No. 16-605

In the Supreme Court of the United States

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

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

BRIEF AMICUS CURIAE THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES, THE U.S. CONFERENCE OF MAYORS, AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICUS CURIAE*[1]

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

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[1] Pursuant to Rule 37.6 *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief, and no person other than *amicus curiae,* its members, or its counsel made a monetary contribution to its preparation or submission.

The parties' consents to the filing of this brief have been filed with the Clerk's office in conjunction with the certificate of service.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts

SUMMARY OF THE ARGUMENT

The Second Circuit's ruling allowing Laroe Estates, Inc. to intervene under Rule 24 without first showing Article III standing sets a dangerous precedent that allows parties without a direct and concrete stake in the outcome of a case to prolong and complicate litigation, resulting in increased costs of litigation. The consequences are even more serious in cases involving state and local governments, as the cost of intervention also comes at the expense of taxpayers, complicating litigation (as well as settlement), and forcing government entities to continue to litigate in order to avoid allowing third-parties to control the results of the litigation, which can have significant public policy consequences. *Amicus* urges the Court to reverse the Second Circuit's decision and hold that Article III standing is required for intervenors.

ARGUMENT

I. ALLOWING PARTIES TO INTERVENE WITHOUT ARTICLE III STANDING REMOVES A CHECK AGAINST FRIVOLOUS CLAIMS AND UNNECESSARILY COMPLICATES LITIGATION

A. Intervention Allows Parties to Participate Fully in the Litigation as a Party.

Intervenors of right can "litigate fully once admitted to a suit," which "[has] the inevitable effect of prolonging the litigation to some degree." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1304 (9th Cir. 1997). Intervention of right allows intervenors to effectively take over litigation from the original plaintiffs and defendants in litigation. *See* Amy Gardner, *An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenors*, 69 U. CHI. L. REV. 701, 702 (2002), *see also Chiles v. Thornburgh*, 865 F.2d 1197, 1216 (11th Cir. 1989) ("The duplicative nature of the claims and interests [the intervenors] asserted threatens to unduly delay the adjudication of the rights of the parties in the lawsuit and makes it unlikely that any new light will be shed on the issues to be adjudicated.").

B. The Supreme Court Has Long Held That a Party That Wishes To Invoke The Jurisdiction Of Any Federal Court Must Have Standing To Bring A Suit as a Check on Litigation.

Courts have long held that "one component of a case or controversy is that a party who invokes federal court jurisdiction must have standing to sue." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). Further, under the American Rule, a petitioner must bear all costs associated with bringing a suit. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682–84 (1983). The system forces litigants to make economically efficient decisions, such that a "rational plaintiff will bring suit only if the expected judgment would be at least as large as his expected legal costs, i.e. the total legal costs discounted by his probability of losing at trial." *New Jersey. v. EPA*, 663 F.3d 1279, 1288 (D.C. Cir. 2011) (Brown, J., dissenting); *see also* Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. Legal Stud. 55, 58 (1982).

Judges have found that standing is a useful safeguard in managing the "litigation explosion" caused by the 1966 amendments to the Federal Rules of Civil Procedure. The amendments relaxed party joinder requirements. *See* Carl Tobias, *Standing to Intervene*, 1991 Wis. L. Rev. 415, 439 (1991). As a check against the relaxed joinder rules, Article III standing limits federal jurisdiction to cases where parties have a personal stake in the outcome. *See* Matthew Light, *Standing of Intervenor-*

Defendants in Public Law Litigation, Fordham L. Rev. 1539, 1584 (2012).

C. Generally, Requiring Intervenors to Demonstrate Standing Aligns the Intervenors' Economic Interests With Those of the Other Parties to the Suit.

"[I]ntervenors bear far fewer costs, and thus shoulder far less risk, than petitioners," meaning that "a party with a marginal claim would be substantially more likely to intervene than it would be to file suit in its own right." *New Jersey*, 663 F.3d at 1288. Because intervenors do not internalize the full costs of bringing a suit, it encourages them "to pile on claims that are not sufficiently meritorious to justify filing in their own right." *See* Richard L. Revesz and Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health,* Oxford University Press (2008) ("[W]e need a mechanism that tells us when to stop spending money. Cost-benefit analysis is that mechanism."). A lack of internalization for intervenors creates an incentive structure at odds with the original parties to suit and a threat to economic efficiency.

