

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TOWN OF CHESTER, NEW YORK, :

4 Petitioner : No. 16-605

5 v. :

6 LAROE ESTATES, INC., :

7 Respondent. :

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9 Washington, D.C.

10 Monday, April 17, 2017

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:03 a.m.

15 APPEARANCES:

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17 Petitioner.

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19 General, Department of Justice, Washington, D.C.;
20 for United States, as amicus curiae, supporting the
21 Petitioner.

22 SHAY DVORETZKY, ESQ., Washington, D.C.; on behalf of
23 the Respondent.

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 16-605, the Town of Chester v. Laroe
5 Estates.

6 Mr. Katyal.

7 ORAL ARGUMENT OF NEAL K. KATYAL

8 ON BEHALF OF THE PETITIONER

9 MR. KATYAL: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 Had Laroe filed the lawsuit against the Town
12 of Chester, it would have been dismissed for lack of
13 standing. However, Laroe claims that because it sought
14 intervention under Rule 24(a)(2), that things are
15 different. That's wrong.

16 An intervenor of right is a full-blown party
17 and can invoke the full suite of powers of the Federal
18 judiciary, from subpoenas to summary judgment. But
19 standing is not dispensed in gross and those indications
20 of judicial power must be grounded in Article III, and
21 that is particularly so because of two key facts.
22 First, Rule 24(a)(2) situates intervenors who are in a
23 different position from regular plaintiffs. Insofar as
24 intervenors only must show that the existing parties
25 don't adequately represent their interests, so it is

1 absolutely foreseeable that an intervenor will adopt a
2 different position than the parties in the case and
3 invoke Federal judicial power.

4 And, second, like here, when the party challenges the
5 standing of an intervenor in district court, that court
6 does not abuse its discretion when it conducts the
7 standing inquiry. This rule is efficient, it avoids all
8 sorts of contingent derivative interests --

9 JUSTICE GINSBURG: It sets up a difference
10 between intervening on the defendant's side and the
11 plaintiff's side. Intervening on the defendant's side
12 under your scheme, that's easy, but not on the
13 plaintiff's side. And why should there be that
14 disuniformity?

15 MR. KATYAL: Yeah, I don't know that there
16 is any sort of disuniformity. The first thing I'd say
17 is, Justice Ginsburg, is this case involves a plaintiff
18 intervenor and some of the defendant intervenor's
19 standards and stuff does get a little meta, and I don't
20 know that you have to reach it here.

21 But if you were to reach it and you were to
22 ask, I'd say that the inquiry would be essentially the
23 same. This Court in Hollingsworth v. Perry basically
24 gave us the test for what that is, and it said in
25 Hollingsworth, ordinarily we think of standing as

1 something about plaintiffs, but it's also true about
2 defendants too. And when a defendant on appeal is
3 trying to bring an appeal or something like that, the
4 question is, how -- is the judgment below creating some
5 sort of concrete harm to them.

6 And we think that same test applies here.
7 It applies to both plaintiffs and defendants. Agreed
8 that sometimes it gets a little bit difficult in the
9 application. It's very easy to see how it applies for
10 plaintiffs, little more difficult for defendants, but we
11 aren't saying that the rules should be different.

12 JUSTICE GINSBURG: You're saying the
13 intervenor must have the same standing as a plaintiff
14 would have. And that hasn't been the understanding in
15 the courts or the commentators.

16 You're probably familiar with the
17 intervention commentary by David Shapiro in which he
18 said, it should go without saying, it must be understood
19 that there is a difference between the -- the question
20 whether one is a proper plaintiff in the -- or defendant
21 in an initial action, and the question whether one is
22 entitled to intervene.

23 MR. KATYAL: So -- so we think with respect
24 to (a)(2) intervenors, they are full-blown parties.
25 That's what this Court in Eisenstein said. And for

1 those folks, they do have to show the same type of
2 standing as a plaintiff.

3 That doesn't mean that they have to show the
4 exact same standing. They could have a different injury
5 than a plaintiff in a given case, but they are going to
6 exercise, Justice Ginsburg, their full suite of powers,
7 and it doesn't make sense to say that they should be off
8 the hook for --

9 JUSTICE GINSBURG: How about permissive
10 intervenors?

11 MR. KATYAL: Permissive intervenors are
12 absolutely different, as our brief explains, because
13 24(b) allows Federal courts to impose all sorts of
14 restrictions on them. And so a good example is this
15 Court's decision in Stringfellow, in which the whole
16 complaint by the intervenor before this Court was, hey,
17 you know, I want to exercise the full-blown rights of a
18 party. This district court only gave me 24(b)
19 permissive intervention and imposed restrictions on, for
20 example, discovery. And they said -- they -- they came
21 to the Court and said that wasn't fair, we should have
22 been a full party, and this Court rejected that.

23 And Justice Brennan's opinion tracked
24 that -- his concurring opinion tracked that of the
25 majority in saying, essentially, courts have -- Federal

1 courts have all sorts of powers over permissive
2 intervenors, that they don't. They can restrict
3 discovery, they can restrict claims, all sorts of that.
4 That's not true for full-blown party status.

5 Now, one last piece, Justice Ginsburg. It
6 is the case that some permissive intervenors under 24(b)
7 do have standing; and for those folks, they can
8 exercise, again, the full suite of powers, as long as
9 there's no restriction on them put on them by the
10 Federal court, but there's no Article III problem with
11 that.

12 JUSTICE BREYER: -- wrong with doing this.
13 Say -- think if a -- a party wants a court to do
14 something. Now, you can't invoke a court's power to do
15 something, including an appellate court, unless you have
16 standing. To say an intervenor, who wants the court to
17 do no more than what the plaintiff, or in an appropriate
18 case, the defendant, wants them to do does not need
19 standing.

20 But where an intervenor wants a court to do
21 something different, then -- then he does need standing.
22 In which case, it would save the court lots of trouble.
23 If there are many intervenors, you wouldn't have to look
24 into the standing -- or you would, if, and only if, they
25 want the court to do something different.

1 MR. KATYAL: So, Justice Breyer, we agree
2 with much of that. So the -- the question is, though,
3 in your -- in your question about what an intervenor is,
4 we agree that everything you said makes sense for
5 permissive intervenors. But for an (a)(2) intervenor,
6 the reason they're coming to the court, as I was saying
7 at the outset, is because they disagree with what the
8 parties are doing.

9 JUSTICE BREYER: They may disagree --

10 MR. KATYAL: Put the two and a half --

11 JUSTICE BREYER: -- perhaps with the
12 argument. The lawyer, amazingly, thinks he's a better
13 lawyer than the one who's already there, and so he
14 thinks he can make a better argument.

15 MR. KATYAL: Correct, but --

16 JUSTICE BREYER: But if he doesn't want
17 anything different than what they've already asked for,
18 why does Article III insist that he have standing?

19 MR. KATYAL: Justice Breyer, I'm unaware of
20 anyone who thinks that they're -- that they're somehow a
21 better lawyer than someone else who doesn't think that
22 they would have a different take with respect to claims,
23 relief, discovery --

24 JUSTICE BREYER: This case --

25 MR. KATYAL: -- jury trial --

1 JUSTICE BREYER: This very case. This very
2 case, he may want nothing different. All he may want is
3 that the town gives the plaintiff the money, and then he
4 will make his own case to say, I'm equitably entitled.

5 MR. KATYAL: Well, let's take this very
6 case. So the sole petition at page 5 said, look,
7 discovery, subpoenas, these are all very important parts
8 of civil litigation. Our entire blue brief is all about
9 that. They don't disclaim anything except claims in
10 relief.

11 JUSTICE KAGAN: But why is there --

12 MR. KATYAL: Even that, I think there's an
13 asterisk about, but -- which I'll explain in a minute,
14 but everything about the trial strategy, any -- they
15 haven't disclaimed any of that.

16 JUSTICE KAGAN: But why --

17 MR. KATYAL: And that's true about --

18 JUSTICE KAGAN: -- do you think there is a
19 real difference, Mr. Katyal, between claims in relief on
20 the one hand, in which case, yes, you need standing too,
21 and everything else on the other hand, in which case,
22 there's somebody with standing who has those claims, who
23 seeks that relief. So the court is doing exactly what
24 the court has authority to do, but this intervenor can
25 contribute to the way the court is thinking about the

1 case.

