No. 17-1237

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

In the decision below, the Tenth Circuit improperly expanded its jurisdiction, in conflict with at least five other courts of appeals. Respondent Osage Minerals Council (OMC) does not meaningfully contest that the circuit courts are divided about the scope of their jurisdiction over nonparty appeals. This Court should grant the Petition to resolve that untenable lack of uniformity.

The Tenth Circuit compounded its erroneous exercise of jurisdiction by unilaterally abrogating important (and congressionally bestowed) private property rights when it invoked the Indian canon of construction to maximize OMC's financial gain rather than to effectuate congressional intent. That decision also conflicts with decisions of other courts of appeals and should not be permitted to stand.

I. The First Question Presented Warrants Review.

By permitting OMC to appeal as a nonparty, the Tenth Circuit improperly expanded its jurisdiction and reinforced a deep divide among circuit courts about the circumstances in which a nonparty can appeal a decision that affects its rights. OMC concedes (BIO 18) that circuit courts use different "analyses to determine when a non-party can appeal," but contends that it would have been permitted to appeal as a nonparty in any circuit court. That is wrong. This Court should grant the Petition to resolve the entrenched circuit split on the first question presented.

A. The Courts Of Appeals Are Divided On The Scope Of Their Jurisdiction Over Nonparty Appeals.

OMC does not meaningfully attempt to rebut Petitioners' showing of an entrenched and widespread circuit split on the scope of circuit courts' jurisdiction over nonparty appeals. OMC agrees with Petitioners (*see* Pet. 10) that this Court's decisions in *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam), and *Devlin v. Scardelletti*, 536 U.S. 1 (2002), "show that there is a general rule that non-parties cannot appeal, but that specific facts of an individual case can bring the matter within a narrow exception to the general rule." BIO 10. And OMC correctly contends (*ibid.*) that courts of appeals agree both on that general rule and on the existence of an exception to that rule. But the devil is in the details—and the circuit courts apply at least three *different* exceptions to the general rule that only a party may appeal a judgment that is adverse to its interests. *See* Pet. 13-20.

Although OMC quibbles at the edges about the *extent* to which circuit courts apply different rules to determine the scope of their jurisdiction over nonparty appeals, it elsewhere concedes (BIO 18, 21) that different circuits employ different analyses in determining whether a nonparty can appeal. As demonstrated in the Petition (at 13-20), those analyses are substantively different, employing distinct criteria that would inevitably lead to conflicting results if applied to identical facts. That is precisely the type of circuit conflict this Court should intervene to resolve. This Court's immediate intervention is particularly warranted because the circuit conflict affects the scope of circuit courts' jurisdiction. This Court has repeatedly

stressed that "uniform rule[s]" are vital to ensuring the "operational consistency and predictability" that is required when determining 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 disparate rules courts of appeals apply in determining the scope of their own jurisdiction falls far short of supplying operational consistency, predictability, or uniformity.[1]

B. OMC's Appeal Would Have Been Dismissed For Lack Of Jurisdiction In At Least Five Other Circuits.

OMC attempts to side-step the entrenched circuit conflict by contending (*see* BIO 16) that it would have been permitted to appeal under any of the many standards employed in the courts of appeals. That is plainly untrue.

1. OMC does not dispute that at least five circuits (the Third, Fourth, Fifth, Eighth, and Ninth) refuse to exercise jurisdiction over a nonparty appeal *unless*, *inter alia*, the nonparty actively participated in the district court proceedings. *See, e.g.*, *Sanchez v.*

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[1] Puzzlingly, OMC protests (BIO 11) that Petitioners should not be heard to complain of the Tenth Circuit's erroneously broad view of its jurisdiction because Petitioners argued below that the appeal should be dismissed under circuit precedent. There is nothing remarkable, however, about a litigant arguing in one court that it should win under that court's binding precedent and then seeking review from a higher court of whether that precedent—or its expansion in the particular case—should be overturned.

R.G.L., 761 F.3d 495, 502 (5th Cir. 2014); *Doe v. Pub. Citizen*, 749 F.3d 246, 259 (4th Cir. 2014); *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 329 (5th Cir. 2001); *Northview Motors, Inc. v. Chrysler Motors Corp.*, 186 F.3d 346, 349 (3d Cir. 1999); *Curtis v. City of Des Moines*, 995 F.2d 125, 128 (8th Cir. 1993); *EEOC v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1504 (9th Cir. 1990). It is beyond dispute that OMC would not have been permitted to appeal in at least those five circuits because it did not participate *at all* in the district court proceedings. Although OMC attempts to suggest that it is just like the objecting class members in *Devlin*, those objectors were permitted to appeal *only* because they had participated in the district court proceedings. 536 U.S. at 14.