Litigation is often a lengthy and expensive process.[2] Intervenors cause the marginal burden (which

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[2] These costs are not always monetary. For example, in *Keith v. Daley*, 764 F.2d 1265 (7th Cir. 1985), a pro-life organization sought to intervene in a suit brought by a group of physicians who challenged the constitutionality of a law that prevented

litigants already do not pay) to increase with each suit presented in the court system. Courts must listen to additional witnesses, arguments, and demand requests which extend litigation over a much longer time frame. *See* Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 Wash. U. L. Q. 215 (2000), http://openscholarship.wustl.edu/law_lawreview/vol78/iss1/4. Some have suggested that the flexibility which encourages parties to intervene facilitates economic efficiency because it allows a single case to incorporate multiple claims, precluding "duplicative suits" and "inconsistent and conflicting decrees." Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. Rev. 279, 302 (1990). However, their logic does not hold when the parties seeking to intervene do not have standing to bring an independent suit. Those parties' interests are at best duplicative, and at worst in outright conflict with the interests of the original party.

The burden of an intervenor's cost on litigation cannot be easily quantified in terms of money, nor time spent on a case. However, coordination costs rise for the original parties and for the court because when intervenors enter litigation, new hearings must be scheduled, and a new timeline for pleadings

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them from performing abortions. While intervention was denied for reasons not implicating Article III standing, a delay in the resolution of the case would surely have imposed costs well beyond attorney's fees.

must be set. When deciding to pursue litigation in the first place, the original litigants may not have anticipated an intervention, so their cost-benefit calculus is distorted post-hoc as they endure delays in the resolution of their case while courts consider new issues raised by intervenors. *See* Vreeland, 57 U. CHI. L. REV. 279 at 299 ("Intervention threatens control because intervenors will usually introduce new evidence, new issues, and new positions on existing issues…New parties always bring with them new costs, and intervention may so strain resources that the original parties cannot afford to maintain the suit.").

Without sufficient standing requirements, court systems that already have serious budget constraints may become further backlogged. *See* Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 673 (1973) (noting the opportunity costs of litigation provide the court system with a functional "initial screening barrier"). The requirement that intervenors have Article III standing will ensure that courts operate efficiently and are free of the intervention of unnecessary parties who bring little to the table.

D. Requiring Intervenors to Demonstrate Standing Also Ensures the Courts Are Not Employed to Decide Ideological Issues.

Standing is designed to limit the judiciary's jurisdiction to actual cases and controversies, whereas public policy should be the domain of democratically elected representatives. For instance, in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2015),

Judge Gorsuch wondered,

> What would happen, for example, if the political majorities who run the legislative and executive branches could decide cases and controversies over past facts?... [C]onversely, what would happen if politically unresponsive and life-tenured judges were permitted to decide policy questions for the future or try to execute those policies? The very idea of self-government would soon be at risk of withering to the point of pointlessness.

The judiciary cannot address all areas of public concern, and it would be misguided to allow private citizens to use the courts towards that end. *See Raines v. Byrd*, 521 U.S. 811, 819 (1997), *citing Muskrat v. United States*, 219 U. S. 346, 356 (1911) ("[F]rom its earliest history this [C]ourt has consistently declined to exercise any powers other than those which are strictly judicial in their nature."). The Court has denied standing based on insufficient interests regarding a number of generalized grievances, from environmentalists, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-76 (1992), to taxpayers, *Massachusetts v. Melon*, 262 U.S. 447, 488-89 (1923), to anti-war activists, *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 217-220 (1974).

Granting standing to parties with only generalized grievances forces courts to serve as moderators "for the vindication of…value interests." *United States v. SCRAP*, 412 U.S. 669, 687 (1973). Self-styled public-interest intervenors who frequently bring actions against government entities and municipalities often lack Article III standing

because their interests are "relatively intangible, abstract, [and] ideological," as compared to the concrete interests of the petitioner who initiated the suit. *See Tobias* at 419; *see also e.g., Lujan*, 504 U.S. 555. Many of the intervenors who effectively lack standing are involved in cases for ideological reasons. Barring those intervenors without standing helps prevent "the conversion of [federal] courts…into judicial versions of college debating forums." *Mausolf v. Babbitt*, 913 F. Supp. 1334, 1344 (1996). Allowing only parties with standing to intervene allows courts to avoid becoming involved in political debates.

