No. 16-605

IN THE
Supreme Court of the United States

TOWN OF CHESTER,
Petitioner,

v.

LAROE ESTATES, INC.,
Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

This case presents the first clean vehicle in over 30 years to resolve a foundational question of civil procedure: whether intervenors as of right must possess Article III standing. This Court has twice identified the question as an unresolved one. *McConnell* v. *FEC*, 540 U.S. 93, 233 (2003) (citing *Diamond* v. *Charles*, 476 U.S. 54, 68-69 n.21 (1986)), *overruled on other grounds by Citizens United* v. *FEC*, 558 U.S. 310 (2010). And the federal courts of appeals are deeply divided over the question, three to seven. Yet this Court has never before been presented with the right case in which to resolve it.

Laroe disputes none of that. Instead, it argues that the issue of intervenors' Article III standing is inconsequential or, alternatively, that the Court should wait for a vehicle that satisfies an impossible and contradictory set of criteria. These objections fail to withstand even modest scrutiny, and they offer no reason for the Court to further delay consideration of this important question—a matter of "federal jurisdiction" and "the proper functioning of the federal judiciary" that this Court has "the prime responsibility" to resolve. Stephen M. Shapiro et al., *Supreme Court Practice* 275 (10th ed. 2013); *see id.* at 275-276 (listing "many [granted] cases falling within this category"). It should grant review to resolve the intractable circuit split once and for all.

ARGUMENT

I. THE QUESTION PRESENTED HAS DEEPLY DIVIDED THE CIRCUITS AND IS OF SUBSTANTIAL IMPORTANCE

1. Laroe does not contest that the courts of appeals are split on the question presented. Nor could it: circuits have time and again acknowledged their divide, which has (as of July) widened to three-to-seven. *See* Pet. App. 7a-8a; *King* v. *Governor of New Jersey*, 767 F.3d 216, 245 (3d Cir. 2014). That is why Laroe must concede that although the Second Circuit joined the "majority of the circuits" in its decision below, Br. in Opp. 16, "some courts have reached a different conclusion," *id.* at 6, and "adopt[ed] Petitioner's contrary view," *id.* at 18.

2. Laroe nonetheless attempts to minimize the import of the split by claiming that it is seldom

dispositive. *Id.* at 9-13. That is demonstrably incorrect.

Case after case in circuits that do not require intervenor standing has permitted intervention where Article III standing was plainly absent. The Ninth Circuit, for example, applies "a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest * * * to intervene pursuant to Fed. R. Civ. P. 24(a)," *Yniguez* v. *Arizona*, 939 F.2d 727, 733 (9th Cir. 1991), even though initiative proponents are not "Article-III-qualified defenders of the measures they advocated," *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 65 (1997). The Fifth, Sixth, Tenth, and Eleventh Circuits hold that the mere "possibility of adverse stare decisis effects provides intervenors with sufficient interest to join an action," *Jansen* v. *City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990); *see Stone* v. *First Union Corp.*, 371 F.3d 1305, 1310 (11th Cir. 2004); *Coal. of Ariz./N.M. Ctys. for Stable Economic Growth* v. *Dep't of Interior*, 100 F.3d 837, 844 (10th Cir. 1996); *Sierra Club* v. *Glickman*, 82 F.3d 106, 109-110 (5th Cir. 1996) (per curiam)[*]—notwithstanding that "concern about the precedential effect of an adverse decision is not sufficient to confer standing," *City of Cleveland* v. *NRC*, 17 F.3d 1515, 1515-1516 (D.C. Cir. 1994) (per curiam). And the Fifth Circuit has held that legisla-

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[*] Laroe describes these courts' statements about "adverse stare decisis effects" as "stray language." Br. in Opp. 13. Not so. In each case, the courts identified those effects as the "impairments" that justified Rule 24(a) intervention. *See Jansen*, 904 F.2d at 342; *Stone*, 371 F.3d at 1310; *Coalition*, 100 F.3d at 844; *Glickman*, 82 F.3d at 110.

tors could intervene in a suit even where "[i]t [wa]s doubtful" that they would "have sufficient standing" to satisfy Article III—indeed, where the court "assume[d] * * * that [they] would not." *Ruiz* v. *Estelle*, 161 F.3d 814, 829-830 (5th Cir. 1998).