2 MR. KATYAL: So for two reasons. One is
3 this Court's decision in United States Catholic in 1988,
4 in which the Court said, quote, "The subpoena power of
5 the court is subject to those limitations inherent in
6 the body that issues them," because of Article III.
7 That is to say that subpoenas, all the discovery,
8 things -- the only way a court can act is with
9 Article III. That is particularly so when you're
10 thinking about discovery. There have been opinion after
11 opinion of this Court, from Iqbal to Twombly to Justice
12 Breyer's opinion in AMD, that say that discovery is
13 becoming the ball game in litigation. And if you don't
14 confine Federal courts to their lane, as Article III
15 does, and allow bystanders, sometimes idealogical
16 bystanders who don't have Article III standing, you are
17 imposing that they use the massive power of the Federal
18 --

19 JUSTICE SOTOMAYOR: Mr Katyal, I am totally
20 confused with the permissive and -- or automatic. If
21 it's okay to do all of this with permissive intervenors
22 and all of the discovery and other burdens that you're
23 talking about, why isn't it okay to do it with automatic
24 intervenors who are limited to only the claims of relief
25 that the plaintiff has asked for?

1 MR. KATYAL: So Justice --

2 JUSTICE SOTOMAYOR: Why -- why is there some
3 sort of added burden with respect to automatic that
4 doesn't exist with respect to permissive?

5 MR. KATYAL: I might not have been clear.
6 It's not about the label. It's about the function.
7 That is, if a permissive intervenor is seeking
8 discovery, is seeking subpoenas, is seeking to invoke
9 the Federal judicial power, they must have standing.

10 My only point is the types of people that
11 Justice Breyer is positing, the people who say, hey, I'm
12 just a better lawyer. I'm going to do the exact same
13 stuff, claims, relief or so on, those are permissive
14 intervenors or they are amici, and they don't need to
15 show standing in order for them to participate in the
16 lifecycle of the case.

17 CHIEF JUSTICE ROBERTS: Does it --

18 MR. KATYAL: That's often how --

19 CHIEF JUSTICE ROBERTS: But does it matter
20 to you what -- at what point the Article III
21 determination you say is required is made? I mean, I
22 would think that -- why would it be necessary to do that
23 at the outset? Why wouldn't it be when you get an
24 intervenor who decides -- certainly if he is going to
25 raise a different claim, but also is the one and the

1 plaintiff is not the one imposing particularly
2 burdensome discovery, can you wait until then, when the
3 other party objects, and say, well, now I've got to look
4 at your Article III standing, because you're doing
5 something that changes the litigation?

6 MR. KATYAL: Mr. Chief Justice, we -- we
7 don't think we have to win that by any stretch. We
8 certainly think that the "what" matters more than the
9 "one;" the "what" being that whenever Federal judicial
10 indications of power, be it subpoenas or summary
11 judgment, is invoked, that's when Article III standing
12 is required.

13 With respect to timing, we do think that
14 the best course of action for a bunch of reasons is to
15 do that at the outset. But, you know, you don't have to
16 reach that here. Here, the district court did, and my
17 friend on the other side would have to convince you that
18 that's somehow an abuse of discretion, which I think is
19 a very hard thing to do, in order for you to reverse the
20 decision below.

21 But here are some reasons why I think that
22 threshold inquiry makes sense at the front end. One, is
23 the Federal Court is already reviewing 24(a)(2)
24 standards at that point, and it's a very closely
25 analogous, if not exactly identical, set of questions.

1 And so it makes sense to do it all in one piece rather
2 than doing it separately.

3 Second, as my friend on the other side's
4 brief admits, there's no guarantee that that later
5 inquiry will even happen. Indeed, his brief at page 30
6 admits that they kind of hope it doesn't happen, that
7 some extra related claims will come in. And that's
8 particularly so when it comes to, for example, Federal
9 Rule of Civil Procedure 45 subpoenas, as to which the
10 court doesn't often even find out about. They are just
11 issued and the power of the Federal court is invoked.
12 And so there might not be that later testing that would
13 occur, unless you do it right at that front end.

14 JUSTICE GINSBURG: Could Congress -- could
15 Congress enact a statute that provides for intervention
16 of right for someone who doesn't satisfy Article III?
17 There are -- there are several statutes that do provide
18 for intervention of right.

19 MR. KATYAL: So -- so I think that it
20 depends on what intervention means. If a -- if a
21 statute provides for full-blown party status for someone
22 who lacks the components of Article III, that, to me,
23 every day of the week, is unconstitutional and that is
24 precisely what they are advocating for. That's what we
25 say --

1 JUSTICE KENNEDY: Well, it's got to be
2 conditioned on there being a party with standing
3 remaining in the suit.

4 MR. KATYAL: And I think the fact that
5 there's a party with standing remaining --

6 JUSTICE KENNEDY: That will solve that
7 problem.

8 MR. KATYAL: I don't think it totally does,
9 Justice Kennedy. It may solve part of the problem, but
10 to the extent that that person in that statute is
11 invoking Federal judicial power in a way different from
12 what that party with standing in the suit does, that
13 drops Article III.

14 This Court had said in DaimlerChrysler
15 standing is not dispensed in gross. And the idea that
16 just because you have one plaintiff with standing that
17 allows someone else, an intervenor, to invoke the
18 Federal judicial power in all sorts of other ways, I
19 think that would be a pretty --

20 JUSTICE KAGAN: So putting -- putting
21 intervenors aside, suppose ten plaintiffs got together
22 and brought a suit, so they were all joined in the same
23 suit. And the district court satisfied itself that one
24 of those plaintiffs had standing, that there was a
25 proper case in controversy before the court, that nobody

1 else was asking for anything else or making any other
2 claims.

3 Does the district court have to go plaintiff
4 by plaintiff by plaintiff by plaintiff, sua sponte, and
5 decide whether each of them has standing?

6 MR. KATYAL: They do not, Justice Kagan.
7 And the reason why, and this is what I was saying at the
8 outset, is that intervenors -- (a) (2) intervenors are
9 situated differently from those plaintiffs, because
10 plaintiffs generally march in lockstep. They file the
11 same complaints; they're all on it together. They don't
12 have to certify to the court and prove inadequate
13 representation of the existing parties.

14 And so if you look, for example, at their
15 brief, the one case they had --

16 JUSTICE KAGAN: I think it is very odd that
17 you can be an actual party. And presumably, you can do
18 all of these things, you can do -- do your own
19 discovery, you can do -- and -- and that's fine with
20 you, but if you're named as an intervenor, then it
21 becomes not fine.

22 MR. KATYAL: So -- well, I think that, you
23 know, to the extent that some party didn't have
24 standing, it might be tested at that point. I just
25 think the case for threshold standing inquiries, akin to

1 what I was saying to the Chief Justice, I think it's
2 different for parties precisely because you can presume
3 that parties do march in lockstep.

4 And here's a very good example: The only
5 case that they cite in their brief for when plaintiffs
6 don't march in lockstep is a case called Archer. And
7 when you go back and look at that case, those parties
8 have filed the exact same discovery requests, and that's
9 generally how civil litigation unfolds with
10 co-plaintiffs.

11 It's very different when you're talking
12 about intervenors. The Solicitor General, the nation's
13 largest litigant, at pages 2 and 18, say -- and 23 --
14 say that intervenors -- it's extremely likely that
15 intervenors do deviate in terms of their indications of
16 judicial power from the existing parties. You can't say
17 that about co-plaintiffs.

18 JUSTICE ALITO: Mr. Katyal, I was trying to
19 understand the -- the universe of cases in which a
20 party -- someone seeking intervention would be able to
21 come in under 24(a)(2) by claiming an interest relating
22 to the property or transaction, but would not be able to
23 claim injury in fact. And I -- I found it difficult to
24 identify that universe of cases. And then I said, well,
25 this is one of them; this case must be one of them. But

1 actually, it doesn't seem -- it seems to me that Laroe
2 has Article III standing.

3 Now Laroe may not be the -- may -- may not
4 be entitled to recover under the Takings Clause, but why
5 is there not Article III standing here? If -- if it --
6 in fact, Laroe has a mortgage where an -- is an
7 equitable owner of the property, isn't that enough for
8 injury in fact?

