Case 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

BRIEF FOR PLAINTIFF NANCY SHERMAN, EXECUTRIX, AS AMICUS CURIAE IN SUPPORT OF NEITHER PETITIONER NOR RESPONDENT, URGING REVERSAL

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Dated: March 6, 2017

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INTEREST OF THE AMICUS PLAINTIFF[1]

Amicus Curiae Nancy Sherman is executrix for the Estate of her late husband, Steven Sherman, the plaintiff below. This is the Sherman Estate's lawsuit. Respondent Laroe Estates, Inc. ("Laroe") is not a party below.

Mrs. Sherman did not participate in the appeal at the Second Circuit, for valid reasons including avoiding unnecessary appellate expense where the only issue was the challenge of the Petitioner Town of Chester ("Town") to the lack of constitutional standing by Laroe. Nevertheless, Mrs. Sherman is vitally interested in the proper adjudication of the appeal, as her Sherman lawsuit will be directly affected.

PLAINTIFF SHERMAN REQUESTS PARTICIPATION AT ORAL ARGUMENT

Mrs. Sherman is the plaintiff below, yet is not party to this appeal. Her counsel never anticipated a grant of *certiorari*, yet the grant creates on opportunity for justice, or the denial of justice. This Court's decision could greatly impact Sherman's rights and interests in several respects. Therefore, although Sherman did not address the narrow standing question at the Second Circuit, she requests a voice at oral argument here regarding the jurisdictional questions raised.

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[1] The captioned parties have consented to the filing of this brief. This brief is exclusively the undersigned's product with no outside monetary contribution.

Absent Sherman's input at oral argument, the Court will be disadvantaged. It will not hear Sherman's perspective, where the Town and Laroe are both very hostile adversaries to Sherman. The appellate counsel to both the Town and Laroe are new to the case. They cannot be expected to know all relevant and very complicated facts regarding a litigation commenced by Mr. Sherman's attorney (the undersigned) in 2008. They easily could make misstatements at oral argument unintentionally misrepresenting events. The undersigned is better equipped to provide answers and corrections at oral argument. And only he can provide Sherman's perspective as the civil rights victim.

Accordingly, Sherman requests participation at oral argument, so that the Estate's views can be heard. The Court can see from this *amicus curiae* brief that Sherman's arguments are very distinct from those proffered by Petitioner and Respondent. Only Sherman offers principled harmonization of Rule 24's intervention criteria with the standing requirements of Article III.

The Court will do itself a great disservice if it refuses to permit the plaintiff Sherman participation at oral argument. Justice, due process and the public interest require Sherman's input, even if the Court grants only 5 or 10 minutes of oral argument.

SUMMARY OF ARGUMENT

The Town will argue for and Laroe against requiring standing for intervention by right under Rule 24(a)(2). The best argument, however, is the argument presented by the plaintiff Sherman in this brief. Sherman's principled approach preserves and harmonizes the liberal goals of Rule 24 with the constitutional constraints of Article III. Neither the Town nor Laroe do this.

The Town argues for denying intervention to a person or entity that clearly meets Rule 24(a)(2)'s criteria for intervention by right, if standing to sue is lacking. Thus, the Town's argument substantially diminishes Rule 24(a)(2)'s coverage. The Town ignores the Rule 24 as a tool for helping a party in need of assistance, and the desirability of *pro bono publico* or otherwise generous intervenors who might be willing to help a party, even if lacking standing of their own.

The Respondent Laroe, on the other hand, argues that standing is not necessary because Rule 24 does not require it. An intervenor by right—even one who does not possess standing sufficient to sue in her own name—will under Laroe's view have full party status, with all litigation rights and privileges, merely by meeting the Rule 24(a)(2) criteria. Laroe's view is an affront to the limitations on judicial power contained in Article III—a jurisdictional question. Laroe's view allows a party without standing to fully displace a party with standing. Laroe seeks to displace Sherman in Sherman's own lawsuit. This will necessarily create a lawsuit within a lawsuit, because Laroe's effort to hijack Sherman's lawsuit will not go unopposed. Moreover, granting Laroe full party

status will empower it to obstruct settlement, to compound discovery, to demand trial, to demand attorney's fees, and to significantly burden both the plaintiff Sherman and the defendant Town. These and other pernicious effects are persuasively described in the Town's merits brief. Essentially, Laroe's position ignores the rights of the party that it ostensibly supports.

Plaintiff Sherman's principled approach, set forth at Point II below, permits a party to intervene by right if it meets the Rule 24(a)(2) criteria, while at the same time respecting Article III's constraints on federal judicial power. Thus:

- Only if the proposed intervenor has

  1) standing sufficient to viably sue in its own name, and

  2) standing to litigate against the party on whose side intervention is sought, if the relationship is adversarial,

is the proposed intervenor entitled to receive full party status in, and to employ the judicial power of, the federal courts.

- If the proposed intervenor does not have standing sufficient to sue in its own name, then it is allowed to proceed only to the extent it assists or aids the party supported and does not seek to control the supported party's lawsuit. If the proposed intervenor asserts claims against the party on whose side intervention is sought, creating an adversarial relationship that will require adjudication by the federal court, then it is not a permissible intervenor, absent meeting the requirements of diversity jurisdiction. Such

intervenor has no standing to ask the federal court to adjudicate the dispute, as the federal court has no Article III power to do so.