Courts on the short side of the split, by contrast, prohibit intervention in all of these circumstances. The Seventh Circuit holds that an organization's "interest as chief lobbyist * * * in favor of [a law]" does not confer standing to intervene. *Keith* v. *Daley*, 764 F.2d 1265, 1269 (7th Cir. 1985) (denying intervention on this basis); *see United States* v. *36.96 Acres of Land*, 754 F.2d 855, 857 (7th Cir. 1985) (similar). The D.C. Circuit says that Article III bars intervention based merely on "the possible precedential impact" of a decision. *Rio Grande Pipeline Co.* v. *FERC*, 178 F.3d 533, 537 (D.C. Cir. 1999); *see Bethune Plaza, Inc.* v. *Lumpkin,* 863 F.2d 525, 530-531 (7th Cir. 1988) (similar). And the Eighth and D.C. Circuits broadly deny legislators leave to intervene because they lack standing. *See, e.g.*, *Planned Parenthood of Mid-Mo. & E. Kan., Inc.* v. *Ehlmann*, 137 F.3d 573, 577 (8th Cir. 1998); *S. Christian Leadership Conference* v. *Kelley*, 747 F.2d 777, 778 (D.C. Cir. 1984) (per curiam).

Indeed, the Court's own docket confirms that requiring intervenors to establish standing matters. In two cases in recent years, the Court has ordered appeals dismissed because entities granted Rule 24 intervention in the courts below could not satisfy standing requirements. *See Wittman* v. *Personhuballah*, 136 S. Ct. 1732, 1736 (2016); *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2660, 2668 (2013). (In a third case, the Court closely divided on that question.

See United States v. *Windsor*, 133 S. Ct. 2675, 2688 (2013); *id.* at 2703-2705 (Scalia, J., dissenting); *id.* at 2713 (Alito, J., dissenting).) If standing were a prerequisite for intervention in every circuit, neither appeal would have existed.

3. Having failed to establish that the question presented lacks consequence, Laroe tries flyspecking individual cases in the ten-circuit split in an effort to show that not all of those circuits have confronted the question presented. These arguments are unavailing.

Laroe complains (at 8) that a handful of cases discussing the split did not involve a live dispute between the named parties. But those cases make clear whether the circuit would require standing in a live dispute. *See Bond* v. *Utreras*, 585 F.3d 1061, 1069-1070 (7th Cir. 2009); *Dillard* v. *Chilton Cty. Comm'n*, 495 F.3d 1324, 1337 (11th Cir. 2007) (per curiam); *Yniguez*, 939 F.2d at 731; *Planned Parenthood of Mid-Mo.*, 137 F.3d at 577. And each of these circuits has repeatedly applied its rule where the named parties did have an ongoing controversy. *Compare, e.g.*, *City of Chi.* v. *FEMA*, 660 F.3d 980, 984-985 (7th Cir. 2011) (requiring standing), *and Mausolf* v. *Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996) (same), *with Vivid Entm't, LLC* v. *Fielding*, 774 F.3d 566, 573 (9th Cir. 2014) (no standing necessary), *Wilderness Soc'y* v. *USFS*, 630 F.3d 1173, 1179 (9th Cir. 2011) (same), *and Chiles* v. *Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (same).

Laroe also says (at 9) that three cases discussing the split did not involve motions to intervene under Rule 24(a). But that is of no moment. In *King*, the Third Circuit surveyed the circuit split and, without

limitation, adopted "[t]he majority's view" that "an intervenor is not required to possess Article III standing to participate." 767 F.3d at 245. In the other two cases that Laroe cherry picks, the courts of appeals simply restated their longstanding rules on intervention, which they had previously applied in the Rule 24(a) context. *Compare Agric. Retailers Ass'n* v. *U.S. Dep't of Labor*, 837 F.3d 60, 66 (D.C. Cir. 2016), *and Tarsney* v. *O'Keefe*, 225 F.3d 929, 939 (8th Cir. 2000), *with Kelley*, 747 F.2d at 778, *and Planned Parenthood of Mid-Mo.*, 137 F.3d at 576, 578. (Laroe also cites *City of Chicago*, but there the proposed intervenor sought leave to intervene under both Rule 24(a) and (b). *See* 660 F.3d at 982.)