9 MR. KATYAL: We don't think it is. So -- so
10 two points.

11 JUSTICE ALITO: Why not?

12 MR. KATYAL: First is, we do think that the
13 rule tracks Article III, and they basically move
14 coextensively. And second, with respect to the facts
15 here, a contingent interest, like this one, contingent
16 on zoning approvals and so on, isn't enough for
17 Article III, just as it wouldn't be -- and if you adopt
18 their position, you are -- I could take out a derivative
19 on the outcome of the case that you heard today in the
20 first hour, *Perry v. MSPB*, and bet a million dollars on
21 who's going to win in the district court. That would
22 allow me intervenor status under the rule, and under
23 this view of Article III. That -- and then allow me to
24 be a full-blown party. That can't possibly be --

25 JUSTICE KENNEDY: Well, I -- I -- it's

1 almost as if -- I had the same trouble with -- as
2 Justice Alito did. I don't know why this party doesn't
3 have standing, because at the end of the day, if there's
4 a regulatory taking, he can say, and incidentally, that
5 taking award is mostly mine.

6 Now, do we just take this case on the
7 assumption that there's no standing?

8 MR. KATYAL: I do -- I do think that's the
9 way the case comes to the Court. And, you know, I think
10 this kind of contingent speculative interest would flunk
11 this Court's precedence about Article III, particularly
12 Clapper.

13 JUSTICE KENNEDY: On Justice Alito's point,
14 if, as a practical matter, you have an interest to
15 protect, that almost sounds like a shorthand for
16 standing.

17 MR. KATYAL: Completely agree that the --
18 that the rule and Article III track the same thing. If
19 I may reserve.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Ms. Harrington.

22 ORAL ARGUMENT OF SARAH E. HARRINGTON

23 FOR UNITED STATES, AS AMICUS CURIAE,

24 SUPPORTING THE PETITIONER

25 MS. HARRINGTON: Thank you, Mr. Chief

1 Justice, and may it please the Court:

2 The best reading of Rule 24(a)(2) is that it
3 requires an intervenor, as a right, to demonstrate that
4 he has Article III standing by showing that he has a
5 cognizable interest cognizable under Article III, and
6 that it could be impaired by the disposition of the
7 pending lawsuit.

8 I'd like to start where Justice Ginsburg
9 started by focusing on how it works, sort of how you
10 establish standing when you're talking about
11 intervenors, and particularly, defendant intervenors.

12 Like Justice Ginsburg, most of the courts of
13 appeals that have held the other way have held that
14 standing is not required, have focused on whether an
15 intervenor can establish standing to initiate a lawsuit.
16 But in our view, that is not the appropriate focus.
17 What the rule itself focuses on is whether an intervenor
18 could be injured by the disposition of the pending
19 lawsuit.

20 And so the -- it's -- it's much more like
21 asking whether a party has standing to appeal than it is
22 like asking whether a party would have standing to
23 initiate a lawsuit. What you look at is whether there
24 is a particular outcome of the lawsuit that one of the
25 parties is trying to obtain and you ask if that outcome

1 happened, would it injure the intervenor, the potential
2 intervenor, such that that person, the intervenor, would
3 have standing to appeal.

4 And so it's the same whether you're talking
5 about a plaintiff or a defendant. Now, they have to
6 have an interest that's related to the underlying
7 dispute, but their injury comes from the disposition of
8 the lawsuit.

9 CHIEF JUSTICE ROBERTS: In -- in what sense,
10 if any, is your position different from that of the
11 Petitioner's?

12 MS. HARRINGTON: I think it's not
13 particularly different. You know, I think they take
14 sort of, you know, a stronger line than we do on the
15 constitutional question. Our view is that you could --
16 I think everyone here agrees that there are some things
17 a party -- a litigant would do that don't require
18 standing, like presenting oral argument, filing briefs.
19 There are some things that do require standing, like
20 seeking damages, filing a new claim.

21 There are -- in our view, there are some
22 other things in the middle that are kind of fuzzy. In
23 our view, as a theoretical matter, you can imagine a
24 system where a person could easily obtain the label
25 "intervenor," and then a court could later inquire into

1 that intervenor's standing, if and when they did
2 something that would require standing.

3 We think, as a matter of reading the rule,
4 that the rule -- that the drafters of the rule have --
5 have required that inquiry up front. We think the
6 requirements of -- of Rule 24(a)(2) are best read to map
7 onto the Article III requirement --

8 JUSTICE SOTOMAYOR: Why did they bother?

9 MS. HARRINGTON: Why did they --

10 JUSTICE SOTOMAYOR: I-- if -- if the only
11 issue is standing, totally different language was used
12 by the rule drafters. And I don't think they track very
13 well, because to require standing, you need immediacy of
14 effect. And in a lot of these intervenor cases, it's
15 very clear that part of the interest in the property is
16 a contingent one. If the person loses the property, my
17 interest will be destroyed. That's very contingent and
18 not likely to permit standing in a lot of situations.

19 MS. HARRINGTON: So there are sort of two
20 parts to your question. The first, on the text, that
21 it's true that the text doesn't track the modern
22 parlance of standing, but this rule was drafted -- was
23 -- was adopted in 1966, which is before this Court's
24 cases in like Sierra Club and Defenders of Wildlife --

25 JUSTICE KAGAN: Well, that's great. I mean,

1 given that that's true, do you think -- are you saying
2 that Congress had it in mind to track the requirements
3 of standing, whatever they turned out to be? Because,
4 of course, the Standing Doctrine in 1966 was nothing
5 like what it is now.

6 MS. HARRINGTON: It was different, but the
7 -- but the Standing Doctrine and intervention rules have
8 always required that an intervenor or a party have an
9 interest.

10 And this Court, going back to the beginning
11 of the 20th century, has said that you -- that an
12 interest that is contingent or hypothetical is not
13 sufficient for intervention, just like it had said it's
14 not sufficient for standing.

15 Now, the predecessor to the 1966 version of
16 the rule allowed intervention as a right if a party
17 would be bound by the judgment, or if a party had an
18 actual interest in property that was going to be
19 distributed by the court. I think it's clear that both
20 of those sets of -- of people would have had standing,
21 and so that's kind of the people that I think the rule
22 drafters had in mind. There's certainly --

23 JUSTICE BREYER: What kind of rule --
24 probably not -- I -- I don't know. Where I draw --
25 begin to get a kind of blank is defendant's standing. I

1 can see defendant's standing on appeal, et cetera, but
 2 forget it. What about on the initial -- when does --
 3 are there any cases? Are there -- is there a good
 4 article? When does a defendant have or lack standing?

5 MS. HARRINGTON: Justice Breyer, that's
 6 where I tend to start, that I think the -- the focus of
 7 the rule is on injury from the disposition of the
 8 lawsuit. And so what you would ask is -- when you're
 9 talking about a defendant -- if the plaintiff gets what
 10 it wants, will that harm the defendant? And I think
 11 it's natural to say, will it harm it in a way that would
 12 give it standing to appeal.

13 And so what the defendant is trying to do
 14 is, instead of waiting until that point, is trying to
 15 come in and prevent the injury. This goes to the second
 16 part of Justice Sotomayor's question about the
 17 imminence. And the Respondent said --

18 JUSTICE BREYER: That gives the defendant
 19 standing to --

20 MS. HARRINGTON: It doesn't give --

21 JUSTICE BREYER: -- take position to
 22 issue -- ask for subpoenas and so forth.

23 MS. HARRINGTON: Right. So if the
 24 intervenor could be harmed by what the plaintiff wants
 25 in such a way that the -- this intervenor would have

1 standing to appeal, then the intervenor sees this injury
2 coming down the road -- this is an actual -- it's a
3 pending lawsuit, and so there's an imminent injury
4 that's -- that's coming the way of the defendant -- or
5 the intervenor, pardon me -- and so the intervenor wants
6 to get involved --

7 JUSTICE BREYER: I see your point.

8 MS. HARRINGTON: -- and protect his
9 interest.

10 JUSTICE GORSUCH: Ms. Harrington, I really
11 get confused when you invoke the Doctrine of
12 Constitutional Avoidance.

13 MS. HARRINGTON: Yes.

14 JUSTICE GORSUCH: So as I understand it,
15 you're saying, well, all right, Rule 24 is old and Lujan
16 is new, but let's match them up, and any ambiguity we
17 ought to just ignore or construe in your favor because
18 of the Doctrine of Constitutional Avoidance. But the
19 upshot of applying the doctrine here to avoid the
20 question whether intervenors have to have Article III
21 standing would be that we would have to ask the
22 Article III question effectively through the guise,
23 admittedly, of Rule 24 in every single case.

