IN THE SUPREME COURT OF THE UNITED STATES

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TOWN OF CHESTER, NEW YORK, :

Petitioner : No. 16-605

v. :

LAROE ESTATES, INC., :

Respondent. :

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Washington, D.C.

Monday, April 17, 2017

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

APPEARANCES:

NEAL K. KATYAL, ESQ., Washington, D.C.; on behalf of the Petitioner.

SARAH E. HARRINGTON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting the Petitioner.

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

C O N T E N T S

P R O C E E D I N G S

(11:03 a.m.)

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

Mr. Katyal.

ORAL ARGUMENT OF NEAL K. KATYAL

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: How about permissive intervenors?

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

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

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

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

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

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

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

JUSTICE BREYER: They may disagree --

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

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

MR. KATYAL: Correct, but --

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

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

JUSTICE BREYER: This case --

MR. KATYAL: -- jury trial --

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

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

JUSTICE KAGAN: But why is there --

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

JUSTICE KAGAN: But why --

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

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

case.

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

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

MR. KATYAL: So Justice --

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

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

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

CHIEF JUSTICE ROBERTS: Does it --

MR. KATYAL: That's often how --

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

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

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

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: That will solve that problem.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE ALITO: Why not?

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Harrington.

ORAL ARGUMENT OF SARAH E. HARRINGTON

FOR UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MS. HARRINGTON: Thank you, Mr. Chief

Justice, and may it please the Court:

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: Why did they bother?

MS. HARRINGTON: Why did they --

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: That gives the defendant standing to --

MS. HARRINGTON: It doesn't give --

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

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

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

JUSTICE BREYER: I see your point.

MS. HARRINGTON: -- and protect his interest.

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

MS. HARRINGTON: Yes.

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

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

MS. HARRINGTON: That's the --

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

MS. HARRINGTON: Yes.

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

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

JUSTICE GORSUCH: I --

MS. HARRINGTON: -- that argument here.

JUSTICE GORSUCH: I appreciate the candor of that concession.

MS. HARRINGTON: Yes.

(Laughter.)

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

A couple of --

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Right.

JUSTICE GINSBURG: There are -- there are

several statutes.

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

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

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

MS. HARRINGTON: No.

CHIEF JUSTICE ROBERTS: No.

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

JUSTICE BREYER: Oh, sure.

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

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

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

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

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

JUSTICE SOTOMAYOR: But there's --

MS. HARRINGTON: -- and has that incentive.

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

party is adequately protecting your interests.

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Dvoretzky.

ORAL ARGUMENT OF SHAY DVORETZKY

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

(Laughter.)

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

MR. DVORETZKY: That is a yes.

CHIEF JUSTICE ROBERTS: That type of proceeding is okay.

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

CHIEF JUSTICE ROBERTS: Now --

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

MR. DVORETZKY: Yes. But --

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

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

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

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

MR. DVORETZKY: Yes. And --

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

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

JUSTICE KENNEDY: I understand.

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

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

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

JUSTICE SOTOMAYOR: Yes.

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

JUSTICE ALITO: And would they lack Article III standing?

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

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

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

JUSTICE ALITO: Right, right.

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

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

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

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

JUSTICE ALITO: Plaintiff. Plaintiff intervenors.

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

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

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

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

CHIEF JUSTICE ROBERTS: But --

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

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

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

Article III standing or not.

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

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

MR. DVORETZKY: It would.

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

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

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

MR. DVORETZKY: That's not an Article III

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

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

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

Second of all --

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

driving at.

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

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

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

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

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

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

(Laughter.)

JUSTICE ALITO: How can that possibly be?

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

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

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

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

be said to be injured.

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

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

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

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

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

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

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

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

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

only in our name.

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

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

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

But the reason --

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

MR. DVORETZKY: We are disclaiming --

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

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

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

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

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

JUSTICE GORSUCH: Or just a judgment in its favor.

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

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

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

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

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

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

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

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

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

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

JUSTICE GORSUCH: I'll let you go.

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

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

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

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

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

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

But the point is that so long as we are not

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

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

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

What Article III is --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

District courts have ample tools to deal with the parade of horribles of having an intervenor come in and potentially take the case -- take the case in different directions

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

MR. DVORETZKY: In theory, if the person

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

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

MR. DVORETZKY: Yes.

JUSTICE GINSBURG: Which are stringent.

MR. DVORETZKY: Exactly, Justice Ginsburg.

The -- the Petitioner's contrary theory here, that Article III polices every action of every court, is contrary to a number of settled principles.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GORSUCH: Let's use a hypothetical.

MR. DVORETZKY: I'm sorry.

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

MR. DVORETZKY: Uh-huh.

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Katyal, four minutes.

REBUTTAL ARGUMENT OF NEAL K. KATYAL

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

at Joint Appendix page 162.

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

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