II. FAILING TO REQUIRE STANDING OF INTERVENORS POSES A PARTICULAR PROBLEM FOR STATE AND LOCAL GOVERNMENTS AND THEIR TAXPAYERS.

When acting as parties to litigation, state and local government entities suffer the same problems as other litigants when litigation is unnecessarily complicated by intervenors. However, the burden intervenors impose is more magnified in a setting where state or local government entities are parties.

A. When Intervenors Complicate Litigation Involving Government Entities, the Increased Cost of the Litigation Falls on the Taxpayer.

When an intervenor enters a suit where a government entity is already a party, the increased litigation costs for the government fall on the taxpayers. As noted above, intervenors raise costs, creating issues of particular concern for government

litigants. The number and complexity of cases involving state and local governments has risen in the past four decades, largely in part to the 1966 amendments to the joinder rules, which gave rise to what became known as "public law litigation." *See* Appel, 78 Wash. U. L. Q. 215 at 215. Abram Chayes described public law litigation as involving a "grievance about the operation of public policy"—most often governmental policy. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1302 (1976).

The new rules that facilitated intervention, coupled with the large pool of potential parties to draw on, have increased the size and frequency of lawsuits that state and local governments are forced to defend against. *See* Vreeland, 57 U. Chi. L. Rev. 279 at 280. These suits are particularly expensive to litigate as they "involve sprawling party structures, an emphasis on legislative fact-finding, prospective relief, ongoing decrees that affect widespread interests, and active involvement by judges." *Id.* at 280. Reduced barriers to entry in public-interest cases attract ideologically driven intervenors who will raise costs for the original litigants not only by "making the litigation more cumbersome, but also (and more important) by blocking settlement." *Solid Waste Agency v. United States Army Corps of Eng'rs,* 101 F.3d 503, 507 (7th Cir. 1996). The inability for a government entity to settle a case also adds unnecessary burden on taxpayers because the suit is prolonged.

Further, the risk of prolonged and convoluted

litigation weighs more heavily on smaller governments relative to larger cities.[3] For example, New York City reduced its overall litigation costs after it began a cost-mitigation policy that encouraged settlement. *See* Mike Maciag, *From Police Shootings to Playground Injuries, Lawsuits Drain Cities' Budgets, Governing the States and Localities* (November 2016), http://www.governing.com/ topics/finance/government-lawsuits-settlements.html. Smaller municipalities such as the petitioner in this case cannot utilize similar strategies that require larger economies of scale.

B. Intervenors in Suits Involving Government Entities May Be More Likely to Have an Ideological Interest, Resulting in a Greater Risk of Litigation Over Generalized Grievances.

Standing requirements purposely prevent parties with only generalized grievances from bringing suit. Failure to impose standing requirements on intervenors increases the risk that intervenors will introduce generalized grievances to a suit. When a government entity is a party to litigation, it is more

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[3] Most municipalities are relatively small. In 2015, 84% of cities, towns and villages in the United States (16,470 of 19,505) had populations of less than 10,000 people. Statista.com, Number of cities, towns and villages (incorporated places) in the United States in 2015, by population size, https://www.statista.com/statistics/ 241695/number-of-us-cities-towns-villages-by-population-size/.

likely that a third party will seek intervention because of ideological concerns about government regulations or statutes, rather than because of more concrete and particularized interests in the subject matter of a suit.

Because government entities craft and execute public policy, they face the brunt of the costs and the consequences of increased access to litigation regarding policy matters. Government entities have few precious resources to dedicate to litigation resolution. If standing requirements are relaxed to allow disinterested parties to intervene in such cases, this would remove autonomy from governments and force them to address legal battles they would otherwise find it prudent to avoid.

The issue is particularly salient in cases with public policy controversies involving governmental bodies. Two parties may simply want their controversy resolved, but must worry about "their case being taken over by intervenors who present themselves as concerned citizens or public interest organization." Gardner, 69 U. CHI. L. REV. at 702; *see, e.g.*, *Sagebrush Rebellion, Inc. v Watt*, 713 F.2d 525 (9th Cir. 1982) (where a wildlife group intervened to protect bird habitats).

