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 PETITIONER

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QUESTION PRESENTED

Whether intervenors participating in a lawsuit as of right under Federal Rule of Civil Procedure 24(a) must have Article III standing, or whether Article III is satisfied so long as there is a valid case or controversy between the named parties.

PARTIES TO THE PROCEEDING

Town of Chester, petitioner on review, was the defendant-appellee below.

The Town Board of the Town of Chester and the Planning Board of the Town of Chester are listed on the court of appeals docket as defendants-appellees, but the district court had dismissed the claims against them at the time of the appeal. The court of appeals subsequently amended the caption of the case to list only Town of Chester as the defendant-appellee.

Laroe Estates, Inc., respondent on review, was the movant-appellant below.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 828 F.3d 60. Pet. App. 1a-19a. The district court's opinion denying Laroe Estates, Inc.'s motion to intervene is not published. Pet. App. 20a-59a.

JURISDICTION

The Second Circuit entered judgment on July 6, 2016. On September 23, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including November 3, 2016, and the petition was filed on that date. On January 13, 2017, this Court granted the petition. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Article III, Section 2, Clause 1 of the U.S. Constitution states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Federal Rule of Civil Procedure 19 provides:

> (a) Persons Required to Be Joined if Feasible.
>
> > (1) *Required Party*. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
> >
> > * * *
> >
> > (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

> (i) as a practical matter impair or impede the person's ability to protect the interest[.]

Federal Rule of Civil Procedure 24 provides:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
>
> (b) Permissive Intervention.
>
> (1) *In General.* On timely motion, the court may permit anyone to intervene who:
>
> (A) is given a conditional right to intervene by a federal statute; or
>
> (B) has a claim or defense that shares with the main action a common question of law or fact.
>
> (2) *By a Government Officer or Agency*. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:
>
> (A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) *Delay or Prejudice*. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) *Notice and Pleading Required*. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

INTRODUCTION

In 2008, Steven Sherman sued the Town of Chester for an alleged regulatory taking. Respondent Laroe Estates, Inc. ("Laroe"), a prospective developer of Sherman's property, was also frustrated by the Town's actions, but Laroe could not initiate an identical suit because it lacked a sufficient interest in the property. If Laroe had filed its own suit, the Town of Chester could have quickly obtained a dismissal of the complaint on Article III standing grounds. And if Laroe had joined Sherman's complaint as a co-plaintiff, that too would have led to a swift and successful motion to dismiss Laroe for lack of Article III standing.

Laroe did neither of these things. Instead, the company waited more than six years, and only then moved to enter Sherman's suit as an intervenor-plaintiff under Federal Rule of Civil Procedure 24(a). As logic would dictate, when the Town opposed the motion, the District Court denied intervention as of

right because Laroe could not satisfy the Article III standing requirements. The Second Circuit, however, reversed. It did not question the District Court's holding that Laroe lacks Article III standing in this suit. Rather, it held that an intervenor under Rule 24(a) does not need to meet constitutional standing requirements at all.

That cannot be right. There is no difference between a plaintiff and an "*intervenor*-plaintiff" that would justify a constitutional constraint on one but not the other. To the contrary, intervention as of right is simply the means by which an entity "become[s] a 'party' to a lawsuit" and "assume[s] the rights and burdens attendant to full party status." *U.S. ex rel. Eisenstein* v. *City of N.Y.*, 556 U.S. 928, 933-934 (2009). Chief among the rights of a party is the ability to invoke the court's authority to decide issues and to compel other litigants to comply with litigation demands. As this Court has said time and again, an entity may not "invoke the authority of a federal court" unless it has standing. *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342 (2006).

This case is therefore a simple one. An intervenor exercises the same rights as an original party, and a court may not authorize a person to exercise those rights unless she has Article III standing. The Court's constitutional precedents—and, indeed, Rule 24(a) itself—make this clear. The Second Circuit's decision to the contrary should be reversed.

STATEMENT

A. Intervention As Of Right In Civil Litigation

1. Intervention is "the requisite method for a nonparty to become a party to a lawsuit." *Eisenstein*, 556 U.S. at 933. Once admitted to a suit, an intervenor as of right is placed on "equal" footing "with the original parties" and is "entitled to litigate fully on the merits." 7C Charles Alan Wright et al., *Federal Practice & Procedure* § 1920 (3d ed. Apr. 2016 update).

Intervenors as of right may thus exercise all of the privileges and powers of litigation. They can raise new claims, lodge new defenses, and seek new forms of relief. *See* Fed. R. Civ. P. 24(c); Wright, *supra*, §§ 1921-1922. They can subpoena documents, *see, e.g.*, *Perry* v. *Schwarzenegger*, 602 F.3d 976, 980 (9th Cir. 2010), and demand discovery, *see, e.g.*, *Grinnell Corp.* v. *Hackett*, 519 F.2d 595, 596 (1st Cir. 1975); *South Carolina* v. *North Carolina*, 558 U.S. 256, 287-288 (2010) (Roberts, C.J., concurring in the judgment in part and dissenting in part). If there are settlement discussions, intervenors are entitled to participate. *See Local No. 93* v. *City of Cleveland*, 478 U.S. 501, 529-530 (1986). If hearings are conducted or the case goes to trial, intervenors can demand a jury, *see Ross* v. *Bernhard*, 396 U.S. 531, 541 n.15 (1970), and present evidence, *see, e.g.*, *Georgia* v. *Ashcroft*, 539 U.S. 461, 476 (2003); *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 537 (1972). If an intervenor ultimately prevails in her suit, she may—in certain circumstances—be entitled to attorney's fees. *See, e.g.*, *United Steelworkers of Am., AFL-CIO-CLC* v.

Sadlowski, 435 U.S. 977 (1978) (White, J., dissenting from denial of certiorari).

An intervenor as of right therefore enjoys a status far more significant than her distant cousin, the *amicus curiae*. *See Int'l Union* v. *Scofield*, 382 U.S. 205, 209 (1965) (contrasting an intervenor with "an amicus [who] is not a 'party' to the case"). She is a party like any other, with all of the rights the Federal Rules of Civil Procedure grant.

2. Because of the substantial powers that intervenors as of right exercise, courts have long restricted the circumstances in which a person or entity may obtain this status. While the historical origins of the practice of intervention are murky, it most likely originated in Roman law. *See* James WM. Moore & Edward H. Levi, *Federal Intervention I. The Right to Intervene and Reorganization*, 45 Yale L.J. 565, 568 (1936); *Florida* v. *Georgia*, 58 U.S. (17 How.) 478, 502 (1854) (Curtis, J., dissenting). If so, intervention's earliest antecedent was very limited indeed; Roman law permitted intervention only at the appeals stage. Moore & Levi, *supra*, at 568.

By the time of the Founding, lower courts sometimes permitted a person to intervene, but intervention was typically available only by a formal complaint—in a manner equivalent to the initiation of a new suit—or by "[e]xamination *pro interesse suo*," a writ that allowed intervention in cases in which the intervenor's property "had been seized" and was in the hands of "the court." 2 C. L. Bates, *Federal Equity Procedure: A Treatise on the Procedure in Suits in Equity in the Circuit Courts of the United States including Appeals and Appellate Procedure* §§ 625, 628, at 661, 664 (1901); *see* Moore & Levi,

supra, at 569-572. Over the following century and a half, intervention remained "narrow in scope," and the procedures governing the practice were "not well developed nor of very general applicability." Wright, *supra*, § 1901.

In 1938, Congress "codifi[ed]" the longstanding "doctrines of intervention" in Federal Rule of Civil Procedure 24. *Mo.-Kan. Pipe Line Co.* v. *United States*, 312 U.S. 502, 508 (1941). The Rule required district courts to grant "[i]ntervention [as] of right" only if a statute provided "an unconditional right to intervene," if the intervenor would be "bound by a judgment in the action," or if the intervenor would be "adversely affected" by the "distribution or other disposition of property in the custody of the court." Fed. R. Civ. P. 24(a) (1938). Rule 24 also gave courts discretion to grant "[p]ermissive intervention" to a person raising a claim or defense sharing a common "question of law or fact" with the original parties' claims. Fed. R. Civ. P. 24(b) (1938).

