No. 16-605

IN THE
Supreme Court of the United States

TOWN OF CHESTER,
Petitioner,
v.
LAROE ESTATES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

In order to permit its intervention, Laroe urges the Court to adopt two sweeping principles that, taken together, would severely undermine the structural protections that Article III affords.

First, Laroe urges the Court to hold that a party needs Article III standing only to make an independent "claim" or seek separate "relief." By its lights, a party that lacks standing can invoke the judicial power in any other way it pleases: It can demand discovery, issue subpoenas, introduce evidence, obtain attorney's fees, and pursue an independent

litigation strategy potentially at odds with that of the existing parties. It may also require courts to resolve any legal issues that crop up along the way, all without demonstrating any cognizable interest in the case.

Second, Laroe asks the Court to announce that the Constitution places no limit on who may become a party in the federal courts. Congress could, for example, amend the Federal Rules to permit any person (no matter how attenuated her interest) to intervene in litigation between two adverse parties. Any suit could be joined by dozens, or hundreds, of these newly minted parties; only the grace of Congress keeps them from the courthouse now.

A standing limit that permits these results is hardly a limit at all. The Case-or-Controversy requirement constrains the judicial power to "the traditional role of Anglo-American courts," *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 492 (2009), and ensures that courts resolve questions only where "necess[ary] in the determination of" a "vital controversy," *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). At its core, that rule requires a party that exercises the privileges of a litigant to demonstrate at least a minimal legal interest in the outcome of the suit. Federal Rule of Civil Procedure 24(a)(2) ensures that intervenors as of right meet that threshold, and Article III demands no less.

At a bare minimum, Article III demands a standing inquiry where, as here, a party with standing opposes a motion to intervene on standing grounds in

district court. A plaintiff must be dismissed at the outset when there is a successful standing challenge, as a contrary rule would paradoxically give intervenors more rights than plaintiffs. Pet. Br. 25. That cannot be.

ARGUMENT

I. ARTICLE III MAKES STANDING A PREREQUISITE FOR INTERVENTION UNDER RULE 24(A).

A. The Case-or-Controversy Requirement Demands That Intervenors As Of Right Demonstrate Standing.

The parties agree—as they must—that Article III "limits the federal judicial power to situations where its exercise is 'a necessity in the determination of real, earnest and vital controversy.'" Resp. 14 (quoting *Valley Forge*, 454 U.S. at 471). The parties also agree—as they must—that enforcing this limit protects the "tripartite allocation of power" on which the Constitution is premised. *Id.* at 17-18 (quoting *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 353 (2006)). But Laroe nonetheless asserts that, as far as the Constitution is concerned, courts may compel a rightful litigant to press her suit alongside or against her neighbor, her congressman, and every other interested onlooker who wishes to "piggyback" on the litigant's case. Article III's Case-or-Controversy requirement is designed to foreclose precisely this type of hijacking of the judicial machinery by "concerned bystanders." *Valley Forge*, 454 U.S. at 473.

1. Laroe begins (at 14-15) from a faulty premise, asserting that a litigant must satisfy Article III's standing requirements only if she invokes the judicial power to decide an independent "claim" or issue a separate form of "relief." Laroe never denies that litigants invoke the judicial power in other ways, both implicitly to compel other parties to submit to their litigation demands, and explicitly to seek judicial resolution of any resulting disputes. *See* Pet. Br. 24-25. Laroe simply dismisses the application of standing doctrine in this respect, arguing that standing merely ensures that "judicial intervention" in a particular claim is "a necessity." Resp. 16. But that is not what this Court has said, and it is not what Article III requires: Judicial authority may be exercised only as a "necessity * * * *in the course of carrying out the judicial function of deciding cases*." *DaimlerChrysler*, 547 U.S. at 340 (emphasis added).