24 So to avoid the constitutional question
25 once, we have to ask it every single time hereafter.

1 MS. HARRINGTON: That's the --

2 JUSTICE GORSUCH: Is there -- is there a
3 precedent --

4 MS. HARRINGTON: Yes.

5 JUSTICE GORSUCH: -- for applying that
6 doctrine in quite that way?

7 MS. HARRINGTON: Let me, if I can, take the
8 air out of something. I will concede that my friend,
9 Mr. Dvoretzky, has very ably pointed out the flaws in
10 our constitutional avoidance argument, and I'm not
11 testing --

12 JUSTICE GORSUCH: I --

13 MS. HARRINGTON: -- that argument here.

14 JUSTICE GORSUCH: I appreciate the candor of
15 that concession.

16 MS. HARRINGTON: Yes.

17 (Laughter.)

18 MS. HARRINGTON: He is a very capable lawyer
19 and has proven himself with respect to that argument, so
20 we're not pressing that -- that argument here.

21 A couple of --

22 JUSTICE GINSBURG: Can I ask you the same
23 question that I asked Mr. Katyal? Could Congress pass a
24 statute that said give someone a right to intervene,
25 someone who would not have Article III standing?

1 MS. HARRINGTON: Yes. I mean, I think
2 Congress has done that in -- with a number of statutes.
3 I think in those cases, the intervention would be -- and
4 those intervenors would not be permitted to do something
5 that would require standing without a subsequent
6 assessment of -- of the standing of those intervenors.

7 So, you know, in this case, as in many
8 cases, I think the point of the intervenor that is
9 attempting to intervene is that he -- it wants to get
10 damages. Well, you can't get damages if you don't have
11 standing. And so even if he prevailed here, there's
12 going to have to be some showing at some point down the
13 road that he has standing to get damages.

14 CHIEF JUSTICE ROBERTS: I -- I'm not sure I
15 understood your answer to the question. You said that
16 this person does not have to show standing, Article III
17 standing, in the first instance, but if she tries to do
18 something different than what the plaintiff is doing,
19 she does?

20 MS. HARRINGTON: Yes. I mean, I thought the
21 question was, if there was a -- setting aside
22 Rule 24(a), if there was a statute that authorized
23 intervention --

24 CHIEF JUSTICE ROBERTS: Right.

25 JUSTICE GINSBURG: There are -- there are

1 several statutes.

2 MS. HARRINGTON: Yes. So our view is, as a
3 constitutional matter, again, you could have a system
4 where you could easily get the label of intervenor, and
5 then a court could later inquire into your standing if
6 and when you did something that required standing.

7 We think Rule 24(a)(2) is best read to
8 require that standing upfront, and for some other
9 reasons that Mr. Katyal was saying. That's because the
10 rule requires an intervenor to show that their interests
11 are not adequately represented by existing parties, and
12 that they're going to be injured --

13 CHIEF JUSTICE ROBERTS: So -- so you think
14 it is satisfactory to -- it satisfies the constitutional
15 requirement of standing if Congress says you have
16 standing?

17 MS. HARRINGTON: No.

18 CHIEF JUSTICE ROBERTS: No.

19 MS. HARRINGTON: No, the question was, if
20 Congress says a party can intervene as of right, and
21 doesn't require a showing of standing. We don't think
22 that is a violation of the Constitution, as long as you
23 don't let that intervenor later do something that
24 requires standing --

25 JUSTICE BREYER: Oh, sure.

1 MS. HARRINGTON: -- without then asking for
2 a showing.

3 JUSTICE BREYER: We don't have to go into
4 that here.

5 MS. HARRINGTON: No, you don't have to go
6 into that.

7 There have been a couple questions about
8 sort of piggyback intervenors. And I think you have to
9 keep in mind that there's Rule 24(b), which is -- allows
10 permissive intervention. And permissive intervention
11 expressly contemplates that a party has claims, has
12 legal questions, or factual questions in common with
13 existing parties.

14 And I think if a person just wants to come
15 in and say, oh, yeah, I have the same kind of claim you
16 do, they can seek permissive intervention, or they can
17 just file their own claim. The point of Rule 24(a)(2)
18 is that there's a potential injury from the disposition
19 of the lawsuit to the person who is trying to
20 intervene --

21 JUSTICE SOTOMAYOR: But there's --

22 MS. HARRINGTON: -- and has that incentive.

23 JUSTICE SOTOMAYOR: -- that step that you
24 keep referring to which doesn't make any sense under
25 Article III, which is the one about whether the existing

1 party is adequately protecting your interests.

2 MS. HARRINGTON: That's right. The rule --

3 JUSTICE SOTOMAYOR: I -- let's assume
4 they've hired the best lawyer in the world, and they've
5 made every conceivable argument, but you're still a
6 contract vendor or -- with the kind of potential injury
7 that the others assume would give you standing. Why is
8 it that we then read Article III into Rule 24?

9 MS. HARRINGTON: Well, tell me if I'm not
10 getting your question right.

11 In our view, Rule 24(a)(2) requires a
12 showing of Article III standing. And in addition, you
13 have to show timeliness and inadequate representation.
14 And so in those two ways, it's a higher hurdle than
15 Article III is.

16 But that's -- that's appropriate because it
17 is a person trying to come in and sort of intrude on an
18 existing lawsuit. And there you need to show that --
19 you really need to be able to come in, because,
20 otherwise, your interests are going to be impaired by
21 the lawsuit.

22 So we think the ultimate question under
23 Article III is really the same as the ultimate question
24 under Rule 24(a)(2). And under Article III, if you're
25 asking whether a person can initiate a lawsuit or can

1 appeal, what you're asking is, do they have a
2 substantial enough interest in the outcome of this
3 actual dispute?

4 And it's really the same inquiry under
5 Rule 24(a)(2). Do they have an interest that's --
6 that's -- this Court has said it has to be an interest
7 that's legally cognizable, that's a significantly
8 protectable interest. That's the same language that the
9 Court has used under Article III.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 Mr. Dvoretzky.

12 ORAL ARGUMENT OF SHAY DVORETZKY
13 ON BEHALF OF THE RESPONDENT

14 MR. DVORETZKY: Thank you, Mr. Chief
15 Justice, and may it please the Court:

16 Petitioner's effort to turn every
17 intervention motion into a constitutional question is a
18 solution in search of a problem. Article III requires
19 only a case or controversy. It does not speak to the
20 question of who can join an existing case or
21 controversy.

22 CHIEF JUSTICE ROBERTS: So somebody who has
23 no connection, other than that they're very interested
24 in the subject -- it's an environmental case, the Sierra
25 Club wants to be involved. It's all right to allow them

1 to intervene as a party? Because there is a case or
2 controversy. They don't -- you know, they wouldn't
3 satisfy Article III standing, but they don't have to,
4 according to you. So their views are valuable, their
5 participation in, you know, depositions, discovery, all
6 might help the Court, so why not?

7 MR. DVORETZKY: Mr. Chief Justice,
8 Rule 24(a)(2) would not allow the party that --

9 CHIEF JUSTICE ROBERTS: No, no, I know. But
10 I'm asking a constitutional question, putting aside
11 exactly what the rule is.

12 If you say, all there has to be is an
13 existing case or controversy, and once there is, you
14 don't care whether the person has standing, Congress
15 could pass a statute saying anybody who the Court thinks
16 is appropriate -- you know, an expert in the area,
17 qualified with a record or whatever, they can jump in
18 and participate as a party, and you would say that's
19 okay.

20 MR. DVORETZKY: Article III would not speak
21 to that particular bad idea by Congress.

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: Now, I can't tell
24 whether that's a yes or a no.

25 MR. DVORETZKY: That is a yes.

1 CHIEF JUSTICE ROBERTS: That type of
2 proceeding is okay.

3 MR. DVORETZKY: Constitutionally, it is
4 okay. Rule 24 does not authorize that. If Congress
5 were to do something like that, district courts would
6 have ample tools, the same as the tools they use now, to
7 manage multiparty litigation and to prevent these
8 hypothetical intervenors from --

9 CHIEF JUSTICE ROBERTS: Now --

10 MR. DVORETZKY: -- taking the case and --

11 CHIEF JUSTICE ROBERTS: -- I hope I haven't
12 given Congress an idea, but --

13 (Laughter.)

14 CHIEF JUSTICE ROBERTS: I mean, is that
15 consistent with what we've said, that Article III
16 standing plays an essential role in the separation of
17 powers?

18 MR. DVORETZKY: Absolutely, because the
19 purpose of Article III, its core purpose, is to prevent
20 courts from issuing advisory opinions about the actions
21 of the political branches, absent a need to do so,
22 absent a case or controversy.