Under the above approach, absent the proposed intervenor possessing requisite standing, the federal judicial power is employed exclusively on behalf of an existing party, with the "non-Article III Intervenor's role limited to assisting the party supported. It has a voice, but not a veto.

Sherman's principled approach will allow Laroe to aid or assist the Sherman Estate in win a recovery against the wrongdoing Town, which funds can then be distributed to Mr. Sherman's creditors and heirs. Laroe will benefit from this, if it can establish itself as a *bona fide* Estate creditor. This approach prevents Laroe from hijacking or otherwise taking control of Sherman's lawsuit, and prevents Laroe from burdening the federal courts with a "equitable title" or related State law controversy over which the district court has no Article III jurisdiction.

RELEVANT FACTS

A. Overview

Mr. Sherman began seeking to develop his 398 acres of residentially zoned land ("MareBrook") in 2000. He was obstructed by the Town in many respects. *See*, *Sherman v Town of Chester*, 752 F.3d 554 (2d Cir 2014).

For example, Mr. Sherman was forced to sue in 2002 to end the Town's 18 month development moratorium. He should have received subdivision preliminary approval in 2003, but the Town changed its zoning. Then again, again, and again.

Due to the Town's obstruction, Mr. Sherman sought help from various business entities, for example TD Bank and Laroe (both of whom have filed claims against the Sherman Estate). *See*, C. below.

Mr. Sherman commenced a federal lawsuit that included a takings claim in May 2008. He litigated that action in federal court until confronted by the Town's *Williamson County*[2] ripeness defense, at which time he requested and received a "so-ordered" dismissal of the federal action on January 6, 2012, and then immediately re-commenced the lawsuit in State court.[3] The Town promptly removed the Sherman's lawsuit to U.S. District Court. The District Court dismissed the action while his counsel was away,[4] and Sherman then appealed. The Second Circuit reversed. *See, Sherman, supra*. Due to cancer, Mr. Sherman did not live to see the Second Circuit's reversal, and the restoration of his takings claim by the Second

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[2] *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

[3] Mr. Sherman expected tolling of the limitation period under 28 U.S.C. §1367(d), but the District Court denied this right. The Sherman Estate believes it can prevail if appeal becomes necessary, as the dismissed was "so ordered." By attempting to comply with *Williamson County*, Sherman has been deprived of almost 4 years for limitations purposes. *Cert Pet.*, 35a. Unlike Sherman, Laroe's intervenor complaint does not show that it sought State court exhaustion (it did not) and thus is fatally defective.

[4] The undersigned served as a U.S. Army JAG officer in Kandahar, Afghanistan, during most of 2012.

Circuit. Mr. Sherman's widow was substituted as executrix of his Estate.

B. Laroe emerges out of the woodwork

Shortly after the Second Circuit's 2014 reversal of the dismissal in *Sherman, supra,* Laroe sprung out of the woodwork. It formally moved to intervene in late July 2014. The Town opposed intervention. Plaintiff Sherman took no position, as it appeared that Laroe was intervening in order to assist the Sherman Estate.[5] Laroe's motion to intervene was denied by the District Court, based on Laroe's lack of standing. The Second Circuit reversed. *Cert. Pet.* 1a ("*Laroe v. Town*"[6]).

It now seems that Laroe's intention, if it is permitted to intervene, is to hijack Sherman's case and recover most if not all takings proceeds for itself. The Sherman Estate intended to oppose Laroe's intervention based upon Rule 24(a)(2)'s criteria, per the Second Circuit's ruling, if Laroe persisted with its adversarial approach. However, this Court's unexpected[7] grant of *certiorari* preempted Sherman's planned opposition.

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[5] Laroe was not clear about its intentions at the Second Circuit: "Although it is unclear from the record whether Laroe believes the Town is directly liable to Sherman or Laroe for the alleged taking, Laroe has acknowledged that its damages are essentially the same as Sherman's. Oral Arg. Tr. 16." *Cert. Pet.* 9a (*emphasis added*).

[6] *Laroe Estates, Inc. v. Town of Chester*, 828 F. 3d 60 (2d Cir. 2016).

[7] Plaintiff Sherman's attorney had no reason to anticipate that the Court would take this case, especially since he has tried for years to get one of his sympathetic civil

C. Laroe has no rights superior to any other Sherman Estate creditor

The Sherman Estate certainly disputes Laroe's claim of "equitable title" or anything purporting to entitle Laroe to takings damages from the Town. It is true that Laroe paid over $2 million to Sherman in connection with MareBrook. Yet Laroe is one of several Sherman lenders, the largest being TD Bank which foreclosed on and took title to MareBrook and has a claim of well over $5 million filed with the Sherman Estate.

In 2003 Sherman entered a purchase agreement with Laroe where Laroe would pay $6 million in interim payment and $60,000 per lot to Sherman (e.g., $15 million for 250 lots) for MareBrook's development. The Town's obstruction prevented development, making the contract impossible to perform and so void or voidable.[8] Ten years later, around May 2013, when Mr. Sherman was undergoing chemotherapy and soon to die of cancer, Laroe entered into another (purported) agreement (the 2013 Agreement).[9] In the 2013 Agreement, Laroe obtained one single right from Mr. Sherman—the right to take the deed and possession of MareBrook from Mr. Sherman if Laroe paid off TD Bank's mortgage. Laroe declined

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rights cases heard by this Court. *See, e.g., Caruso v. Zugibe*, No. 16-7509 (docketed January 12, 2017).

