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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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INTRODUCTION

As usual, the United States has recommended that the Court deny the Petition for a Writ of Certiorari. That recommendation should be rejected. Although the United States attempts to cabin the import of the Tenth Circuit's published opinion to the specific facts of this case, only the Tenth Circuit can do that—and it did not. Indeed, that court recognized that 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." Pet. App. 51a. The Petition presented two important questions on which the courts of appeals are divided. This Court should grant the Petition to decide both questions.

I. The First Question Presented Warrants Review.

As explained in the Petition (Pet. 2-3), the courts of appeals are divided about the scope of their appellate jurisdiction over nonparty appeals. That lack of uniformity on a fundamental jurisdictional question is untenable. Notably, the United States does not contest the importance of uniformity on legal questions concerning the scope of courts' appellate authority. *See Raley v. Hyundai Motor Co.*, 642 F.3d 1271, 1274 (10th Cir. 2011) (Gorsuch, J.) (explaining that the rules governing who may appeal "form a 'single jurisdictional threshold' to appellate review") (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988)). The Tenth Circuit's decision below improperly expanded its own appellate jurisdiction where other circuit courts would not have. This Court's intervention is warranted to restore jurisdictional uniformity.

Although it would be easy to miss, the United States subtly acknowledges that courts of appeals employ different standards to determine when a nonparty can appeal—and that "those varying standards" "could produce" "disparities" in outcomes in a particular case. U.S. Br. 14; *see id.* at 12 (acknowledging "tension among the circuits"). That is another way of saying there is a circuit split. The United States expends a good deal of effort deflecting attention from the core aspect of the circuit conflict Petitioners have identified—*i.e.*, whether a nonparty that did not participate in the district court may commence and pursue an appeal when no party has done so. But neither Respondent Osage Minerals Council (OMC) nor the United States seriously disputes that there is a circuit conflict on that question. And it is clear that OMC would not have been permitted to appeal in at least five other circuits because it did not participate in the district court proceedings. This Court's review on certiorari is therefore warranted.

Petitioners have articulated quite clearly the basis of the asserted circuit conflict: some courts of appeals refuse to exercise jurisdiction over an appeal by a nonparty that did not participate in the district court while other courts of appeals (most notably the Tenth Circuit below) view their jurisdiction as extending to such appeals. Rather than commenting on the existence or importance of *that* circuit conflict, the United States brushes it off by contending that every court of appeals agrees that some nonparties can appeal without first intervening. Nobody disputes the truth of that proposition; indeed, as Petitioners pointed out (Pet. 21-23), that was this Court's holding in *Devlin v. Scardelletti*, 536 U.S. 1 (2002). But even in *Devlin*, the

Court was careful to specify that the nonnamed class members who were permitted to appeal the approval of the class-action settlement *would not* have been permitted to appeal without intervening if they had not participated in the district court by objecting to the proposed settlement. *Id.* at 11 ("[T]he power to appeal is limited to those nonnamed class members who have objected during the fairness hearing.").

After taking the unusual step of rewriting the questions presented to limit them to the facts of this case (U.S. Br. i), the United States contends (*id.* at 10) that there is no circuit conflict warranting this Court's attention because "[n]o other court of appeals has addressed whether a nonparty Indian tribe may appeal in its federal trustee's place." But as the United States well knows, circuit splits involve conflicts on a question of *law*, not on the application of a settled question to a particular set of *facts*. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 243 (10th ed. 2013). And the court of appeals' decision was certainly not limited to the particular facts of this case or even to the Tribe-trustee relationship, as the United States suggests (*see* U.S. Br. i, 12). Rather, the Tenth Circuit held that OMC was entitled to appeal because (1) it had "a particularized and significant stake in the appeal" and (2) its interests were adequately represented by a party in the district court. Pet. App. 12a. Nothing in the opinion purports to limit the holding to the tribal-trust context or to the circumstances of this case.

As noted, this Court in *Devlin* held that a nonnamed class member could appeal a binding settlement *only* if he had first presented his views to the district court at a time when the court could act on those views. 536 U.S. at 14 (limiting nonparty appeals to

"nonnamed class members . . . who have objected in a timely manner to approval of the settlement at the fairness hearing"). This Court surely would not have permitted a nonnamed class member who did not object to a proposed settlement to appeal approval of the settlement based on an objection asserted by a *different* nonnamed class member. But that is effectively the rule adopted by the Tenth Circuit and advanced by the United States, which argues (at 14) that OMC did not need to participate in the district court because "it would have raised the same arguments that its federal trustee was already making." Like OMC, a nonnamed and non-objecting class member has "a particularized and significant stake in" an appeal from approval of a class settlement, Pet. App. 12a, and had his interests adequately represented at the fairness hearing by a separate party that did participate. But under *Devlin*, he cannot appeal. The same rule should apply to OMC here. The United States' contrary rule cannot be squared with *Devlin* or with the general principle that interested nonparties cannot preserve their rights in ongoing litigation by sitting on their hands and staying silent. And that is why it has been rejected by at least five other courts of appeals.