It is a "necessity" for a court to exercise its authority to compel an injured plaintiff and a defendant from whom she seeks redress to accept the litigation burdens they place on one another and to resolve resulting disagreements. But it is *unnecessary*—and therefore *unconstitutional*—for a court to subject these parties to litigation burdens, and to decide the disputes that ensue, at the behest of an intervenor that lacks any "vital" stake in the controversy. *Cf. U.S. Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) ("the subpoena power of a court * * * is subject to those limitations inherent in the body that issues them because of [Article III]").

Laroe fights this straightforward conclusion primarily by arguing (at 15) that Article III is concerned with preserving the separation of powers, and the "[a]ncillary case-management questions" an intervenor gratuitously introduces into a controversy are "not likely to implicate the core functions of the political branches." That is wrong.

First, Laroe's argument is mistaken on its own terms. Even ancillary disputes often implicate the powers of the other branches when the Government is a party. *See* Pet. Br. 27-28. For example, in *Cheney* v. *United States District Court*, 542 U.S. 367 (2004), the dispute involved discovery orders against the Vice President that allegedly burdened his ability to conduct his constitutional duties. The Court held that appropriate resolution of the discovery dispute required the district court to assess the scope of the Vice President's responsibilities and the effect of the document requests on his ability to fulfill them, *id.* at 390, precisely the sort of "measur[ing of] the authority of governments" that is "legitimate only in the last resort" in the course of deciding a "vital controversy," *Valley Forge*, 454 U.S. at 471. Yet, under Laroe's theory, an intervenor without standing in a suit against the Executive is free to make similar requests, and courts are free to resolve the resulting disputes, even though the intervenor's very presence in the suit is unnecessary.

Second, Laroe errs in asserting that the political branches are the only entities that standing doctrine is designed to protect. "[C]ourts must stay within their constitutionally prescribed sphere of action,

whether or not exceeding that sphere will harm one of the other two branches." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102 n.4 (1998). The "finite bounds" established by Article III also "protect citizens from * * * the excessive use of judicial power." *U.S. Catholic Conference*, 487 U.S. at 77. Laroe does not explain how its theory of intervenor standing provides "due regard for the autonomy of those most likely to be affected by a judicial decision." *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986). Laroe does not even recognize this rationale for the standing doctrine *at all*.

Third, Laroe's theory permits lawsuits to be converted into legislative hearings. With no constitutional boundary on who may actively participate in a suit, the resolution of an individualized grievance could become the excuse for a proceeding in which ideologically or politically motivated persons on both sides of the question have as much of an opportunity to present evidence and advocate for their desired outcome as those with a concrete stake in the case. As Laroe acknowledges, standing doctrine exists to prevent such a "system of intermingled legislative and judicial powers." Resp. 13 (quoting *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995)).

Fourth, and finally, Laroe's theory flies in the face of *DaimlerChrysler*, which considered and rejected an analogous "theory of ancillary standing." 547 U.S. at 353. There, the Court held that the doctrine of supplemental jurisdiction articulated in *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966), does not permit "federal jurisdiction" to

"extend[] to all claims sufficiently related to a claim within Article III," if no plaintiff has standing to press those claims. 547 U.S. at 351. That application of supplemental jurisdiction would "erode" the Constitution's "tripartite allocation of power" because it would lead to courts "deciding issues they would not otherwise be authorized to decide." *Id.* at 353. Laroe's theory of ancillary standing would do the same: By Laroe's admission (at 15), it would allow courts to "resolve questions" posed exclusively by parties without standing. Indeed, Laroe *relies* (at 23) on the *Gibbs* doctrine of supplemental jurisdiction that *DaimlerChrysler* held inapplicable in the standing context. Laroe even doubles down on this error (at 26-27), asking the Court to view two intervention cases that, like *Gibbs*, have nothing to do with Article III standing—and involve intervenors that clearly had standing—as applicable precedent in this case.

