No. 19-1166

IN THE

Supreme Court of the United States

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT; SAN JUAN CITIZENS ALLIANCE; AMIGOS BRAVOS; SIERRA CLUB; CENTER FOR BIOLOGICAL DIVERSITY,

Petitioners,

v.

NAVAJO TRANSITIONAL ENERGY CO. LLC; ARIZONA PUBLIC SERVICE CO.; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT; UNITED STATES BUREAU OF LAND MANAGEMENT; DAVID BERNHARDT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR; UNITED STATES FISH AND WILDLIFE SERVICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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INTRODUCTION

Petitioners are a coalition of tribal, regional, and national conservation organizations that seek to enforce obligations placed on federal agencies by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, and the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1531 *et seq.* Those legal obligations apply only to federal agencies and officials, requiring them to undertake certain analyses and consultations so that federal officials can be fully informed of the environmental effects of proposed agency actions before approving or taking them. The Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, entitles petitioners to obtain review of the actions of the federal defendants and authorizes relief only against federal entities. 5 U.S.C. §§ 701(b)(1), 702, 706. Because the legal obligations at issue in this case apply only to federal entities and because the cause of action authorizes relief only against federal entities, the federal defendants are the only necessary or indispensable parties under Federal Rule of Civil Procedure 19.

The Ninth Circuit held—in direct conflict with at least three other courts of appeals—that this action could not proceed because a non-federal entity with a financial interest in the challenged agency action could not be joined due to tribal sovereign immunity. Although that holding benefitted the federal defendants in this case, even the United States argued in the court of appeals that it is wrong and has the deleterious effect of immunizing the federal agencies' actions from judicial review. U.S. C.A. Br. 17. Because the circuit conflict is unlikely to deepen, this Court's immediate intervention is warranted.

Rather than engaging directly on the legal question presented in the petition, respondents Navajo Transitional Energy Co. (NTEC) and Arizona Public Service Co. (APS)—two corporations with a financial stake in the permits at issue—devote most of their briefs to an appeal to emotion by distorting the nature of petitioners' suit and the legal issues at stake. In particular, respondents hyperbolically contend that petitioners' goal is to visit financial ruin on the Navajo Nation. That is simply untrue. Petitioners seek to compel *federal agencies* to comply with *federal law* that is designed to protect the human environment, including the environment in which tribal members live. Petitioners have expressly sought a remand to the responsible federal agencies for the analyses and consultations required by federal law—and petitioners have *not* sought to cancel or modify any contracts between the corporate respondents and a federal entity. Pet. App. 10a; C.A. E.R. 68-69. If petitioners prevail, federal agencies may reissue the relevant permits to respondents after complying with the requirements of federal law, as the United States explained in the court of appeals. U.S. C.A. Br. 16-17.

Respondents repeatedly assert that their "legal rights" are in peril because of petitioners' claims. But NTEC and APS have *no* "legal rights" to operate a mine pursuant to federal permits if the permits were issued in violation of federal law. Petitioners seek to compel federal actors to comply with federal requirements governing the issuance of the permits. Because the federal defendants are the only necessary or indispensable parties under Rule 19, this Court should reverse the Ninth Circuit's decision and resolve the circuit conflict it created.

I. The Decision Below Directly Conflicts With Decisions Of Multiple Federal Courts Of Appeals.

As explained in the petition for a writ of certiorari (Pet. 13-22), the Ninth Circuit's decision directly conflicts with decisions of the Seventh, Tenth, and D.C. Circuits. *Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999); *Kansas v. United States*, 249 F.3d 1213, (10th Cir. 2001); *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001); *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977); *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996).[*] Each of those courts has held that, in an APA suit seeking to enforce federal laws applicable only to federal entities and seeking relief only from federal entities, the responsible federal entities are the only necessary and indispensable parties under Federal Rule of Civil Procedure 19—even when the challenged agency action implicates the sovereign or financial interests of an Indian tribe. Respondents attempt to downplay the direct conflict by highlighting only the portions of those conflicting opinions that do not address the question presented. But they have no answer to the holdings of those cases that, when a plaintiff challenges a federal agency's compliance with federal law under the APA, the federal agency is the only necessary and indispensable party.

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[*] As explained in the petition (Pet. 23-25), the Ninth Circuit's decision is also in tension with decisions of the Sixth and Eleventh Circuits. *Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ.*, 584 F.3d 253 (6th Cir. 2009) (en banc); *Jeffries v. Ga. Residential Fin. Auth.*, 678 F.2d 919, 921 (11th Cir. 1982).

