No. 17-___

IN THE

Supreme Court of the United States

OSAGE WIND, LLC; ENEL KANSAS, LLC;
ENEL GREEN POWER NORTH AMERICA, INC.,

Petitioners,

v.

UNITED STATES; OSAGE MINERALS COUNCIL,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This suit was filed by the United States as trustee for the Osage Nation. Neither the Osage Nation nor the Osage Minerals Council intervened or otherwise participated in any capacity in the district court proceedings. The United States opted not to appeal the district court's adverse judgment. The first question presented is:

Whether the court of appeals had jurisdiction over the appeal filed by a nonparty when the nonparty did not participate in any capacity in the district court proceedings.

2. The "Osage Act" divided the surface estate from the mineral estate in what is now Osage County, granting the former to individual tribe members and the latter to the Osage Nation. Act of June 28, 1906, ch. 3572, §§ 2-3, 34 Stat. 539, 540-544. Although both estates were intended to benefit Indians, the Tenth Circuit invoked the Indian canon of construction to benefit only the Osage Nation by distorting the clear regulatory definition of "mining" to include the removal and non-commercial manipulation of dirt and rocks in order to construct a structure on the surface. The second question presented is:

Whether the Tenth Circuit improperly invoked the Indian canon of construction to deprive surface-estate owners who are members or successors-in-interest to Indian tribe members of important property rights by overriding clear regulatory language for the express purpose of favoring the economic interests of an Indian tribe without examining congressional intent.

RULE 29.6 STATEMENT

Petitioner Osage Wind, LLC is owned in part by Osage Wind Holdings, LLC, which is in turn owned by EFS Osage Wind, LLC and by petitioner Enel Kansas, LLC. Enel Kansas, LLC is a wholly owned subsidiary of petitioner Enel Green Power North America, which is in turn a wholly owned subsidiary of Enel Green Power, S.p.A, which is itself a wholly owned subsidiary of Enel S.p.A. In addition, JPM Capital Corporation, Dortmund, LLC, and Antrim Corp. each owns 10% or more of petitioner Osage Wind, LLC's membership interests.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Osage Wind, LLC, Enel Kansas, LLC, and Enel Green Power North America, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 871 F.3d 1078. The opinion of the district court (Pet. App. 27a-49a) is not published in the *Federal Supplement*, but is available at 2015 WL 5775378.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2017. Pet. App. 1a. The court of appeals denied petitioners' timely petition for rehearing and rehearing en banc on October 17, 2017. Pet. App. 53a. On December 28, 2017, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including March 2, 2018. No. 17A690. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT REGULATORY PROVISION

25 C.F.R. § 211.3 provides in relevant part:

> *Mining* means the science, technique, and business of mineral development including, but not limited to: opencast work, underground work, and in-situ leaching directed to severance and treatment of minerals; Provided, when sand, gravel, pumice, cinders, granite, building stone, limestone, clay or silt

is the subject mineral, an enterprise is considered "mining" only if the extraction of such a mineral exceeds 5,000 cubic yards in any given year.

INTRODUCTION

The case raises questions about whether a nonparty can appeal absent intervention or participation in the district court and about the application of the Indian canon of statutory construction to disadvantage the property rights of successors-in-interest to members of the Osage Nation.

The decision below improperly abrogated the property rights of individuals with surface-estate ownership interests in land that was formerly part of the reservation set aside in what is now Oklahoma for the Osage Nation. The Tenth Circuit contorted a regulatory definition of "mining" to reach the activity of digging holes, crushing portions of the removed material, and placing that material back in the holes—not because the court found any indication that that is what Congress intended, but because that construction would provide the maximum financial benefit to an Indian tribe.

That was error—and it was error the Tenth Circuit should not have had the opportunity to commit because *no party* to the district court litigation filed a notice of appeal. After opting to *completely* sit out the entire district court proceedings and then waiting 60 days after the district court's decision, the Osage Minerals Council (OMC) filed a motion to intervene and a notice of appeal essentially simultaneously. The court of appeals held that it had jurisdiction to hear OMC's appeal, even though OMC was not an original party,

had not intervened, and had not even bothered to participate as amicus to present its views to the district court. The Tenth Circuit's expansion of its own jurisdiction was error and conflicts with decisions of at least eight other courts of appeals. The lack of uniformity among the courts of appeals about the scope of their jurisdiction over nonparty appeals is untenable and should be resolved by this Court in this case.

In the words of the Tenth Circuit itself, the decision below "presents several substantial issues of federal law upon which there is a substantial possibility that the Supreme Court would decide to review by certiorari." Pet. App. 51a. This Court should take the Tenth Circuit up on its invitation by granting this Petition.