Rule 24 was amended in 1966 to dispense with some of its "formal" requirements, but the Rule's fundamental contours remained the same. Fed. R. Civ. P. 24(a)(2) advisory committee's note to 1966 amendment; *see New Orleans Pub. Serv., Inc. (NOPSI)* v. *United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984) (explaining that "the *kind* of interest necessary [for intervention] was not affected"). The drafters removed the text requiring that an intervenor be "bound" by a judgment. That alteration was intended to clarify that the Rule was not targeted at those potentially affected by res judicata, but rather those whose rights would inevitably be adjudicated in a case—such as the "benefi-

ciary of [a] trust" in a suit involving the trustee or an unnamed "member of a class" in class action litigation. Fed. R. Civ. P. 24(a)(2) advisory committee's note to 1966 amendment; Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 401-407 (1967). The drafters also relaxed the requirement that disputed property actually be "in the custody or subject to the control or disposition" of a court. Fed. R. Civ. P. 24(a)(3) (1946). This restriction, the drafters found, was outdated, and in any event had not been interpreted strictly. Fed. R. Civ. P. 24(a)(2) advisory committee's note to 1966 amendment.

As revised in 1966, Rule 24(a) mirrored—almost verbatim—the text of Rule 19(a)(1)(B), the mandatory joinder provision. The drafters explained that Rule 24 was intended to be a "counterpart" to Rule 19, and to allow a "comparable" class of persons to voluntarily intervene in a suit. *Id.*

3. The text of Rule 24 has not changed materially since 1966. Now, as then, Rule 24(a) provides that courts "must" grant intervention to any person who (1) "is given an unconditional right to intervene by a federal statute" or (2) "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the [person]'s ability to protect [her] interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). Rule 24(b) states that courts "may" also grant intervention to parties who have a conditional statutory right to intervene or "a claim or

defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

Courts may restrict the extent to which permissive intervenors are able to participate in a lawsuit. *See Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987); Wright, *supra*, § 1922. But the Rules provide no equivalent authority to deny intervenors as of right the status of full parties. *See* Fed. R. Civ. P. 24(a) (providing that intervention "must" be granted). Accordingly, apart from "reasonable" conditions "of a housekeeping nature," courts must allow intervenors as of right to exercise all of the powers of litigation afforded ordinary litigants. Wright, *supra*, § 1922.

B. Factual and Procedural Background

1. Sixteen years ago, Steven Sherman sought approval from the Town of Chester planning board to build a subdivision on land he had purchased with the help of a mortgage from TD Bank. Pet. App. 3a, 21a-22a; J.A. 27. While his application to the planning board was pending, Sherman contracted with Laroe. Sherman and Laroe agreed that, if the Town approved Sherman's subdivision application, Laroe would purchase some of the lots for development. Pet. App. 3a. Laroe made several interim payments to Sherman under the agreement. *Id.*

Sherman never obtained approval for the subdivision. *Id.* at 22a-23a. Ultimately, he defaulted on his mortgage payments, and TD Bank commenced foreclosure proceedings on Sherman's undeveloped property. *Id.* at 3a. Laroe attempted to buy the property from Sherman to prevent foreclosure, but he failed to do so. *Id.* at 3a-4a. TD Bank foreclosed on the land in May of 2014. *Id.* at 4a.

2. In 2008, Sherman filed a suit against the Town in federal court, alleging—among other things—a regulatory taking. *Id.* at 23a. Sherman voluntarily dismissed that suit in 2012 and then filed a nearly identical suit in New York state court. *Id.* at 23a-24a. The Town removed that suit to federal court, where it was dismissed as unripe. *Id.* at 24a. Sherman appealed. *Id.* In 2014, the Second Circuit held that Sherman could proceed with his takings claim, and remanded the case to the District Court for consideration of the merits. *Id.* at 24a-25a. During the pendency of these proceedings, Sherman passed away, but his estate continued to pursue the litigation. *Id.* at 2a, 4a.

On remand from the Second Circuit, and more than six years after the litigation began, Laroe filed a motion to intervene as a plaintiff pursuant to Rule 24(a)(2) or Rule 24(b). *Id.* at 53a. Laroe's intervenor complaint purported to make its own takings claim, J.A. 157-162, and sought damages separate from Sherman's, *id.* at 162. Laroe claimed that Sherman's estate was unwilling to continue pursuing Sherman's takings claim and that Laroe needed to take up the cause. Pet. App. 13a. The Town opposed intervention. *Id.* at 10a-11a; J.A. 9-10.

The District Court denied the motion to intervene. Pet. App. 57a. Applying established circuit precedent, the court held that Laroe lacked any ownership interest in Sherman's property and so lacked standing to pursue a takings claim against the Town. *Id.* at 55a-57a (citing *U.S. Olympic Comm.* v. *Intelicense Corp., S.A.*, 737 F.2d 263, 268 (2d Cir. 1984)).

3. The Second Circuit vacated and remanded. *Id.* at 2a. The panel did not dispute the District Court's

conclusion that Laroe lacked standing. It held, however, that Laroe did not need to "show it had Article III standing" at all. *Id.* at 8a-9a. Rather, the court opined that so long as "a case or controversy has been established in the underlying litigation," there is "no need to impose the standing requirement upon a proposed intervenor." *Id.* at 7a (brackets omitted) (internal quotation marks omitted). In support of this view, the Court of Appeals observed that the Supreme Court sometimes resolves legal issues raised by both original parties and intervenors "without determining whether [the intervenors] independently have standing." *Id.* at 8a.

The panel declined to decide whether Laroe had a right to intervene under Rule 24(a)(2). *Id.* at 11a. The court noted that Rule 24(a)(2) requires an applicant for intervention to claim an interest in the suit that is "direct, substantial, and legally protectable." *Id.* at 13a (internal quotation marks omitted). The Court of Appeals also acknowledged that the Town's challenge to Laroe's standing was "essentially a challenge to" Laroe's ability to satisfy the "'interest' requirement of Rule 24(a)(2)." *Id.* Nonetheless, the Second Circuit remanded the case to the District Court to determine whether Laroe could satisfy Rule 24's requirements. *Id.* at 17a.

The Town of Chester petitioned for review, and this Court granted certiorari to decide "[w]hether intervenors participating in a lawsuit as of right under Federal Rule of Civil Procedure 24(a) must have Article III standing *** or whether Article III is satisfied so long as there is a valid case or controversy between the named parties." Pet. i.

SUMMARY OF ARGUMENT

A person or entity that seeks to intervene as of right and thus become a "'party' to a lawsuit," *Eisenstein*, 556 U.S. at 933, must have Article III standing. Both the Constitution and Rule 24(a)(2) compel this straightforward conclusion.

I. Article III dictates that federal courts may exercise "the judicial Power" only as necessary to resolve a vital "Case" or "Controvers[y]" between litigants with standing. U.S. Const. art. III, § 2, cl. 1; *see Summers* v. *Earth Island Inst.*, 555 U.S. 488, 491 (2009). Therefore, standing is "not dispensed in gross": Courts may not consider any claim, award any relief, or decide any legal issue, large or small, unless they do so at the behest of an entity with standing. *DaimlerChrysler*, 547 U.S. at 353 (internal quotation marks omitted). Similarly, a party may not invoke the judicial power to issue subpoenas, demand discovery, or otherwise impose burdens on her fellow litigants unless she has standing. That is why a district court must grant a motion to dismiss any party that cannot satisfy the Article III standing requirements.

That is also why a court may not permit any person or entity without standing to intervene pursuant to Rule 24(a). Intervenors as of right exercise all of the rights of a party and have the same capacity to impose burdens on other litigants. Authorizing a person without standing to exercise these rights enlarges the judicial power, facilitating its use to "decid[e] issues [courts] would not otherwise be authorized to decide" and to compel discovery and testimony that could not otherwise be obtained. *Id.* Granting intervention to a person without standing

also wrests control of the suit from those litigants who have the most direct stake in the controversy. *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986). If a person without standing cannot intrude on a suit in this way at the outset, she surely cannot do so later through intervention.

Lower courts have offered no persuasive justification for exempting intervenors as of right from the requirements of Article III. The existence of a "case" or "controversy" between the original parties does not excuse an intervenor's lack of any cognizable stake in the case; standing is not "commutative." *DaimlerChrysler*, 547 U.S. at 352. Nor does the fact that the Supreme Court may *decide an issue* without resolving the standing of each party prove that a district court may permit a prospective intervenor to *enter* a suit without first scrutinizing her standing. A court has the authority to decide a particular issue so long as one party invoking that authority has standing; a court does *not* have the authority to bestow upon a party without standing the right to invoke the judicial power going forward.