[8] *See, e.g., 407 E. 61st Garage v Savoy Fifth Ave. Corp.,* 23 N.Y.2d 275, 296 N.Y.S.2d 338, 244 N.E.2d 37 (1968); 10 N. Y. JUR 2D., *Contracts*, § 384.

[9] The Town and Laroe do not provide these agreements in their Joint Appendix, but the agreements are in the record below.

to do so. Laroe thus waived its recourse, and had no further recourse against Sherman.

At no time did Mr. Sherman ever give Laroe any assignment of rights. The 2003 Agreement is explicit as to this. Mr. Sherman not an agent, partner or joint venturer with Laroe. *See*, 2003 Agreement at ¶ 18(u).[10]

Thus, at most Laroe has a possible monetary claim against the Sherman Estate under the 2003 Agreement, and had the right to have Mr. Sherman tender Laroe a deed if Laroe paid off TD Bank's mortgage, per the 2013 Agreement.

The takings claim against the Town is Sherman's not Laroe's. The Town caused Sherman injury, including the need to seek Laroe's and other lenders' financial help. For this, Mr. Sherman sought a remedy in federal court.

D. Additional Relevant Facts

As relevant to this appeal, this Court can take judicial notice, based upon publicly filed court documents, that Mr. Sherman and then his Estate, represented by the undersigned, has been actively and vigorously representing Mr. Sherman and then the Estate's interest since 2008. The Sherman Estate and the undersigned have at all times been trying to move this case forward as fast and

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[10] The 2003 Agreement, at ¶ 18 (u), explicitly states that the Sherman-Laroe agreement "… does not create any agency relationship, joint venture or partnership, expressly or implicitly, with regard to the acquisition of the Approvals or any subject matter of this Agreement." (*emphasis added*). *See*, *Sherman v. Chester*, 12-cv-00647 Doc. No. 19-5 (SDNY).

efficiently as possible. *Cf.*, *Cert Pet.*, 13a. The Sherman Estate is not "impecunious" or "without funds." *Id.* Its resources, though not unlimited, are sufficient to prosecute the underlying takings litigation against the Town. Laroe's assertions to the contrary are hearsay, disputed and irrelevant to the issue at hand—Laroe's standing.

Second, although Laroe was not clear at the Second Circuit as to its intentions,[11] presently Laroe clearly seeks to recover money for itself directly, and not for the Sherman Estate. Thus, it seeks relief different from Sherman's, namely, relief for itself directly. It essentially seeks to take over the Sherman lawsuit as the real party in interest. Laroe's position is adversarial to Sherman's.[12] Thus, Laroe by necessity will

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[11] *Id.*, at *9a* (and *supra*, note 5).

[12] Because the federal courts are without Article III jurisdiction to adjudicate Laroe's purported claims against Sherman, it is unnecessary for Sherman to devote substantial ink explaining why Laroe has no cognizable "equitable title" takings claim. Otherwise, Sherman could explain in detail why the documents Laroe offers below fail to support its "equitable title" assertions. Why Laroe has no plausible argument that it is a proper party-plaintiff in its own right in the underlying *Sherman v. Town of Chester* lawsuit. Why Laroe could never have filed a takings lawsuit in its own right regarding MareBrook. That Laroe never held title. That it was not an applicant. That it did not do any work, encounter obstruction, or suffer a regulatory "death by a thousand cuts." *Cert Pet.*, 25a. That it never sought the State court review required under *Williamson County*. And that after 2013 it did not exercise its right to pay off TD Bank and take title to MareBrook, where it could have then tried getting its own land use approvals from the Town.

eventually be asking the federal court to decide its rights *vis à vis* Sherman under New York law.[13]

Third, Laroe put in a claim as a creditor of the Sherman Estate. If Laroe believes that Mr. Sherman owes Laroe financial obligations based upon their prior dealings, such as the 2003 Agreement, the appropriate forum for Laroe to seek redress is the New York State Surrogate's Court.

Fourth, Sherman's undersigned counsel has represented Sherman and the Sherman Estate on a largely contingency fee basis, with at least a partial expectation that fees can be recovered against the wrongdoing defendant Town under the fee shifting provisions of 42 U.S.C. § 1988. Yet counsel did not foresee that one of Mr. Sherman's prior business associates would attempt to hijack the lawsuit. Civil rights attorneys will be reluctant to take worthy cases if officious or malicious intermeddlers can intervene and take over.

Finally, the underlying District Court litigation will become inordinately complex, and perhaps severely and unfairly disadvantageous to the Sherman Estate, if an entity claiming an interest but having no standing is permitted either to hijack the lawsuit or otherwise inextricably insert itself into the case. Settlement may become impossible, discovery convoluted, trial unwieldy, and the overall additional expense in time and resources to Sherman, the Town and the Court

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[13] In essence, Laroe's intervention efforts would be akin to a *de facto* third party complaint against the Sherman Estate. There is no Article III jurisdiction present for this.

entirely unnecessary and very burdensome.

