No. 20-96

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

KANE COUNTY, UTAH, ET AL.

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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QUESTION PRESENTED

Whether an advocacy organization's environmental concerns qualify as an "interest" required by Rule 24(a)(2) of the Federal Rules of Civil Procedure for the organization to intervene as of right as a party defendant in a pending civil action, where no judicial relief could be granted against that organization in the action and its environmental concerns are unrelated to any claim or defense that the organization could itself assert in the action.

PARTIES TO THE PROCEEDING

Petitioner is the United States, which was the defendant in the district court.

Respondents are Kane County, Utah (the plaintiff in the district court), the State of Utah (the intervenor plaintiff), and two environmental organizations—Southern Utah Wilderness Alliance and the Wilderness Society—which moved to intervene as intervenor defendants.

RELATED PROCEEDINGS

United States District Court (D. Utah):

Kane County v. *United States*, No. 2:08-cv-315 (Aug. 21, 2018)

United States Court of Appeals (10th Cir.):

Kane County v. *United States*, No. 09-4087 (Mar. 8, 2010)

Kane County v. *United States*, Nos. 13-4108, 13-4109, 13-4110 (Dec. 2, 2014)

Kane County v. *United States*, No. 18-4122 (June 25, 2019)

Supreme Court of the United States:

Kane County v. *United States*, No. 14-1497 (Oct. 13, 2015)

Utah v. *United States*, No. 15-27 (Oct. 13, 2015)

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The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 928 F.3d 877. The order of the court of appeals denying rehearing en banc (Pet. App. 119a-120a), and opinions regarding the denial of rehearing (Pet. App. 121a-148a), are reported at 950 F.3d 1323. Prior opinions of the court of appeals (Pet. App. 61a-95a, 96a-110a) are reported at 772 F.3d 1205 and 597 F.3d 1129. The opinion of the district court (Pet. App. 52a-60a) and a prior opinion (Pet. App. 111a-118a) of that court are not published in the Federal Supplement but are available at 2018 WL 3999575 and 2009 WL 959804.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2019. A petition for rehearing was denied on February 27, 2020. On March 19, 2020, the Court extended the time within which to file a petition for a writ of certiorari due on or after that date to 150 days from the date of, as relevant here, the order denying a timely petition for rehearing. Under that order, the deadline for filing a petition for a writ of certiorari is July 26, 2020 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Pertinent provisions are set out in the appendix to the petition (Pet. App. 524a-535a).

STATEMENT OF THE CASE

This case concerns intervention of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. Respondents Kane County, Utah (County) and the State of Utah (State) sued the United States to quiet their asserted title to rights-of-way for public roads through federal lands. Respondents Southern Utah Wilderness Alliance (SUWA) and the Wilderness Society (collectively, Wilderness Groups) moved to intervene as defendants based on their desire to prevent potential harm to the surrounding environment from increased traffic.

1. In 1866, Congress enacted a statute that encouraged the development of "public lands, not reserved for public uses," by granting statutory "right[s] of way for the construction of highways over [such federal] lands." Act of July 26, 1866, ch. 262, § 8, 14 Stat. 253. That provision, later codified in the Revised Statutes, Rev. Stat. § 2477 (1875), and the United States Code, 43 U.S.C. 932 (1970), is commonly called "R.S. 2477."

On October 21, 1976, Congress repealed R.S. 2477. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2793. Congress expressly preserved, however, "any valid * * * right-of-way * * * existing on the date of [that repeal]." § 701(a), 90 Stat. 2786 (43 U.S.C. 1701 note).

The existence of an R.S. 2477 right-of-way thus now turns on the question whether the right-of-way was established no later than 44 years ago, *i.e*, by October 21, 1976. Unlike property rights established under other federal land-grant statutes, "the establishment of R.S. 2477 rights of way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested." *SUWA* v. *Bureau of Land Mgmt.*, 425 F.3d 735, 741 (10th Cir. 2005). Instead, the Tenth Circuit has determined that R.S. 2477 generally incorporates longstanding common-law rules for determining whether a right-of-way exists, *id.* at 768, and that, in this context in Utah, a state or local government claiming title to a R.S. 2477 right-of-way has the burden of proving "public use [of the land as a road] for a period of ten years" that was sufficiently "continuous and intensive" to establish the right-of-way by 1976, *id.* at 771. See *id.* at 746, 769.