II. Rule 24(a)(2) itself points to the same conclusion. The Court has long held that an intervenor as of right must have a "significantly protectable interest" in a suit—a standard that mirrors, in almost every particular, the requirements of Article III. *Donaldson* v. *United States*, 400 U.S. 517, 532 (1971). Moreover, the "interest" required for intervention as of right is, by design, the same as the interest necessary for mandatory joinder under Rule 19(a)(1)(B). It is virtually inconceivable that a person could be deemed a necessary party to a suit—and ordered to become an "involuntary plaintiff,"

Fed. R. Civ. P. 19(a)(2)—without satisfying the minima of Article III standing. Rule 24(a)'s history reinforces the conclusion that an intervenor's interest cannot be less than that required to establish standing. So do the improbable consequences of a contrary reading, which would enable an end-run around standing limits for plaintiffs and foster wasteful litigation in the district court by intervenors unable to press their claims on appeal.

III. Requiring intervenors to have standing benefits the courts and those who rightfully practice in them. It avoids the needless use of judicial resources to resolve the disputes of parties with no cognizable interest in a suit, and it protects other parties from unwarranted litigation burdens. Indeed, this case provides an excellent example of how an unwarranted intervenor can prolong and complicate litigation.

Enough is enough. Because Laroe lacks standing, the judgment below must be reversed.

ARGUMENT

I. INTERVENORS AS OF RIGHT MUST HAVE ARTICLE III STANDING.

Article III "require[s] that a litigant have standing to invoke the authority of a federal court." *DaimlerChrysler*, 547 U.S. at 342. This "essential and unchanging" requirement, although nominally imposed on litigants, in fact serves as the "fundamental" means of ensuring that the judicial power remains within its constitutional boundaries. *Id.* at 341-342 (quoting *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992), and *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997)). By exercising its power only at the behest of a person who has alleged a cognizable

injury, the "Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'" *Id.* at 341 (quoting *Allen* v. *Wright*, 468 U.S. 737, 750 (1984), *abrogated on other grounds by Lexmark Int'l, Inc.* v. *Static Control Components*, *Inc.*, 134 S. Ct. 1377 (2014)).

When an individual moves to intervene in a suit under Rule 24(a), she asks the court to grant her all "the rights and burdens [of a] party" that are set out in the Federal Rules of Civil Procedure. *Eisenstein*, 556 U.S. at 934. Paramount among those is the right to bring the judicial power to bear to decide issues, to impose the burdens of litigation on other parties, and to resolve any resulting disputes. *See, e.g.*, Fed. R. Civ. P. 37, 45, 56. In other words, intervention gives a person the right "to invoke the authority of a federal court." *DaimlerChrysler*, 547 U.S. at 342. When a court confers that right on an intervenor without ensuring that she has Article III standing, it transgresses the Constitution's limits on its judicial power and undermines, however subtly, the democratic principles those limits protect.

A. Parties Must Have Standing To Invoke The Judicial Power.

1. Article III provides that the "judicial Power shall extend to * * * Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. This Court has long cautioned that those words are both a grant of authority to the judicial branch and a restraint on the scope of that authority. By "limiting the judicial power" to cases and controversies, the Constitution "restricts" the judiciary "to the traditional role of Anglo-American courts." *Summers*, 555 U.S. at 492. Accordingly, courts may exercise no more authority

than is "necessary in the execution" of their constitutionally delegated function: "redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by private or official violation of law." *Id.*; *see Lujan*, 504 U.S. at 560. The judiciary's "power to declare the rights of individuals and to measure the authority of government[] * * * 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.'" *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Chi. & Grand Trunk Ry. Co.* v. *Wellman*, 143 U.S. 339, 345 (1892)).

Standing doctrine polices this limit on the judicial power. It permits a person to invoke a court's authority only if she "has alleged such a personal stake in the outcome of the controversy as to * * * justify exercise of the court's remedial powers on [her] behalf." *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (internal quotation marks omitted). If a person cannot make that showing, exercise of the court's authority at her behest "would be gratuitous and thus inconsistent with the Art. III limitation." *Id.*

Limiting the class of litigants who can appear before the federal courts "serves several of the implicit policies embodied in Article III." *Valley Forge*, 454 U.S. at 472 (internal quotation marks omitted). Most notably, it preserves the separation of powers by "prevent[ing] the judicial process from being used to usurp the powers of the political branches." *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). In doing so, it vindicates the "central principle of a free society": courts must have "finite

bounds" to "protect citizens from * * * the excessive use of judicial power." *U.S. Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988).

Standing doctrine also embodies the constitutional policy in favor of providing "due regard for the autonomy of those most likely to be affected by a judicial decision." *Diamond*, 476 U.S. at 62. "The exercise of judicial power * * * can so profoundly affect the lives, liberty, and property of those to whom it extends" that it must be "restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate." *Valley Forge*, 454 U.S. at 473.

2. Only a robust standing doctrine can faithfully protect these constitutional principles. The Court has therefore emphasized time and again that "standing is not dispensed in gross." *Davis* v. *FEC*, 554 U.S. 724, 734 (2008) (brackets omitted) (internal quotation marks omitted); *DaimlerChrysler*, 547 U.S. at 353; *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000); *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996). Article III is not satisfied simply because a case involves *some* controversy that has allegedly caused concrete injury to *some* litigant. Rather, every exercise of the judicial power—from an order that strikes down a major statute to a subpoena that commands a lowly document production—must be at the request of a litigant with standing. *See, e.g.*, *Lewis*, 518 U.S. at 358 n.6.

Hence, a party "must demonstrate standing for each *claim* [she] seeks to press," *Davis*, 554 U.S. at 734 (quoting *DaimlerChrysler*, 547 U.S. at 352) (emphasis added), and each "particular *issue*[]" she

asks the court to resolve, *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975) (emphasis added). She must also show "standing separately for each form of *relief* sought." *Friends of the Earth*, 528 U.S. at 185 (emphasis added). And there must be "an actual controversy [in existence] at all stages of review, not merely at the time the complaint is filed." *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974). Before a court may decide any question at any point, it must be confident that "the particular plaintiff" who invokes the court's authority has standing. *DaimlerChrysler*, 547 U.S. at 352 (quoting *Allen*, 468 U.S. at 752).

Furthermore, a district court must dismiss a plaintiff from a suit if another party successfully challenges her standing—regardless of whether other plaintiffs with standing are pursuing the same claims or seeking the same relief. This Court's decision in *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), is illustrative. There, the Court considered the propriety of an award of summary judgment for lack of standing in a housing discrimination suit brought by a village and six individuals. *Id.* at 93-94. All of the plaintiffs appeared on the same complaints and sought the same declaratory and injunctive relief. *Id.* at 94-95. This Court held that the village and four of the individual plaintiffs had standing and could continue to pursue their claims in the district court. *Id.* at 109-115. But it held that the two remaining individual plaintiffs were "without standing" and could not remain in the litigation unless they "amend[ed] their complaints to include allegations of actual harm." *Id.* at 112 n.25; *see also Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 369, 374-375 (1982) (observing that the district

court had dismissed three of the four original plaintiffs for lack of standing and separately scrutinizing the standing of each of the plaintiffs that appealed their dismissal).

The district courts abound with similar cases in which one plaintiff is dismissed for lack of standing, while others are permitted to continue to press the same claims. *See, e.g.*, *Miller* v. *Albright*, 523 U.S. 420, 426-427 (1998) (explaining that petitioner's father had originally been a co-plaintiff raising the same claim, but was dismissed by the district court for lack of standing); *Nunez Colon* v. *Toledo-Davila*, 648 F.3d 15, 18 (1st Cir. 2011) (dismissing "the claims of the wife and children plaintiffs for lack of standing"); *Phillips* v. *Montgomery Cty.*, 24 F.3d 736, 737 (5th Cir. 1994) (per curiam) (observing that the district court had permitted the suit to continue but "dismissed one plaintiff" for lack of standing).

Thus, this Court's Article III precedent as a whole establishes that a plaintiff with standing to pursue one claim may not leverage that standing to press other extraneous claims or issues. And a plaintiff without standing may not leverage the presence of a plaintiff with standing to evade a motion to dismiss based on her failure to satisfy Article III. These rules ensure that the judicial power is not used in any way that is not "necess[ary]" to "the determination of real, earnest and vital controversy.' " *Valley Forge*, 454 U.S. at 471 (internal quotation marks omitted). A *court* is prevented from the gratuitous exercise of its authority to decide disputes, and a *litigant* is prevented from unnecessarily exercising the judicial power to impose burdens on other parties.

3. This latter point bears explanation. The judicial power is typically conceived of as a court's authority to issue definitive rulings in contested matters. But the power is not so limited; it extends to any circumstance in which a court compels the behavior of parties and nonparties to facilitate a controversy's resolution. *U.S. Catholic Conference*, 487 U.S. at 76. That authority to compel can be, and often is, exercised indirectly through litigants.