STATEMENT OF THE CASE

1. Petitioners are business entities that have built and are operating a wind-energy project in Osage County, Oklahoma. Pet. App. 5a. Osage County comprises the land that Congress established in 1872 as a reservation for the Osage Nation. Act of June 5, 1872, ch. 310, 17 Stat. 228. In 1906, Congress severed the mineral estate in what is now Osage County from the surface estate, reserving the mineral estate for the benefit of the Osage Nation and parceling out the surface estate to individual members of the Tribe. Act of June 28, 1906, ch. 3572, §§ 2-3, 34 Stat. 539, 540-544 (Osage Act). The Osage Act established that the Osage Nation would retain a beneficial interest in the mineral estate in Osage County and that the United States would serve as the legal trustee for that mineral estate. § 3. The Act authorized the Osage Nation to issue leases for "all oil, gas, and other minerals" in

the reserved mineral estate, subject to the approval of the United States Department of the Interior (DOI) and to any rulemaking undertaken by DOI. *Ibid.* In allotting the surface estate in parcels to individual members of the Osage Nation, the Act provided that each allotment would be freely alienable after 25 years and ensured that the property owners could use the land for "farming, grazing, or any other purpose not otherwise" prohibited by the Act. §§ 2, 7; *see* Pet. App. 3a.

DOI regulations provide that "[n]o mining or work of any nature will be permitted upon any tract of land" in Osage County "until a lease covering such tract shall have been approved by the Secretary of the Interior." 25 C.F.R. § 214.7. For purposes of "leases and permits for the development of Indian tribal . . . solid mineral resources," *id.* § 211.1(a), the term "mining" is defined as "the science, technique, and business of mineral development including, but not limited to: opencast work, underground work, and in-situ leaching directed to severance and treatment of minerals," *id.* § 211.3. The regulations provide that such a lease in Osage County may require, *inter alia*, payment of royalties based on the amount of mineral removed and, for substances such as common minerals, determined with reference to the "value at the nearest shipping point of all ores, metals, or minerals marketed." *Id.* § 214.10(d).

2. In 2010, the predecessor of petitioner Osage Wind, LLC leased surface rights to approximately 8,400 acres of privately owned land in Osage County to build a commercial wind-energy project to generate electricity. Pet. App. 5a. To construct the wind-energy project, Osage Wind needed to install 84 wind turbines

secured in the ground by reinforced concrete foundations, underground electrical lines connecting the turbines to a substation, an overhead transmission line, meteorological towers, and access roads. *Ibid.* The proposed structures would occupy only 1.5 percent of the leased 8,400 acres. *Ibid.*

In October 2011, before Osage Wind broke ground on the project, OMC, acting on behalf of the Osage Nation, filed suit seeking to prevent construction of the wind-energy project. Pet. App. 5a-6a. OMC claimed that the planned wind-energy project would deprive oil-and-gas lessees of reasonable use of the surface land to support underground oil-and-gas operations, but did not contend that Osage Wind needed a federally approved lease to construct the project. *Ibid.* OMC lost that case and voluntarily dismissed its appeal. *Id.* at 6a.

By September 2014, petitioners had initiated excavation work for the planned wind turbines. Pet. App. 6a. Because each turbine required a cement foundation extending 10 feet deep and between 50 and 60 feet across, Osage Wind dug large holes in the ground. *Id.* at 6a, 28a. Osage Wind extracted soil, sand, and rock of common mineral variety (such as limestone and dolomite); crushed any rocks that were smaller than three feet long; and poured and cured each foundation using materials imported to the site. *Ibid.* Osage Wind then filled any remaining space in each hole with the soil, sand, and crushed rock that had been removed from that hole. *Ibid.* Any large rocks removed in the process of digging the foundation holes were placed next to the holes from which they had been removed. *Ibid.* The excavated soil, sand, and rock was not used for any purpose other than to return

it to (or set it next to) the hole from which it was taken. *Id.* at 28a.

3. In November 2014, the United States filed this action against petitioners, claiming that the excavation work associated with digging the foundation holes constituted "mining" under DOI regulations and therefore required a lease. Pet. App. 6a-7a; *see* 25 C.F.R. §§ 211.3, 214.7.

a. In September 2015, the district court granted summary judgment to petitioners. Pet. App. 27a. The court first held that the United States' suit was not barred by the doctrine of *res judicata* based on OMC's unsuccessful 2011 suit against petitioners because the United States could not be bound by the tribe's earlier litigation. *Id.* at 32a-35a.

On the merits, the district court rejected the United States' argument that petitioners engaged in "mining" under applicable DOI regulations when they built the foundations for their wind turbines. Pet. App. 37a-49a. The court explained that "mining" under 25 C.F.R. § 211.3 is limited to mineral development with a commercial purpose. Pet. App. 37a-40a. In so holding, the court relied on the text of the regulatory definition of "mining," each aspect of which "refers to a specific method of extracting minerals for commercial purposes." *Id.* at 38a. And the court explained that other regulations governing the extraction of tribe-owned minerals confirm that "mining" is limited to activities with a commercial purpose. *Id.* at 39a. The court declined to defer to the United States' interpretation of the DOI regulations because that interpretation "defies their plain language and is accordingly not a reasonable interpretation or a permissible construction" requiring deference. *Id.* at 48a-49a

(internal quotation marks omitted). Finally, the court rejected the United States' invitation to "apply the general rule that 'statues passed for the benefit of dependent Indian tribes are to be liberally construed with doubtful expression being resolved in favor of the Indians.'" *Id.* at 49a (quoting *Millsap v. Andrus*, 717 F.2d 1326, 1329 (10th Cir. 1983)). Although the court acknowledged that "the United States' reading of the regulations would almost certainly result in a financial boon to the Osage Nation," it refused to apply the Indian canon of construction because it could find no ambiguity or "doubtful expression" in the statute to construe. *Ibid.*

b. OMC did not seek to intervene in this suit—or to participate *in any manner*—at any point in the summary judgment proceedings. Pet. App. 7a. The United States declined to appeal the district court's adverse judgment and affirmatively communicated that decision to OMC on the last day a notice of appeal could have been timely filed. *Ibid.* OMC immediately filed a motion to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a) and (nearly simultaneously) filed a notice of appeal from the decision on summary judgment. *Ibid.* The district court denied OMC's motion to intervene because the filing of the notice of appeal deprived the court of jurisdiction over the case. *Ibid.* OMC promptly appealed that judgment as well. *Id.* at 7a-8a.