2. As a fall-back, Laroe argues (at 28-29) that principles of constitutional avoidance favor waiting until an intervenor has made a formal request of the court before examining her standing. But Laroe cannot guarantee that there will be an opportunity for a standing analysis then, suggesting only that an intervenor is "*likely*" to press a new claim through an amended pleading and a court "*may*" then need to analyze her standing. *Id*. at 29. In any event, a standing assessment then, or even at an earlier point when the intervenor asks the court to decide a case-management question, will not suffice. There are many ways for intervenors to invoke "the judicial

Power" that do not give courts an opportunity to assess their standing, such as issuing a subpoena or making discovery demands. Pet. Br. 21-22, 24-25. It would be irony indeed if the doctrine of constitutional avoidance, designed to restrict gratuitous use of the judicial power, were employed to permit litigants to wield that authority unconstitutionally.

B. This Court's Decisions Do Not Permit A Person To Intervene Without Satisfying Article III Standing Requirements.

Finding no real theoretical support for its position, Laroe asserts that this Court's precedents foreclose a standing requirement for intervenors. Each argument fails.

1. Laroe begins by repeating (at 19) its erroneous certiorari-stage assertion that the cases in which this Court has held it has jurisdiction to *decide a question* because at least one petitioner has standing indicate that a district court may *permit intervention* by a person without standing. Not so. As Petitioner has explained (at 22-23), those holdings establish only two things: *First*, a court may not decide a question without establishing that its authority to do so has been invoked by a party that "has demonstrated standing." *Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977). And *second*, a court's jurisdiction to decide a particular issue at the behest of a party with standing is not destroyed when a party without standing simultaneously asks the court to decide the same issue.

Neither of these principles establishes that a person may intervene in the district court without demonstrating Article III standing; they show the opposite. That a court's authority cannot be invoked unless at least one party has standing underlines the need to scrutinize an intervenor's standing *before* authorizing her to invoke the judicial power. It is a virtual certainty that a Rule 24(a) intervenor will not be joined by a party with standing each time she invokes the court's authority. Rule 24(a) prevents a person from intervening unless she has an interest that cannot be "adequately represent[ed]" by an existing party. Fed. R. Civ. P. 24(a)(2). And even setting that rule aside, a person has no reason to intervene—as opposed to seeking participation merely as an *amicus*—if she is satisfied with how the existing parties are conducting the litigation.

As to the Court's recognition that jurisdiction is unaffected by the presence of parties without standing: Of course, their presence does not *deprive* a court of authority it would otherwise enjoy. The point is simply that an intervenor's presence cannot *enlarge* a court's authority by permitting it to be exercised in ways that a party with standing has not requested.

2. Laroe gets no help from cases cautioning that an appellate court may only be certain of its own jurisdiction by checking the jurisdiction "of the lower courts in [the] cause under review." Resp. 30 (quoting *Steel Co.*, 523 U.S. at 95). Appellate courts fulfill this task in the same way they decide their own jurisdiction: by ensuring that at least one party in

the lower court had standing to press the "cause under review." Laroe suggests that under Petitioner's theory, every appellate court must analyze the standing of every party below, because the resolution of the cause might have been altered by the presence of an improper party. But the fact that a party without standing may have shaped the *way* a lower court decided a question does not bear on whether that court had jurisdiction to decide the question in the first place. The participation of a party without standing might give rise to a challenge to the integrity of the merits outcome, but an appellant must raise the issue as it would any other contention that the outcome was tainted by a constitutional violation. *See Brecht* v. *Abrahamson*, 507 U.S. 619 (1993). If the constitutional error was obviously harmless, it may be overlooked. If it was not, the matter may be reconsidered without the participation of the impermissible party.

3. Similarly unavailing is Laroe's attempt (at 19) to draw support from this Court's decisions affirming a judgment and award of injunctive relief sought by multiple plaintiffs without ascertaining the standing of each one. In the cases Laroe cites, at least one party had standing to ask the Court to affirm the judgment and the injunction, meaning the Court had the authority to decide each question. The fact that doing so *benefitted* litigants who may have lacked standing does not make that exercise of authority unlawful. *See* Pet. Br. 22. If a party named in the judgment later sought to enforce it separately from the party whose standing the Court confirmed, it

would be necessary to check that party's standing *then*. But the Court's affirmance alone does not mean the judicial power will be exercised solely at the behest of a party without standing.

