; we have shown that this split is the result of fundamentally different approaches to the standing doctrine. By requiring that at least one party in the case possess standing, federal courts ensure that they only hear "cases" and "controversies."[187] Thus, standing should be approached as a requirement that *every federal court* must ensure is satisfied at all times during a case—not as a requirement that *every party* must satisfy before it enters the case. Viewing standing in this manner is not only consistent with the Supreme Court's approach to standing but is also supported by the language and policies of Article III and Rule 24.[188] We encourage all federal courts to approach standing as a requirement on every federal court and hold that Rule 24 intervenors need not possess Article III standing to enter an existing case.

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187. U.S. CONST. art. III, § 2, cl. 1.

188. It has been suggested that Rule 24 should be amended to clarify whether or not standing applies to intervenors. *See* Gardner, *supra* note 3, at 699–700 (concluding that ideally, the advisory committee would amend Rule 24 to clarify the issue). However, we conclude that the advisory committee need not—and indeed should not—enact such an amendment. Congress is ultimately responsible for the language of Rule 24, and it is not the role of Congress to declare that the Constitution does not apply to a particular statute. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). The Eighth Circuit recognized this principle in *Mausolf v. Babbitt*: "Congress could no more use Rule 24 to abrogate the Article III standing requirements than it could expand the Supreme Court's original jurisdiction by statute." 85 F.3d 1295, 1300 (8th Cir. 1996). If Congress determined that intervenors *should* have standing to enter a case, it would be proper for Congress to amend Rule 24 to require such an interest of intervenors. Such an amendment would not be a declaration of constitutional law but rather a decision of legislative policy.