23 CHIEF JUSTICE ROBERTS: Well, what if it's
24 a -- as it goes along, the defendant says, well, I'm
25 going to settle with the original plaintiff. Okay? You

1 know, he's raised this claim. I'm going to do this, but
2 I -- I'm still going to litigate against the -- the
3 Sierra Club. Is that okay?

4 MR. DVORETZKY: No, because at that point,
5 there would no longer be a case or controversy for the
6 Sierra Club to participate in, absent its own injury
7 that it was pursuing relief for.

8 The -- the key -- the key point under
9 Article III is that its purpose is to prevent the
10 judicial machinery from being mobilized in the first
11 instance, and opining on the actions of the
12 political branches --

13 JUSTICE KENNEDY: Can you give me a
14 hypothetical example of a case where an intervention
15 should be allowed, because it's important, but there's
16 no Article III standing? Maybe outside of the context
17 of this suit? I think there may be Article III
18 standing. What -- is there a practical illustration you
19 can give us for why it's very important to allow this
20 intervenor under -- under the rules, even though there's
21 no standing?

22 MR. DVORETZKY: I think defendant
23 intervenors are the best example of that. And it
24 doesn't make sense to ask whether a defendant
25 intervenor, whether it's an environmental group

1 defending an EPA regulation, whether it's white
2 employees intervening in a discrimination claim to
3 defend the employer's promotion practices --

4 JUSTICE KENNEDY: Here, of course, we have a
5 plaintiff intervenor, correct?

6 MR. DVORETZKY: Yes. But --

7 JUSTICE KENNEDY: Can you give me an example
8 of that out -- outside of the context of this case?

9 MR. DVORETZKY: Sure. So an example might
10 be the plaintiffs in Clapper did not have standing
11 because there was no evidence in that case that their
12 interest in not being surveilled was actually being
13 infringed.

14 If, hypothetically speaking, you had a
15 resident of a house who was being surveilled or
16 plausibly alleged that -- that he was being surveilled,
17 perhaps the roommate of that individual whose cell phone
18 was not presently being wiretapped, whose movements were
19 not presently being tracked, would have an interest
20 under Rule 24. That interest might well be impaired or
21 impeded if the wiretapping program as to the house were
22 judged constitutionally --

23 JUSTICE KENNEDY: Well, I'll -- I'll look at
24 Clapper. As I recall, they -- they said that they --
25 they were threatened, they were chilled --

1 MR. DVORETZKY: Yes. And --

2 JUSTICE KENNEDY: -- from meeting with their
3 clients and so forth.

4 MR. DVORETZKY: And I'm just building a
5 hypothetical off of Clapper, so looking at Clapper --

6 JUSTICE KENNEDY: I understand.

7 MR. DVORETZKY: -- would track this. But --

8 JUSTICE SOTOMAYOR: We've said it with
9 respect to union members who we've permitted to
10 intervene, even though the union has all of the claimed
11 contract rights.

12 MR. DVORETZKY: In the Trbovich case, that's
13 right.

14 JUSTICE SOTOMAYOR: Yes.

15 MR. DVORETZKY: What the Court recognized in
16 Trbovich was that the union member could intervene, not
17 to assert separate claim or relief, but to present
18 arguments, to potentially present evidence, and to
19 protect the union members' interest in that case.

20 JUSTICE ALITO: And would they lack
21 Article III standing?

22 MR. DVORETZKY: Well, the union member in
23 Trbovich would lack Article III standing, because of the
24 particular statute at issue there, in which Congress
25 authorized only the Secretary of Labor to bring suit.

1 JUSTICE ALITO: No, but that's not an --
2 that's not an Article III question. That's a merits
3 question. That's the scope of the claim.

4 MR. DVORETZKY: So -- so that would
5 certainly be -- that would be a situation where the
6 union member would not have a cause of action.

7 JUSTICE ALITO: Right, right.

8 MR. DVORETZKY: Presumably, if Congress had
9 authorized the cause of action, we'd have to look at the
10 union member's particular harm --

11 JUSTICE ALITO: Could I come back to Justice
12 Kennedy's question?

13 Can you give me a real case, where there
14 is -- where -- where you believe that the requirements
15 of 24(a)(2) are met, but there is not -- there was not
16 Article III standing?

17 MR. DVORETZKY: So, again, I think the
18 defendant intervenor examples are --

19 JUSTICE ALITO: Plaintiff. Plaintiff
20 intervenors.

21 MR. DVORETZKY: So -- so let me talk for a
22 moment about this case. We absolutely have standing in
23 this case because we were the purchasers of the
24 property. If you actually go through all of the
25 agreements and go through New York law about ownership

1 interests, it does get complicated. Again, we -- the --
2 the interest that we have is not a contingent one, as
3 the Second Circuit recognized. We're actually the
4 equitable owner.

5 But let's say that in parsing through all of
6 these agreements and all of these facts it was
7 determined that legal title is the key to having
8 standing to pursuing a regular takings claim. Again, I
9 don't believe that that ought to be the outcome here.

10 But if you had such a situation, we would
11 have a sufficient interest. Even if as a technical
12 matter we lacked legal standing, our equitable ownership
13 interest would be a sufficient one to be protected under
14 Rule 24, it would be impaired if we were absent from
15 this litigation, and we ought, in that situation --

16 CHIEF JUSTICE ROBERTS: But --

17 MR. DVORETZKY: -- to be allowed to
18 intervene.

19 CHIEF JUSTICE ROBERTS: The Second Circuit
20 has assumed otherwise, right? It decided this case on
21 the assumption that there wasn't Article III standing,
22 right?

23 MR. DVORETZKY: It -- it didn't -- it did
24 not decide the question on that assumption. It simply
25 did not reach the question of whether there was

1 Article III standing or not.

2 The district court had held,
3 incorrectly we believe, that we lacked standing, and
4 what the Second Circuit held was that the district court
5 was wrong, as a matter of law, to require that inquiry
6 in the first place.

7 CHIEF JUSTICE ROBERTS: Right. Well -- so
8 now you're arguing before us that, in fact, you do have
9 Article III standing, so that if we agree with you,
10 the -- the Second Circuit decision that it's not
11 necessary would -- would stand, right?

12 MR. DVORETZKY: It would.

13 CHIEF JUSTICE ROBERTS: The -- the question
14 you want us to decide is a real estate law question
15 under New York law.

16 MR. DVORETZKY: Well, I'm -- I'm not asking
17 you to decide that question. I was trying to respond to
18 the -- the hypotheticals about a plaintiff who would
19 lack standing, and --

20 JUSTICE BREYER: How does a defendant have
21 standing? How does that work? What the government says
22 is a defendant has standing because the judgment in the
23 case may affect an interest of the defendant, a
24 significant interest. Is that right?

25 MR. DVORETZKY: That's not an Article III

1 standing inquiry. And, in fact, the Article III
2 standing --

3 JUSTICE BREYER: I mean, I don't see any
4 more with the defendant, how you can find a defendant
5 without standing on that basis? I mean, the reason I
6 find it relevant is because I think the other side is
7 arguing that an intervenor has to have standing in the
8 sense that a defendant has to have standing, at least
9 when you intervene on the side of the defendant, as most
10 do.

11 MR. DVORETZKY: So, first of all, it doesn't
12 make sense to speak about whether a defendant intervenor
13 has standing because a defendant intervenor is not the
14 one who is alleging an injury and invoking the authority
15 of the court.

16 Second of all --

17 JUSTICE BREYER: Can we write an opinion and
18 say the only people that have to have stand -- I mean, I
19 don't know how to write this opinion unless you're
20 talking about standing in general. Yes or no on that.
21 And why can a defendant invoke the court's power on
22 appeal -- for example, subpoenas, discovery -- where
23 defendants all the time invoke the court's power, and
24 how can they do that if they don't have -- I don't even
25 know how to phrase the question but you see what I'm

1 driving at.

2 MR. DVORETZKY: I think what you're driving
3 at is the difficulty of writing an opinion that applies
4 a standing --

5 JUSTICE BREYER: No, not the difficulty of
6 writing an opinion. I want to know is there such a
7 think as defendants having or not having standing, and
8 if there is such a thing, why and how. And if you don't
9 know the answer right away, have you ever read anything
10 on the topic, and what would you recommend?