ARGUMENT

I.
Rule 24(a)(2) cannot bestow "full party status" upon Laroe, as it lacks standing to sue both the defendant (Town) and the plaintiff (Sherman)

Article III of the Constitution does not permit the federal courts to bestow "full party status" upon a prospective intervenor under F.R.C.P. Rule 24 if the intervenor lacks standing. It does not matter whether the intervention is permissive or by right. The exercise of federal judicial power requires a judiciable controversy—this is jurisdictional and non-waivable. Standing requires a justiciable controversy between the Intervenor and the Defendant, and if there is a controversy between the Intervenor and the Plaintiff, that too must be justiciable. The court below focused *Intervenor vs. Defendant* standing, not *Intervenor vs. Plaintiff* standing. Yet the Question Presented includes both.

Here, Laroe lacks standing in two respects. First, it lacks standing to sue the Town for taking MareBrook. Second, because of Laroe's adversarial posture as to Sherman, Laroe lacks standing to ask the federal court to adjudicate any legal dispute it may have with Sherman.

Laroe is not entitled to full party status on either of these standing grounds. It cannot be granted full party status under Rule 24 because Article III prohibits the exercise of judicial power

in favor of Laroe, because Laroe is not entitled to assert a claim on its own in federal court against either the Town or against Sherman. It has no standing to fight either one in federal court.

However, Rule 24 does not require that "full party status" or federal judicial power be granted to the proposed intervenor. As argued in Point II below, the federal courts can grant intervention (by right or by permission) to a party lacking its own standing, but only if the Intervenor is not bestowed with control of the litigation on the side of the party that the intervenor favors. The intervenor without standing can be assistive but not adversarial to the side supported. It cannot be given full party rights. It can only be allowed to help—given a voice but not a veto. In this manner, the district court's power is exercised only on behalf of the original parties, even though one of those parties now has a helper—the intervenor. This approach effectuates the important goals of Rule 24, while completely honoring the judicial limits imposed by Article III.

With Laroe's help, the Sherman Estate might be better able to prosecute its federal takings case against the Town.[14] But if Laroe is adversarial to

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[14] With non-adversarial assistance, the nature and character of the case will not be altered. Mrs. Sherman will simply have greater resources to fight the defendant Town for the benefit of the Estate and its potential creditors (including Laroe).

In contrast, if Laroe is allowed to become an entirely new party, then an entirely new case has begun (actually two new cases: *Laroe vs. Town* and *Laroe vs. Sherman*.) The Second Circuit would not permit this under its teachings in *Washington Electric,* cited in its decision being challenged here. *See*, *Washington Elec. Co-op., Inc. v.*

Sherman, it will not qualify for intervention, because absent diversity, Article III does not empower the federal court to entertain what will amount to an *Intervenor vs. Party* lawsuit within the *Plaintiff vs. Defendant* lawsuit.

A. Absent standing, Rule 24 allows an intervenor's voice but not its veto

What F.R.C.P. Rule 24 states on its face, and how the federal courts have interpreted it, are two very different things. On its face, the rule does not explicitly grant an intervenor a status equivalent to that of a party. It does not state that the intervenor becomes a "plaintiff" or a "defendant." It does not provide for the filing of an "intervenor's complaint." *Cf. J.A.* 148 (Laroe's complaint).[15] The statutory language disallows intervention if the existing party can "adequately represent [the prospective intervenor's] interest." This strongly suggests that an intervenor is not entitled to "full party status" absent being able to sue on its own.

A common sense view of Rule 24 intervention that a Congressman or overworked lawyer might find is found on (admittedly non-authoritative) WIKIPEDIA.[16] It describes a view of intervention that makes sense—that intervention allows the

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Massachusetts Mun. Wholesale Elec. Co., 922 F.2d 92, 96–97 (2d Cir. 1990)("Intervenors must take the pleadings in a case as they find them. *** The purpose of the rule allowing intervention is to prevent a multiplicity of suits where common questions of law or fact are involved.")(*emphasis added*).

[15] *See, Washington Electric*, *supra* ("Intervenors must take the pleadings in a case as they find them.").

[16] *See*, https://en.wikipedia.org/wiki/Intervention_(law).

intervenor a "voice." This Court should agree. It should hold that intervention is not equivalent to a substitution of parties or a consolidation of actions, but rather, that the core purpose of Rule 24 is to allow a person or entity the opportunity to be heard—a voice. The core purpose is not to establish rights as a party, although that may be bestowed if proposed intervenor qualifies for such status because it possesses an independent right to sue. But if the proposed intervenor is without standing, then it cannot be given the full rights of a party, nor given the ability to take control of or hijack a lawsuit from an existing party.

The concept that intervention grants a voice makes sense. Existing federal case law on intervention, however, is often strained in this regard.[17] It is judicial interpretation,[18] not Rule 24's plain text, that has equated intervenor status as "party-plaintiff" or "party—defendant" status. The courts have pigeon-holed "intervenors" as being lumped as either plaintiff or defendant, rather than simply being a "intervenor" or "party-intervenor." The courts have presumed to bestow "party" status upon intervenors, where Rule 24 does not. What the courts should say is: "The voice and status allowed an intervenor depends upon Article III."

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[17] *See*, *e.g.*, *Cummings v. United States*, 704 F.2d 437, 440 (9th Cir.1983)(intervention of an insurer-subrogee was essentially equivalent to a *pro tanto* substitution of the real party in interest).

[18] *See*, e.g., *U.S. ex rel. Eisenstein v. City of N.Y., N.Y.,* 556 U.S. 928, 933 (2009)("A 'party' to litigation is '[o]ne by or against whom a lawsuit is brought.'").