4. Not only is Laroe unable to find precedent in support of its rule, but that rule is irreconcilable with the precedent most directly on point: *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979). The *Gladstone* Court held that two plaintiffs who lacked standing could continue to litigate in the district court only by amending their complaint to allege a cognizable injury. *Id.* at 112 n.25. And the Court reached that conclusion even though the plaintiffs without standing pressed the same claims and sought the same injunctive relief as four other plaintiffs who *did* have standing. *Id.* at 94-95; *see* Pet. Br. 19-20.

Laroe tries (at 23) to wave this case away by observing that the plaintiffs that lacked standing also sought distinct monetary relief. But if Laroe's theory were right, the Court should have stated that the plaintiffs without standing could continue to litigate *either* by amending their complaint to allege cognizable injury *or* by deleting their request for monetary relief and seeking injunctive relief alone. The Court did nothing of the kind.

Nor is *Gladstone*'s precedential effect diminished by Laroe's citation to a handful of lower court cases in which a plaintiff without standing was nonetheless permitted to remain in a district court case. Resp. 21-22 & n.5. Of course, to the extent those cases are inconsistent with *Gladstone* and this

Court's other precedents, they are simply wrong. But many of the cases are distinguishable because there is no indication that the plaintiff without standing attempted to invoke the court's authority in any way distinct from a plaintiff with standing.

In this sense, intervenors are different even from "ride-along" plaintiffs that appear beside a plaintiff with standing on an initial complaint. A court may not need to check the standing of those additional plaintiffs unless and until there is any indication that they intend to act separately from the plaintiff with standing. Prospective intervenors, in contrast, *necessarily* seek the right to invoke the district court's authority in some way distinct from the existing parties, and so must establish their standing at the outset. Fed. R. Civ. P. 24(a); *see supra* p. 9.

C. Petitioner's Rule Is Fully Consistent With The Traditional Roles Of Defendants, Intervenors, And *Amici.*

1. Laroe's final defense of its constitutional rule rests on a false foundation. Laroe contends (at 35) that standing cannot be a prerequisite for imposing burdens on one's fellow litigants because defendants regularly "demand discovery and issue subpoenas," and "[c]ourts do not ask whether *defendants* have Article III standing." That is simply wrong. This Court has made clear that "[s]tanding to sue *or defend* is an aspect of the case-or-controversy requirement." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997) (emphasis added). The adversity the Constitution requires means that

standing exists only when there is a plaintiff with a cognizable injury *and* a defendant to whom that injury "is fairly traceable." *Spokeo*, *Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016).

Laroe quotes the Court's opinion in *Bond* v. *United States*, 564 U.S. 211, 217 (2011), for the proposition that the "requirement of Article III standing . . . ha[s] no bearing upon [a defendant's] capacity to assert defenses in the District Court." Resp. 36 (alterations in original). *Bond* holds the opposite. As it explains, Article III is satisfied where a plaintiff has "standing to obtain the relief requested" *and* the defendant has "an ongoing interest in the dispute * * * that is sufficient to establish concrete adverseness." 564 U.S. at 217. It is only "[w]hen those conditions are met" that Article III "ha[s] no bearing" on a defendant's "capacity to assert defenses in the District Court." *Id.*

That does not mean, as Laroe suggests, that the standing requirement for defendants works the same as the one for plaintiffs, or that a party that is sued bears the burden of proving her own standing. "Article III requires the party who invokes the court's authority" to make the showings necessary to prove standing. *Valley Forge*, 454 U.S. at 472; *see Gladstone*, 441 U.S. at 99. How that works varies depending on the context. At the outset of a suit, it is the plaintiff's burden to demonstrate that each party has the requisite adversity. *Bond*, 564 U.S. at 217. When a defendant seeks to appeal an unfavorable decision, *it* must demonstrate that it has suffered "injury in fact" from the lower-court judgment.