It is undisputed that OMC was aware of the United States' suit against Petitioners from its inception. But instead of exerting even minimal effort to protect its own interests, it chose to sit back and permit the United States to expend its time, money, and effort on behalf of those interests. In so doing, OMC necessarily left to the United States the decision whether to appeal any adverse judgment. When the United States—presumably with the approval of the Solicitor General, *see* 28 C.F.R. § 0.20(b)—opted to forego an appeal, that should have been the end of the case. If OMC wanted to hedge against the possibility that the United States would not appeal, it should have participated in the district court proceedings, just as the objecting class members did in *Devlin*.

OMC is correct (BIO 1) that the United States filed this suit in its trustee capacity. But in light of the history of the trust relationship between the United States and federally recognized Indian tribes,

OMC cannot now contend with a straight face that it never contemplated that the United States might make a litigation decision that OMC would view as contrary to the Tribe's interests. That risk is inherent in the nature and history of the trust relationship between the United States and tribes—as OMC acknowledges. *See* BIO 21 (noting that "sadly" the United States "often fails" to live up to its obligation to litigate as trustee on behalf of tribes). OMC therefore faced two choices: (1) leave everything up to the United States and hope that it will make all the same litigation decisions OMC would have made if acting on its own behalf, or (2) hedge against the risk that the United States' view of what is best might diverge from OMC's by participating in the district court proceedings. OMC chose the former.

OMC protests (BIO 14-15) that it could not participate in the district court proceedings while the United States was adequately representing its interests. That is not so. Although the *Devlin* objectors did not intervene as of right, they found a way to make their views heard and to participate in legal proceedings that might adversely affect their interests. OMC could have done the same—by participating as *amicus curiae* or as a permissive intervenor in the district court. OMC preferred to sit on its hands and do nothing; they should face the consequences of that choice.[2]

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[2] OMC's reliance (BIO 15) on *United Airlines, Inc. v. McDonald* is misplaced. That case involved the timeliness of a motion to intervene but said nothing about when a court of appeals may exercise jurisdiction over a nonparty appeal. 432 U.S. 385, 387 (1977).

2. OMC further errs in contending that this Court should not intervene to resolve the widespread circuit conflict because courts of appeals agree that a nonparty "tribal entity can appeal a district court decision when its trustee, the United States, who brought the case to protect tribal trust property, declines to appeal." BIO 16. Tellingly, OMC does not identify *even one* other circuit court decision permitting a nonparty appeal in these circumstances—and Petitioners are not aware of any such case.

There is no reason to think, moreover, that the general rules governing nonparty appeals are any different in this context. OMC attempts to rewrite the first question presented so that it is limited to the facts of this case—but the Tenth Circuit's reasoning and holding are *not* limited to this case. The court of appeals held that it had jurisdiction over OMC's nonparty appeal because OMC has "a particularized and significant stake in the appeal" and declined to intervene as of right in the district court because a party was adequately representing its interests. Pet. App. 12a. That holding is not limited to cases involving trustee-beneficiary relationships and certainly is not limited to cases involving the trust relationship between the United States and Indian tribes. That is merely the context in which the jurisdictional question arose in this case. But in holding that it had jurisdiction to hear the appeal, the Tenth Circuit applied a general legal rule that directly conflicts with the general legal rules applied in nearly every other circuit. This Court's review is warranted to resolve that conflict.

C. The Court May Wish To Solicit The Views Of The United States.

The United States initiated this action by filing suit against Petitioners. But the United States has conspicuously declined to argue that the Petition should be denied, just as it conspicuously declined to support OMC's appeal. The United States has a strong interest in whether a nonparty may appeal without first intervening, particularly in a suit that the United States initiated and that the United States, in consultation with the Solicitor General, has decided to abandon in the face of an adverse district court judgment. The United States has previously argued that the Tenth Circuit lacks jurisdiction over an appeal by a nonparty that was not a party to the district court's decision, did not seek to intervene before the adverse decision was entered, and took "no action to participate in the litigation in any way, despite [the nonparty's] actual knowledge of the pendency of the litigation prior to the entry of that decision"—*i.e.*, in precisely the circumstances presented here. Brief for the Federal Appellees at 6, *S. Utah Wilderness All. v. Kempthorne*, 525 F.3d 966 (10th Cir. 2008) (Nos. 06-4251, 07-4223), 2007 WL 5067797. In light of the United States' institutional interest in the first question presented, the Court may wish to solicit the views of the United States, which is a party to this matter.

II. The Second Question Presented Warrants Review.

Review is also warranted of the second question presented because the Tenth Circuit, in conflict with several other circuits, improperly invoked the Indian canon of construction for the express purpose of

maximizing an Indian tribe's financial gain rather than for the purpose of discerning congressional intent. In so doing, the court of appeals "reli[ed] on ambiguities that do not exist," "disregard[ed] the clearly expressed intent of Congress," and adopted "a contorted construction" of clear regulatory text. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). The decision below erroneously deprives surface-estate owners of important property rights and should not be allowed to stand.