Respondents attempt (APS BIO 24-30; NTEC BIO 27-31) to explain away the clear circuit conflict by focusing on the facts of the cases decided by the Seventh, Tenth, and D.C. Circuits. But respondents fail to grapple with or even acknowledge the relevant legal reasoning of those decisions. It is true, as respondents repeatedly note, that those courts applied the factors listed in Rule 19 to the relevant circumstances—an unremarkable fact given that those cases involved Rule 19 motions. What is relevant here is the legal conflict between those courts' application of the Rule 19 factors and the Ninth Circuit's decision below.

Respondents argue that, unlike the Ninth Circuit in this case, the Seventh, Tenth, and D.C. Circuits declined to dismiss APA suits based on the absence of a tribal entity that was immune to suit because of case-specific facts like the nature of the asserted tribal interest. That is not so. As explained in the petition (Pet. 13-22), the courts of appeals in those cases refused to order dismissal of the suits *not* simply because of the nature of the tribal entity's interest in the suit but because of the nature of the suit—namely, that each suit challenged the manner in which the federal entities had performed functions assigned to them by federal law. The Seventh Circuit explained, for example, that the tribe was not a necessary party because, "[a]t its base, th[e] lawsuit [wa]s a challenge to the way certain federal officials" performed functions assigned by law to them. *Thomas*, 189 F.3d at 666-667. The same was true of the Tenth Circuit, which held that a tribe was not an indispensable party because the plaintiff's claims "focus[ed] on the propriety of an agency decision." *Kansas*, 249 F.3d at 1226; *Sac & Fox Nation of Missouri*, 240 F.3d at 1260 (holding that

tribe was not a necessary or indispensable party because the suit "turn[ed] solely on the appropriateness of the [agency's] actions"); *accord*, *Jeffries*, 678 F.2d at 928-929 (holding that landlords were not indispensable parties because suit challenged only regulations promulgated by a federal agency). *That* is the crux of the asserted circuit conflict and *that* is the legal question presented in the petition; but respondents simply ignore it rather than refuting it. Under the plain legal reasoning of those decisions, this case would have been allowed to proceed in those circuits—and that is the definition of a circuit conflict.

Respondents also argue (APS BIO 20-21; NTEC BIO 26) that there is no circuit conflict because the Ninth Circuit *sometimes* allows an APA suit to proceed without joining a tribal entity with an interest in the subject of the suit when other factors are present. Even if that were so, it would not undermine the existence of the circuit split. In the Seventh, Tenth, and D.C. Circuits, *all* such suits will proceed. That means that if this suit had been filed in one of those circuits, it would have proceeded without joining NTEC as a party—a proposition respondents do not meaningfully contest. That simple fact shows that there is a circuit conflict.

But the Court need not take petitioners' word that there is a circuit conflict—the United States agrees. In its Ninth Circuit *amicus* brief, the United States argued that the district court's application of Rule 19 conflicted with the same decisions of the Tenth and D.C. Circuits that petitioners rely on to demonstrate a circuit conflict. U.S. C.A. Br. 8-9 (citing *Kansas*, 249 F.3d at 1225-1227; *Sac & Fox Nation of Missouri*, 240 F.3d at 1258-1259; *Ramah Navajo Sch. Bd., Inc.*, 87

F.3d at 1350-1352); *id.* at 10 (citing *S. Utah Wilderness All. v. Kempthorne*, 525 F.3d 966, 970-971 (10th Cir. 2008)); *id.* at 16-17 (citing *Manygoats*, 558 F.2d at 558-559). The United States explained that those other courts of appeals had correctly held "that federal agencies and officers are normally the only necessary defendants in an APA action"; that "[a]llowing joinder rules to preclude judicial review of agency action in situations where the APA itself authorizes review frustrates the statute"; and that "joinder rules" must not be permitted "to undermine public rights in this way, particularly in APA litigation intended to vindicate broad public interests in compliance with federal environmental laws." *Id.* at 8-10. And the United States explained that the district court's decision—the reasoning of which the Ninth Circuit parroted in affirming—conflicted with the holdings of those other circuit courts. *Id.* at 11-17.

II. The Question Presented Warrants This Court's Immediate Review.

A. Respondents do not dispute that, if a circuit conflict exists (it does), this Court's immediate intervention is warranted. As explained in the petition (Pet. 22-23), because nearly all APA actions challenging federal agencies' compliance with procedural requirements on federal or Indian lands will be filed in the Ninth, Tenth, or D.C. Circuits, the existing circuit conflict is unlikely to deepen. It is also unlikely to resolve itself as the Ninth Circuit declined to rehear its decision in this case en banc even after petitioners pointed out the circuit conflict. Allowing the circuit conflict to fester would merely promote forum-shopping and create uncertainty about the ability of private citizens to enforce federal environmental laws.