4. On appeal, the court of appeals held that it had jurisdiction over OMC's nonparty appeal, declined to decide whether the district court should have granted OMC's motion to intervene, held that petitioners' digging of foundation holes qualified as mining requiring a lease, reversed the grant of summary

judgment, and remanded for further proceedings. Pet. App. 1a-26a.

The Tenth Circuit first rejected petitioners' argument that OMC could not appeal the summary judgment ruling because it was not a party to the district court proceedings. Pet. App. 8a-13a. The court of appeals acknowledged that OMC was not a party to the case and that "[i]t is black-letter law generally that 'only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment.'" *Id.* at 8a (quoting *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam)). But the court concluded that an "exception" to that rule applies here because "OMC has a unique interest in this case entitling it to appeal without having intervened below." *Id.* at 12a. The court explained that, although OMC did not participate in the proceedings below and did not seek to intervene until 60 days after summary judgment was entered, it was entitled to appeal because its particularized interest in this matter ceased to have adequate representation when the United States declined to appeal. *Ibid.* In light of its holding that OMC could pursue the appeal as a nonparty, the court declined to consider whether OMC should have been permitted to intervene 60 days after summary judgment was granted and dismissed as moot the appeal from the denial of OMC's motion to intervene. *Id.* at 12a-13a.

The court of appeals also rejected petitioners' argument that OMC is barred by principles of *res judicata* from pursuing the appeal based on its failed 2011 lawsuit. Pet. App. 13a-14a. In so holding, the court relied on OMC's "facially plausible" argument that it could not have asserted claims under 25 C.F.R. § 214.7 in its 2011 litigation because a claim that petitioners

were required to obtain a lease in order to dig foundation holes might not have been ripe for adjudication at that point. *Ibid.*

The court of appeals also reversed on the merits, holding that petitioners' excavation activities qualify as mining under DOI regulations and therefore require a permit. Pet. App. 14a-26a. The court rejected the district court's conclusion that, for purposes of the applicable regulations, mining is limited to commercial mineral development and does not include activities "of an entity that incidentally encounters minerals in connection with surface construction activities," *id.* at 37a-38a. *See id.* at 19a-21a. The court of appeals acknowledged that petitioners did not "commercialize the minerals" extracted in the process of digging foundation holes, *id.* at 21a, and held that "the simple removal of dirt does not constitute mining," *id.* at 23a (quoting 53A Am. Jur. 2d *Mines and Minerals* § 14). The court also agreed that petitioners' (and the district court's) interpretation of the regulation was reasonable. *Ibid.* But the court opted to apply "the Indian canon of interpretation," *ibid.*, in order to benefit OMC by "maximiz[ing]" its "best economic interests," *id.* at 21a (quoting 25 C.F.R. § 211.1), and held that "'mineral development' includes acting upon the minerals to exploit the minerals themselves," *id.* at 23a. The court then held that petitioners had engaged in "mineral development" because, in addition to simply removing dirt from the ground, they had manipulated that dirt by crushing it and placing it back in the holes "as structural support for each wind turbine"—but the court acknowledged that "the sorting and crushing of rocks to provide structural support does not fit nicely

with traditional notions of 'mining' as that term is commonly understood." *Id.* at 24a.

5. The court of appeals denied petitioners' timely petition for rehearing and rehearing en banc. Pet. App. 53a. The court then granted petitioners' motion to stay the mandate pending the filing of a petition for a writ of certiorari, *id.* at 50a, and later declined to reconsider that order, explaining: "It is the Court's judgment that our opinion in this case presents several substantial issues of federal law upon which there is a substantial possibility that the Supreme Court would decide to review by certiorari." *Id.* at 51a.

REASONS FOR GRANTING THE WRIT

The courts of appeals are deeply and intractably divided about the scope of their own jurisdiction over nonparty appeals. Some courts of appeals—including the Tenth Circuit below—have erroneously expanded their own jurisdiction to include appeals by entities that were not parties in the district court proceedings, never sought to intervene in those proceedings, and did not participate *in any way* to protect a known interest in the case. The Tenth Circuit's decision encourages free-riders with an interest in litigation to sit back and rely on the efforts of other litigants rather than taking advantage of the tool provided by the Federal Rules: intervention. Courts of appeals apply at least three different legal rules to determine whether a nonparty appeal is allowed—a lack of uniformity that the federal system should not tolerate. This Court should grant the Petition to resolve that circuit split.