Diamond, 476 U.S. at 65; *see also DaimlerChrysler*, 547 U.S. at 342 n.3 (defendant must prove standing to invoke the federal court's removal jurisdiction, but plaintiff must prove standing on appeal from resulting federal-court judgment). By the same token, when an individual seeks to intervene as a defendant in a district court, she must demonstrate that she faces "injury in fact" that is traceable to the relief the plaintiff seeks. *See, e.g.*, *Fund for Animals, Inc.* v. *Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003) (intervenor-defendant had standing because it would suffer a "concrete and imminent injury" from the relief plaintiff sought).

2. Laroe is also wrong in suggesting (at 37-38) that Petitioner's position has absurd consequences for intervention under Rule 24(b). While the Court need not reach the question, permissive intervenors may only share the existing parties' right to invoke the court's authority if they meet the same standing requirements. Contrary to Laroe's assertion, that is consistent with the possibility that a party without standing may intervene under Rule 24(b). As Petitioner and the Government have explained, courts have more leeway in limiting the rights of an intervenor under Rule 24(b) than they do under Rule 24(a). Pet. Br. 9-10; U.S. Br. 24-25. A party without standing may intervene under Rule 24(b) so long as the court limits her rights to prevent her from independently invoking the court's power. That is, she may offer her perspective on how the court should decide disputes presented by the parties, and she may otherwise participate in the litigation to the

extent those parties are willing to tolerate her presence and litigation demands. But she may not invoke the court's authority to compel submission to those demands, and she may not ask the court to decide any question that is not raised by a party with standing.

3. Finally, Laroe suggests (at 38) that even *amicus* participation would be unconstitutional under Petitioner's view. False. Deciding whether and on what terms a party may participate in a suit is a "necessity in the determination" of a "vital controversy." *Valley Forge*, 454 U.S. at 471. And voluntary or court appointed *amici* are free to offer guidance as to *how* a court should decide a question presented by adverse parties. Indeed, an individual without standing—whether her formal title is "concerned bystander," *amicus*, permissive intervenor, or intervenor as of right—may take a number of actions that influence and alter the outcome of a suit without offending Article III. What such an individual may *not* do is expand the judicial power beyond that necessary to decide a claim, by unilaterally invoking the court's authority to resolve a new question or to compel a new action.

II. RULE 24(A)(2) REQUIRES ARTICLE III STANDING.

The Federal Rules reinforce the conclusion that intervenors as of right must have Article III standing. Rule 24(a) *requires* a court to permit intervention when its conditions are met. It is hard to believe that Congress intended to force courts to open their

doors to litigants with no standing of their own. And indeed, for half a century, the Court has held that Rule 24(a) requires an entity to demonstrate "standing to intervene." *Cascade Nat. Gas Corp.* v. *El Paso Nat. Gas Co.*, 386 U.S. 129, 133 (1967). Since *Donaldson* v. *United States*, 400 U.S. 517 (1971), the Court has made clear that standing under Rule 24(a), just like under Article III, requires a "legally protectible" interest in the suit. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 315 (1985). Those identical standards mean identical things; and the Rule's structure, its purpose, and common sense underscore that straightforward conclusion.

A. This Argument Is Properly Before The Court.

Laroe begins by trying to duck the question, claiming (at 41) that the meaning of Rule 24(a) is "not at issue here." That is incorrect. The question presented is "[w]hether intervenors participating in a lawsuit as of right under Federal Rule of Civil Procedure 24(a) must have Article III standing * * * ." Pet. i. The answer is yes, for two interrelated reasons: because Article III itself requires standing, and because Rule 24(a)(2) incorporates the requirements of Article III. As the Government explains, the Court may properly resolve the case on either ground.

Petitioner did not, as Laroe contends (at 41), "disclaim[]" reliance on Rule 24 at the certiorari stage. It merely suggested (accurately) that the Court did not need to wait for the lower courts to decide if Laroe has met all of the fact-specific requirements of

Rule 24(a) because the Second Circuit had already resolved the "purely legal" question presented. Cert. Reply Br. 10.