The Second Circuit was perhaps wise in this regard. Its *Laroe v. Town* decision below does not state that Laroe would be a full-fledged party with the same rights as the Sherman Estate and the Town. Rather, the Second Circuit merely opined that Rule 24:

> "asks only whether the proposed intervenor has an 'interest in the proceeding' that is 'direct, substantial, and legally protectable.'"

Cert Pet., at 16a; 828 F.3d at 69. The Second Circuit did not state what "rights" the federal judiciary would necessarily extend.

As argued at Point II below, this is a view that is consistent with Laroe being permitted to intervene for the purpose of helping recover money for the Sherman Estate (where Laroe filed a claim).[19] It is not consistent with Laroe taking over the takings claim in its own right, by becoming a co-plaintiff (*Laroe vs. Town*) or a *de facto* third party plaintiff (*Laroe vs. Sherman*) while lacking requisite standing to sue on its own.

If Laroe had its own independent takings claim to assert against the Town, it should have commenced its own separate action and then moved to consolidate.[20] It would then become a co-

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[19] This is very consistent with protecting a beneficiary to trust assets, such as the Sherman Estate's assets, as argued in Petitioner's Brief at p. 8-9.

[20] If as Laroe asserts it had contractually obtained basically all of Mr. Sherman's rights in MareBrook, and the Sherman Estate agreed and stipulated to this (it won't), then Laroe could have moved for substitution under F.R.C.P. Rule 25(c). However, any conflict between Laroe and Sherman in this regard could not properly be

plaintiff. Similarly, if Laroe believes it should have held actual title, rather than its undisclosed "equitable title," it could have sued in State court and recovered, for example, a declaratory judgment that it, not Sherman, should be deemed the title owner to MareBrook. Laroe then could have moved to substitute itself for Sherman under F.R.C.P. 25(c), based upon the transferred interest.

Laroe took neither step and thus established no rights. Instead, it takes the role of officious or malicious intermeddler, seeking to hijack a case in which it has no right to belong.

Only if Laroe chooses to become an ally of Sherman, rather than an adversary, and agrees to assist the Sherman Estate in recovering assets for the Estate (with potential benefit to Laroe as an Estate claimant), then there is no dispute, no Laroe-Sherman controversy, and Laroe it should be permitted to help Sherman as a "non-Article III Intervenor. *See*, Point II, below.

B. Lacking its own takings claim and in conflict with Sherman, Laroe has no standing for both reasons

There are two Article III reasons why Laroe cannot be permitted to intervene with full party status. First, for all the reasons stated in the Petitioner Town's merits brief and as further argued below, an intervenor without independent standing to pursue the lawsuit in its own name cannot be bestowed with full party status. The

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resolved in the federal court, as it has no Article III jurisdiction to adjudicate such a "controversy" between these same-state citizens.

burdens placed on the original parties and the federal courts are simply too great, and judicial power under Article III is lacking.

Second, because there is a contentious legal dispute between the proposed Intervenor and the original, the federal court must examine whether it has Article III power to adjudicate such dispute. Here it does not. It has no jurisdiction to do so.

1. *Laroe has no plausible grounds allowing it to sue the Town for its taking of MareBrook*

The Town persuasively argues in its brief why Laroe could not viably sue the Town for a takings, where Laroe was essentially a stranger to the Town. The District Court was correct in this regard. *Cert Pet.*, 53a – 58a.

Laroe cannot plausibly assert that it could ever have sued the Town for its alleged taking of MareBrook. MareBrook was at all relevant times titled in Mr. Sherman's name, and Sherman was never the agent, partner or joint venturer of Laroe. Laroe's rights under the purported 2013 Agreement were limited to paying off TD Bank's mortgage and then taking a deed from Sherman. Laroe did not pay off the TD Bank, and the property was thus lost in foreclosure.

If Laroe had a *bona fide* takings claim, it should have asserted it long ago and then, if it wished, moved to consolidate its lawsuit with Sherman's. *See*, F.R.C.P. 42(a)(2). If Laroe wanted actual title (and responsibility for the Town's tax bills) rather than merely its purported equitable title, it could have sued Sherman for such relief in State court,

obtained title, and then moved for substitution as party plaintiff under F.R.C.P. 25(c). It did not.

Laroe's proposed intervenor's complaint is fatally defective in many respects. The Second Circuit directed the lower court to examine the "equitable title" dispute, as potentially being viable. *Cert Pet.*, 17a. That could be relevant regarding the N.Y.S. Surrogate's Court proceeding. As to an independent takings claim, if Laroe sued rather than moved to intervene in 2014, its 3 years limitations period would have included comparatively nothing, as the *Sherman v. Chester* wrongdoing was almost all before then. Most significantly, Laroe's proposed intervenor's complaint is fatally defective on its face, because it fails to allege *Williamson County* exhaustion, namely, that Laroe first pursued a takings remedy in State court.[21] Laroe did not (and could not).

In sum, Laroe could not sue the Town on its own. Any rights that Laroe believes it may have had against Sherman needed to be resolved, if anywhere, in the New York courts. Laroe has no standing to assert Sherman's takings claim in the federal courts. Thus, Laroe has no right to intervene with full party status.