The stakes of the Tenth Circuit's improperly broad view of its own jurisdiction are high in this case—because the court of appeals further erred in its treatment of the merits question presented on appeal. The court adopted a self-professed unnatural reading of regulatory text—not because the court thought it was the best reading of the text based on the regulation as a whole and not because the court thought that reading best reflected congressional intent, but for the sole purpose of maximizing a financial benefit to an Indian tribe at the expense of private land owners. Although the Indian canon of construction can be an important tool in discerning congressional intent, it is not a license for courts to create new benefits for a tribe that Congress never intended, especially at the expense of other Indians and their successors in interest.

I. The Court Should Grant The Petition To Decide The First Question Presented.

The courts of appeals are intractably divided about the circumstances in which a nonparty may appeal a district court judgment that is adverse to its interests. Circuit courts have adopted at least three different legal tests for making that determination; as a result, nonparty appeals are permitted in some parts of the country that would not be permitted in others. Put another way: some circuits have interpreted their own jurisdiction to be broader than that exercised by other circuits. The federal judiciary should not tolerate such a lack of uniformity about the fundamental question of who may participate in the appeals process. This case perfectly illustrates the problem: although OMC opted to sit out the district court proceedings *completely*, the Tenth Circuit found no prob-

lem with allowing OMC to pursue an appeal in its own name and without a named party as co-appellant. Such an appeal would have been dismissed in almost every other court of appeals—and properly so.

This Court has repeatedly held that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); *see Karcher v. May*, 484 U.S. 72, 77 (1987) ("[O]ne who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom.") (citing *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917); *Ex parte Leaf Tobacco Bd. of Trade*, 222 U.S. 578, 581 (1911) (per curiam); *Ex parte Cockcroft*, 104 U.S. 578, 579 (1882); *Ex parte Cutting*, 94 U.S. 14, 20-21 (1877)). In *Devlin v. Scardelletti*, the Court reaffirmed that general rule, and clarified that a person or entity may in some circumstances be considered a "party" entitled to appeal even when that person or entity is not one of the "named parties to the litigation." 536 U.S. 1, 7-11 (2002) (permitting a nonnamed member of a class action who objected in the district court to a proposed settlement to appeal approval of the settlement); *id.* at 7-8 (noting other cases permitting nonparty appeals by a bidder for property at a foreclosure sale, a receiver, and a person found to be in contempt). Significantly, this Court has never permitted an appeal by a nonparty that did not participate (or at least seek to participate) in district court proceedings. *See id.* at 11 (emphasizing that "the power to appeal is limited to those nonnamed class members who have objected during the fairness hearing"); *see also Marino*, 484 U.S. at 304 ("We think the better practice is for

such a nonparty to seek intervention for purposes of appeal.").

The Court should grant this Petition to resolve the widespread circuit conflict on the first question presented and to bring the law on that question into line with this Court's decisions.

A. The Courts Of Appeals Are Deeply Divided About Whether And When A Nonparty Can Appeal.

The courts of appeals are deeply and intractably divided about the circumstances in which a nonparty may appeal a district court judgment that arguably affects the nonparty's interests. The courts of appeals recognize the "general" and "well settled" "rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino*, 484 U.S. at 304. But the courts of appeals have adopted three distinct methods for determining whether or when an exception to that rule permits a nonparty to appeal.

1. At one end of the spectrum, the First, Seventh, and D.C. Circuits apply a strict standard for determining when a nonparty may appeal a judgment that is adverse to its interests.

The First Circuit permits an entity that is not a named party to a district court judgment to appeal the judgment in only very limited circumstances. Although that court acknowledges that "there may be exceptions to the general rule that non-parties may not appeal," it applies such exceptions very sparingly. *Brenner v. Williams-Sonoma, Inc.*, 867 F.3d 294, 297 (1st Cir. 2017); *see Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*,

582 F.3d 30, 41 (1st Cir. 2009) (noting that "[e]xceptions exist" to the "general rule" in *Marino*, but "stress-[ing]" that "they are limited"). The First Circuit generally holds that an entity with an interest in litigation to which it is not a party should intervene in that litigation if it anticipates wanting to appeal. *Brenner*, 867 F.3d at 298; *Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 43 (1st Cir. 2000) ("To summarize, we hold that nonparties who have had the opportunity to seek intervention, but have eschewed that course, lack standing to appeal."). Significantly, the First Circuit has applied that restrictive view to deny appellant status even when the would-be appellant both had an interest that would be affected by the district court's judgment *and* participated in the district court proceedings (but declined to intervene). *Microsystems Software, Inc.*, 226 F.3d at 42.

The Seventh and D.C. Circuits apply a similarly strict standard in determining whether a nonparty may appeal. The Seventh Circuit generally limits such appeals to situations in which "the outcome of the appeal would be likely to determine (not just affect)" the rights of a nonparty. *In re Trans Union Corp. Privacy Litig.*, 664 F.3d 1081, 1084 (7th Cir. 2011); *SEC v. Enter. Trust Co.*, 559 F.3d 649, 651 (7th Cir. 2009) (noting that nonparty appeals are permitted where "the judicial decision concludes the rights of the affected person, who cannot litigate the issue in some other forum"). That court, like the First Circuit, has emphasized that a nonparty with an interest in litigation should seek to intervene. *SEC v. Custable*, 796 F.3d 653, 655 (7th Cir. 2015). The D.C. Circuit also limits nonparty appeals to cases in which "the

district court order 'effectively [binds] a non-party.'" *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1328 (D.C. Cir. 2013) (quoting *United States v. LTV Corp.*, 746 F.2d 51, 53 (D.C. Cir. 1984) (per curiam)) (brackets in original). That court has emphasized that a nonparty is not entitled to appeal merely because it has an interest that may be affected by the district court's decision. *Pinson v. Samuels*, 761 F.3d 1, 7 (D.C. Cir. 2014), *aff'd sub nom. Bruce v. Samuels*, 136 S. Ct. 627 (2016); *Defenders of Wildlife*, 714 F.3d at 1328.

