No. 16-605

In The
Supreme Court of the United States

TOWN OF CHESTER, NEW YORK,

Petitioners,

v.

LAROE ESTATES, INC.,

Respondent.

On Writ of Certiorari To
The United States Court Of Appeals
For the Second Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

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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.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus* National Association of Home Builders (NAHB) states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

Amicus National Federation of Business Small Business Legal Center (NFIB Legal Center) is a 501(c)(3) public interest law firm affiliated with the National Federation of Independent Business (NFIB), a 501(c)(6) business association, which supports the NFIB Legal Center through grants and exercises common control of the NFIB Legal Center through officers and directors. No publicly-held company has a ten percent or greater ownership of the NFIB Legal Center.

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MISCELLANEOUS

INTEREST OF *AMICI CURIAE*[1]

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. NAHB has member companies in all 50 states, the District of Columbia, and Puerto Rico, and over 700 affiliated local and state associations throughout the Nation. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and constitute 80% of all homes constructed in the United States.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated. NAHB frequently seeks to intervene in cases where its members' interests are implicated, and where its perspective will not otherwise be represented. For example, NAHB has sought to intervene on behalf of the federal government in cases where environmental groups challenge regulations that govern NAHB's members.

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1 Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses. As a frequent participant in the federal courts, the NFIB Legal Center is concerned that its ability to participate in the future would be hindered if the Petitioner's position is adopted.

Imposing standing requirements onto parties like *Amici* when they seek to intervene impermissibly burdens their ability to give their members a voice in litigation concerning the regulations with which they must comply.

SUMMARY OF ARGUMENT

Intervention into an existing case or controversy provides an efficient means for parties to have their related concerns adjudicated in one proceeding, creating additional efficiency for courts as well. *See* 7C Charles Alan Wright, et al., *Federal Practice and Procedure* §1901 (3d. ed. 2017)(recognizing the "public interest in the efficient resolution of controversies"). Rule 24 of the Federal Rules of Civil Procedure appropriately governs the interests of those who seek to intervene.[2]

Some courts have added a standing inquiry to this equation, which is wholly unnecessary. As Respondent Laroe Estates' brief concisely states, "Rule 24 already ensures that only appropriate intervenors participate in litigation, and courts have ample case-management tools to ensure that intervention does not improperly burden other parties." Brief for Resp't at 2, *Town of Chester v. Laroe Estates, Inc.,* No. 16-605 (March 27, 2017).

The errors of requiring standing for all would-be intervenors are crystallized in an examination of instances where standing is required of those seeking to intervene on behalf of *defendants*. An

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[2] Rule 24 of the Federal Rules of Civil Procedure governs intervention as of right (Rule 24(a)) and permissive intervention (Rule 24(b)). Intervention as of right is required where a party "is given an unconditional right to intervene by a federal statute" or "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." Fed. R. Civ. P. 24(a).

opinion from the D.C. Circuit – one of the few jurisdictions that requires standing for intervenors – laid out some of the conflicts between a standing requirement for intervenors supporting defendants (so-called "intervenor-defendants") and well-established precedent governing access to the federal courts. In *Roeder v. Islamic Republic of Iran,* the court recognized that requiring intervenors to demonstrate standing runs counter to the doctrines that the "standing inquiry is directed at those who invoke the court's jurisdiction" and "that Article III is satisfied so long as one party has standing." 333 F.3d 228, 233 (D.C. Cir. 2003). This brief will discuss these conflicts more fully below, and address as well the principle that standing is an obligation for courts, not individual parties. Finally, this brief will highlight the broader policy ramifications of the current circuit split and the need for a clear national directive.

Amici stand firmly with Respondent Laroe Estates in opposing the Petitioner's ill-conceived stance requiring all intervenors to demonstrate Article III standing. *Amici* urge this Court to affirm the U.S. Court of Appeals for the Second Circuit's holding that intervenors need not show standing.

ARGUMENT

I. STANDING IS NOT AN ELEMENT OF INTERVENTION.

A. Standing is Required for Those Invoking the Court's Jurisdiction

Courts have long placed the onus on the plaintiff or petitioner to demonstrate that she has standing to bring a case. In *Lujan v. Defenders of Wildlife,* this Court held that the "party *invoking* federal jurisdiction bears the burden of establishing" the elements of standing. 504 U.S. 555, 561 (1992)(emphasis added). As this Court stated in *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.,* this requirement arises out of the U.S. Constitution's Article III. 454 U.S. 464, 472 (1982)("Article III requires the party who *invokes* the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant'. . .") (internal citations omitted)(emphasis added). *See also Virginia v. Hicks*, 539 U.S. 113, 120 (2003)(holding that because the party invoking "the authority of the federal courts" had standing, the case could be heard). More recently, in *Wittman v. Personhuballah,* this Court held that Article III "requires a party *invoking* a federal court's jurisdiction to demonstrate standing." 136 S.Ct. 1732, 1736 (2016)(emphasis added).