2. *Laroe cannot sue Sherman in federal court, and so lacks standing to fight Sherman there*

In this case, the Sherman Estate asserts a takings claim for all damages Mr. Sherman suffered at the hands of the Town. Six years after Mr. Sherman first filed suit, in 2014, Laroe

[21] *See* note 2 *supra* and accompanying text.

appeared on the scene asserting that it is the real party in interest and that it is entitled to essentially all of Sherman's damages. The Sherman Estate vehemently disputes Laroe's claims. Thus, there is a legal controversy. It is essentially a *de facto* third party complaint, *Laroe vs. Sherman*. However, as to such controversy, the federal courts lack power under Article III.

The exercise of Article III power requires that the claim arise under federal law. The Sherman-Laroe agreements and any dispute relating thereto certainly do not involve the same operative facts as Sherman's takings claim. As to their contractual issues, there is no diversity (Laroe and Sherman are both citizens of New York), no federal question and no supplemental jurisdiction.[22] Thus, as between Sherman and Laroe, there is no justiciable Article III "case or controversy." Laroe's contentions are for a New York court to decide, not a federal court. Any Second Circuit instruction suggesting otherwise was error.[23] Laroe has no standing to bring what amounts to a *de facto* third party complaint against Sherman in federal court. Any Laroe-Sherman dispute was and is for New York State court adjudication.

Specifically, Laroe's recourse is in the Surrogate's Court. Apart from the frivolousness of Laroe's "equitable title" assertions, Laroe's own description of its entitlement involves the Sherman-Laroe 2003 Agreement, a (purported)

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[22] *Cf.., Owen Equip. & Erection Co. v. Kroger,* 437 U.S. 365, 371 (1978)(common nucleus of operative facts).

[23] The Second Circuit's ruling need not be read to extend so far. *See*, note 25 *infra*.

rabbinical court arbitration,[24] and the purported 2013 Agreement (executed shortly before Mr. Sherman died, while he was on chemotherapy) wherein Laroe was given the right to take title if it paid off the TD Bank mortgage. None of these Sherman-Laroe contractual issues involve any federal question. These are frivolous claims, but even if plausible, the claims involve complicated factual and State law issues that are exclusively within the province of the State courts to adjudicate, not the federal courts.[25]

Laroe and Sherman are presently adversaries. Laroe wishes to insert itself into the *Sherman v. Town* lawsuit, to take it over. Laroe wants all of any recovery against the Town, and to stiff all of Mr. Sherman's other creditors and heirs in the process. To the extent that Laroe can receive the ear of a court, this will be a nasty fight. It is not a fight that should be allowed in federal court. Laroe's adversarial presence will create a litigation nightmare for Sherman, the Town and any court entertaining the dispute. If Laroe is permitted to pursue its "equitable title" claim in federal court against Sherman, what may follow is mischief like one might expect from a scorned lover

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[24] *Cert Pet.*, at 57a, n. 19.

[25] The Second Circuit directed the lower court to examine Laroe's equitable title assertions. *Cert Pet.*, 17a; 828 F.3d at 70. This could inform the District Court as to whether Laroe has a potentially valid Surrogate's Court claim against Sherman for Rule 24(a)(2) criteria purposes. However, the Second Circuit should not be viewed as directing that the district court adjudicate a State law dispute between Laroe and Sherman. *Id.* This Court should hold that any such adjudication will offend Article III.

desiring palimony being allowed intervention into a husband-wife's matrimonial action.

This Court's response must be clear, by holding that there is no Article III judicial power to adjudicate any Laroe-Sherman dispute. There is no diversity jurisdiction, no federal question, only contract claims totally independent from Sherman's takings claim against the Town.

C. Permitting Laroe "full party status" without standing will impair the original parties' rights and unconstitutionally burden the federal courts

1. *Obstruction of possible settlement, discovery, trial and appeal*

If Laroe, as an intervenor, is allowed full party status it will essentially be allowed to obstruct any settlement that might be negotiated between the Sherman Estate and the Town. It will be able to extort payments that it would not be able to recover on its own, as it could not sue on its own.

It is thus apparent that allowing Laroe full party status will be highly detrimental, and unfairly so, towards both Sherman and the Town. Full party status will allow Laroe to veto any agreement that may be reached between the existing plaintiff and defendant (Sherman and the Town), unless Laroe receives something in return. Laroe will thus be able to obtain proceeds, even though Laroe is entitled to nothing (as its rights are derivative—as a potential creditor of the Sherman Estate). Granting Laroe the rights of a party will grant it the right to be troublesome and a nuisance. Rule 24 is certainly not intended to allow this, and Article III forbids it.

Allowing Laroe full party status will allow it to dictate the course of the federal action. Not only will it be allowed to prevent a settlement between the Sherman and the Town, but it will have the right to engage in discovery, including against Sherman regarding the competing interests. A *Laroe vs. Sherman* adversarial proceeding will arise within the existing federal action. Laroe may demand a trial, where it will ask that the jury decide in favor of Laroe and against Sherman as to damages. If it disagrees with damages being awarded to Sherman, it may join the Town in an appeal. And if Sherman ultimately succeeds in full, the district court will need then to adjudicate whether Sherman should be entitled to all or only a portion of a requested 42 U.S.C. § 1988 fee-shifting award, where the Town will certainly argue that its taxpayers should not be responsible for the *Laroe vs. Sherman* expenditures in the *Sherman vs. Town* case. This Court should view these potentialities as intolerable, and certainly not what is intended by Rule 24 or allowed by Article III.