If OMC believed that its interests might be determined by the outcome of the United States' suit against petitioners, it should have moved to intervene before judgment was entered against the United States. Its failure to do so would likely be fatal to its attempt to pursue an appeal in the First, Seventh, or D.C. Circuits. The decision below therefore directly conflicts with decisions from those courts.

2. The decision below also directly conflicts with decisions from five other courts of appeals—the Third, Fourth, Fifth, Eighth, and Ninth Circuits—all of which apply a balancing test to determine when a nonparty may appeal.

When confronted with an appeal by a nonparty, the Third, Fifth, and Ninth Circuits all apply the same three-part test to determine whether the appeal may proceed. Before allowing a nonparty appeal, each court requires that: "(1) the nonparty has a stake in the outcome of the proceedings that is discernable from the record; (2) the nonparty has participated in the proceedings before the district court; and (3) the equities favor appeal." *Northview Motors, Inc. v. Chrysler Motors Corp.*, 186 F.3d 346, 349 (3d Cir. 1999) (relying on test first articulated in *Binker v.*

Pennsylvania, 977 F.2d 738, 745 (3d Cir. 1992)); *see, e.g.*, *Sanchez v. R.G.L.*, 761 F.3d 495, 502 (5th Cir. 2014); *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 329 (5th Cir. 2001); *EEOC v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1504 (9th Cir. 1990). Although potentially more permissive in some circumstances than the approach employed by the First, Seventh, and D.C. Circuits, that three-part test is intended to permit nonparty appeals only in "exceptional circumstances." *United States v. Kovall*, 857 F.3d 1060, 1069 n.6 (9th Cir. 2017) (internal quotation marks omitted); *see ibid.* (noting that satisfaction of the three-part test is "[n]ecessary, but not sufficient").

The Fourth and Eighth Circuits employ a similar multi-factor test to determine whether to permit a nonparty appeal. Those courts do not allow nonparty appeals unless the nonparty both "(1) possessed 'an interest in the cause litigated' before the district court and (2) 'participated in the proceedings actively enough to make him privy to the record.'" *Doe v. Pub. Citizen*, 749 F.3d 246, 259 (4th Cir. 2014) (quoting *Kenny v. Quigg*, 820 F.2d 665, 668 (4th Cir. 1987)); *see Curtis v. City of Des Moines*, 995 F.2d 125, 128 (8th Cir. 1993).

If this case had been filed in any of those five courts of appeals, there can be no doubt that OMC would not have been permitted to appeal the district court's adverse judgment against the United States. Even setting aside whether OMC has a stake in the case and whether the equities would weigh in favor of allowing such an appeal, it is undisputed that OMC did not participate *at all* in the district court proceedings. Participation below *in some capacity* is a necessary prerequisite to pursuing appeal as a nonparty in

the Third, Fourth, Fifth, Eighth, and Ninth Circuits. The decision below therefore illustrates a direct circuit conflict: OMC's appeal would have been dismissed in any of those courts of appeals—and should have been dismissed (but was not) in the Tenth Circuit.

3. Like the Tenth Circuit below, the Second Circuit employs a relatively permissive standard in assessing whether a nonparty may appeal. That court has allowed a nonparty to appeal a district court judgment that does not bind the nonparty if the nonparty "has an 'interest affected by the . . . judgment.'" *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 78 (2d Cir. 2006) (quoting *Hispanic Soc'y of the N.Y. City Police Dep't Inc. v. N.Y. City Police Dep't*, 806 F.2d 1147, 1152 (2d Cir. 1986), *aff'd sub nom. Marino v. Ortiz*, *supra*) (alteration in original). Remarkably, the Second Circuit does not require a nonparty seeking to appeal to "prove that it has an interest affected by the judgment; stating a plausible affected interest has been sufficient." *Ibid.*; *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 239 (2d Cir. 2013) (noting the rule that a nonparty may appeal "where the non-party has an interest plausibly affected by the judgment" below).

The Second Circuit's approach is similar to that employed in the Tenth Circuit, which permits nonparty appeals when a nonparty has a "unique interest" in the subject matter of the case, regardless of whether the nonparty will be bound be the district court's decision. *See* Pet. App. 9a-12a; *Plain v. Murphy Family Farms*, 296 F.3d 975, 979 (10th Cir. 2002). And, as evidenced by the decision in this case, the Tenth Circuit does not require that a nonparty participated in the district court proceedings in order to appeal.