Nor is Laroe correct that this issue was not "passed on below." Resp. 42. The Second Circuit categorically held that standing is not a prerequisite for intervention as of right. Pet. App. 2a. And it expressly rejected the views of the Seventh and D.C. Circuits, both of which have treated standing as a component of intervention under Rule 24(a)(2). *Id.* at 7a-8a; *see* Pet. 11; U.S. Br. 22. There is no impediment to the Court's resolution of that split.

B. Laroe's Interpretation Of Rule 24(a)(2) Lacks Merit.

1. Laroe's response on the merits is no more convincing. Laroe does not dispute that Rule 24(a)(2) requires an intervenor to have a "legally protectible" interest in the suit. *Tiffany*, 469 U.S. at 315. Nor does it dispute that this standard requires an intervenor to identify an interest that is "direct," "concrete," and non-"speculative." Pet. Br. 34-35 & n.1. These requirements are identical to the criteria for Article III standing, and Laroe does not even attempt to identify a way in which they differ.

Quoting from a dissent, Laroe briefly suggests that *Cascade* permitted intervention by an entity that lacked a "direct and concrete stake in the litigation." Resp. 44 (quoting *Cascade*, 386 U.S. at 147 (Stewart, J., dissenting)). That is incorrect. In *Cascade*, the Court permitted two purchasers of natural gas to intervene to challenge a merger between two suppli-

ers, on the ground that the merger would saddle the purchasers with "new and allegedly onerous prices." 386 U.S. at 132-133. That pocketbook injury plainly conferred standing; indeed, the Court has found standing present on closely similar facts. *See Kansas* v. *UtiliCorp United, Inc.*, 497 U.S. 199, 206-207 (1990) (holding that "direct purchaser[s]" of natural gas have standing to bring antitrust claims against a supplier).

Laroe also claims (at 42-44) that Rule 24(a)(2) does not impose the Article III requirements of imminence, traceability, and redressability. As discussed below, that is wrong, but it would do nothing to help Laroe even if it were right. The District Court denied Laroe intervention because it lacks the requisite "interest in property" to have standing to contest Petitioner's alleged taking. Pet. App. 55a (quoting *U.S. Olympic Comm.* v. *Intelicense Corp., S.A.*, 737 F.2d 263, 268 (2d Cir. 1984)). Laroe thus fails at the threshold of having any "legally protectible" interest; the imminence or traceability of Laroe's legally noncognizable injury is beside the point.

In any event, Laroe's attempts to distinguish the interest in Rule 24(a) from the interest required by Article III are unconvincing. More than a century ago, the Court held that a statutory predecessor of Rule 24(a) permitting intervention by anyone with an "interest in the matter in litigation" implicitly required the interest to be "of such a *direct* and *immediate* character that the intervener will either gain or lose *by the direct legal operation and effect of the judgment*." *Smith* v. *Gale*, 144 U.S. 509, 517-519

(1892) (emphases added). Likewise, in *Sutphen Estates* v. *United States*, 342 U.S. 19 (1951), the Court said that an intervenor must identify some "imminent" "liability" that it would incur if relief is granted; a "claim of injury" that is merely "speculative" and "contingent" does not suffice. *Id.* at 22-23. And, in *Donaldson*, as Justice O'Connor explained in her *Diamond* concurrence, the Court required at least a "palpable threat of * * * liability," not merely a "speculative" or "contingent" risk of harm. *Diamond*, 476 U.S. at 76 (O'Connor, J., concurring in part and concurring in the judgment).

The "interest" prong of Rule 24(a)(2) thus incorporates all of the components of Article III standing. An intervenor who shows a "direct," "immediate," and non-"speculative" threat of harm necessarily satisfies Article III's requirement that her injury be "actual or imminent" rather than "speculative." *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). Because Rule 24(a)'s interest prong also requires that this harm be related to the matter under suit, the intervenor's alleged injury will necessarily be "fairly traceable to the challenged action." *Id*. And a "legally protectible" interest that meets these requirements, *Tiffany*, 469 U.S. at 315, is "redressable by a favorable ruling," *Clapper*, 133 S. Ct. at 1147.