2. *Allowing an officious or malicious intermeddler full party status will invite the abuse of process*

Laroe stands no differently from any other Sherman creditor, yet it seeks to pursue a direct action against the Town, at the expense of all other *bona fide* Estate creditors and the heirs. Another creditor, and even the widow, could claim "Mr. Sherman promised me the land." Any such claims must be pursued, if anywhere, in State court (e.g., the Surrogate's Court).

Laroe is not a necessary or proper party in federal court. Its motive is ulterior. It knows that its submission to the Surrogate's Court is inferior to the much larger creditor, TD Bank. So Laroe seeks to avoid the Surrogate's Court altogether by intruding directly into the Sherman takings lawsuit, where it hopes to obtain money directly from the Town.

Laroe's efforts to intervene essentially amount to an effort to abuse judicial process. Laroe should know that it has no legal basis for stepping into Mr. Sherman's or his Estate's shoes, yet Laroe is doing so to coerce Mrs. Sherman and the Town into paying it something, or to bamboozle the federal courts into allowing it entry into the courthouse. Yet the proper venue—the only permissible venue—is the New York State Surrogate's Court.

3. *Hindrance of civil rights' objectives of §1983 and §1988*

This is a civil rights action under 42 U.S.C. § 1983. Attorney's fees are recoverable under the fee-shifting provisions of 42 U.S.C. § 1988.

If this Court allows an intervenor to come in with full party status in the circumstances of this case, it will create a tremendous disincentive for plaintiffs' attorneys (such as the undersigned) to become involved in such cases. The record suggests that Laroe seeks to take over the *Sherman v. Town of Chester* case basically in its entirety. What this means is that Sherman's counsel, after 9 years of fighting the wrongdoing Town, now has another lawsuit to simultaneously wage—a "lawsuit within the lawsuit" against Laroe.

Sherman has been proceeding on the basis that the Sherman Estate may be able to recover attorney's fees against the Town after the case is won, as Sherman will then be a "prevailing party." If Laroe remains in the case, however, an unpredictable amount of time—discovery, motions, trial, appeal—may be devoted to fending off Laroe, rather than fighting the defendant Town. Counsel's time should be reimbursed by someone, but the Sherman Estate will have no recourse for attorney's fees against Laroe, and might have none against the Town regarding the efforts employed to oppose Laroe's mischief. If this Court endorses Laroe's mischief, it will create a strong disincentive for attorneys like the undersigned to pursue similar civil rights litigation. Congress certainly did not intend to stifle civil rights actions by approving Rule 24.

II.
Principled Approach to Rule 24—limited "non-Article III intervention"

The Sherman Estate proposes a principled answer to the Question Presented. This Court can honor the language and intent of both Rule 24 and Article III by requiring that the lower courts determine in the first instance whether a proposed intervenor has requisite standing. If it does, and otherwise meets Rule 24's requirements, it can be deemed an intervenor with full party status.

However, if the proposed intervenor (such as Laroe) lacks standing,[26] then the District Court

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[26] Requisite standing may be absent 1) because the person lacks independent standing sufficient bring its own independent lawsuit, or 2) because the person is in

should deem it a "non-Article III Intervenor." This is a limited status indicating that this intervenor does not have the same "full party" rights of Article III-qualified intervenors possessing requisite standing. As a consequence, the non-Article III Intervenor is limited to aiding the party on whose side it intervenes—a voice, not a veto.

Aiding the party it supports is a tool for justice. It is a means by which an intervenor supporting a plaintiff such as Sherman can help "David fight Goliath." This will not offend the Constitution. Rather, it will assist in its promise of "liberty and justice for all."[27] It is an approach that is consistent this Court's holdings in *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 537, 539 (1972)(member allowed participation as long as member sought same relief as the existing plaintiff) and *Diamond v. Charles*, 476 U.S. 54, 68–69 (1986)(intervenor wishing to appeal on its own must satisfy Article III's standing requirements). *Cf., Cert Pet.*, 9a.

Assume *arguendo* that Laroe was the largest potential creditor of the Sherman Estate (*it is not*), and assume *arguendo* that the Sherman Estate

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conflict with the party on whose side the person seeks to intervene, yet lacks diversity of citizenship required by Article III.

[27] "Justice for all" and the right to petition government are overarching principles. These principles are much more important than the Town's argument that Article III should be strictly applied because district court judges are presently overworked. The courts' customers are the citizens of this Nation, and their reliance upon the Constitution and this Court to protect the People, their Rights, and their Democracy.

was impecunious and did not have an attorney to represent it (*not so*). It certainly would seem appropriate to allow Laroe to intervene, and perhaps even intervene "by right," in order to assist the Sherman Estate in recovering money from the Town to create a larger "fund" for the Estate. Such intervention would be in both the Sherman Estate's and Laroe's interest. Yet absent Laroe possessing requisite standing, Sherman must remain the sole quarterback, and Laroe merely a member of the team.

In the present case, if Laroe wishes to help Sherman increase estate assets for the benefit of all creditors and Mr. Sherman's heirs, it should be allowed to do so as a "non-Article III Intervenor."[28] As such, Laroe could help Mrs. Sherman pay for necessary experts, and to the extent Mrs. Sherman consents as plaintiff, Laroe can assist with discovery and assist at trial. But Laroe's participation on behalf of the Sherman Estate requires the Estate's agreement and consent on all scores. Two chefs are not allowed in this kitchen.