4. In sum, the courts of appeals have adopted at least three different legal tests to determine whether a nonparty can appeal a district court decision.[1] That lack of national uniformity is untenable on an issue that affects whether a federal court of appeals has jurisdiction to hear an appeal at all. The Federal Rules of Appellate Procedure (along with Article III of the Constitution) delineate the bounds of that jurisdiction. Rule 3(c) provides that a notice of appeal "must … specify the party or parties taking the appeal," and Rule 4 provides that a compliant notice of appeal "must be filed" within a specified period of time (60 days when the United States is a party in the district court). Fed. R. App. P. 3(c)(1)(A), 4(a)(1). As then-Judge Gorsuch has explained, "[b]oth of these rules are 'mandatory' in nature and, taken together, form a 'single jurisdictional threshold' to appellate review," *Raley v. Hyundai Motor Co.*, 642 F.3d 1271, 1274 (10th Cir. 2011) (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988)), such that "'[f]ailure to name the proper party taking the appeal,' within the time

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[1] The Sixth and Eleventh Circuits do not appear to have developed firm standards for evaluating when a nonparty can appeal. *See, e.g.*, *United States v. 1308 Selby Lane*, 675 Fed. Appx. 546, 547 (6th Cir. 2017) (noting the "well settled" "rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment") (quoting *Marino*, 484 U.S. at 304); *McCormick v. Braverman*, 451 F.3d 382, 396 n.9 (6th Cir. 2006) (explaining that "in a proper case a nonparty may be sufficiently interested in a judgment to permit him or her to take an appeal from it") (quoting 5 Am. Jur. 2d *Appellate Review* § 265); *AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305, 1309-1310 (11th Cir. 2004) (explaining the general rule that only parties and people "who are actually bound by a judgment" may appeal).

allotted by Rule 4, can and 'will result in the dismissal of an appeal for lack of appellate jurisdiction,'" *id.* at 1274-1275 (quoting *Riggs v. Scrivner, Inc.*, 927 F.2d 1146, 1149 (10th Cir. 1991)) (brackets in original). The lack of uniformity in the circuit courts' interpretation of who *is* a proper party translates directly into a lack of uniformity in the scope of those courts' jurisdiction. And by applying an incorrectly expansive view of who may pursue a nonparty appeal, the Tenth Circuit (like the Second Circuit) has impermissibly expanded its jurisdiction.

In a related context, this Court has stressed that "operational consistency and predictability"—in the form of "uniform rule[s]"—is vital in the application of rules governing the viability of federal appeals. *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 134 S. Ct. 773, 779 (2014) (quoting *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988)). The current situation provides anything *but* operational consistency, predictability, or uniformity when it comes to nonparty appeals. Occasionally, a court of appeals panel expresses dismay at the lack of clear standards governing nonparty appeals. *See*, *e.g.*, *Raley*, 642 F.3d at 1275 (Gorsuch, J.) (noting that courts have created "perhaps too many exceptions" to "rules of contemporary civil litigation," including the rule that only a party may appeal); *Texas v. United States*, 679 Fed. Appx. 320, 324 (5th Cir. 2017) (per curiam) (describing the three-part test employed in the Third, Fifth, and Ninth Circuits as "a vague balancing test") (quoting *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 249 (5th Cir. 2009)). But because no court of appeals has shown an inclination to alter its current approach to the

matter, the deep division among the circuits is likely to persist without this Court's intervention.

B. The First Question Presented Is Important And Recurring.

As demonstrated by the deep circuit split, the first question presented arises frequently in the federal courts of appeals. Nonparties often have an interest in the outcome of other entities' litigation. But simply having an interest in the outcome of a dispute between other entities does not create a right to independently appeal the outcome of those entities' separate dispute. The Federal Rules of Civil Procedure have created a mechanism through which a nonparty can protect any interest that is likely to be implicated by litigation between other entities: intervention. Fed. R. Civ. P. 24. The decision below—and the decisions of other courts of appeals that are generous in allowing nonparty appeals—significantly undermines the system established by the Rules because it greatly reduces a nonparty's incentive to intervene in existing litigation even when the nonparty knows that its interests may well be implicated by that litigation.

The permissive rule applied in the decision below is not good for anyone. It rewards, rather than discourages, free riders who closely monitor a case in which they have an interest, but exert none of their own time, effort, or money to try to protect that interest—at least until they know that no other party will appeal an adverse decision. Such a perverse incentive structure is unfair to litigants. A prevailing party should be able to rely on a final decision when its adversary opts not to appeal. Losing parties, too, may be adversely affected when a nonparty swoops in to pursue an appeal at the last minute: losing parties often

agree to forego any appeal in exchange for a concession from the prevailing party. Nonparties should not be able to upset such agreements with a surprise appeal at the last minute.[2] The decision below also creates inefficiencies by permitting potentially affected nonparties to withhold their input until after a final decision is issued. The point of intervention (like joinder) is to collect all interested entities in one proceeding so that all interests can be considered. Finally, the existing circuit split creates problems for nonparties who are considering whether to intervene. Such entities should be able to rely on clear rules about the consequences of a decision not to intervene—and the multifactor standards employed in many courts of appeals make it difficult to make such an assessment.