Title to an R.S. 2477 right-of-way does not confer the rights of "fee simple ownership," *SUWA*, 425 F.3d at 747, which remain in this case with the United States. The right-of-way title holder is limited in its ability to "use" the federal land "within the physical boundaries of [its] right of way." *Ibid.* The holder's right is "limited by the established usage of the route as of [1976]," *id.* at 746, and the holder cannot undertake "improvements

in the road along its right of way, beyond mere maintenance," without allowing the relevant federal land-management agency to "determine whether the proposed improvement is reasonable and necessary in light of the traditional uses of the rights of way as of October 21, 1976," *id.* at 748.

2. Rule 24 of the Federal Rules of Civil Procedure governs the process by which a stranger to a civil action may insert itself as a party. That rule provides that a putative intervenor's "motion to intervene * * * must * * * be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). Rule 8 further provides that any "pleading that states a claim for relief must contain" a short and plain statement of the claim showing that "the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In a responsive pleading, the pleader similarly "must" state, in short and plain terms, "its defenses" to "each claim asserted against it." Fed. R. Civ. P. 8(b)(1)(A).

Rule 24 establishes two general types of intervention for anyone who "timely" files such a motion: permissive intervention and intervention of right. Fed. R. Civ. P. 24(a) and (b). A district court has discretion to grant permissive intervention if the person seeking party status either has a conditional statutory right to intervene or has a "claim or defense" that shares "a common question of law or fact" with "the main action." Fed. R. Civ. P. 24(b)(1). By contrast, intervention of right under Rule 24(a), at issue here, is available only to a person who either (1) possesses an unconditional statutory right to intervene, or:

> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so

> situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a).

3. a. In 2008, the County filed this action against the United States under the Quiet Title Act, 28 U.S.C. 2409a. See Pet. App. 62a. Its amended complaint (Pet. App. 149a-228a) sought to quiet title to alleged R.S. 2477 rights-of-way for various roads or road segments in the County that cross federally owned lands. See *id.* at 149a, 155a-156a, 216a-217a.

Under Utah law, the State of Utah "jointly" holds title with its counties to rights-of-way for county roads, Utah Code Ann. § 72-5-103(2)(b) (LexisNexis 2009), including to "R.S. 2477 rights-of-ways," *id.* § 72-5-302(2). The State thus moved to intervene as a plaintiff and filed a complaint against the United States (Pet. App. 311a-373a), asserting its own title claims to the same rights-of-way claimed by the County. *Id.* at 312a, 317a-318a, 371a-373a. The district court granted intervention. See *id.* at 63a.

b. Meanwhile, the Wilderness Groups and a third environmental organization moved to intervene in this quiet-title action as defendants. See Pet. App. 111a.

The district court denied intervention, Pet. App. 111a-118a, including, as relevant here, intervention of right. *Id.* at 112a-116a. The court first determined that the environmental groups did not "claim[] an interest relating to the property or transaction" that was the subject of this action, Fed. R. Civ. P. 24(a)(2). See Pet. App. 114a. The court explained that "the only issue in this case is whether Kane County can establish that it holds title to the roads at issue," *ibid.*, and that the

environmental groups seeking party status did "not share any claim or defense in this action that is different from any other member of the public who cares deeply about the outcome of this litigation," *id.* at 118a. The court emphasized that the Wilderness Groups "do[] not claim title to the roads at issue" in this quiet-title action and even "conce[ded]" that they "would have no right to continue with the action" if "the United States and Kane County [were] to resolve all of the title issues as to the roads without [their] consent or participation." *Id.* at 114a.

The district court further determined that, even if the environmental groups had the requisite "interests" to intervene under Rule 24(a)(2), they "failed to show that [their] interests in this case are not adequately represented by the United States," which stated that "it has been and will be vigorous in defending its claim to legitimate title." Pet. App. 115a-116a.

The court of appeals affirmed. Pet. App. 96a-110a. The court held that, "even assuming [the environmental groups] ha[d] an interest in the quiet title proceedings," they were not entitled to intervene as of right under Rule 24(a)(2) because they "failed to establish that the United States may not adequately represent [their] interest." *Id.* at 103a; see *id.* at 103a-107a.

c. After a bench trial, the district court entered a final judgment quieting title for the State and County on 12 of the 15 rights-of-way in dispute. See 5/30/13 Order.

The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 61a-95a. As relevant here, the court determined that the district court erred in setting the width of R.S. 2477 rights-of-way for three roads: two five-mile-long dirt roads (Swallow Park and North Swag Roads), most of which have 10- or 12-foot-

wide roadways, and a major two-lane thoroughfare (Skutumpah Road) having a 24-to-28-foot-wide surface. *Id.* at 91a-95a & n.4. The grant of 24-, 24- and 66-foot-wide rights-of-way, respectively, was error, the court of appeals concluded, because although the proper width is not limited to "the actual beaten path as of October 21, 1976," the district court failed to perform a "proper inquiry," which determines the width "'reasonable and necessary'" for the "'*traditional uses to which the right-of-way was put*'" by that date. *Id.* at 92a-93a (citation omitted). Unspecified future improvements not presented to the United States for its consideration cannot expand that width. *Id.* at 94a-95a.