11 MR. DVORETZKY: The only sense in which
12 there is defendant standing does not apply here. Courts
13 have recognized defendants' -- defendants' standing in
14 two circumstances: Where defendants are appealing and
15 thereby invoking the jurisdiction of a new court, and
16 where defendants are asserting counterclaims and
17 thereby acting --

18 JUSTICE BREYER: What about when they ask
19 for a subpoena to be enforced? I can't go in and -- you
20 can't -- people can't just go in randomly and say I'd
21 like to have a subpoena enforced against so and so.

22 MR. DVORETZKY: No, of -- of course not, and
23 a defendant can do that as part of an Article III case
24 or controversy once there already is an existing case or
25 controversy.

1 JUSTICE ALITO: Well, let's put aside the
2 question of intervention. How can a defendant not have
3 standing? I mean, I'm -- somebody sues me, so they are
4 dragging me into court. I don't want to be in the
5 court. I'm there because I'm the defendant. And then
6 the court is going to turn around and say, well, you
7 have to leave because you don't have standing.

8 (Laughter.)

9 JUSTICE ALITO: How can that possibly be?

10 MR. DVORETZKY: Most defendants would be
11 happy to accept that, and the anomaly that you're
12 pointing out is defendant --

13 JUSTICE ALITO: But then the case would go
14 on without me.

15 MR. DVORETZKY: The anomaly that you're
16 pointing out is precisely why it doesn't make sense to
17 ask the question whether defendants have standing. Once
18 there is a case or controversy, the judicial power
19 extends to all of it. That includes discovery requests,
20 subpoena requests, and whatever else by participants in
21 that case or controversy.

22 To get back to Justice Breyer's question,
23 the reason that standing as an inquiry did not work in
24 particular for defendant intervenors is that there are
25 two contingents before a defendant intervenor can even

1 be said to be injured.

2 The first is that the district court has to
3 rule in a way that the defendant intervenor doesn't
4 want, and the second is that then the defendant
5 intervenor has to actually be harmed by that, as opposed
6 to the defendant intervenor simply having an interest
7 that may as a practical matter --

8 JUSTICE BREYER: Okay. That brings me back
9 to my original question. Fine. A defendant can go and
10 get subpoenas and so forth, but if he has a
11 counterclaim, that's different, then he has to show
12 standing.

13 So why don't we apply the same standard to
14 the intervenors? The intervenors have to be like
15 defendants in respect to intervening on the -- on either
16 side. They can get subpoenas, et cetera, but if they
17 want something that somebody else doesn't want in this
18 case, then they have to have standing.

19 MR. DVORETZKY: I think this goes to the
20 question of what is the standard for having standing.
21 In other words, what is it that you might want to do
22 differently that would require you to have standing.

23 And the only thing that you might want to do
24 differently that would require standing is asserting a
25 different claim or seeking a different form of relief.

1 Not making a different argument, even potentially
2 injecting a constitutional argument the way amici do,
3 and not seeking discovery or subpoenas, because those
4 are not a claim or form of relief with which Article III
5 is concerned.

6 JUSTICE GORSUCH: Counsel, on -- on that
7 score, why isn't that exactly the case we have here?
8 The Plaintiff in this case, by way of relief, seeks a
9 money damages for the taking. All right. That's his
10 complaint, page 122 of the Joint Appendix. Your client,
11 page 162, wants damages for itself. That's something
12 that the Plaintiff could not have had standing to obtain
13 for your client.

14 Why isn't that a form of additional relief
15 where an intervenor wishes a judgment against the
16 defendant directly in its favor that would be
17 enforceable through all the mechanisms of post-judgment,
18 garnishment, liens, et cetera, and would offer your
19 client claim preclusion effect, not just nonmutual issue
20 preclusion, for example? Seems to me like that is a
21 different form of relief, isn't it?

22 MR. DVORETZKY: Justice Gorsuch, the way in
23 which this case has been litigated, and trial counsel
24 conceded this in the Second Circuit, I'll represent it
25 to you here today, we are not seeking separate relief

1 only in our name.

2 JUSTICE GORSUCH: Well, except for the
3 complaint expressly says that.

4 MR. DVORETZKY: The -- the complaint says
5 that, but oftentimes the complaint says one thing and
6 over the course of the litigation the theories might
7 develop differently. And the -- the way in which we are
8 at this point seeking relief here is relief to recover
9 for Sherman.

10 We will at a later date need to figure out
11 how we'll get that money from him, and we would either
12 need to potentially settle that claim or have standing
13 to bring our own claim in Federal court or in State
14 court to get the money from him.

15 But the reason --

16 JUSTICE GORSUCH: So you're disclaiming the
17 relief sought in your complaint.

18 MR. DVORETZKY: We are disclaiming --

19 JUSTICE GORSUCH: Is there any relief you're
20 seeking at this stage?

21 MR. DVORETZKY: The relief that we are
22 seeking is to maximize Sherman's recovery because we
23 have a stake in that recovery, and it's a stake that
24 Rule 24(a) (2) protects and gives us an ability to -- to
25 intervene --

1 JUSTICE GORSUCH: Would you agree though
2 that if an intervenor did seek relief in its own name,
3 that that would be relief beyond that which the
4 plaintiff would be entitled to provide?

5 I mean, after all, plaintiff normally
6 doesn't have standing to seek a judgment in someone
7 else's name. So would you agree in the normal case that
8 we'd have a problem here?

9 MR. DVORETZKY: If -- if by the normal case
10 you mean a situation where an intervenor comes in and
11 asks for either additional money or money to be paid
12 separately --

13 JUSTICE GORSUCH: Or just a judgment in its
14 favor.

15 MR. DVORETZKY: So whether it's a judgment
16 in its favor I think depends really on the scope of the
17 judgment.

18 This Court has repeatedly affirmed judgments
19 in favor of plaintiffs without inquiring into their
20 standing once it had assured itself that at least one
21 plaintiff in the case had standing. So just the
22 issuance of a judgment is -- would be an inconsistent
23 standard with this Court's settled jurisprudence.

24 Now, under the Petitioner's theory of this
25 case, every exercise of judicial power --

1 JUSTICE GORSUCH: I'm sorry for
2 interrupting, counselor. If you would just answer my
3 question, I would be grateful.

4 If a plaintiff seeks a judgment in its own
5 name, can't seek it for an intervenor, agree?

6 MR. DVORETZKY: If the -- the question is
7 whether the judgment requires --

8 JUSTICE GORSUCH: The question is whether a
9 plaintiff can seek a judgment against a defendant in
10 someone else's name. Generally not, right? That --
11 that's not a trick question.

12 MR. DVORETZKY: No, generally not. But --

13 JUSTICE GORSUCH: Okay. So if an intervenor
14 then seeks a judgment in its name, generally speaking,
15 that's asking for relief beyond that which the plaintiff
16 has standing itself to provide, right?

17 MR. DVORETZKY: Not -- not necessarily and
18 not the way this Court has considered the question in
19 numerous cases where it's affirmed judgments in favor of
20 parties without standing, or at least without inquiring
21 into their standing.

22 JUSTICE GORSUCH: I'll let you go.

23 CHIEF JUSTICE ROBERTS: Well, I -- I may
24 not. What -- what is the -- the legal case you have
25 where the Court has granted judgment in favor of a party

1 without standing? Other than treble pitch or putting
2 that aside.

3 MR. DVORETZKY: In -- in Department of
4 Commerce v. U.S. House of Representatives, Clinton v.
5 New York, Bowsher v. Synar, these are all cases where
6 the Court has expressly said, we satisfy ourselves of
7 the jurisdiction -- of the standing of one plaintiff and
8 need not inquire further.

9 CHIEF JUSTICE ROBERTS: Well, no. No. No.
10 I know that, but that's -- that's -- those cases are
11 distinct, in that the Court is saying they need not
12 inquire further because those are separate parties, but
13 they're all seeking the same relief. It may be
14 necessary at some point for the Court to inquire further
15 if it determines that the party is seeking to exercise
16 authority beyond Article III.

17 Sure, you don't have to decide cases that
18 might never come up or issues that might never come up,
19 but I don't see how that helps you.

20 MR. DVORETZKY: Well, no. And we agree that
21 if, in fact, an intervenor -- if we ourselves came in at
22 a later date, filed and amended pleading and said now we
23 are seeking additional damages in our own name. Then,
24 at that point, an Article III inquiry would be required.

25 But the point is that so long as we are not

1 seeking a separate claim or separate relief, no inquiry
2 into standing is required, and that is what this case --
3 this Court's cases support.