The second prong of Rule 24(a)(2), which requires that an intervenor be "so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," further confirms that an individual that lacks Article

III standing cannot intervene as of right. In order to demonstrate that an ongoing suit may "impair" or "impede" her interest, an intervenor must show the sort of risk of imminent harm from a judgment that this Court has repeatedly found sufficient to satisfy Article III. *See, e.g.*, *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2343 (2014) (finding Article III standing to bring a pre-enforcement challenge of a law that threatened imminent harm).

2. A comparison between Rules 24(a)(2) and 19(a)(1)(B) fortifies this conclusion. By design, these two Rules impose nearly identical criteria for intervention as of right and mandatory joinder. Pet. Br. 37-39. Laroe does not attempt to claim otherwise. Yet it embraces the view that "proponents of a ballot initiative" and other "attenuated" interests in a case are entitled to intervene as of right. Resp. 45. Entities with such frail interests, however, cannot possibly qualify as necessary parties under Rule 19.

Laroe objects (at 52) that it cannot find any cases that have expressly discussed Article III standing in the context of Rule 19. But as Petitioner has explained (at 38), in every Rule 19 case it can find, mandatorily joined parties had an interest easily establishing Article III standing. Despite conducting its own search, Laroe has failed to locate a single counterexample. Because Rules 24(a)(2) and 19(a)(1)(B) must be interpreted in tandem, Rule 24 requires an interest of similar magnitude.

3. Laroe also looks to the history and purpose of Rule 24 for support, but there too it comes up empty-handed. Laroe agrees (at 50-51) that Rule 24(a)(2)

was amended in 1966 to achieve two narrow goals: to remove the requirement that an intervenor be "bound by a decision," and to free courts from the obligation to determine whether property was "in the 'custody' of the court." Nothing about these amendments altered "the *kind* of interest necessary" for intervention as of right. Pet. Br. 40 (citing authorities). Thus, like its predecessor, the revised Rule continues to require an interest at least sufficient to confer Article III standing. *Id.* at 39-40.

Laroe nonetheless claims (at 51) that the 1966 amendments "'refocus[ed]' the rule on practicalities rather than 'legal technicalities.'" That is irrelevant twice over. As Laroe's own recounting of the history confirms, the drafters refocused the rule on "practicalities" in specific ways, by eliminating two requirements the drafters deemed overly formalistic. It is not the Court's role to search for additional ways of enhancing the Rule's "practicalit[y]" that the drafters themselves did not select. *See Kucana* v. *Holder*, 558 U.S. 233, 252 (2010) ("no law pursues its purpose at all costs").

Furthermore, contrary to Laroe's apparent view, Article III is not concerned with "legal technicalities." Resp. 44. The Court has made clear that standing is not "a mechanical exercise," *Allen* v. *Wright*, 468 U.S. 737, 751 (1984), *abrogated on other grounds by Lexmark Int'l, Inc.* v. *Static Control Components*, *Inc.*, 134 S. Ct. 1377 (2014), but "undeniably" permits litigants to assert interests as practical as "the desire to * * * observe an animal species * * * for purely esthetic purposes," *Lujan* v. *Defs. of*

Wildlife, 504 U.S. 555, 562 (1992), or to engage in "activities or pastimes," *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972). It just requires *some* interest that is "legally protected." *Lujan*, 504 U.S. at 560.

4. Finally, Laroe appears to concede each of the implausible consequences its reading would entail. It acknowledges that its rule would enable plaintiffs dismissed for lack of standing to reenter the suit promptly as intervenors as of right. Pet. Br. 41. It just thinks this is fine because of its misguided view that any party can participate in a suit and invoke a court's authority without standing. Resp. 28 n.7; *see supra* pp. 4-5, 12-13.