4. On remand, the district court granted the parties' requests to stay proceedings from mid-September 2017 to February 5, 2018, to allow them to explore settlement of the three remaining right-of-way claims. 9/18/17 Order; 1/4/18 Order. On February 4, 2018, the County and State informed the Court that its adjudication of the width of those rights-of-way was necessary and proposed a corresponding schedule. D. Ct. Doc. 315 (Feb. 5, 2018). The United States agreed that the remaining issues required adjudication. D. Ct. Doc. 318 (Feb. 20, 2018).

Meanwhile, on December 27, 2017, during the stay of proceedings, the Wilderness Groups moved to intervene as defendants with respect to the width of the three rights-of-way. Pet. App. 432a-452a (motion); see *id.* at 454a-476a, 478a-496a (answers in intervention). The groups sought intervention based on their "environmental concern" that recognizing rights-of-way going beyond the roads' "pre-1976 * * * widths" and uses would cause "'potential damage to the environment

arising from vehicular traffic' in the [surrounding federal] lands," which their "members regularly visit." *Id.* at 442a-443a (citation omitted). The district court treated the motion as a request for reconsideration and again denied intervention. *Id.* at 52a-60a.

The district court determined that the Wilderness Groups were not entitled to intervention of right under Rule 24(a)(2) for two reasons. Pet. App. 56a-60a. First, the court found no basis to reconsider its determination that the Wilderness Groups lacked the requisite "interest" under Rule 24(a)(2). *Id.* at 56a-57a. Second, even if the groups had established such an interest, the court rejected their contention that the United States no longer "adequately represents" that interest because "the new administration" had "expressed willingness to engage in settlement negotiations in this and other R.S. 2477 cases." *Id.* at. 57a-60a. The court found nothing in the record to show that "the United States would advocate for anything other than retention of the maximum amount of property"; stated that while the parties initially indicated on remand that settlement might be possible, their later filings showed that adjudication "is necessary for the resolution of the matter"; and concluded that the movants failed to identify "any actual competing interests or motivations that would cause the United States to take a position other than advocating for the narrowest possible right of way." *Id.* at 58a-59a.

5. A divided panel of the court of appeals reversed and remanded. Pet. App. 1a-51a.

a. The panel majority held that the Wilderness Groups are entitled to intervene of right under the Tenth Circuit's "liberal approach" to Rule 24(a)(2)'s requirements, which the court further "relaxe[s] in cases

raising significant public interests," Pet. App. 19a (citations omitted). See *id.* at 18a-32a.

The majority first determined that the Wilderness Groups possessed the requisite "interest" under Rule 24(a)(2) in light of the Tenth Circuit's prior en banc decision in *San Juan County* v. *United States*, 503 F.3d 1163 (2007). See Pet. App. 20a-21a. In *San Juan County*, the divided en banc court held by a seven-to-six vote that the "concern" of a putative intervenor (there, SUWA) about "the potential damage to the environment arising from vehicular traffic" on a road was a "legally protectable interest" that supported its intervention in a Utah county's R.S. 2477-based action to quiet title to a right-of-way through federally owned lands. 503 F.3d at 1199; see *id.* at 1190-1200. The court "recognize[d] that SUWA d[id] not claim that it has title to [the road in dispute], even though [the case] is a quiet-title suit," but the court concluded that SUWA's "environmental concern" was "a legally protectable interest" sufficient under Rule 24(a)(2) in the quiet-title action because that same concern had given SUWA "standing to bring [a prior lawsuit] against [the federal government]" to challenge earlier federal land-management decisions about use of the road. *Id.* at 1199-1200; see *id.* at 1168. In the court's view, "the purpose of Rule 24(a)(2)" supported treating its interest requirement primarily as "'a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Id.* at 1195 (citation omitted). As such, the court stated, Rule 24(a)(2) merely calls for a "practical judgment" about "whether the strength of the interest and the potential risk of injury to that interest justif[ies] intervention." *Id.* at 1199. But see *id.* at 1207-1210 (Kelly, J.) (six-vote

opinion); *id.* at 1210-1211 (McConnell, J.) (six-vote opinion) (concluding that SUWA has "no legal rights regarding *whether* the United States owns the land" and thus "lacks the legal interest necessary to intervene" as a party). The majority in this case concluded that, under *San Juan County*, the Wilderness Groups' "'environmental concern[s]'" similarly gave them a sufficient Rule 24(a)(2) "interest" relating to the property that is the subject of this quiet-title action. Pet. App. 21a-22a (citation omitted).