4 CHIEF JUSTICE ROBERTS: Well, no. But then
5 the question becomes if you are, then, exercising the
6 authority to issue subpoenas with respect to other
7 parties, you're exercising the authority of the court in
8 a way that expands beyond what the particular plaintiff
9 was seeking.

10 MR. DVORETZKY: You -- you are, but you are
11 not exercising the authority of the court in a way
12 that's relevant to Article III, because you're not
13 seeking a separate claim or a separate form of relief.

14 What Article III is --

15 CHIEF JUSTICE ROBERTS: But that just seems
16 to me to be circular. I guess I was looking for a
17 reason why that is so.

18 MR. DVORETZKY: The reason I don't think
19 it's circular is the purpose of Article III is not to
20 micromanage the conduct of litigation and how litigation
21 is conducted; it's to prevent courts from interjecting
22 themselves into a controversy in the first place.

23 CHIEF JUSTICE ROBERTS: That's the
24 argument -- your argument in your brief, you focus on
25 case or controversy. There has to be a case or

1 controversy. But we have said, repeatedly, that the
2 Article III standing is an element of the case or
3 controversy requirement. And so I don't know how you
4 can put Article III standing to one side, while -- while
5 saying it's okay, because we still have a case or
6 controversy.

7 MR. DVORETZKY: Article III standing is an
8 element of the case or controversy requirement or an
9 interpretation of the case or controversy requirement,
10 but the requirement that this Court has imposed in order
11 to have standing, is an -- an intervenor's that is
12 injured, imminently, or concretely has been injured,
13 traceability, and redressability, all with respect to a
14 particular claim and a form of relief, not with respect
15 to things that happened along the way in litigation.

16 CHIEF JUSTICE ROBERTS: No. With respect to
17 a particular party, you don't -- you don't just ask is
18 there an injury. You say, has the plaintiff been
19 injured? You don't just ask is there redressability?
20 You say is -- is his injury redressed? I don't see how
21 you can just carve off one part of the -- of the test
22 for standing.

23 MR. DVORETZKY: Well, I think the -- the
24 reason for carving it off, again, goes back to the
25 purposes of Article III, which are not to police every

1 single exercise of judicial power. When an amicus comes
2 into court, it potentially introduces a new issue, a new
3 constitutional question. In this case, the government
4 has introduced a Rule 24 issue that -- that we've
5 responded to.

6 Each of those is a form of -- of asking the
7 court to use its power, power to resolve the case a
8 certain way. That --

9 JUSTICE KENNEDY: But -- but we're talking
10 about mandatory intervention. The district --
11 intervention must -- the -- the court must permit anyone
12 to intervene. And then there's this requirement of --
13 of there be a practical interest and so forth.

14 It seems to me you're going to have to -- in
15 order just to protect the courts against parties coming
16 in, you're going to have to make an inquiry that looks
17 very much like standing, anyway.

18 MR. DVORETZKY: I think this goes to a key
19 premise of the Petitioner's argument that I want to make
20 sure to clarify. The Petitioner is arguing that once an
21 intervenor comes in as an intervenor of right -- as of
22 right, there can essentially be no limits on what that
23 intervenor can do. And that's simply not true. The
24 advisory committee notes make clear that restrictions
25 can be placed as of right.

1 We cite numerous cases in our brief, in
2 which courts have recognized that had they can limit the
3 discovery of -- of intervenors as of right; certainly,
4 they can limit them from asserting claims in additional
5 forms of relief. And, in fact, courts are used to doing
6 this in multiparty litigation all the time, including
7 preventing multiple plaintiffs and multiple intervenors
8 from seeking any unilateral discovery at all.

9 So this notion that once an intervenor is
10 allowed in, that the intervenor will simply be able to
11 do whatever it wants and take the judicial power in
12 different directions, this is why I started out by
13 saying this is -- this constitutionalization of every
14 intervention motion, is a solution in search of a
15 problem. This is simply not a problem in real-world
16 courts.

17 District courts have ample tools to deal
18 with the parade of horrors of having an intervenor
19 come in and potentially take the case -- take the case
20 in different directions

21 JUSTICE GINSBURG: Suppose somebody was a
22 plaintiff and was dismissed for lack of standing. That
23 same person could come back into the case as an
24 intervenor on -- on -- that's your position.

25 MR. DVORETZKY: In theory, if the person

1 satisfied the requirements for an interest that may be
2 impaired and so forth under Rule 24, then, yes, but not
3 just any plaintiff could, then, come back in as an
4 intervenor.

5 JUSTICE GINSBURG: You would have to meet
6 the 24(a) requirements, of course.

7 MR. DVORETZKY: Yes.

8 JUSTICE GINSBURG: Which are stringent.

9 MR. DVORETZKY: Exactly, Justice Ginsburg.
10 The -- the Petitioner's contrary theory
11 here, that Article III polices every action of every
12 court, is contrary to a number of settled principles.

13 One, I mentioned it's contrary to the
14 one-plaintiff rule, which this Court has applied
15 repeatedly. If it were not possible for a court to
16 issue a judgment even in favor of a plaintiff without
17 standing, then this Court has been wrong for decades to
18 be doing exactly that.

19 Second of all, and I think this goes back
20 to -- to Justice Breyer's point earlier, it would
21 require constructing an entirely new defendant
22 intervenor standing doctrine that, whatever it is, is
23 not standing as we think of it. A defendant intervenor,
24 first of all, will be injured only if there's a judgment
25 that goes a certain way, and even then, will not

1 necessarily actually be harmed by the judgment,
2 depending on whether his or her interests actually are
3 impaired.

4 The -- the standard for Rule 24 intervention
5 is simply whether the -- the interest may, as a
6 practical matter, be impaired. That is not standing.
7 Standing requires an actual or an imminent injury, not
8 this conjectural injury --

9 JUSTICE BREYER: On the defendant's side --
10 I mean, on the -- why can't we just say simple? It's --
11 defendants are there because the court might affect
12 their -- their behavior, do something they don't want to
13 do or -- or affect their property in a way they don't
14 want. And an intervenor on the defendant's side, why
15 not just interpret the rule that way? That's what the
16 government says. It has to show the same.

17 An intervenor on the plaintiff's side
18 doesn't have to show anything, unless they want
19 something -- other than the rule, I mean, you have --
20 unless they want something that the plaintiff doesn't
21 want. That's where I started. The government is saying
22 interpret the rule this way and you object to that
23 because?

24 MR. DVORETZKY: Because Rule 24 and
25 Article III serve different purposes, as reflected in

1 Rule 24's distinct language. With respect to the
2 purposes, Article III is about ensuring that Federal
3 courts do not intervene in controversies, absent a live
4 dispute. Rule 24 ensures that once there is a live
5 dispute, once there is a case or controversy, parties
6 whose interests may be affected can participate in order
7 to protect their interests, and in order to avoid
8 additional litigation later on. So these are different
9 purposes, and they are reflected in the language of Rule
10 24, which does not speak in terms of standing.

11 The -- the key point is that Rule 24 allows
12 an intervenor to intervene, if the intervenor's interest
13 may, as a practical matter, be impaired or impeded.
14 That is different than the stringent requirements for
15 standing, which require an actual or imminent injury,
16 not just may as a practical matter. Traceability and
17 redressability, likewise, do not track on to the
18 language of Rule 24.

19 For Article III standing purposes, you need
20 to have an injury that is traceable to the defendant's
21 conduct. For Rule 24, it simply needs to be related to
22 the subject matter of the litigation. Likewise with
23 redressability. For Article III purposes, there has to
24 be an ability by a court to directly redress the injury
25 and thereby -- and bind the defendant to a legal

1 judgment. For purposes of Rule 24, again, it's not --
2 the -- the nexus is not -- is different than that. It's
3 simply whether the intervenor might potentially be aided
4 in its ability to protect his interest.

5 These are all looser standards than
6 Article III. Congress has -- has enacted Rule 24 in
7 1966, but has amended it four times since then,
8 including as recently as 2007. So -- so there has been
9 ample opportunity for Congress, the advisory committee,
10 this Court reviewing the rule, to take account of modern
11 standing doctrine. Yet, the language of Rule 24(a) has
12 been allowed to stand using very different terms than --
13 than the standing inquiry. And so the --

14 JUSTICE SOTOMAYOR: Let's assume, for the
15 sake of argument, that -- because I think, as I read the
16 district court's opinion here, they assumed you were
17 asking for judgment in your name, because they were
18 treating you as a contract vendor or vendee, and they
19 were saying, you don't have the right to have a judgment
20 in your name.

