

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**

**OPPOSITION TO MOTION OF
NANCY SHERMAN REQUESTING THAT
SHE BE DEEMED A RESPONDENT**

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INTRODUCTION

On February 7, 2017, Nancy Sherman filed a motion to be deemed a respondent in this case and to participate in oral argument. Sherman acknowledges that she chose not to take part in the proceedings below and that she has nothing to say about the legal issue on which this Court granted certiorari. The Court should deny Sherman's motion. At most, the Court should permit Sherman to file an *amicus curiae* brief in support of Petitioner Town of Chester or in support of neither party.

ARGUMENT

I. SHERMAN IS NOT ENTITLED TO PARTICIPATE AS A PARTY BEFORE THIS COURT

Sherman is not a party before this Court because she was not a party to the Second Circuit's proceedings below. There are no new circumstances that would warrant her participation now, and her contrary arguments are unavailing.

A. Under Rule 12.6, "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court." S. Ct. R. 12.6. This Court granted certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit, and there is no dispute that Sherman was not a "part[y] to the proceeding" in that court.¹ Indeed, Sherman's motion repeatedly acknowledges that she "chose not to participate in the appeal"

¹ Sherman's suggestion (Motion at 13) that interlocutory decisions are not "judgments" that this Court can review is plainly wrong. See Stephen M. Shapiro, et al., SUPREME COURT PRACTICE 282 (10th ed. 2013) ("The Supreme Court has unquestioned jurisdiction to review interlocutory judgments of federal courts of appeals[.]").

before the Second Circuit. Motion at 8; *see id.* at 12, 13, 14. Having failed to file an appearance in the Second Circuit, Sherman was “barred ... from being heard” in that court. 2d Cir. L.R. 12.3(c). She has no greater right to be heard as a party here. *Cf.* S. Ct. R. 12.6.

Moreover, Sherman waived any right to object to Respondent Laroe Estates, Inc.’s intervention because she failed to raise her objections below. Despite ample opportunity to do so, Sherman chose not to respond to Laroe’s motion to intervene in the district court. Nor did she attempt to participate in Laroe’s Second Circuit appeal. Sherman has accordingly waived any right to raise her objections for the first time now. *See, e.g., In re Troutman Enters., Inc.*, 286 F.3d 359, 363 (6th Cir. 2002); *Transamerica Ins. Co. v. South*, 125 F.3d 392, 396 (7th Cir. 1997); *Martindell v. Int’l Tel. & Tel. Co.*, 594 F.2d 291, 294 (2d Cir. 1979); 7C Fed. Prac. & Proc. Civ. § 1914 (3d ed.) (“[A]n existing party that does not object to the application to intervene may waive its right to object later.”).

B. Without any citation or support, Sherman nevertheless insists that this Court should depart from the rule that only “parties to the proceeding in the court whose judgment is sought to be reviewed are ... entitled to file documents in this Court.” S. Ct. R. 12.6. All of her arguments fail.

First, Sherman claims that her participation is necessary for the Court to decide this case. But this Court granted certiorari to consider a particular legal issue: whether intervenors participating in a case as of right must possess Article III standing. Sherman admits—repeatedly—that she had nothing to say about this

“narrow issue” in the Second Circuit (Motion at 12, 13, 14), and it is unclear what she would add now. Instead, Sherman’s request to participate as a party appears to be based on her mistaken belief that “this case stands on an entirely different footing” now that this Court has granted certiorari (*id.* at 12), and her concern that this Court may consider new questions that were not before the Second Circuit, including “whether Laroe has any rights vis-a-vis Sherman” (*id.* at 7), whether Laroe satisfies Rule 24 (*id.* at 8), and the extent of the rights of Sherman’s creditors and heirs (*id.* at 12). But those issues are beyond the scope of the question presented, and Sherman’s views on them have no bearing on the proceedings in this Court.