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[28] In *United States Postal Serv. v. Brennan*, 579 F.2d 188, 190-92 (2d Cir. 1978), the letter carrier association sought to help the postal service with its litigation. Using Sherman's proposed non-Article III intervenor approach, the District Court could have allowed the union to assist, but not control, the USPS litigation. The District Court had no such Supreme Court guidance, and perhaps as a consequence denied intervention. There, if found no "inadequacy of representation" and observed that the union's involvement might be intrusive to the party plaintiff. Yet if there existed inadequacy of representation or a need for help due to USPS budget cuts, the union should be been allowed to help, but not to hijack.

Laroe cannot engage in "its own" discovery, or control or stymie settlement discussions, or demand a jury trial or possess a right of appeal. The "judicial power" of the United States will, in all respects, be exercised through the party with standing—Mrs. Sherman—not the non-Article III Intervenor, Laroe.[29]

In this manner, Laroe can have a say in protecting its interests through Rule 24 intervention, through helpful, non-adversarial participation for the purpose of increasing Sherman's Surrogate Court fund for eventual Surrogate Court distribution.

Similarly in this regard, the Sherman Estate's largest creditor, TD Bank, might also desire to intervene. It meets the Rule 24(a)(2) and (b)(1(B) criteria. TD Bank's intervention to protect its own interest as an Estate creditor might be welcomed by both the Sherman Estate and Laroe, as its assistance would benefit all Estate creditors. As long as Sherman quarterbacks plaintiff's side of the courtroom, both Rule 24 and Article III will exist in harmony.

This Court has recognized that sometimes an intervenor's rights are hefty, and thus may have "an interest in the subject matter of the litigation similar to that of the original parties." *See, Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 382 n.1 (1987). However, such is not always the case, and certainly is not the case here. Laroe has no rights, other than what it might be

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[29] *See*, *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003).

able to claim against the Sherman Estate in the New York State Surrogate's Court. TD Banks interest is much greater than Laroe's.

In sum, granting non-Article III Intervenors the role of helper is fine, but their intervention must be limited to helping. This is basically what intervenors are now granted by courts through permissive intervention under Rule 24(b)(1)(B).[30] Sherman's approach harmonizes the "right to intervene" under the Rule 24(a)(2) criteria with the constraints of Article III. Call it "intervention by right, light."[31] The intervenor by right without standing is permitted a role, but only if helpful—an assistant, not an adversary. Again, a voice, not a veto. This approach allows the intent of Rule 24 to be effectuated without offense to the standing requirements of Article III.

III.
Affirm the District Court

Laroe may argue that the Second Circuit did not expressly rule on whether Laroe possesses standing. However, the record is clear that 1) Laroe does not possess independent standing to sue the Town, and 2) that there is no diversity or supplemental jurisdiction for the district court to adjudicate any Laroe claim

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[30] An permissive intervenor may also have independent standing. Rule 24 distinguishes between a person with a strong interest and a weak interest, and does not expressly bestow "full party status" rights upon either. Intervenor's "rights" should hinge upon standing, not whether entry into the lawsuit is permissive or by right intervention.

[31] This is consistent with the teaching in *Diamond, supra,* that for the intervenor to keep the case alive, as by being the sole party on appeal, Article III standing is required.

against Sherman. Thus, if Laroe asks this Court to direct the Second Circuit to rule on whether Laroe possesses requisite standing, it should decline. Remand to consider standing is unnecessary, will unduly burden the Court of Appeals, and will further delay the Sherman's almost decade long effort to obtain justice. This Court should affirm the District Court.

Conclusion

Under Article III and Rule 24, the federal courts must deny "full party status" to a person or entity such as Laroe without standing, lest the officious intermeddler hijack a lawsuit that is not its own. Laroe had no right, and thus no standing, to pursue a claim against either the Town or Sherman.

However, if Laroe chooses to be a non-adversarial assistant to Sherman, agreeing to help Sherman recover assets for all Estate creditors (including Laroe) without infringing upon Sherman's control of her case, then Laroe should be allowed "non-Article III intervenor" status, whether intervention is permissive or by right.

Respectfully submitted,

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MARCH 6, 2017

SUPREME COURT OF THE UNITED STATES

TOWN OF CHESTER,

Petitioner,

v.

LAROE ESTATES, INC.,

Respondent.

Certificate of Compliance Pursuant to Rules 33.1(g)(h) and 37.3

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

As Required by Supreme Court Rule 33.1(g)(h), I certify the Amicus Brief Contains 7,522 Words.

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

Dated: March 6, 2017

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF WESTCHESTER)

Brian R. Landy, Jr., being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at 38 Davis Avenue, Rye, NY, 10580.

That on the 6th day of March, 2017, deponent served the within:

BRIEF FOR PLAINTIFF NANCY SHERMAN, EXECUTRIX, AS AMICUS CURIAE IN SUPPORT OF NEITHER PETITIONER NOR RESPONDENT, URGING REVERSAL

upon designated counsel for the parties indicated herein at the addresses provided below by depositing 3 true copies thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State.

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Sworn to before me this
6th day of March, 2017

_____ _____

Notary Public Brian R. Landy, Jr.

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