4. Laroe offers three more scattershot arguments why the split does not merit this Court's review. All fail.

First, Laroe points (at 10) to a few cases in which a court denied standing but suggested that Rule 24(a) might also bar intervention as proof the split does not matter. Laroe is wrong both legally and factually. Legally, it matters a great deal whether a court denies intervention under Article III or Rule 24(a): deeming a limit jurisdictional rather than procedural has important doctrinal and practical consequences. *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824-825 (2013). Factually, Laroe's argument reflects another instance of cherry-picking; many more cases have held that intervenors lack Article III standing without even hinting that Rule 24(a) would also bar intervention. *See, e.g.*, *United States* v. *Geranis*, 808 F.3d 723, 729 (8th Cir. 2015); *Defs. of Wildlife* v. *Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013);

People Who Care v. *Rockford Bd. of Educ.*, 171 F.3d 1083, 1089-1090 (7th Cir. 1999).

Second, Laroe argues (at 11) that courts have found standing to be "irrelevant" where "the intervenor and a named party raised the same arguments or sought the same relief." Laroe misstates those courts' holdings. When a court is determining whether it has jurisdiction to *decide an issue*, it is irrelevant whether every party that raises that issue has standing. *See McConnell*, 540 U.S. at 233. When a court is deciding whether *a party may participate in a case*, however, the court must assure itself of each party's standing. That rule is well-established for plaintiffs. *See, e.g.*, *Hochendoner* v. *Genzyme Corp.*, 823 F.3d 724, 733 (1st Cir. 2016). The crux of the dispute among the courts of appeals is whether that same requirement applies to intervenors. Laroe cannot wave the circuit split away simply by calling the core question it presents "irrelevant."

Third, Laroe asserts (at 11) that "an intervenor who satisfies Rule 24(a) typically also satisfies Article III." Laroe's premier evidence for this broad claim consists of cases in which courts have opined that Article III standing can suffice to establish an element of Rule 24(a). Br. in Opp. 11-12. But Laroe's argument and its proof do not line up. The fact that Article III standing may suffice to establish a Rule 24(a) interest does not mean the inverse is true—that a Rule 24(a) interest suffices to establish Article III standing. Indeed, courts have made clear that it does not. *See, e.g.*, *Utah Ass'n of Ctys.* v. *Clinton*, 255 F.3d 1246, 1252 n.4 (10th Cir. 2001) ("Article III standing requirements are more stringent than those for intervention under Rule 24(a)").

In sum, Laroe presents nothing to show this split is not real, recurring, and consequential. The Court should grant certiorari and resolve it.

II. THE DECISION BELOW IS WRONG

As the petition explained (at 19-21), review is also warranted because the decision below is inconsistent with Court precedent and contrary to common sense. Intervenors invoke the power of the federal courts separately from the original parties; therefore, they should have to satisfy the same Article III standing requirements as the original parties. *See Hollingsworth*, 133 S. Ct. at 2661; *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475-476 (1982).

Laroe argues (at 17) that this Court has held otherwise, but it once again confuses a court's jurisdiction to decide an issue with its jurisdiction to grant intervention. The cases it cites explained that appellate courts have jurisdiction to resolve a disputed merits question so long as at least one party on each side of the dispute has standing. *See, e.g.*, *Horne* v. *Flores*, 557 U.S. 433, 446-447 (2009) (finding jurisdiction to reach a disputed merits question because one petitioner had standing); *Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (finding jurisdiction to determine a statute's constitutionality because one plaintiff had standing, but also "limit[ing] [the opinion's] discussion" to that plaintiff). This line of cases has nothing to do with the question presented by this case, which concerns courts' jurisdiction over particular *entities*.

On that subject, this Court has long held that "the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether

the particular plaintiff is entitled to an adjudication of the particular claims asserted." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006) (brackets and emphasis omitted) (quoting *Allen* v. *Wright*, 468 U.S. 737, 752 (1984)). Accordingly, defendants often levy—and courts often resolve—challenges to individual claimants' standing. *See, e.g.*, *Gladstone Realtors* v. *Vill. of Bellwood*, 441 U.S. 91, 112 n.25, 115-116 (1979) (concluding that certain plaintiffs had standing to assert claims and others did not); *Cal. Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 66-70 (1974) (rejecting constitutional challenge by banking plaintiffs on the merits, but declining to consider merits of a "similar challenge by the depositor plaintiffs" because "the depositor plaintiffs lack standing"); *Hochendoner*, 823 F.3d at 733 ("the plaintiff-by-plaintiff and claim-by-claim analysis required by standing doctrine demands allegations linking each plaintiff to each of these injuries"); *Fontenot* v. *McCraw*, 777 F.3d 741, 746 (5th Cir. 2015) ("The court must evaluate each plaintiff's Article III standing for each claim; 'standing is not dispensed in gross.'" (quoting *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996))).