C. The Decision Below Is Wrong.

The decision below conflicts with decisions of this Court and cannot be justified on the facts of this case. This Court explained in *Marino* that "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." 484 U.S. at 304. That case involved an employment discrimination suit that was filed by black and Hispanic police officers and was resolved through a consent decree. *Id.* at 302. A group of white

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[2] The decision below is particularly troubling because the non-appealing plaintiff was the United States. Federal regulations require the United States to obtain authorization from the Solicitor General before appealing an adverse judgment (authorization that was not required to initiate this suit). 28 C.F.R. § 0.20(b). When the United States makes a considered decision not to appeal, a nonparty who has never participated in the litigation should not be able to essentially reverse that decision unilaterally.

firefighters who objected to the terms of the consent decree—and who presented their objections to the district court at a hearing—chose not to intervene and then sought to appeal the order approving the decree. *Id.* at 303-304. This Court held that the objecting white firefighters could not be considered "parties" to the case and therefore had no right to appeal. *Id.* at 304. The Court declined to adopt the Second Circuit's "suggest[ion]" that nonparties may appeal when they have "an interest that is affected by the trial court's judgment"—explaining instead that "the better practice" for such nonparties is "to seek intervention for purposes of appeal." *Ibid.*

In *Devlin*, the Court later confronted the question whether a nonnamed member of a class (*i.e.*, someone who was not a named party) could appeal an order approving a class-action settlement. 536 U.S. at 7. Emphasizing that the would-be appellant was "bound by the settlement" he sought to challenge and had presented his objections to the settlement in the district court, this Court held that the appellant had "the power to bring an appeal without first intervening." *Id.* at 11, 14. In so holding, the Court was careful to explain that its departure from the ordinary rule would not apply to a nonnamed class member who had *not* "objected in a timely manner to approval of the settlement at the fairness hearing." *Id*. at 14.

Together, the decisions in *Devlin* and *Marino* convey a clear message: a nonparty with an interest in existing litigation may not appeal a final judgment if it did not participate (or at least attempt to participate) in the district court proceedings, either by intervening or through some other available mechanism. *Cf. United States ex rel. Eisenstein v. City of New York*,

556 U.S. 928, 935 (2009) (explaining that when "a real party in interest has declined to bring the action or intervene, there is no basis for deeming it a 'party' for purposes of [Fed. R. App. P.] 4(a)(1)(B)").

OMC was fully aware that this case was pending from its inception—and fully aware of the extent to which the outcome of the case might affect OMC's interests. But OMC did not even bother to participate as *amicus* in the district court, let alone seek to intervene until minutes before it filed a notice of appeal. That delay is particularly galling in this case because OMC had *60 days* after the district court's decision in which to file a motion to intervene for purposes of appealing (rather than the usual 30 days), *see* Fed. R. App. P. 4(a)(1)(B)(i), but did nothing until the 60th day. By nevertheless permitting OMC to pursue an appeal as the sole appellant, the Tenth Circuit has ignored this Court's clear direction and impermissibly expanded its own jurisdiction.

II. The Court Should Grant The Petition To Decide The Second Question Presented.

In conflict with this Court's admonitions and with decisions of other courts of appeals, the Tenth Circuit invoked the so-called "Indian canon of construction" for the express purpose of providing maximum financial benefit to an Indian tribe rather than for the purpose of determining congressional intent. As a result, the Tenth Circuit unilaterally abrogated the rights of private property owners for the express purpose of benefitting an Indian tribe—in spite of statutory indications that Congress did *not* intend such a result. This Court should grant this Petition to resolve the second question presented in order to clarify the

proper role of the Indian canon and to restore to private property owners the rights Congress intended.

A. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals.

1. This Court has made plain that federal "statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit." *Chickasaw Nation v. United States*, 534 U.S. 84, 93-94 (2001) (internal quotation marks omitted). But, like other canons of construction, the Indian canon is merely a tool "to help judges determine the Legislature's intent as embodied in particular statutory language." *Id.* at 94. A court should therefore refrain from employing the Indian canon unless a statute remains grievously ambiguous—*after* examination of the relevant Act, surrounding circumstances, and legislative history. *DeCoteau v. Dist. Cty. Court*, 420 U.S. 425, 445 (1975). "The canon of construction regarding the resolution of ambiguities in favor of Indians," this Court has explained, "does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986).

Most courts of appeals have adhered to this Court's guidance, employing the Indian canon as a tool for discerning congressional intent in the face of ambiguous statutory text. The First Circuit, for example, recently explained that "it would be an error of law to apply the [Indian] canon" where "the plain meaning" of statutory text leaves "no ambiguities to resolve in favor of" a tribe. *Penobscot Nation v. Mills*, 861 F.3d 324, 329 n.3 (1st Cir. 2017). The Ninth Circuit has similarly emphasized that a court may not invoke the

Indian canon to find "ambiguities that do not exist" or to disregard congressional intent. *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 998 (9th Cir. 2014) (citing *Catawba Indian Tribe, Inc.*, 476 U.S. at 506). And the Federal Circuit has emphasized that "the Indian canon" cannot "overcome . . . evidence of congressional intent." *Little Six, Inc. v. United States*, 280 F.3d 1371, 1376 (Fed. Cir. 2002).

2. In the decision below, in contrast, the Tenth Circuit invoked the canon to *disregard* clear regulatory text—and for the express purpose of maximizing financial gain to an Indian tribe (at the expense of private land-owner holders of congressionally granted surface rights) rather than for the purpose of discerning the congressional intent behind the statutes animating the regulations at issue.