Neither respondent argues that this case is a poor vehicle to decide the question presented beyond simply asserting that the Navajo Nation has a sizable financial stake in the validity of the permits at issue. Petitioners greatly respect the sovereign rights and interests of NTEC and all tribal entities. But individual tribal members are entitled to the protection of national environmental laws like NEPA and the ESA just as much as non-tribal individuals in the rest of the country. NTEC notes (NTEC BIO 5) the tragic losses suffered by the Navajo people as a result of the COVID-19 pandemic. The type of environmental review petitioners seek in this case is designed in part to protect the air and water quality of the human environment—factors that have a direct influence on the susceptibility of affected populations to respiratory and other illnesses. This is not an either-or proposition. The health and safety of the environment and of tribal members can be protected at the same time as the economic health of the Navajo Nation. Petitioners merely seek to enforce the federal environmental laws that require federal agencies to consider all such concerns before approving actions that will affect the human environment. And when the APA's "basic presumption of judicial review" is displaced, *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967))—and thus "no consequence[s]" result from violations—"legal lapses and violations occur" more often. *Ibid.* (quoting *Mach Mining LLC v. EEOC*, 135 S. Ct. 1645, 1652-1653 (2015)).

Respondents suggest that this case is different from the decisions of other courts of appeals because the sheer size of NTEC's financial stake in the mining

operation implicates NTEC's sovereign interests. But even if the size of its financial stake were larger, that is no basis to distinguish this case from the conflicting cases in the Seventh, Tenth, and D.C. Circuits, which considered agency action affecting core sovereign interests like tribal membership, tribal elections, and the status of Indian land. *See* Pet. 17-22.

Respondents' arguments come close to suggesting that federal actions affecting tribal entities and businesses should be immune from enforcement of federal environmental laws. But nothing in NEPA or the ESA suggests that that is so. If that is what respondents seek, they should address their concerns to Congress. For now, Congress has made clear that NEPA and the ESA apply to the actions at issue here and that individuals adversely affected by agency actions that do not comply with those laws are entitled to judicial review of those actions under the APA.

B. Respondents also err in defending the merits of the decision below. In particular, their arguments that the federal defendants cannot properly represent NTEC's interests are empty. Respondents still cannot identify a single argument NTEC would make in defense of the challenged agency action that the United States has not already made or would not make if the suit were to progress. That is not surprising because NTEC surely knows less about the federal agencies' decision-making process than the agencies do. In any event, the substantive defense of the agencies' compliance with federal law must rise or fall on the basis of the *agencies*' proffered justifications contained in the record and made at the time of the challenged agency decision. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc.*

v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983).

Respondents also do not identify any argument that NTEC would make in defense of the agencies' actions that APS—which *is* a party and also has a large financial stake in the challenged agency actions—would not make. NTEC and APS strenuously object that the mere possibility that NTEC could be financially affected by this suit means that the suit cannot proceed without hearing from NTEC. If NTEC is truly concerned that neither the United States nor APS—both of which share NTEC's interest in defending the challenged agency actions—will make the full panoply of arguments that NTEC would make, NTEC can participate as *amicus* to protect its interests without waiving its tribal sovereign immunity. *See Thomas*, 189 F.3d at 669; *Sch. Dist. of Pontiac*, 584 F.3d at 266.

Finally, respondents' assertions (APS BIO 21-22; *see* NTEC BIO 22) that petitioners seek a "categorical carve-out to Rule 19 that would single out Indian tribes for inequitable treatment" is entirely off-base. Petitioners argue only that, when plaintiffs seek relief under the APA solely from federal agencies and officials, the *ordinary* rule that federal defendants are the only necessary or indispensable parties should apply, regardless of what other entities may have a financial stake in the agency action under review. It is *respondents* that seek a special carve-out from ordinary APA rules for agency actions that implicate tribal interests. But when no action of the tribal entity is challenged, when the relevant substantive law does not apply to the tribal entity, and when no relief is or can be sought against the tribal entity, ordinary joinder rules dictate that the tribal entity is neither a necessary nor an

indispensable party. This Court should grant the petition to resolve the circuit conflict created by the decision below.

CONCLUSION

For the foregoing reasons, and those offered in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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