Take the subpoena power. Federal Rule of Civil Procedure 45 "grants a district court the power to issue subpoenas as to witnesses and documents." *Id*. But courts rarely issue these subpoenas themselves. Instead, Rule 45 permits a party, with the aid of her attorney, to serve a subpoena compelling the production of testimony or documents from a reluctant opponent or third party. Fed. R. Civ. P. 45(a)(3), (g). Even though a court may be unaware that a subpoena has issued, its power is implicated all the same, and Article III limits apply. *U.S. Catholic Conference*, 487 U.S. at 76 (the subpoena power is "subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution" (internal quotation marks omitted)).

If a person without standing exercises the subpoena power or otherwise wields the court's authority to compel acquiescence to her litigation demands, Article III's limits are violated. *Cf. Hein* v. *Freedom From Religion Found., Inc.*, 551 U.S. 587, 617 (2007) (Kennedy, J., concurring) (observing that the "burden[s] of discovery" justify tight restrictions on standing). Indeed, this Court has sometimes phrased the standing inquiry in the district court as

a question of whether a party has "standing *to litigate.*" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997) (emphasis added).

4. Of course, these rules with respect to standing have their own limits. They do not block a court from deciding an *issue* when its resolution is "necessary in the execution of [the judicial] function." *Summers*, 555 U.S. at 492. For that reason, where multiple parties raise a single legal question, a court need not assure itself that each of the parties has standing before deciding *that question*. So long as one party has standing, that narrow exercise of the court's power is necessary to the resolution of a live controversy and thus permitted by Article III. It does not matter that other parties that lack standing will also benefit from the court's decision on the issue. After all, that is the case whenever a court publishes a precedential opinion.

For example, *this* Court typically needs only to assure itself that one party has standing before resolving the question presented in a case. The Supreme Court's jurisdiction is limited to deciding "the questions set out in the [certiorari] petition, or fairly included therein." Sup. Ct. R. 14(1)(a). Because this Court has such a discrete task, "the critical question" for it "is whether at least one [party] has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of" the Court's jurisdiction. *Horne* v. *Flores*, 557 U.S. 433, 445 (2009) (internal quotation marks omitted); *see also, e.g.*, *Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). If one party meets that condition, it suffices to demonstrate that resolving the question presented is necessary to

the adjudication of a live controversy. The presence of other parties without standing is simply irrelevant.

That does not mean, however, that courts may authorize parties that lack standing to remain in a case for *other* purposes. If different parties raising a single issue seek different relief, then standing must be shown for each one. *See Horne*, 557 U.S. at 445 (holding that a remedial injunction must be narrowed to reflect only the interests of the plaintiffs with standing); *see also Rumsfeld*, 547 U.S. at 52 n.2 ("limit[ing]" the Court's "discussion" to the petitioner with standing). And a court cannot ratify a person's status as a party when—as in the district court—doing so will allow that person to invoke the court's authority in the future to decide distinct issues that may not otherwise be raised or to burden fellow litigants in ways they may oppose. *See, e.g.*, *Arizonans for Official English*, 520 U.S. at 64 (in order to have "standing to litigate, a person must show, first and foremost, an invasion of a legally protected interest" (internal quotation marks omitted)).

B. Intervenors As Of Right Must Have Standing Because They Implicitly And Explicitly Invoke The Judicial Power.

These principles lead inexorably to the conclusion that an intervenor as of right under Rule 24(a) must have standing.

1. When a motion to intervene is granted, an intervenor "become[s] a party." *Karcher* v. *May*, 484 U.S. 72, 77 (1987). She therefore "assume[s] the rights and burdens attendant to full party status." *Eisenstein*, 556 U.S. at 933-934. She can raise new

claims and seek new forms of relief. *See* Wright, *supra*, §§ 1921-1922. And she can exercise the numerous powers, large and small, afforded to parties by the Federal Rules and the Constitution itself. *Eisenstein*, 556 U.S. at 934.

She may, for example, seek summary judgment under Rule 56 or request a "jury trial on legal issues," *Ross*, 396 U.S. at 541 n.15. She may subpoena documents, *Perry*, 602 F.3d at 980, make discovery requests, *Grinnell*, 519 F.2d at 596, and present evidence, *Georgia*, 539 U.S. at 476. In certain circumstances, she may also receive an award of attorney's fees. *Sadlowski*, 435 U.S. 977 (White, J., dissenting from denial of certiorari); *see also supra* pp. 6-7.

In other words, like any other party, an intervenor can invoke a court's power to decide issues and to impose burdens on others. A district court cannot grant a motion under Rule 24(a) and authorize an intervenor to exercise these rights unless it determines that the intervenor has satisfied the Article III standing requirements. *See Valley Forge*, 454 U.S. at 472 ("[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury * * * ." (internal quotation marks omitted)).

That is all the more so because granting a motion to intervene expressly informs the original parties that the intervenor is entitled to "full party status," with all the burdens, rights, and privileges that entails. *Eisenstein*, 556 U.S. at 934. Opposing parties are thereby put on notice that they must, for example, respond to the intervenor's motions, discov-

ery requests, and deposition subpoenas. Meanwhile, those on the same side of the v. are made aware that they must tolerate the presence of a new party and the new claims, arguments, and alterations to the litigation strategy that she may bring with her.

If the intervenor's fellow parties would otherwise refuse to comply with some or all of these demands, then the intervenor is able to enjoy "full party status" only because the court has exercised its power to compel the acquiescence of those parties. Unless the intervenor has standing, that exercise of judicial power violates Article III.

Indeed, if an intervenor can enter a suit without satisfying Article III's requirements, then she will enjoy *more* than "full party status," at least in comparison with an original plaintiff. A plaintiff who appears on the complaint from the outset must be swiftly ejected from the suit if an opponent successfully moves to dismiss for lack of standing. *See Gladstone*, 441 U.S. at 112 n.25; *Havens Realty*, 455 U.S. at 369, 374-375; *supra* pp. 19-21. In that way, a defendant may avoid enduring any litigation burdens imposed by a plaintiff without standing. More importantly, the court can ensure that its power will not be invoked inappropriately to compel a defendant to submit to those burdens. But, if Article III standing is unnecessary for an intervenor, then—unlike an original plaintiff—she is *not* vulnerable to such a challenge. As a result, it is impossible to be confident that the judicial power will be exercised only within its constitutional boundaries.

2. Permitting intervention as of right without standing would also grievously undermine the "implicit policies embodied in Article III." *Valley Forge*,

454 U.S. at 472 (internal quotation marks omitted). In particular, keeping the standing doctrine free of unwarranted exceptions is crucial in "maintaining th[e] separation" of powers, *DaimlerChrysler*, 547 U.S. at 353, and the "finite bounds" on judicial authority that "exist to protect citizens from * * * the excessive use of judicial power," *U.S. Catholic Conference*, 487 U.S. at 77. *See also DaimlerChrysler*, 547 U.S. at 341 ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.").

Standing doctrine effectively limits the judicial power because it tethers a court's authority to the "concrete and particularized" interests presented by the litigants that appear before it. *Lujan*, 504 U.S. at 560. But that tether is weakened if, through intervention, litigants may appear before the court pursuing a much wider range of interests that do not meet that description. The problem becomes obvious when one considers a hypothetical intervenor without standing who asks a court to decide a claim or to award a remedy that no party with standing has pursued. In the absence of the intervenor, the court would plainly lack the power to decide that question or issue that relief. *DaimlerChrysler*, 547 U.S. at 352 (claim must be pressed by a party with standing); *Friends of the Earth*, 528 U.S. at 185 (party with standing must request "each form of relief"). The court's power would break its constitutional restraint if it increased merely because of the presence of the intervenor who herself lacks standing.

Nor is that the only way an improper intervenor may impermissibly bring new issues into the district court's domain. She also does so merely by carrying

out the day-to-day tasks of civil litigation. An intervenor's discovery request may require a court to issue a ruling or award sanctions. *See, e.g.*, *Abrams* v. *Johnson*, 521 U.S. 74, 94-95 (1997). An intervenor's decision to introduce evidence may lead to a holding with respect to its admissibility. *See, e.g.*, *Georgia*, 539 U.S. at 476. And her request for attorney's fees may lead to a dispute over their propriety that a court must resolve. *See, e.g.*, *Sadlowski*, 435 U.S. 977 (White, J., dissenting from denial of certiorari). "With federal courts thus deciding issues they would not otherwise be authorized to decide, the 'tripartite allocation of power' that Article III is designed to maintain would quickly erode, [and] * * * the standing requirement's role in maintaining this separation would be rendered hollow rhetoric." *DaimlerChrysler*, 547 U.S. at 353 (quoting *Valley Forge*, 454 U.S. at 474).