The circuit courts as well have held fast to this principle. *See, e.g., Carbon Sequestration Council v. EPA,* 787 F.3d 1129, 1132-1133 (D.C. Cir. 2015)("As the parties invoking federal jurisdiction, Petitioners

'bear [ ] the burden of establishing' Article III standing.")(internal citations omitted); *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 569 (8th Cir. 2007)(holding that the party invoking federal jurisdiction must demonstrate standing); *Bischoff v. Osceola Cnty., Fla.,* 222 F.3d 874, 877-878 (11th Cir. 2000)(holding that the party invoking the court's jurisdiction must demonstrate standing); *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998)("Traditionally, standing was required only of parties seeking to initiate a lawsuit.").

Nowhere have courts held that a defendant – a person decidedly not invoking the jurisdiction of the court – must demonstrate standing. At the expense of stating the painfully obvious, if defendants were required to demonstrate standing, the vast majority would simply decline to make such a showing and thereby escape judicial review.

Yet, some circuit courts have held that for parties to intervene on behalf of defendants, these parties must demonstrate standing. Would-be intervenor-defendants are not "invoking federal jurisdiction" – instead, they seek to protect interests that are implicated by the case-in-chief. *See, e.g., Fund for Animals, Inc. v. Norton*, 322 F.3d 728 (D.C. Cir. 2003)(permitting the intervention of a country's natural resources agency on behalf of defendant Secretary of the Interior because if environmental plaintiffs were successful in their suit, the country would be injured through resulting revenue decline for its conservation program).

The D.C. Circuit in *Roeder* recognized the inherent conflict in requiring intervenor-defendants

to demonstrate standing: "Requiring standing of someone who seeks to intervene as a defendant. . . runs into the doctrine that the standing inquiry is directed at those who invoke the court's jurisdiction." 333 F.3d 228, 233 (D.C. Cir. 2003). This Court should reiterate here its long-held position that standing is required only of those invoking the court's jurisdiction.

B. Standing is Satisfied by One Party

Another familiar refrain of the standing doctrine is that only one party must demonstrate standing in order for a case to move forward. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47, 52 n.2 (2006)(recognizing that the court of appeals did not determine whether other plaintiffs had standing because the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement)*; Bowsher v. Synar,* 478 U.S. 714, 721 (1986)(finding that, although multiple entities challenged the act in question, because one party has standing, that was sufficient to allow the court to reach the merits); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 264 n.9 (1977)(holding that because one party had standing, the case could proceed). Recently, the Supreme Court in *Massachusetts v. EPA*, held that "[o]nly one of the petitioners needs to have standing to permit us to consider the petition for review." 549 U.S. 497, 518 (2007). The circuit courts as well have echoed this refrain: *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 981 (9th Cir. 2013)("[T]he presence in a suit of even one party with standing suffices to make a claim justiciable")(internal citations omitted); *World Trade Ctr. Families for*

Proper Burial, Inc. v. City of New York, 359 F. App'x. 177, 179-180 (2d Cir. 2009)(citing *Rumsfeld* and holding that "other plaintiffs' standing is not a threshold constitutional question" where another plaintiff has demonstrated standing); *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014)("[T]he Supreme Court has made it clear that" only one party must have standing for a case to proceed).

Requiring would-be intervenors to independently demonstrate standing imposes greater burdens on those parties than if they had been original parties in multiparty litigation. Instead, so long as one party has standing to bring the suit, all parties satisfying Rule 24 should be permitted to intervene.

C. Standing is an Obligation for the Courts, Not the Parties

Legal scholars have written extensively on the question of whether intervenors should be required to demonstrate standing. *See, e.g.,* Carl Tobias, *Standing to Intervene,* 1991 Wis. L. Rev. 415 (1991)(examining the imposition of standing requirements onto intervenors in various circuits). One author has framed the conflict between the circuits as arising from differing perspectives on standing and on the question of whether courts believe Article III governs courts or parties. *See* Tyler R. Stradling & Doyle S. Byers, *Intervening in the Case (or Controversy): Article III Standing, Rule 24 Intervention, and the Conflict in the Federal Courts*, 2003 BYU L. Rev. 419 (2003)(positing that the divergence in circuit opinions on standing and intervention stems from whether courts view

standing as an obligation for the courts, or for the parties).