21 Would that holding have been wrong, absent
22 your current concession that -- that you are not seeking
23 money in your own name, but just a payment of money?

24 MR. DVORETZKY: Justice Sotomayor, that --
25 that was not the state of play before the Second

1 Circuit. And we quote in our brief -- this is at page
 2 54 of our brief -- and this is just a quote from the --
 3 from the appellate lawyer in the Second Circuit. There
 4 is, quote, "exactly one fund, and the Town doesn't have
 5 to do anything other than turn over the fund." And
 6 that's why the Second Circuit correctly found, and this
 7 is Petition Appendix 9A, that -- the Laroe, quote,
 8 "Asserts the same legal theories and seeks the same
 9 relief" as --

10 JUSTICE SOTOMAYOR: I have asked a different
 11 hypothetical. I don't know that the court below
 12 understood your claim that way. So when it ruled, it
 13 ruled understanding that you were following your
 14 complaint and seeking a -- money in your name. You
 15 disavow that in the Second Circuit. They accepted that
 16 disavowal, and they've ruled a slightly different way.
 17 I'm saying, if you hadn't, would this be the same case?

18 MR. DVORETZKY: If we hadn't, it would be a
 19 different case, but I think the court --

20 JUSTICE SOTOMAYOR: And what would happen if
 21 it were a different case?

22 MR. DVORETZKY: If it were a different case
 23 and we were asking for -- for money in our own name, I
 24 think an Article III standing inquiry would be
 25 appropriate in that situation, and for reasons that --

1 JUSTICE SOTOMAYOR: So your rule is always
2 on a motion to intervene, there is a standing inquiry.
3 The standing inquiry is whether or not you're asking for
4 relief different from someone with a case or
5 controversy.

6 MR. DVORETZKY: I would put it slightly
7 differently, which is whether or not there needs to be a
8 standing inquiry depends on whether the intervenor is
9 seeking relief or asserting a claim different than the
10 existing plaintiff.

11 JUSTICE GORSUCH: Let's use a hypothetical.

12 MR. DVORETZKY: I'm sorry.

13 JUSTICE GORSUCH: A -- a number of federal
14 prisoners are similarly situated with respect to a claim
15 that they're not being provided food consistent with
16 their religious beliefs. One -- one brings a claim. He
17 wants relief as to him, because that's what he can seek
18 relief for, right?

19 MR. DVORETZKY: Uh-huh.

20 JUSTICE GORSUCH: Okay. Then we have 80
21 join him. Can they join him, so long as they simply
22 say, we want him to get his meal, or if -- if they seek
23 meals in their own name, a judgment running as to them,
24 do they have to show standing at that stage?

25 MR. DVORETZKY: I -- I think it depends on

1 what relief the initial plaintiff is seeking. If he is
2 seeking a declaratory judgment or an injunction
3 invalidating the prison's entire meal program, then I
4 think they can join. If he is seeking an injunction
5 saying, he, individually, is entitled to a particular
6 type of food and they would like that judgment to extend
7 to them, they need at that point standing, because
8 they're asking the defendant to do something different,
9 not only to provide him with particular food, but also
10 to provide it to them, whereas otherwise the defendant
11 would not be free to do that.

12 So I think it requires a careful parsing
13 at -- at the -- either on the papers or at the time --

14 JUSTICE GORSUCH: To the extent he's seeking
15 relief only in his own name, an as-applied challenge.

16 MR. DVORETZKY: To an as -- if it were an
17 as-applied challenge, then an additional plaintiff would
18 need to show standing because the question, again, is
19 what is the court ordering the defendant to do. That's
20 the touchstone for the relief. And if an additional
21 plaintiff is asking for different relief, then it
22 requires standing.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Katyal, four minutes.

25 REBUTTAL ARGUMENT OF NEAL K. KATYAL

1 ON BEHALF OF THE PETITIONER

2 MR. KATYAL: Thank you, Mr. Chief Justice.

3 Three points. First, a 24(a)(2) mandatory
4 intervenor is a full party and can send thousands of
5 subpoenas or document requests without the court ever
6 finding out about them. In two --

7 JUSTICE GINSBURG: Are there cases in which
8 courts have controlled 24(a)(2) intervenors?

9 MR. KATYAL: There -- there are not.
10 Indeed, the court cannot restrict -- and this is, you
11 know, what Stringfellow says, it's what --

12 JUSTICE GINSBURG: Did your -- I think we
13 were just told that we think we have -- in fact, these
14 courts have limited 24.

15 MR. KATYAL: They can limit it in the sense
16 that they limit parties, but they can't ban discovery
17 altogether from a party --

18 JUSTICE KENNEDY: Well, of course not. But
19 -- but they can say, now, counsel, we have lead counsel
20 taking these depositions. We're not going to let you
21 take the same depositions. The courts do that all the
22 time.

23 MR. KATYAL: Sure, they can do that. Or
24 they could say -- but at the point where they are
25 restricting a full party, like an intervenor, from doing

1 anything independently, they are no longer an (a) (2)
2 intervenor. At that point, Justice Kennedy, they are a
3 permissive intervenor at best, or they are an amici.
4 They are not doing anything. And that gets to, I think,
5 a fundamental point, Justice Kennedy --

6 JUSTICE KENNEDY: Well, I -- I don't want to
7 take up your time, but it does seem to me that district
8 courts have very substantial control over what mandatory
9 parties can do in the way of -- of duplicative and
10 oppressive discovery. It happens all the time.

11 MR. KATYAL: Well, we don't disagree with
12 that. Our only point is that they have much more power
13 over 24(b) than they do over (a) (2). And at the point
14 where they are coming in and saying, we're going to do
15 everything exactly the same way, either because the
16 court has imposed that restriction on them or otherwise,
17 they aren't at that point an (a) (2) intervenor.

18 And that gives rise to -- you asked,
19 Justice Kennedy, my friend on the other side, what --
20 what are we giving up? When do we ever need these kinds
21 of interventions? And he gave you two answers, neither
22 of which dealt with the fact that amici and permissive
23 intervention provide for that participation.

24 His first answer was Trbovich. Trbovich is
25 a case in which that union member had Article III

1 standing. So, you know, that would have -- that
2 wouldn't be screened out by our rule anyway.

3 The second thing he gave you was Clapper,
4 and a long thing about a -- a roommate that, you know,
5 might want to have a grievance here. That, to me,
6 boomerangs. That shows exactly what our point is. He
7 wants them to -- intervenors -- (a) (2) intervenors to
8 raise stuff that parties legitimately can't raise
9 because of Article III standing.

10 And the only support he can have for that --
11 there's no support in the Constitution -- the only
12 support is page 30 of his brief, where he is admitting
13 that's what he wants intervenors to do.

14 And Justice Breyer, that is what intervenors
15 are doing right now. The National Counties brief
16 explains that ideological intervenors are coming in now,
17 concerned bystanders like the Sierra Club or Club For
18 Growth. It doesn't matter ideologically, but it's just
19 -- the point is that that's happening right now, because
20 of (a) (2) intervention status. And that's why you need
21 some sort of upfront restriction on a threshold inquiry.

22 And then this is my last point, which it
23 gets to the Chief's question about, why would you need
24 to have a threshold inquiry? And I think the best
25 reason is what the answer to Justice Gorsuch was given,

1 at Joint Appendix page 162.

2 Joint Appendix page 162 says, "They are
3 seeking a pot of money for themselves." That's what the
4 complaint says. Now, my friend now has disclaimed that
5 before this Court. That, by the way, is not the
6 disclaimer before the Second Circuit. The disclaimer
7 before the Second Circuit is, we want the same pot of
8 money, but we still want a court order for ourselves.
9 And that is an indication of judicial power. That's
10 exactly what (a)(2) intervenors do all the time. And if
11 you -- and if you accept his rule and you don't have
12 that threshold inquiry, you allow for this protean
13 shifting of a case to the point where -- and I'll just
14 read to you from Joint Appendix page 162. This is what
15 the complainant asks for. The road prays -- this Court
16 prays that this Court grant judgment against the
17 defendants, awarding it damages and other appropriate
18 relief as follows: A, an award of compensation for the
19 taking of awarder's interest, and, B, such other and
20 further relief.

21 He's disclaimed A. I don't know what B is
22 anymore. This can't be the right way for courts to
23 proceed. The right way for courts to proceed is a
24 threshold standing for a defendant which confines them
25 to party status.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 The case is submitted.

3 (Whereupon, at 12:04 p.m., the case in the
4 above-entitled matter was submitted.)

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