Requiring Article III standing of intervenors does not prevent these groups from having their views heard. Rather, they have another avenue that they could consider instead of burdening litigation as intervenors: acting as *amici*. Most courts place few limitations on who can file an amicus brief or what

the brief must say. *Amici* can impact litigation without having the same expansive rights as intervenors. *See* Appel, 78 WASH. U. L. Q. 215 at 307-309. Like intervenors, *amici* can make their arguments known to a court through briefs without adding to the cost of litigation. Research indicates that well-written amicus briefs from prominent attorneys in particular can be very influential. Kelly J. Lynch, *Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J. L. & POLITICS 33, 52-56 (2004). Parties whose interest is merely to impact policy should not be permitted to intervene in the litigation because they can express their views to the court as *amici*.

As noted above, municipalities are more likely to be the victims of intervenors with an ideological bent, who lack Article III standing. Consider the example of the polarizing litigation a number of municipalities, including San Francisco, have brought against President Trump relating to the Executive Order entitled, "Enhancing Public Safety in the Interior of the United States." Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) or the so-called "sanctuary city" litigation. In these cases, municipalities have brought suit against President Trump claiming that the aforementioned executive order violates the Constitution in a number of ways, specifically with regard to the Fifth and Tenth Amendments.

This is a politically charged issue, with people on both sides of the issue holding unshakable beliefs that their side is correct. It is not a stretch therefore

to imagine that if Article III standing was not required for intervenors, (which is currently not a requirement in the Ninth Circuit), residents of San Francisco would be lining up to intervene in the suit. Some might argue that the city was wrong not to comply with the executive order because they will lose a huge portion of their city's budget if federal funding is withdrawn, thereby depriving residents of needed services. Others may want to intervene arguing the city should cooperate fully with the federal government in immigration enforcement because they have been the victim of a crime committed by an undocumented person. On the other side, intervenors may argue that President Trump's executive order will cause an increase in crimes going unreported and erosion of trust between communities and local law enforcement. Indeed, someone might seek to intervene because of increased violence in their neighborhood due to the community's fear in reporting crime to the police. Someone else might intervene to argue that the executive order prevented her daughter from going to the police when her spouse was abusing her, which resulted in her death.

In either case, a federal judge who is already dealing with expedited briefing and perhaps expedited discovery under a national microscope would have to allow additional hearings and discovery for these added intervenors, which would waste time and resources for both the court and parties. These intervenors would likely be seeking information via written discovery request and potentially time consuming and costly depositions

that do not go to the heart of the case, for example, information on how the city spends its funds, what programs it plans to cut if it loses funding, discovery on police reports, crime statistics, etc. It is not hard to imagine how the litigation could quickly spiral out of control.

Now consider if the exact same litigation had been brought by the City of Chicago against President Trump in the Seventh Circuit. None of these intervenors would be allowed in to the suit unless they could demonstrate independent Article III standing, which in this hypothetical is unlikely. Instead, as noted above, they would have the ability to file amicus briefs to help persuade the court to decide the case in their favor. This result balances judicial economy while still allowing these outside parties to influence the court.

C. Intervention Forces Government Entities to Litigate Positions Beyond the Point Where the State Would Choose to Avoid Further Expenditure of Government Funds, In Order to Avoid Allowing an Intervening Third Party to Control the Result.

The government entity represents the entirety of its citizens, while a single intervenor undertakes the costs of litigation to further its own particularized preferences. When it comes to intervenors of right, state and local governments are faced with a Hobson's choice—either fully litigate the issue themselves, or risk allowing a party to intervene as of right based on inadequacy of representation,

which would then allow that party to shape litigation. Either way, the issue ends up being litigated to its furthest extent, perhaps against the wishes of the government, the public at large, and the taxpayers.

Private citizens and governmental entities have necessarily different motivations. The ability of intervenors of right to intervene depends on their individualized interest in the outcome. However, state and local government actors ostensibly engage in litigation to protect the public interest. While the private interests of intervenors and public interests of state and local government may line up at least occasionally, they do not line up all of the time. Given that governments, by their formation, hold a monopoly on recognized political power within their respective jurisdictions, it is more philosophically consistent not to allow private actors to effectively act as state and local government actors in litigation.

In *Diamond v. Charles*, 476 U.S. 54 (1986), the constitutionality of an Illinois statute concerning abortion was challenged, and Diamond sought to intervene as a defendant. When the trial court issued a preliminary injunction against the law, Diamond was the sole appellant as an intervenor. This Court held that for an intervenor to be the sole appellant from a judgment, the intervenor must "fulfill the requirements of Article III." *Id.* at 68.