1. It is the Courts' Responsibility to Ensure the Presence of a Case or Controversy.

Courts must abide by Article III; specifically, federal courts must ensure that the disputes before them are legitimate cases or controversies as defined by Article III. As this Court held in *FW/PBS, Inc. v. City of Dallas*, "The federal courts are under an independent obligation to examine their own jurisdiction." 493 U.S. 215, 231 (1990). *See also, e.g., U.S. v. Hays,* 515 U.S. 737, 742 (1995)(holding that the "question of standing is not subject to waiver" and citing *FW/PBS* admonition that federal courts have an "independent obligation to examine their own jurisdiction."); *DaimlerChrysler v. Cuno*, 547 U.S. 332, 340 (2006)("We have 'an obligation to assure ourselves' of litigants' standing under Article III.")(internal citations omitted). As such, courts are obligated to ensure that standing is satisfied, regardless of whether it is raised by the parties or considered by the courts below. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997)(holding that federal appellate courts have a "special obligation" to ensure their jurisdiction as well as that of the courts below, "even though the parties are prepared to concede it.")(internal citations omitted). Thus, the Constitution and subsequent judicial interpretation require the courts, not the parties, to ensure the existence of a justiciable controversy. The court in *Habitat Educ. Ctr., Inc. v. Bosworth,* emphasized that "Article III represents a limitation on the power of the federal

courts – not a requirement of all who seek to come before them." 221 F.R.D. 488, 493 (E.D. Wis. 2004). As the Fifth Circuit said in *Ruiz,* "These cases recognize that the Article III standing doctrine serves primarily to guarantee the existence of a 'case' or 'controversy' appropriate for judicial determination…and hold that Article III does not require each and every party in a case to have such standing." 161 F.3d at 832.

2. This Responsibility Arises From the Separation of Powers Doctrine.

Courts have interpreted the case-or-controversy requirement as born from the separation of powers doctrine. "[T]he law of Art. III standing is built on a single basic idea – the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984) *abrogated on other grounds by Lexmark Int'l. Inc. v. Static Control Components,* 134 S.Ct. 1377 (2014). By ensuring the existence of a live controversy, the risk of offering an advisory opinion – a quasi-legislative function – is substantially diminished. *See Flast v. Cohen,* 392 U.S. 83, 96 (1968)(recognizing that "implicit policies embodied in Article III . . . impose the rule against advisory opinions on federal courts."). If one plaintiff has standing, then a live, valid Article III controversy exists and the court may adjudicate it. The Fifth Circuit in *Ruiz* likewise recognized that the injury component of standing "ensures that courts will decide only actual disputes and not abstract policy questions more properly decided by coordinate branches of government." 161 F.3d at 829.

Because the ultimate responsibility for ensuring that the case-or-controversy requirement is satisfied rests with the federal courts, the court can assure itself of its jurisdiction to hear a dispute when one plaintiff demonstrates standing. While it is the plaintiff who must make the demonstration, the sole purpose of that exercise is to assist the court in determining that the presence of a properly limited case-or-controversy is present, thereby satisfying the court's separation of powers obligation imposed through Article III.

II. CIRCUITS IN THE MINORITY ILLUSTRATE THE NEED FOR A NATIONAL RULE.

A. Geographic Disparities Undermine Access to Justice

Many courts, including this Court, have noted the long-standing split among the Circuit Courts on the question of whether intervenors must demonstrate standing. *See Diamond v. Charles,* 476 U.S. 54, 69 n.21 (1986)(observing that the "Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing."); *Ruiz,* 161 F.3d at 831-832 (describing the state of the circuit split and reviewing recently decided cases in the circuits); *Rio Grande Pipeline Co. v. FERC,* 178 F.3d 533, 538 (D.C. Cir. 1999)(recognizing the split among the various circuits). The end result of the disparity is that a person may not be able to protect her legitimate interests solely because of her geographic location. *See* Amy M. Gardner, *An Attempt to Intervene in the Confusion: Standing Requirements*

for Rule 24 Intervenors, 69 U. Chi. L. Rev. 681 (2002)("[O]ne's right to intervene is dependent not upon the Federal Rules of Civil Procedure or the Constitution, but instead upon the circuit in which the suit is brought.") *Id. at* 697.

Moreover, Congress has assigned the D.C. Circuit sole authority to consider a number of statutory challenges. *See* Eric M. Fraser, et al., *The Jurisdiction of the D.C. Circuit*, 23 Cornell J.L. & Pub. Pol'y 131, 133 (2013)(examining the various statutes in which Congress designated the D.C. Circuit to adjudicate claims on certain statutes that involved national subjects or had national effects.). For example, Congress requires nearly all litigation concerning the Clean Air Act to be heard only by the D.C. Circuit. 42 U.S.C. §7607(b).