Equally unavailing is the United States' argument (at 10) that the decision below does not conflict with circuit courts' "treatment of nonparties in analogous circumstances." The United States contends (*ibid.*) that, "where the federal government brings a civil enforcement suit to vindicate the alleged injuries to particular individuals outside the tribal trust context, courts of appeals regularly allow those individuals to take an appeal to protect their own interests." What the United States fails to mention is that,

without exception, those decisions permit nonparty appeals *only* when the nonparty participated in the district court proceedings. And that is the precise basis of the circuit conflict Petitioners have identified.

The United States contends, for example, that the Fourth Circuit permitted an appeal by a nonparty who "did not seek to intervene on appeal in a timely fashion" in a suit brought by the Secretary of Labor to enforce the nonparty's statutory rights. U.S. Br. 10 (citation omitted); *see Kenny v. Quigg*, 820 F.2d 665 (4th Cir. 1987). That is true. But in doing so, the Fourth Circuit was careful to explain that the appeal was permitted not only because (as the United States seems to suggest) the nonparty "'had a direct financial interest' in the challenged transaction," U.S. Br. 10 (quoting *Kenny*, 820 F.2d at 668)—but *also* because the appealing nonparty had "participated in the [district court] proceedings actively enough to make him privy to the record," *Kenny*, 820 F.2d at 668 (citation omitted). And the Fourth Circuit has made clear in other contexts that participation below is required before the court will recognize its jurisdiction over a nonparty appeal. *E.g.*, *Doe v. Pub. Citizen*, 749 F.3d 246, 259 (4th Cir. 2014).

The United States also relies (U.S. Br. 10-12) on cases involving suits filed by the Equal Employment Opportunity Commission, the Securities and Exchange Commission, and the Commodity Futures Trading Commission to secure the rights of individuals (and on a *qui tam* suit, *id.* at 11 n.3). But every one of those cases lends further support to Petitioners' argument that courts of appeals are divided about whether a nonparty that did not participate in the district court can appeal without first intervening—

because each of those cases made sure to point out that the nonparty that was permitted to appeal had participated in the district court proceedings. *SEC v. Enter. Tr. Co.*, 559 F.3d 649, 651 (7th Cir. 2009) (Sotomayor, J.); *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 76 (2d Cir. 2006); *SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 662-663 (6th Cir. 2001); *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 328 (5th Cir. 2001); *CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1113 (9th Cir. 1999); *Binker v. Pennsylvania*, 977 F.2d 738, 743-744 (3d Cir. 1992); *EEOC v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1503 (9th Cir. 1990); *see Searcy v. Philips Elec. N. Am. Corp.*, 117 F.3d 154, 155 (5th Cir. 1997). The United States does not dispute (*see* U.S. Br. 13-14) that at least five courts of appeals expressly require participation in the district court as a prerequisite to a nonparty appeal. *See* Pet. 13-17; Reply 2-3. And the United States has not identified *even one* case (other than this one) in which a nonparty that did not participate in the district court was permitted to appeal on its own.

The United States objects (U.S. Br. 14-15) that OMC could not have presented its views at an earlier stage of the case because it would not have satisfied the requirement for intervention as of right that a party's interests are not adequately represented. *See* Fed. R. Civ. P. 24(a)(2). That suggestion ignores the myriad ways in which nonparties are able to make their views heard without intervening as of right—as illustrated by nearly every circuit-court decision the United States relies on in its brief. OMC could have moved for permissive intervention or could have filed an amicus brief asserting its views. OMC could also

have moved to intervene in a timely fashion after the adverse judgment when the United States was unwilling to give it assurances that it would proceed with an appeal. As OMC's Brief in Opposition explains (BIO 21), the history of the tribal-trust relationship surely put OMC on notice that its litigation interests may well diverge from those of the United States. And nothing about the trust relationship between OMC and the United States prevented OMC from asserting its own interests—indeed, it did exactly that by filing an earlier suit in its own name in 2011, challenging the same wind-energy project at issue here. Pet. App. 5a-6a.

The United States' further suggestion (U.S. Br. 9) that OMC's views were in fact "aired in the district court" when OMC filed its motion to intervene—after the close of business on the final day to appeal—and minutes later deprived the district court of jurisdiction to decide that motion by filing a notice of appeal, cannot be taken seriously. The general requirement that entities must present objections to the district court in order to preserve them is not a mere formality; it is driven by efficiency concerns and demands that the objections be presented at a time when they can be acted on by the district court.