By not appealing, the state indicated its acceptance of that decision and its lack of interest in defending its own statute. There are a number of

reasons why this would be perfectly acceptable behavior: a number of states prior to *Obergefell* declined to appeal decisions against their gay marriage bans, for instance. When a state or local government makes such a public policy decision, intervenors should not be permitted to override that decision and force the litigation to continue unless they can demonstrate Article III standing.

The case at bar illustrates how intervenors with such tenuous interests may needlessly prolong a case at the expense of a local government. The controversy in question began when Laroe Estates, Inc. entered a purchase agreement with the now-deceased original plaintiff, Steven Sherman. *Laroe Estates, Inc. v. Town of Chester*, 828 F.3d 60, 63 (2d Cir. 2016). The parties signed the agreement in 2003, when many homeowners purchased homes at prices above post-Recession values. *Id.* Now over a decade later, the circumstances have changed significantly, yet resolution for the original parties is nowhere in sight. The current plaintiff (Sherman's widow) has asserted that she lacks an "incentive to move the case forward" and is "unwilling to pursue the claim" herself. *Laroe*, 828 F.3d at 67. However, by allowing Laroe to intervene, the court further prolonged a case that has already lasted for eight years since the date of filing, and sixteen years since the original plaintiff applied for subdivision approval. *Id.* (emphasis added).

The circumstances today are nothing like those the parties anticipated when litigation began. The Town of Chester continues to bear the cost of a

lawsuit that the original plaintiff no longer wishes to pursue, and for which the intervenor has no cognizable interest. In the interest of efficiency, such situations should be prevented by requiring intervenors to demonstrate Article III standing.

D. Allowing Parties to Intervene Without Article III Standing Leads To Prolonged Litigation Because Settlement Becomes More Difficult.

Judges have utilized standing requirements as "an efficacious basis for excluding intervention applicants that would expand the number of litigants in a lawsuit" amid "increasingly unwieldy party structure of cases." *See* Tobias, 1991 WIS. L. REV. 415 at 440. Settlement negotiations have been harmed by the introduction of third parties to litigation. As the Seventh Circuit has observed:

> [W]hen the extra litigant may block settlement or receive an award of attorneys' fees, it is not simply along for the ride. An intervenor is not an *amicus curiae,* even a "litigating" *amicus curiae* (one that introduces evidence at trial). The intervenor seeks control of the suit, acquires a right to conduct the case in a way that may undermine the interests of the original plaintiff…and may become eligible for a separate grant of relief or an award of attorneys' fees. *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988).

An example of the settlement issue in litigation comes *Altitude Nines, LLC v. Deep Nines, Inc*., Index

No. 603268-2008E (N.Y. Sup. Ct. 2008). Deep Nines used a third-party litigation financier to pay for commercial litigation prior to *Altitude Nines, LLC v. Deep Nines*. Deep Nines settled that initial case for $25 million dollars, but after paying the financier, their attorney costs, and court costs, they were only able to keep $800,000 – just three percent of the initial settlement.[4]

The Seventh Circuit addressed the settlement issue in *Solid Waste Agency v. United States Army Corp of Eng'rs*. The Court held that "A party cannot be forced to settle a case. An intervenor acquires the rights of a party. He can continue the litigation even if the party on whose side he intervened is eager to settle." *Id.* at 509, *citing United States v. City of Chicago*, 897 F.2d 243, 244 (7th Cir. 1990); *Bethune Plaza, Inc. v. Lumpkin*, *supra*, 863 F.2d at 531, *United States v. Yonkers Board of Education*, 801 F.2d 593, 596 (2d Cir. 1986). The effect that these intervenors have on litigation is massive – and creates an especially large burden when the taxpayers must foot the bill. When government entities are original parties to a suit, they must be able to settle that suit when necessary in order to prevent wasteful spending that burdens the taxpayers. Intervenors drastically undermine the ability of government

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[4] *Stopping The Sale On Lawsuits: A Proposal To Regulate Third Party Investments In Litigation*, U.S. Chamber Institute For Legal Reform, October 2012, http://www.instituteforlegalreform.com/ uploads/sites/1/TPLF_Solutions.pdf

entities to settle suits.

CONCLUSION

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

Respectfully submitted,

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