Second, Sherman claims that she has an interest in participating as a party now because Laroe’s motivation for intervening changed during the course of the Second Circuit appeal. *See id.* at 7. Nothing has changed: Laroe made clear in its original intervention motion that it seeks to protect its interest as the equitable owner of the real property that is the subject of Sherman’s takings claim (by virtue of having paid for the property in full). *See Mot. to Intervene* at 13-14, *Sherman v. Town of Chester*, No. 1:12-cv-00647-ER (S.D.N.Y. Mar. 31, 2015), ECF No. 26. It pressed the same argument before the Second Circuit, and again in its Brief in Opposition to Certiorari. *See Appellant’s Br.* at 5, 30, *Laroe Estates v. Town of Chester*, No. 15-01086 (2d Cir. 2015); BIO at 4-5. Laroe has never sought to “substitute itself for Sherman,” nor does it seek to “steal” any recovery that belongs

to Sherman. Motion at 7-8.² Sherman saw “no need” to address “the limited question presented” before the Second Circuit (*id.* at 13), and there are no changed circumstances that would warrant her participation in this Court’s resolution of that same question here.

Finally, the personal expertise of Sherman’s counsel has no bearing on whether Sherman is entitled to participate as a party before this Court. *See id.* at 10-12. Counsel’s “fee expectations” are likewise irrelevant. *Id.* at 6 n.9.

II. AT MOST, SHERMAN MAY FILE AN *AMICUS CURIAE* BRIEF

Although she is not entitled to party status, Sherman may file an *amicus* brief, either with the consent of both parties or by leave of the Court. *See* S. Ct. R. 37.3. Laroe does not oppose Sherman’s request to file an *amicus* brief in support of Petitioner or in support of neither party. The schedule for filing such a brief is appropriate because Sherman makes clear that she supports the Town and opposes Laroe’s intervention. *See* Motion at 3, 7, 8, 10 n.10. Laroe should therefore have an opportunity to respond to Sherman’s arguments.

Because Sherman can at most participate in this case as an *amicus*, her request for an extension of time should be denied. *See* S. Ct. R. 37.3(a) (“Motions to extend the time for filing an *amicus curiae* brief will not be entertained.”). In any event, the deadline for filing *amicus* briefs will afford Sherman ample time to

² Sherman also incorrectly suggests that Laroe is a mere creditor. *See* Motion at 6-7. The Second Circuit rejected a similar argument by the Town, *see* Pet. App. 12a n.2, 14a n.3, and “Laroe has never premised its claim upon its status as a secured creditor,” Reply ISO Mot. to Intervene at 2, *Sherman*, No. 1:12-cv-00647-ER, ECF No. 38.

incorporate citations to the record and address the Town's arguments. *See* Motion at 15-16 (requesting seven-day extension from February 27, 2017).

Finally, Sherman has no right to participate in oral argument absent consent from the party she supports (here, the Town) and leave of the Court. *See* S. Ct. R. 28.7. If the relevant party withholds consent, this Court will permit argument by an *amicus* "only in the most extraordinary circumstances." *Id.* There are no such circumstances here.³

CONCLUSION

Sherman's motion to participate as a party should be denied, along with her requests to participate in oral argument and for an extension of time.

Respectfully submitted,

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February 15, 2017

³ Even if Sherman were a party (which she is not), she would still not be permitted automatically to participate in oral argument. "Only one attorney will be heard for each side, except by leave of the Court," and "[d]ivided argument is not favored." S. Ct. R. 28.4. Moreover, because Sherman seeks to support Petitioner, it would be inappropriate to allow her the same amount of argument time as both the Town and Laroe. *See* S. Ct. R. 28.3 ("Additional time is rarely accorded.").

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CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I certify that one copy of the Opposition to Motion of Nancy Sherman Requesting She Be Deemed a Respondent in *Town of Chester v. Laroe Estates, Inc.*, No. 16-605 was served via overnight mail on all entities required:

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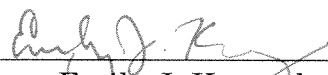
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I declare under penalty of perjury that the foregoing is true and correct.

Date: February 15, 2017



Emily J. Kennedy