Thus, this Court has emphasized that courts have no jurisdiction to address a subsidiary dispute that arises during the course of litigation unless the party seeking relief has standing in the underlying action: In *Diamond*, an intervenor that lacked a sufficient stake in the merits controversy sought to demonstrate standing to appeal based on his challenge to attorney's fees that were awarded against him in the district court. 476 U.S. at 70. This Court rejected that attempt, finding it obvious that a litigant may not satisfy Article III by pointing to "an injury that is only a byproduct of the suit itself." *Id.* at 70-71.

That conclusion only stands to reason. A subsidiary dispute may give rise to a gratuitous constitutional holding. Even controversies regarding the propriety of a request for discovery or the admissibil-

ity of a piece of evidence, for instance, often implicate constitutional rights and limits. *See, e.g.*, *Cheney* v. *U.S. District Court*, 542 U.S. 367, 381 (2004) (compelled document production may violate separation of powers); *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 34 (1984) (noting that "judicial limitations on a party's ability to disseminate information discovered in advance of trial" may "implicate[] the First Amendment rights of the restricted party"). To decide these rights in the context of a dispute provoked by an intervenor who lacks standing would violate the basic principle that "courts should be extremely careful not to issue unnecessary constitutional rulings." *Am. Foreign Serv. Ass'n* v. *Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam).

3. Along with these weighty separation of powers concerns, dispensing with the standing requirements for intervenors would impermissibly wrest control of the litigation from "the hands of those who have a direct stake in the outcome." *Sierra Club* v. *Morton*, 405 U.S. 727, 740 (1972). This result would undermine the standing doctrine's role in protecting "the autonomy of those most likely to be affected by a judicial decision." *Diamond*, 476 U.S. at 62.

Thus, in *Valley Forge*, the Court emphasized that the standing doctrine must prevent "concerned bystanders" from interfering with the suits of those whose "lives, liberty, and property" will be "profoundly affect[ed]" by the outcome. 454 U.S. at 473 (internal quotation marks omitted). And in *Diamond*, concern for the "autonomy" of the parties with standing contributed heavily to the holding that a putative intervenor *without* standing may not appeal a deci-

sion the parties *with* standing are content to leave unreviewed. 476 U.S. at 62, 65, 71.

The same logic militates in favor of requiring intervenors as of right to show standing in the district court. Once permitted to become parties to a suit, intervenors may influence a wide range of litigation decisions, from which claims to press and how vigorously to pursue them, to which witnesses to subpoena and what trial date to request. Only those parties who "can show 'injury in fact' resulting from the action which they seek to have the court adjudicate" should be permitted to make decisions about how that adjudication will unfold. *Valley Forge*, 454 U.S. at 473.

The prerequisites for intervention under Rule 24(a) make it particularly important to ensure that improper intervenors do not usurp the rightful litigants' control of the suit. Under that Rule, an applicant for intervention typically must prove that she will seek to do something to "protect [her] interest" beyond what the "existing parties" who cannot "adequately represent that interest" might do. Fed. R. Civ. P. 24(a)(2). An intervenor who has satisfied that requirement will necessarily ask a court to exercise its authority in a way different than the original parties. This infringement on the "autonomy" of the original litigants is permissible only if the intervenor possesses a direct, personal stake in the litigation. *Diamond*, 476 U.S. at 62.

In short, the Constitution demands that intervenors as of right demonstrate standing, and the constitutional principles that Article III protects depend on the strict enforcement of this constitutional command.

C. There Is No Justification For Dispensing With The Standing Requirements For Intervenors As Of Right.

Although several courts of appeals have held that intervenors as of right need not satisfy Article III's standing requirements, none has offered a convincing rationale for that position.

1. Courts have sometimes attempted to justify allowing the participation of an intervenor without standing by claiming that there are "lessened justiciability concerns in the context of an ongoing Article III case or controversy." *Dillard* v. *Chilton Cty. Comm'n*, 495 F.3d 1324, 1330 (11th Cir. 2007) (per curiam). But this Court has already flatly rejected an analogous theory of "ancillary standing." *DaimlerChrysler*, 547 U.S. at 353. That a plaintiff may have "standing as to one claim" does not "suffice" to demonstrate standing over "all claims arising from the same 'nucleus of operative fact.'" *Id.* at 352. Still less does a court's jurisdiction over one plaintiff's claim suffice to establish jurisdiction over new issues introduced by *an entirely different party*. To hold as much would resurrect the oft-rejected proposition that standing is "dispensed in gross." *Lewis*, 518 U.S. at 358 n.6.

Nor may an intervenor without standing rely on the facile point that the text of Article III is satisfied so long as some "case" or "controversy" exists. This Court has long held that the Constitution's Case-or-Controversy provision may not be interpreted broadly if it is to serve its vital function in limiting the "judicial Power." *Lujan*, 504 U.S. at 559-560. After all, even "an executive inquiry can bear the name 'case' (the Hoffa case) and a legislative dispute can

bear the name 'controversy' (the Smoot–Hawley controversy)." *Id.* at 559. But Article III demands more. *Each* plaintiff that invokes a court's authority must point to a cognizable injury with respect to *each* claim that she pursues; standing is not "commutative." *DaimlerChrysler*, 547 U.S. at 352.

2. Courts on the other side of the circuit split also sometimes point to dicta from *Diamond*. *See, e.g.*, *Dillard*, 495 F.3d at 1330. The *Diamond* Court observed that, had a party with standing sought certiorari, the intervenor without standing could have "piggyback[ed]" on the petition and filed a brief or sought leave to participate in oral argument. 476 U.S. at 64. But that statement cannot possibly be read to establish that an intervenor as of right under Rule 24(a) can evade the standing requirements; *Diamond* expressly reserved that question. *Id.* at 68-69. In any event, in this Court even an *amicus curiae* may participate in briefing and oral argument. Sup. Ct. R. 28(7), 37(1). These activities are permissible for a much wider range of litigants because they do not introduce new issues for the Court to decide or burden other parties with additional demands. *Diamond* therefore says nothing about whether standing is required for persons or entities that seek to do more than act as an *amicus*. *See Rio Grande Pipeline Co.* v. *FERC*, 178 F.3d 533, 539 (D.C. Cir. 1999) (treating a potential intervenor without standing "as an amicus curiae" because "it sought only to contribute its views to those issues raised [in the main] petition for review and * * * to participate in oral argument" and *Diamond* "says that an entity lacking Article III standing can do no more than that").

3. Finally, courts that make Article III standing optional for intervenors typically claim support from cases in which this Court has found jurisdiction to decide a question presented so long as one petitioner had standing. *See, e.g.*, Pet. App. 8a. But that is a serious misreading of these precedents. As noted, those cases establish that a court's jurisdiction to decide a particular *issue* is not destroyed by the presence of a party without standing. *See supra* pp. 22-23; *see also, e.g.*, *McConnell* v. *FEC*, 540 U.S. 93, 233 (2003), *overruled on other grounds by Citizens United* v. *FEC*, 558 U.S. 310 (2010). They do not establish that a court may permit an individual without standing to intervene under Rule 24(a) in order to participate as a party in the case going forward.

Indeed, the *McConnell* Court made very clear that there is a distinction between *this Court's* jurisdiction to decide a particular question despite the presence of intervenors that "lack Article III standing," and a *district court's* jurisdiction to grant intervention "pursuant to [Rule] 24(a)." *Id.* at 233. The *McConnell* Court held that the former was proper, but it reserved any decision on the latter. *Id.*

Unsurprisingly, this Court's cases simply do not establish that a prospective party may evade Article III's requirements, introduce new issues into a case, and place new and unwelcome burdens on the other parties to the litigation merely by filing a motion to intervene.

II. RULE 24(A)(2) REQUIRES INTERVENORS AS OF RIGHT TO SATISFY ARTICLE III.

If there is any doubt as to whether Article III requires a person to have standing to intervene as of

right, Rule 24(a)(2) resolves the question. That Rule demands that an intervenor have a "legally protectible" interest in the suit. And it requires that the interest be so substantial that the intervenor would be *mandatorily joined* under Rule 19 if intervention were not sought. The Rule's history, as well as the absurdities created by a contrary reading, reinforce the conclusion that the requirements of Article III standing are written into the Rule itself.