Amici urge this Court to take this opportunity provide a comprehensive answer to this split and hold that intervenors on behalf of both plaintiffs and defendants need not demonstrate standing where the plaintiff has already established the presence of a case or controversy.

B. The D.C. Circuit's Minority-Held View Has an Out-sized Impact on Access to the Courts

In 1950, President Truman said of the D.C. Circuit, "[N]owhere else, outside the Supreme Court of the United States, will so many legal questions of national magnitude be decided as in this building here before us." Adam J. White, *The Regulatory Court*, The Weekly Standard, (Aug. 26, 2013), *http://www.weeklystandard.com/the-regulatory-*

court/article/748494 (last visited March 28, 2017). President Truman's words remain true today, nearly 70 years later. The D.C. Circuit hears more cases challenging federal administrative issues than any other circuit court. *See The Jurisdiction of the D.C. Circuit* at 132 ("It is old news that the D.C. Circuit hears proportionately more cases involving administrative law than do the other circuits."). *Amici* frequently challenge regulatory actions on behalf of their members, and are not alone in this endeavor. Federal regulations impact millions of Americans in all areas of their lives, from running businesses to building homes. The D.C. Circuit's sphere of influence therefore is nationwide.

Yet, the D.C. Circuit, which has such breadth and depth of influence, has chosen to require would-be intervenors (both plaintiff and defendant) to demonstrate standing, albeit not without raising some concerns. *See, e.g., Roeder*, 333 F.3d at 233. While the D.C. Circuit has been joined by only two other circuits, the impact of this minority viewpoint is enormous.

The D.C. Circuit's position has prevented regulated industries from participating in litigation on the very rules with which they must comply. *See Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013)(preventing utilities from intervening in a lawsuit between an environmental group and EPA regarding the promulgation of Clean Water Act regulations with which the utilities must comply). A group of creditors were barred from litigation that threatened their ability to recover lost funds resulting from a bank closure. *See Deutsche Bank Nat'l Trust Co. v. F.D.I.C.*, 717 F.3d 189 (D.C.

Cir. 2013)(holding that senior note holders failed to demonstrate standing in litigation brought against the receiver of the defunct bank in which the note holders invested and another party). And a group representing hunters was prevented from intervening in settlement discussions between environmental groups and the U.S. Fish and Wildlife Service that led to the listing of hundreds of species. *In re Endangered Species Act Section 4 Deadline Litigation-MDL No. 2165*, 704 F.3d 972 (D.C. Cir. 2013)(barring hunting group from intervening in environmental groups' litigation seeking listing decisions on hundreds of species). The mass species listing that resulted from this settlement impacted more than hunting groups. *See National Ass'n of Home Builders, et al. v. U.S. Fish and Wildlife Serv.*, 786 F.3d 1050 (D.C. Cir. 2015)(prohibiting four trade associations from challenging settlement agreements requiring consideration of 251 species).

The holdings in these cases impact millions of individuals nationwide. Two of the cases listed above involved settlement agreements hastily reached between plaintiff groups and federal agencies in such a way that parties directly regulated by the settlement agreements were denied a say in the outcome of the cases.

The high cost of litigation also militates in favor of allowing parties that satisfy Rule 24 to intervene. In many cases, regulated parties – especially small entities – lack the funds to initiate separate legal actions.

While moving these cases quickly to settlement may in general serve judicial efficiency goals, that laudable goal cannot be allowed to trump legitimate access to federal courts. Allowing parties that satisfy Rule 24's requirements to intervene into existing cases creates efficiencies for the courts as well as parties.

The Second Circuit recognized the egregious conduct of the Town in its dealings with the plaintiff, the late Mr. Sherman. *See Sherman v. Town of Chester,* 752 F.3d 554, 556-557 (2d Cir. 2014)(comparing Mr. Sherman's ordeal to the novel Catch 22: "Plaintiff Steven M. Sherman must have felt a lot like Yossarian in his decade of dealing with defendant Town of Chester" *Id.* at 557). In its brief, Respondent Laroe Estates described its purchase of the development MareBrook for $2.5 million. Brief for Resp't at 3. If Respondent is denied the opportunity to intervene, its ability to recover its interest in MareBrook may be lost forever.

CONCLUSION

Courts must balance an unenviable amount of competing considerations when determining whether their jurisdiction encompasses the parties and issues before them. However, judicial efficiency cannot be bought at the price of denying lawful access to the courts. Article III does not compel a finding that intervenors – plaintiff or defendant – must satisfy Article III standing. Instead, Article III requires courts to ensure that at least one party has demonstrated standing and thereby assured the court that an actual case or controversy is before it. Rule 24 takes care of the rest, and for these and the

foregoing reasons, *Amici* urge this Court to affirm the Second Circuit's decision below.

Respectfully submitted,

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