A. The Decision Below Conflicts With Decisions Of Other Circuits.

As explained in the Petition (at 24-26), multiple courts of appeals have faithfully implemented this Court's instruction that the Indian canon of construction may be used only as a tool for determining congressional intent, not as an excuse to rewrite unambiguous statutory text to reach a result that is maximally beneficial to Indians. *See*, *e.g.*, *Penobscot Nation v. Mills*, 861 F.3d 324, 329 n.3 (1st Cir. 2017); *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 998 (9th Cir. 2014); *Little Six, Inc. v. United States*, 280 F.3d 1371, 1376 (Fed. Cir. 2002). In contrast, the Tenth Circuit invoked the Indian canon in a results-oriented exercise intended to maximize economic return to OMC, Pet. App. 21a, by adopting a definition of the term "mining" that even the Tenth Circuit admitted "does not fit nicely with traditional notions of 'mining' as that term is commonly understood," *id.* at 24a.

OMC does not seriously dispute that the Tenth Circuit's approval of using the Indian canon for that purpose conflicts with decisions of other courts of appeals. Instead, OMC doubles down on the Tenth

Circuit's approach, arguing that, because the phrase "mineral development" (which appears within the regulatory definition of "mining," 25 C.F.R. § 211.3) is not itself defined, the court of appeals was obligated to adopt "a liberal interpretation in favor of the OMC," BIO 24, apparently without reference to the ordinary meaning of the defined term (mining). That is the heart of the circuit split. Other circuits have correctly held that the Indian canon applies only as a means of elucidating congressional intent; the Tenth Circuit has now held that the Indian canon applies when there is an opportunity to provide a financial benefit to Indians by construing a regulatory term contrary to its "commonly understood" meaning. Pet. App. 24a. This Court should grant the Petition to resolve that circuit conflict.

To make matters worse, the Tenth Circuit invoked the Indian canon to benefit OMC by trampling on the rights of Indian surface-estate owners and their successors, whose rights were fixed by the Osage Act, Act of June 28, 1906, ch. 3572, 34 Stat. 539. This Court has held that the Indian "canon has no application" when 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). By ignoring that admonition, the decision below further conflicts with decisions of at least one other circuit. *See, e.g.*, *Redding Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015).

B. The Second Question Presented Is Important.

Rather than addressing the circuit conflict on its merits, OMC attempts to change the subject with hyperbolic assertions that Petitioners were taking and using OMC's property.[3] That is incorrect. Because Petitioners sought to build on the *surface* of the land in question—not to mine any minerals below the surface—Petitioners contracted with the owners of the surface estate to lease the surface. Nothing in any federal statute or regulation restricts a surface-estate owner (or its lessee) from disturbing the ground to build a structure *on the surface*. The only relevant restriction on surface-disturbing activity applies when an entity wishes to mine minerals from the subsurface mineral estate. That is not what Petitioners sought to do and it is not what they did. They dug holes, crushed rocks, and returned the crushed rocks to the holes from which they came. That type of activity can only sensibly be described as building, not as mining.

OMC attempts to limit the reach of the Tenth Circuit's erroneous decision by contending that it applies only when surface excavation is undertaken "as part of a commercial business or enterprise." BIO 27. But that is plainly incorrect. It was the *district court* that limited the scope of "mining" to circumstances in which the dirt removal itself has a commercial purpose. Pet. App. 37a-40a. At OMC's urging, the court

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[3] OMC also impugns Petitioners' motives, suggesting (BIO 22, 23) that Petitioners failed to seek a mining lease not because they were not engaged in mining, but because they do not respect Indians. Those suggestions are incorrect, inappropriate, and without any support in the record.

of appeals *reversed* that decision and held that "mining" encompasses any use of mineral-containing dirt, regardless of whether the use is commercial in nature. *Id.* at 14a-26a. OMC's assertion now that the Tenth Circuit's decision is limited to commercial activity has no basis in the opinion and borders on a concession that the Tenth Circuit's actual holding is far too broad.

As explained more fully in the briefs filed on behalf of Petitioners' amici, the decision below will have significant negative consequences for surface-estate owners throughout the country where the federal government owns or manages the mineral estate. The property rights of surface-estate owners should be fixed when they acquire their ownership interests; but the Tenth Circuit's decision now threatens to impose new regulatory costs on farmers, energy developers, and ordinary surface-estate owners in many parts of the country.[4]

That result is particularly galling here. When Congress initially divided the surface and mineral estates in Osage County, it expressly granted to Indian surface-estate owners "the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein." Osage Act § 7, 34 Stat. at 545. The only limit "specifically provided for" in the Osage Act is a limit on "the sale of the oil, gas, coal, or other minerals covered by said

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[4] OMC errs in arguing (BIO 22, 27) that the decision below does not affect landowners because the "mining" definition excepts volumes below 5,000 cubic yards because extracting any smaller volume requires a permit, 25 C.F.R. § 211.3 (defining "permit")—potentially subjecting property owners' excavation of any volume to OMC's authority.

lands." § 2(7), 34 Stat. at 542. It is undisputed that Petitioners have not sold any disturbed minerals. But the Tenth Circuit ignored Congress's express statutory directive and unilaterally restricted the rights of surface-estate owners in Osage County. That decision should not be allowed to stand.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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