Likewise, Laroe does not dispute that its interpretation would require courts to conduct two almost wholly duplicative "interest" analyses—once under Rule 24, and again when an intervenor inevitably invokes a court's authority. Pet. Br. 41; *see* U.S. Br. 22. Laroe asserts (at 28 n.8) that intervenors might make no requests of the court beyond those of the named parties. But, as noted, *supra* p. 9, both the Rule's text (which requires an intervenor's interest to be inadequately represented by existing parties), and logic (which dictates that intervention is wasteful and unnecessary in these circumstances) make it a virtual certainty that intervenors will act differently than the original parties. And contrary to Laroe's claim, the Federal Rules nowhere require *amici* to show their interests are not adequately represented or anything other than wholly duplicative of the parties'.

Finally, Laroe has no response to Petitioner's observation that its rule would work a "bait and switch" in light of *Diamond* and *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370 (1987). Pet. Br. 42-43. Laroe just throws up its hands and says that the possibility of months of wasted effort or an unappealable order is "a risk that intervenors assume." Resp. 29 n.9. That response does not demonstrate how such a system makes sense, or accords with the assumptions underlying this Court's precedents.

III. LAROE'S POLICY ARGUMENTS ARE WITHOUT MERIT.

Laroe offers a variety of policy reasons of its own to support its rule. None has merit.[1]

Laroe argues (at 29-30) that requiring intervenors as of right to demonstrate standing would "waste judicial resources." That gets things backwards. Consolidating the standing inquiry with the nearly indistinguishable "interest" analysis under Rule 24(a)(2) would be *more* efficient, not less. And ensur-

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[1] Laroe also argues (at 53) that the entire question presented is irrelevant as a practical matter because Laroe can demonstrate Article III standing. Laroe further offers (at 2-6) a statement of "facts" crafted to create the illusion that it can meet Article III's requirements. The District Court—taking a different view of these facts—correctly concluded otherwise. And because the Second Circuit assumed Laroe lacked standing when it held that deficiency was irrelevant, even Laroe concedes (at 53) that the question is not properly before this Court.

ing that only entities with a cognizable stake in the case can exercise the privileges of litigants is not a "waste"; it is a constitutional necessity that *prevents* waste by ensuring that scarce judicial resources are spent deciding live disputes between adverse parties. Pet. Br. 45-47.

Laroe further contends that intervenors "subject[] the existing parties 'to relatively little additional burden.' " Resp. 31 (quoting *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 536 (1972)). Evidence and common sense suggest the opposite: Intervenors require "[c]ourts [to] listen to additional witnesses, arguments, and demand requests which extend litigation over a much longer time frame." Nat'l Ass'n Ctys. Amicus Br. 5-6.

Apparently recognizing the inevitable burdens its rule would impose, Laroe offers (at 31-33) a series of ways courts might mitigate them. But Laroe overstates the efficacy of each one. It says that courts have "ample discretion to impose conditions on Rule 24(a)(2) intervenors," *id.* at 33, but this power is limited to "reasonable" restrictions "of a housekeeping nature," 7C Charles Alan Wright et al., *Federal Practice & Procedure* § 1922 (3d ed. Apr. 2016 update). Similarly, courts generally lack the power to deny discovery outright, and any limits on discovery must be reasonable. *See, e.g.*, *Danny B. ex rel. Elliott* v. *Raimondo*, 784 F.3d 825, 837 (1st Cir. 2015). Anyway, Laroe would presumably object to the restrictive limitations necessary to make intervention without standing constitutional. *See supra* Part I.C.2.

While this sort of dispute might look technical after Laroe's rhetoric, there are two telling places where Laroe reveals what is really at stake in this case. Laroe admits (at 30) that it seeks a rule dispensing with the standing requirement for intervenors to enable "related claims to be decided together." Indeed, it argues (at 2) that any other rule would "handcuff the judicial power to resolve live cases." But "related claims" brought by intervenors that lack standing to bring them are precisely the sort that Article III bars a court from considering. And these constraints are not "handcuff[s]"; they are the time-honored limits the Framers placed on federal courts. Only Petitioner's rule ensures that these constitutional boundaries are enforced.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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