The court of appeals disregarded the Osage-Act-specific mining regulations, *see* 25 C.F.R. § 214.10 (royalty payable on "minerals marketed"), and the full text of the applicable regulations. Instead, the court narrowly focused on 25 C.F.R. § 211.3, which defines "[m]ining" as "the science, technique, and business of mineral development including, but not limited to: opencast work, underground work, and in-situ leaching directed to severance and treatment of minerals." The court left "undisturbed the well-settled notion that mining *includes* the removal of minerals to make commercial use of them or to relocate them offsite"—because such activities make up "the commonly shared understanding of mining." Pet. App. 20a. The court then considered whether that commonly shared understanding of "mining" *could* be stretched to include digging foundation holes, crushing medium-sized rocks, and placing the removed dirt and rocks back in

the holes as support for foundations. *Id.* at 22a-25a. In analyzing that question, the court failed to inquire as to the best reading of the regulatory definition, in light of the statutory provisions the regulation implements. Instead, the court invoked the Indian canon as a reason to examine whether the regulatory text was susceptible to "a construction more favorable to Osage Nation." *Id.* at 23a. The court then adopted that more favorable construction—which encompasses petitioners' activities in this case—even though the court acknowledged that its definition "does not fit nicely with traditional notions of 'mining' as that term is commonly understood." *Id.* at 24a. That was error and a departure from the manner in which this Court and other courts of appeals employ the Indian canon.

The stakes of the Tenth Circuit's approach in this case are high. As a result of the court's erroneous invocation of the Indian canon, private surface-estate owners have been deprived of the full enjoyment of their fee ownership. The Indian canon is not a license for federal courts to rewrite federal statutes and regulations to give benefits to an Indian tribe beyond those bestowed by Congress—and at the expense of congressionally intended rights of private property owners. The purpose of the canon is to avoid construing federal treaties and statutes to inadvertently diminish tribal sovereignty and rights, not to *expand* the rights of a tribe by judicial fiat at the expense of private land owners by adopting "a contorted construction" of clear text. *Catawba Indian Tribe, Inc.*, 476 U.S. at 506.

B. The Decision Below Is Wrong.

Nothing in the text of the regulation at issue—or in the statutes animating the regulation—supports the Tenth Circuit's holding that "sorting and crushing

of rocks to provide structural support" for on-site construction qualifies as mining. Pet. App. 24a.

Assuming (as the parties did below, Pet. App. 4a) that 25 C.F.R. § 211.3 applies to Osage County,[3] the relevant statutory authorization for requiring a lease to mine minerals in Osage County is Section 3 of the Osage Act. That provision states in relevant part that the minerals estate in Osage County shall be "reserved to the Osage tribe" and that "leases for . . . minerals, covered by selections and division of land herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of [DOI], and under such rules and regulations as [DOI] may prescribe." 34 Stat. at 543. The scope of regulations governing leasing of the mineral estate in Osage County must therefore reflect the intent of Congress in enacting the Osage Act. And, to the extent the Indian canon is applicable to agency-issued regulations, it can be used only to discern how the regulations further Congress's intent in enacting the operative statute.

If the court of appeals had properly understood the purpose of the Indian canon, it would have understood that the canon has no place in this case. To be sure, the Osage Act was enacted to benefit Indians. But that is not the end of the inquiry. As explained at pp. 3-4, *supra*, the Osage Act severed the surface estate and the oil, gas, and mineral estate in what is now

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[3] That assumption is questionable. The applicable statutory provisions DOI identifies as the authority for the regulation specify that they do not apply to Osage County. 25 C.F.R. pt. 211 (citing, *inter alia*, Act of May 11, 1938, ch. 198, §§ 4, 6, 52 Stat. 347, 348; 25 U.S.C. §§ 396a-396g).

Osage County—reserving the sub-surface estate for the benefit of the Osage Nation (held in trust by the United States) and granting the surface estate to individual tribe members in fee-simple plots that would eventually become freely alienable. Osage Act, §§ 2-3, 34 Stat. at 540-544. The Act further specifies that individual Osage Nation members "shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States." § 2(7), 34 Stat. at 542. The Act's division of the land then held by the Osage Nation was therefore intended to benefit *both* the Osage Nation *and* individual members of the Nation, as well as their successors in interest.

This Court has held that the Indian "canon has no application" where one construction of a statute would benefit "an Indian tribe" and the opposing construction would benefit "a class of individuals consisting primarily of tribal members." *N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976). Other courts have similarly held that the Indian canon has no application where both competing interpretations of a statute would benefit an Indian tribe or individual Indians. *See, e.g.*, *Redding Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015); *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996); *Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell*, 75 F. Supp. 3d 387, 396 (D.D.C. 2014), *aff'd*, 830 F.3d 552 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 1433 (2017). The Tenth Circuit therefore erred in invoking the Indian canon in this case to adopt "a contorted construction" of clear regulatory text, *Catawba Indian Tribe, Inc.*, 476 U.S. at 506, that the court itself acknowledged "does not fit

nicely with traditional notions of 'mining' as that term is commonly understood," Pet. App. 24a.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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