The same rule should apply to intervenors, who do not simply join existing party filings, but instead file their own separate pleadings. *See* Fed. R. Civ. P. 24(c); *cf. Bullcreek* v. *NRC*, 359 F.3d 536, 540 (D.C. Cir. 2004) (finding it "undisputed that [one petitioner] has standing," and "inasmuch as the petitioners have filed a joint brief, the court need not decide whether the other petitioners have standing" (citation omitted)). Once intervention is granted, intervenors have the privileges of original parties, can develop distinct litigation strategies, and can make

their own discovery demands. 7C Charles Alan Wright et al., *Federal Practice and Procedure* §§ 1920-1921 (3d ed. Apr. 2016 update); *see* Pet. App. 18a (explaining that Laroe and Sherman "disagree about litigation strategy and on the issue of damages"); Br. in Opp. 5 (claiming that "Sherman is [Laroe's] 'adversary' "). It is only logical that they should also share the burdens of the original parties—including the need to satisfy Article III standing requirements. Pet. 19; Int'l Municipal Lawyers Ass'n Amicus Br. 2-14. The court of appeals' contrary ruling was erroneous, and inconsistent with this Court's precedent.

III. THIS CASE PROVIDES THE IDEAL VEHICLE TO RESOLVE THE SPLIT

Laroe does not dispute that the Court has never before been presented with a clean vehicle to resolve the question presented. *See* Pet. 24-26. This case finally offers it one: The question proposed for review was pressed below, squarely answered by the lower courts, and is fairly presented by the petition—none of which Laroe contests.

Laroe instead argues (at 14-15) that this case, too, is a poor vehicle because the lower courts did not *also* resolve Laroe's entitlement to intervene under Rule 24. To the contrary; this case is a clean vehicle to decide the issue *because* "[b]oth the District Court and the Second Circuit based their opinions on Article III standing" exclusively. Br. in Opp. 14; *see* Pet. App. 1a-2a, 57a. Rule 24 brings into play other considerations and factual matters that do nothing to illuminate the purely legal Article III question presented.

Indeed, delaying the case so the district court could consider the Rule 24 question would likely block this Court's capacity to hear it. If the district court granted intervention under Rule 24, the Town could not appeal the order until the case proceeded through discovery, dispositive motions, and potentially a trial—and reached final judgment. *See Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987) (no immediate appeal as of right from order granting intervention). At that point, most of the costs imposed by Laroe's involvement in the case would be irreversible, and there would be scant benefit to obtaining reversal of the intervention motion. Laroe's suggestion that the Court delay review is therefore for all practical purposes a bid to deny it.

Laroe separately argues (at 15) that resolution of the question presented is unlikely to be outcome determinative in this case because, even if Article III standing is required, Laroe "easily" could demonstrate it. Of course, the district court held to the contrary, based on a straightforward application of circuit law. Pet. App. 55a-57a (citing *U.S. Olympic Comm.* v. *Intelicense Corp., S.A.*, 737 F.2d 263 (2d Cir. 1984)). And this issue, too, is irrelevant to the Court's capacity to resolve the question presented. Laroe simply identifies a case-specific Article III standing issue for a potential remand, not a reason to deny review.

Moreover, it is critical to recognize that *no* case could satisfy both of Laroe's vehicle-related objections. Circuits that require Article III standing cannot reach the Rule 24 question once they conclude that standing is lacking. *See Steel Co.* v. *Citizens for*

a Better Env't, 523 U.S. 83, 93-102 (1998); *see also, e.g.*, *Deutsche Bank Nat'l Tr. Co.* v. *FDIC*, 717 F.3d 189, 194 n.4 (D.C. Cir. 2013) ("it would be improper to decide the Rule 24 issue" before "Article III standing, [which] is a threshold, jurisdiction concept"). And circuits that do not require Article III standing have no reason to reach the standing question at all. Accordingly, the Court will likely never encounter a case in which the court below resolved both the Rule 24 question and the Article III question. Accepting Laroe's rationale for denying review would render the question presented "effectively unreviewable." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672 (2009) (explaining collateral-order doctrine). Laroe's arguments should be rejected, and the circuit conflict resolved through this case.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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