A. Rule 24(a)(2) Requires An "Interest" Equivalent To Article III Standing.

Rule 24(a)(2) provides that courts "must" permit any person to intervene in a suit who "claims an *interest*" in the case that may be "impair[ed] or imped[ed]" by the court's disposition, if that interest is not "adequately represent[ed]" by existing parties. Fed. R. Civ. P. 24(a)(2) (emphasis added). In *Diamond*, this Court declined to decide "the precise relationship between the interest required to satisfy th[is] Rule and the interest required to confer standing." 476 U.S. at 68. But its other precedents supply the answer: The same sort of "legally protected" interest necessary to supply standing is also needed to intervene under Rule 24(a)(2).

The Court indicated as much in *Donaldson*. That case arose when a taxpayer, Donaldson, sought to intervene as of right in a suit brought by the IRS to obtain tax documents from his employer, Acme. 400 U.S. at 520-521. Donaldson claimed an "interest" sufficient to intervene under Rule 24(a)(2) because the records the IRS sought "presumably contain[ed] details of Acme-to-Donaldson payments" and might be used in a criminal proceeding against him. *Id.* at 531. The Court held that was "not enough." *Id.*

"What is obviously meant" by Rule 24(a)(2)'s "interest" requirement, it explained, is "a *significantly protectable* interest." *Id.* (emphasis added). Donaldson's mere "desire" to prevent production of the records therefore did not suffice. *Id.* Because Donaldson had no "privilege" to seek "suppression" of the tax documents, he lacked an interest "of sufficient magnitude" to justify intervention. *Id.*

Donaldson thus understood Rule 24(a)(2)'s "interest" requirement to demand a "*legally* protectible" interest. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 315 (1985) (discussing *Donaldson*). Moreover, as Justice O'Connor explained, *Donaldson*'s analysis "[c]learly * * * calls for" an interest that is "direct and concrete," not "abstract" and "speculative"; a mere "desire" to prevent anticipated future harms is not enough. *Diamond*, 476 U.S. at 75-76 (O'Connor, J., concurring in part and concurring in the judgment).

This understanding of Rule 24(a)(2)'s interest requirement has deep roots. By the turn of the last century, this Court found it "well settled" that a party had an enforceable right to intervene only where "the denial of the right * * * would be a practical denial of certain relief to which the intervener [wa]s fairly entitled." *Credits Commutation Co.* v. *United States*, 177 U.S. 311, 315-316 (1900) (internal quotation marks omitted). An interest that was "contingent, speculative," or merely a "future possibility" did not suffice. *Id.* at 315. Similarly, in *Sutphen Estates* v. *United States*, 342 U.S. 19 (1951), the Court indicated that even the early versions of Rule 24(a) required intervenors to possess an inter-

est that was neither "speculative" nor "contingent on unknown factors." *Id.* at 23.

If these requirements sound familiar, that is because they mirror, almost word-for-word, the elements of Article III standing. Article III, too, requires a "legally protected interest" that is "concrete" and non-"conjectural." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). It likewise demands that the interest be "particularized" to the litigant. *Id.* That requirement is reiterated both in *Donaldson*'s insistence that the taxpayer *himself* have an enforceable "privilege," 400 U.S. at 531, and in Rule 24(a)(2)'s requirement that the intervenor's interest must be "[in]adequately represent[ed]" by others, Fed. R. Civ. P. 24(a)(2). And like Rule 24(a)(2), Article III demands that the possibility of redress not be "speculative." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted).

Given the substantial overlap between the two tests, lower courts have unsurprisingly struggled to articulate any clear difference between the requirements of Article III standing and Rule 24(a)(2). Nearly every circuit has agreed that Rule 24(a)(2) requires an intervenor as of right to claim an interest that is "direct, substantial and legally protectable." *Hawes* v. *Gleicher*, 745 F.3d 1337, 1339 n.5 (11th Cir. 2014) (internal quotation marks omitted).[1] Some

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[1] *See also Int'l Paper Co.* v. *Inhabitants of Town of Jay*, 887 F.2d 338, 342 (1st Cir. 1989); Pet. App. 13a (2d Cir.); *Kleissler* v. *U.S. Forest Serv.*, 157 F.3d 964, 973 (3d Cir. 1998); *NOPSI*, 732 F.2d at 463 (5th Cir.); *Purnell* v. *City of Akron*, 925 F.2d 941, 947 (6th Cir. 1991); *Transamerica Ins. Co.* v. *South*, 125 F.3d 392, 396 n.4 (7th Cir. 1997); *United States* v. *Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 839 (8th Cir. 2009); *S. Cal. Edison Co.* v.

have concluded that this standard is simply coterminous with, if not more demanding than, the criteria for Article III standing. *See S. Christian Leadership Conference* v. *Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984) (per curiam) (noting that *Donaldson*'s "gloss upon" Rule 24(a)(2) is the same as what would be "required by Article III"); *United States* v. *36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985) (concluding that "a significantly protectable interest" is "greater than the interest sufficient to satisfy the standing requirement" (internal quotation marks omitted)); *Cotter* v. *Mass. Ass'n of Minority Law Enf't Officers*, 219 F.3d 31, 34 (1st Cir. 2000) (concluding that Rule 24(a)(2)'s " 'interest' requirement" is "almost always" coterminous with Article III). And even those that (wrongly) reject Article III standing as a condition for intervention as of right still consult standing precedents in applying the Rule. *See, e.g.*, *Chiles* v. *Thornburgh*, 865 F.2d 1197, 1212-1213 (11th Cir. 1989) (holding that "standing cases * * * are relevant to help define the type of interest that the intervenor must assert"); *NOPSI*, 732 F.2d at 464-465 (consulting several standing precedents in interpreting Rule 24(a)(2)).

For good reason. Rule 24(a)(2)'s interest requirement has nearly the same aim as Article III's standing rules: To ascertain whether an entity has an interest "appropriate[] to be considered judicially cognizable." *Allen*, 468 U.S. at 752; *cf. Tiffany Fine Arts*, 469 U.S. at 315 (stating that an intervenor's

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Lynch, 307 F.3d 794, 803 (9th Cir. 2002); *Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth* v. *Dep't of Interior*, 100 F.3d 837, 840-841 (10th Cir. 1996).

interest must be "legally protectible"). It therefore makes sense—even putting aside what the Constitution requires—that courts would apply the well-developed, off-the-shelf body of law governing standing in interpreting Rule 24(a)(2), rather than starting from scratch. An intervention-only set of rules to identify sufficient "interests" would inevitably be less predictable for litigants and less uniformly applied across courts. And because there are only so many ways of articulating the same basic cluster of concepts, courts would be likely to fall back on the same set of words ("direct," "concrete," non-"speculative") and the same principles, *see NOPSI*, 732 F.2d at 463-464, to convey the ideas common to both doctrines. It makes far more sense to assume the drafters intended courts to apply a single set of rules in both cases.

B. The Textually Identical Rule 19(a)(1)(B) Requires An Interest Sufficient To Confer Standing.

This reading draws substantial support from Rule 24's context and purpose. The text of Rule 24(a)(2) mirrors almost exactly the language of Rule 19(a)(1)(B), a provision governing mandatory joinder. That Rule states that a court "must" join any person to a suit who "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may * * * as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i).

This nearly word-for-word correspondence was not accidental. The drafters of the current version of Rule 24(a)(2) intended it to be "a kind of counterpart

to Rule 19(a)[(1)(B)]." Fed. R. Civ. P. 24(a)(2) advisory committee's note to 1966 amendment.[2] As the drafters explained, their aim was to permit a person whose "position is comparable to that of a person under Rule 19(a)[(1)(B)]" to join a suit of her own accord through intervention. *Id.*

It is all but inconceivable that someone could have an interest sufficient to merit mandatory joinder under Rule 19(a)(1)(B) but nonetheless lack Article III standing. By its terms, Rule 19(a)(1)(B) contemplates the joinder of persons whose interest in a suit is so great that they must be *compelled* to join, even as "involuntary plaintiff[s]," or have the case "dismissed" in their absence. Fed. R. Civ. P. 19(a)(2), (b). Persons with such a significant stake in the outcome of a controversy will almost inevitably satisfy Article III's requirements. Practice suggests as much: In five decades, it is difficult to find a single Rule 19(a)(1)(B) case in which a mandatorily joined party's standing would be seriously open to question. *See, e.g.*, *Ward* v. *Apple, Inc.*, 791 F.3d 1041, 1050-1051 (9th Cir. 2015) (explaining that Rule 19(a)(1)(B) requires "a legally protected interest" that is "more than a financial stake, and more than speculation about a future event").