Finally, the United States' passing suggestion (U.S. Br. 15 n.5) that a decision in Petitioners' favor by this Court will have no effect on the outcome of this case should be rejected. In so arguing, the United States assumes that OMC's motion to intervene would be granted on remand. But that is not a wise assumption: such a motion must be timely filed, Fed. R. Civ. P. 24(a), and OMC's motion was anything but timely.

II. The Second Question Presented Warrants Review.

The United States' argument that the second question presented does not warrant review is also unconvincing. Notably, the United States does not defend either the court of appeals' interpretation of the regulatory text or the court of appeals' conclusion that the relevant text is ambiguous. That is not surprising in light of the Solicitor General's decision not to appeal the district court's rejection of the United States' original arguments on those points. Instead, the United States again attempts to limit the decision below to the particular facts of this case—and it does so by relying on a fanciful description of the Tenth Circuit's reasoning. The United States' arguments should be rejected.

As explained in the Petition (Pet. 25-26), the Tenth Circuit invoked the so-called Indian canon of statutory construction for the purpose of maximizing economic gain to an Indian tribe, *not* for its intended purpose of construing ambiguous statutory text. The United States contends (U.S. Br. 19) that the court of appeals invoked the Indian canon "only after concluding that [the Department of the] Interior's regulatory definition of 'mining' was ambiguous." But that is not a fair reading of the Tenth Circuit's entire opinion. In particular, the court admitted that, by construing the regulatory term "mining" to include "the sorting and crushing of rocks to provide structural support," it was adopting a definition that "does not fit nicely with traditional notions of 'mining' as that term is commonly understood." Pet. App. 24a. The court should have stopped after determining the "commonly understood" definition of "mining" and affirmed the district court's decision. Instead, the court of appeals invoked the

Indian canon and inquired whether another interpretation—one more economically favorable to OMC—was possible. *Id.* at 18a-26a. That is not a proper use of the Indian canon, or of any canon of construction intended to resolve textual ambiguity.

The fact that opposing litigants are able to propose conflicting interpretations of statutory or regulatory text does not render that text ambiguous. As Justice Thomas has explained, "[a] mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong." *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461 (1999) (Thomas, J., concurring in the judgment). "The task of interpreting a [regulation] requires more than merely inventing an ambiguity and invoking [an interpretative canon]. A [regulation] is not 'unclear unless we think there are decent arguments for each of two competing interpretations of it.'" *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 988 (1986) (Stevens, J., dissenting) (quoting Ronald Dworkin, *Law's Empire* 352 (1986)). But even the court of appeals seemed to acknowledge the lack of decent arguments for its expansive definition of "mining"—for any decent argument would presumably either fit nicely within traditional notions of mining or point to explicit statutory or regulatory text indicating a desire to depart from the settled meaning of that term. "[G]iven the plain terms of the" regulatory definition at issue, "'it require[d] some ingenuity [on the part of the Tenth Circuit] to create ambiguity.'" *United States v. James*, 478 U.S. 597, 604 (1986) (quoting *Rothschild v. United States*, 179 U.S. 463, 465 (1900)), *abrogated on other*

grounds by Cent. Green Co. v. United States, 531 U.S. 425 (2001).

To be sure, the Indian canon of construction serves important purposes by ensuring that Congress does not inadvertently diminish tribal rights. But the canon is abused when invoked to *expand* the rights of a tribe by judicial fiat, particularly when that is accomplished at the expense of private land owners by adopting "a contorted construction" of clear text. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). Neither OMC nor the United States has identified any other circuit court that has invoked the Indian canon in this manner. This Court's intervention is warranted to restore that canon to its proper purpose.

Like any other canon of construction, the Indian canon is intended to discern congressional intent. As applied to regulatory text, the canon should focus on determining the intent of Congress in enacting the operative statute. As explained in the Petition (Pet. 27-29), the purpose of the Osage Act was to benefit both the Osage Nation and individual tribal members (and their successors in interest). Act of June 28, 1906, ch. 3572, §§ 2-3, 34 Stat. 539, 540-544. Where, as here, one construction of a regulation or statute would benefit an Indian tribe and the opposing construction would benefit "a class of individuals consisting primarily of tribal members," the Indian "canon has no application." *N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976). The United States does not refute that point, instead suggesting (U.S. Br. 20 n.6) that Petitioners failed to assert it in the court of appeals. That is incorrect. After the court applied the canon in a manner never suggested by OMC, Petitioners

presented exactly that argument in their rehearing petition, *see* Pet. C.A. Pet. for Reh'g 3-4, 10-12, and again in their motion to stay the mandate, Pet. C.A. Mot. to Stay 2-3. In the stay motion, Petitioners noted their intent to seek certiorari review on, *inter alia*, whether "the Indian canon of construction [may] be applied to favor one Indian over another Indian." *Id.* at 2. In response, the Tenth Circuit granted the stay, 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." Pet. App. 51a. This Court should do just that by granting review of both questions presented.

CONCLUSION

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

Respectfully submitted,

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