Accordingly, Rule 24(a)(2)'s "interest" requirement must also demand an interest sufficient to create Article III standing. Rule 24(a)(2)'s text is essentially identical to Rule 19(a)(1)(B)'s, and it was intended to be the joinder rule's counterpart. It would there-

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[2] At the time of the revision, this Rule was codified at Fed. R. Civ. P. 19(a)(2)(i). Its text was materially the same.

fore violate basic canons of statutory interpretation to require two different types of "interest[s]" in applying the two rules. *See, e.g.*, *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005) ("[I]dentical words used in different parts of the same statute are generally presumed to have the same meaning."); *United Keetoowah Band of Cherokee Indians of Okla.* v. *United States*, 480 F.3d 1318, 1324 (2007) (holding that "our application of the 'interest' requirement" under one Rule "applies similarly" to the other).

C. Historically, Intervention As Of Right Was Not Granted To Entities That Lacked Standing.

The broader history of Rule 24(a) points in the same direction. Intervention originated as a narrow practice. When the Constitution was written, only persons who could file a formal complaint or who had a direct property interest in the suit could intervene as of right. *See* Bates, *supra*, at 664; Moore & Levi, *supra*, at 569-572.

By the time Congress "codif[ied]" existing doctrines in 1938, *Mo.-Kan. Pipe Line*, 312 U.S. at 508, intervention as of right had not broadened substantially. *See*, *e.g.*, *Credits Commutation*, 177 U.S. at 316 (holding that much more than a "contingent" or "speculative" interest is required to establish a right to intervene). The original Rule 24(a) permitted intervention as of right only for those who would be "*bound* by a judgment in the action" or "*adversely affected* by a distribution or other disposition of property in the custody of the court or of an officer thereof." Fed. R. Civ. P. 24(a)(2)-(3) (1938) (emphases added); *see* Wright, *supra*, § 1901. There can be no real doubt that a person who could satisfy that

Rule's requirements could also satisfy the requirements of Article III. *Cf. Mo.-Kan. Pipe Line*, 312 U.S. at 508 (holding that the "sole question" in determining a party's right to intervene was whether it had "standing to make [its] claim before the district court"); *Lujan*, 504 U.S. at 561 (explaining that "there is ordinarily little question" that a person who is "himself an object of [government] action" has standing).

In 1966, Rule 24 was amended to enable intervention in certain additional "meritorious cases." Fed. R. Civ. P. 24(a)(2) advisory committee's note to 1966 amendment. In particular, the drafters thought the insistence on a technically binding judgment made it difficult for the "beneficiary of [a] trust" or a "member of a class [action]" to intervene in suits directly deciding their interests. *Id.* And the drafters observed that the requirement that property be in the "custody" of a court was artificial and rarely followed in practice. *Id.*

But these were particularized concerns, focused on narrow deficiencies in the rule. As the Fifth Circuit recognized not long after the amendment, nothing suggested the drafters intended to change "the *kind* of interest necessary" for intervention as of right. *NOPSI*, 732 F.2d at 463; *see* Kaplan, *supra*, at 405 (similar). Certainly nothing suggests the drafters intended to open the door to the array of abstract and speculative interests that lower courts who dispense with standing have permitted. *See, e.g.*, *Jansen* v. *City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990) (permitting intervention based on concern that a decision will be persuasive to another judge); *Yniguez* v. *Arizona*, 939 F.2d 727, 733 (9th Cir. 1991)

(permitting intervention based on status as sponsor of ballot initiative). It is far more likely that the drafters intended to allow only the sort of concrete, well-defined interests that had always been a prerequisite for intervention as of right—the same interests, in other words, necessary to show standing under Article III.

D. Permitting Intervention As Of Right By Persons Who Lack Standing Would Create Improbable Results.

Finally, construing Rule 24(a)(2) to require an "interest" sufficient to confer standing is necessary to prevent several improbable results.

First, if Rule 24(a)(2) did not require Article III standing for intervenors, then dismissing a plaintiff for lack of standing in a multi-plaintiff suit would be an empty gesture. Any plaintiff so dismissed could simply file a motion to intervene under Rule 24(a) and, often as not, reenter the suit as an intervenor—thereby obtaining all of the privileges and all of the powers that she would have possessed as a plaintiff. It defies belief that the drafters of the Federal Rules intended to allow such an obvious end-run around standing limits.

Second, even if one doubts that standing is required at the moment an intervenor enters a case, one may nonetheless be certain that an intervenor cannot demand discovery, file a claim, seek relief, or otherwise invoke the Court's power without standing. *See supra* Part I.B.1. It is inevitable, moreover, that the intervenor will *eventually* do one of these things; that is, after all, the sole purpose of seeking intervention rather than participating as an *amicus*. It would therefore be senseless to require courts to go

through the process of conducting one interest analysis in granting the motion to intervene, only to inevitably conduct an ever-so-slightly different analysis as soon as the intervenor sought to exercise her rights in a particular way. Far better to simply resolve it all up front, when the interest question is already squarely presented to the court.

Third, permitting an intervenor to participate in a district court without standing would have baffling consequences in light of this Court's precedents on an intervenor's right to appeal. *Diamond* bars the initiation of appeals by intervenors without standing. If such parties are nonetheless permitted to intervene as of right in the district court, an intervenor without standing might pour a vast quantity of time and money into a suit in the district court, only to be left in the cold when the parties with standing elect not to appeal an unfavorable judgment. The unlucky intervenor might not even realize the possibility of such an outcome until she tries to appeal, as no standing assessment would have been made at the district court. Further, the intervenor might—as in *Diamond*—be left with an unpleasant souvenir of her fruitless district-court efforts in the form of an order to pay the opposing side's attorney's fees. 476 U.S. at 70.

A rule dispensing with the standing requirement for an intervenor as of right would also be hard to reconcile with this Court's decision in *Stringfellow*, 480 U.S. 370. In that case, after the district court denied an intervenor the right to seek relief or participate in discovery, the intervenor sought an interlocutory appeal, arguing that this restriction was a "collateral order * * * 'effectively unreviewable on

appeal from a final judgment.' " *Id.* at 373, 375 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). This Court dismissed the appeal. Because an intervenor generally "ha[s] the same rights of appeal from a final judgment as all other parties," the Court explained, the intervenor could obtain review of the order by asking an appellate court "to vacate the judgment because of [the] erroneous intervention order." *Id.* at 376-377; *see Dig. Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 872 (1994) (reiterating that "restrictions on the rights of intervening parties" may be remedied only "by appellate reversal of a final district court judgment").

This holding is difficult to understand if intervenors are not required to have Article III standing. Only one year earlier, the *Diamond* Court had made clear that intervenors without standing cannot appeal an adverse judgment. 476 U.S. at 69; *see also, e.g.*, *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2661 (2013). Thus, for intervenors who lack standing, *Stringfellow* works a bait and switch: no immediate appeal because a final appeal is available; no final appeal because standing is lacking. Nor would it be logical to exempt intervenors without standing from *Stringfellow*'s prohibition on interlocutory appeals altogether; then intervenors who lack standing would have *more* rights than intervenors with a cognizable interest in the suit. That cannot be.

Against these various problems, there is no reason to ratchet Rule 24(a)'s limits below the floor set by Article III. As all agree, in the large majority of cases in which lower courts currently grant intervention under Rule 24(a), standing is present. *See* Br. in

Opp. 9-13. Some courts have persisted in granting intervention in a limited but significant set of cases in which Article III's requirements are not met. *See* Cert. Reply Br. 3-4. These cases, however, do not present compelling candidates for intervention: They involve hypothetical litigants worried that a decision may be cited as persuasive authority in a future case, *Jansen*, 904 F.2d at 342; proponents interested in defending legislation they supported, *Yniguez*, 939 F.2d at 733; or legislators with no particularized interest in a case at all, *Ruiz* v. *Estelle*, 161 F.3d 814, 829-830 (5th Cir. 1998). Requiring individuals raising these interests to participate as *amici* would not work any injustice or impair courts' capacity to resolve cases with the full breadth of relevant knowledge regarding a particular issue. It would simply limit party participation to those with a "legally protectible interest" in the case—a sensible result, and one required by Rule 24(a)(2) and Article III alike.

III. REQUIRING THAT INTERVENORS AS OF RIGHT HAVE STANDING BENEFITS COURTS AND LITIGANTS.

The conclusion that intervenors as of right must have standing is more than sufficient to decide this case. The District Court held that Laroe did not have Article III standing. Pet. App. 56a. The Second Circuit did not question that determination and instead held that Article III standing was unnecessary for an intervenor under Rule 24(a). *Id.* at 7a. This Court should hold the opposite, reverse the Second Circuit, and reinstate the denial of Laroe's motion to intervene.

That outcome is not only correct as a matter of law; it is also good policy. The court system and litigants are well served by assessing an intervenor's standing before permitting intervention under Rule 24(a).

1. As the Chief Justice recently observed, "the typical federal [district court] judge has more than 500 cases on the docket." U.S. Supreme Court, *2016 Year-End Report on the Federal Judiciary* 6 (Dec. 31, 2016), https://www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf. Each of these cases may require a judge to "resolve[] discovery disputes, manage[] the selection of the jury, rule[] on the admission of evidence, determine[] the proper and understandable instruction of the jury, and resolve[] any issues surrounding the acceptance of the verdict and entry of judgment." *Id.* at 4. That "daunting workload" requires the judge to "be an able administrator in managing the ceaseless stream of cases and issues that pass through the court." *Id.* at 6.

Two key tools in the district court's arsenal are the ability to "narrow a case to a small number of issues truly in dispute" and the authority to prompt the parties to "resolve the matter through settlement" whenever possible. *Id.* at 7. Requiring a court to admit intervenors as of right that lack Article III standing badly blunts those tools.

The presence of additional parties inevitably multiplies the number of issues in dispute and the time it takes to resolve a case. *See, e.g.*, *W.L. Hailey & Co.* v. *Cty. of Niagara*, 388 F.2d 746, 748 (2d Cir. 1967) (intervenors introduced new claims); *Exch. Nat'l Bank of Chi.* v. *Abramson*, 45 F.R.D. 97, 103-104 (D. Minn. 1968) (intervenors introduced new counterclaims); *Grinnell*, 519 F.2d at 596 (intervenors pro-

voked a discovery dispute); *Key Bank of Puget Sound* v. *Alaskan Harvester*, 738 F. Supp. 398, 401 (W.D. Wash. 1989) (intervenors provoked an evidentiary dispute). And more parties at the table makes settlement more difficult. *See, e.g.*, *Indus. Commc'ns & Elecs.* v. *Town of Alton*, 646 F.3d 76, 79 (1st Cir. 2011) (individual intervenors sought to continue suit even though original parties had reached a settlement); *South Carolina*, 558 U.S. at 287-288 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("Intervenors do not come alone—they bring along more issues to decide, more discovery requests, more exceptions to the recommendations of the Special Master. In particular, intervention makes settling a case more difficult * * * .").

These additional burdens on the judicial system and on district court judges in particular are acceptable if they are the price of ensuring that a party with a direct stake in a suit is able to play a role in determining the outcome. *See Valley Forge*, 454 U.S. at 473. Indeed, when an intervenor herself has standing to sue, intervention may ultimately minimize the stresses on the judicial system by allowing for a set of linked claims or defenses to be decided in one suit or one settlement, rather than many. But when an intervenor lacks standing, there is no justification for allowing her to impose these substantial burdens. By definition, an intervenor without standing *lacks* a sufficient stake in the matter to seek judicial relief in her own right. The time and energy she demands from the district court judge come at the expense of the many litigants who do have a vital stake in the intervenor's suit and in the other 500-odd cases on the judge's docket. *See City of Chicago* v. *FEMA*, 660 F.3d 980, 985 (7th Cir. 2011)

(Posner, J.) (without "essential limits on [its] scope," intervention would "clutter too many lawsuits with too many parties").

This waste of precious judicial resources extends beyond the district courts. Appellate courts are often forced to dismiss a case that has already been briefed and argued upon discovering that an intervenor-appellant has no standing. *See, e.g.*, *Associated Builders & Contractors* v. *Perry*, 16 F.3d 688, 689 (6th Cir. 1994). The magnitude of the problem is such that even this Court has been forced to dismiss multiple cases in recent years because the intervenors seeking certiorari did not meet the Article III requirements. *See Wittman* v. *Personhuballah*, 136 S. Ct. 1732, 1737 (2016) (intervenors lacked standing to appeal); *Hollingsworth*, 133 S. Ct. at 2668 (same); *see also Arizonans for Official English*, 520 U.S. at 66 (expressing "grave doubts whether [the intervenors] have standing under Article III to pursue appellate review").

2. Improper intervention also harms rightful litigants in ways beyond its drain on the judicial system. Again, an intervenor's participation increases the burdens placed directly on the original parties in numerous ways. To name just a few: additional discovery requests increase the costs of production; additional motions, additional arguments, and even additional disputes about how to frame the arguments increase the fees paid to the lawyers; and additional timing disputes increase the number of days and hours the litigants must carve out of their lives for the litigation.

These burdens may even become so severe that they interfere with a potential litigant's access to

justice. As this Court has explained, the exorbitant costs of litigation—both financial and otherwise—may dissuade a party from asserting a meritorious claim or defense. *Cf. Coopers & Lybrand*, 437 U.S. at 476 ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."). As a result, this Court has carefully monitored litigation practices like discovery to ensure that they do not become so burdensome that they bar the courtroom doors. *See, e.g.*, *Seattle Times*, 467 U.S. at 36 n.22 (emphasizing "the importance of ensuring that potential litigants have unimpeded access to the courts" when considering the propriety of ordering discovery). These efforts are undercut when intervenors without standing are allowed into a suit. Not only are the costs they impose unnecessary, but they are unpredictable. A potential plaintiff can assess how many parties have a direct stake in an action and estimate costs accordingly. It is much harder for that plaintiff to account for the number of potential individuals with lesser interests who may nevertheless parachute into her case.

Further, there is already a less burdensome means for those third parties to make their lesser interests known to the court: participation as *amici curiae*. When necessary, *amici* have been permitted to file briefs and otherwise apprise the court of concerns and interests the parties might otherwise have overlooked. This limited form of participation ensures that a court fully understands the contours of a controversy. At the same time, because an *amicus*'s participation is tightly limited, the court and the

other parties are spared the extra expense of time, energy, and money imposed by an intervenor as of right in the district court. *See Int'l Union*, 382 U.S. at 209 (contrasting an intervenor with "an amicus [who] is not a 'party' to the case").

While the practice of permitting *amici curiae* is generally not well developed in the district courts, there is no reason courts could not implement it more if any gaps are left by enforcing the Constitution's Article III standing limits on intervention as of right. Alternatively, a district court might allow an interested individual without standing to become a permissive intervenor under Rule 24(b), limiting that individual's rights to ensure that she does not independently invoke the court's authority in any way. *Cf. Stringfellow*, 480 U.S. at 373 (explaining that the district court granted an interested environmental group permissive intervention, but strictly limited its powers within the suit).

Whatever the alternative may be, this case offers a vivid illustration of why courts should not dispense with the Article III standing requirements for intervenors as of right. The underlying suit has already been going on for almost nine years, and had already been around for six years when Laroe first sought to intervene. Laroe has asserted that the current plaintiff, Ms. Sherman, informed Laroe that she lacks an "incentive to move the case forward" and is "unwilling to pursue the takings claim" herself. Pet. App. 13a (internal quotation marks omitted). Yet by permitting Laroe to intervene—despite its inability to identify a cognizable interest in the outcome of the suit—the Second Circuit has further drawn out the litigation. *Id.* at 11a. As a result, more district court

resources will be unnecessarily spent and more Town (and therefore taxpayer) funds gratuitously expended. And, if Sherman and Laroe lose, Laroe will have wasted even more of its money obtaining an unfavorable ruling that it cannot appeal of its own accord. *See Diamond*, 476 U.S. at 69; *Stringfellow*, 480 U.S. at 376-377. That outcome cannot be what the drafters of Article III or the Federal Rules intended.

3. All of this is not to say that our courtrooms are currently overrun with improper intervenors. In fact, most courts of appeals already apply the test for Article III standing or something very similar to it before granting intervention as of right. *See supra* Part II.C.1. Making clear that the Constitution requires that threshold standing inquiry will not work a sea change in litigation practices, or—unfortunately—single handedly relieve the heavy workload of the district courts. But it will ensure that, as our Founders intended, the scarce resources of the judiciary and those who appear before it are spent only "in the last resort, and as a necessity in the determination of real, earnest and vital controversy.' " *Chi. & Grand Trunk Ry.*, 143 U.S. at 345.

CONCLUSION

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

Respectfully submitted,

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