The panel majority also held that the district court erred in ruling that the United States would "adequately represent" the Wilderness Groups' interest. Pet. App. 22a-32a. The majority concluded that showing inadequate representation involves only a "minimal burden," *id.* at 22a-24a, which the Wilderness Groups had met because they and the United States do not have "identical interests" related to the "wid[th]" of rights-of-way crossing federal land. *Id.* at 26a. The court stated that the Wilderness Groups' interest is "to limit as much as possible the number of vehicles on the roads," while "the United States' objectives 'involve a much broader range of interests.'" *Ibid.* (citation omitted). Thus, the majority declared, "even if the United States is advocating 'as well as can be expected' for the narrowest scope of the roads, its conflicting interests render its representation inadequate." *Id.* at 28a.

b. Chief Judge Tymkovich dissented. Pet. App. 33a-51a. He recognized that *San Juan County's* seven-judge majority had concluded that a similar "'environmental concern [was] a legally protectable interest' related to the specific lands" in that quiet-title action for purposes of Rule 24(a)(2), *id.* at 45a-46a (citation omitted; brackets in original), but noted that the "[s]ix

judges [who] disagreed" found it "'hard to see how SUWA . . . can be considered a party to the question of what real property the United States owns, or whether the United States granted an easement to [a county] decades ago,'" *id.* at 46a n.3 (quoting *San Juan Cnty.*, 503 F.3d at 1210 (McConnell, J., concurring in the judgment)). Chief Judge Tymkovich emphasized that the Wilderness Groups here sought to litigate "'the legal rights or interests of [others],'" *id.* at 42a (citation omitted), and concluded that the district court did not err in finding that *San Juan County* did not control whether an adequate "interest" had been shown in this case, where "only the length and width of th[e] easements is now in question," *id.* at 46a-47a. He also concluded that the United States' defense of its own title would adequately represent any interest that the Wilderness Groups might have. *Id.* at 47a-51a.

6. The United States and the State and County separately petitioned for rehearing en banc, which the court of appeals denied by an equally divided five-five vote. Pet. App. 119a-120a. Judge Phillips concurred in that disposition, *id.* at 121a-133a, and Chief Judge Tymkovich dissented, *id.* at 134a-148a.

As relevant here, Chief Judge Tymkovich, joined by four judges, concluded that the Wilderness Groups had not established a right to intervene under Rule 24(a)(2), again emphasizing that no grounds exist for concluding that the United States' defense of its own title to federal land would inadequately represent any interest that those groups might have. Pet. App. 134a-137a, 143a-148a. More fundamentally, he concluded, not one of the Wilderness Groups has any proper "role as a party in [this quiet-title action]" because "this dispute focuses solely on the various ownership rights the parties have

in the disputed rights-of-way," and neither of the two putative intervenors has "any independent ownership claim." *Id.* at 142a. Judge Tymkovich further cautioned that the panel's divided opinion would "open[] the intervention doors to parties that wish to disrupt property disputes between the United States and state and local governments—a common occurrence in the Western United States—and make them proxy battlegrounds for the airing of specialty interests." *Id.* at 134a. That problem, he noted, would arise in "many" cases in this very context, given the government's representation that it faces "'more than 12,000' R.S. 2477 claims in Utah alone." *Id.* at 134a & n.1 (citation omitted).

REASONS FOR GRANTING THE PETITION

The Wilderness Groups claim no property right in this case between the United States and the State and County about asserted title to rights-of-way for certain roads crossing federal lands. The divided Tenth Circuit nevertheless applied a self-styled "liberal approach" to Rule 24(a)(2), Pet. App. 19a, 31a, to hold that those groups are entitled to intervene as party defendants to the State and County's property-right claims, because the groups' environmental concerns about traffic that gave them Article III standing in a *different* case involving *different* claims challenging federal decisions about the use of the roads showed (in the court's view) that the Wilderness Groups possess an "interest" under Rule 24(a)(2) relating to the property that is the subject of this quiet-title action. That was error.

The court of appeals' interpretation of intervention of right under Rule 24(a)(2) is fundamentally misguided, and it erroneously and dramatically expands the universe of interests cognizable under that Rule. The court of appeals previously divided seven-six on

this issue, *San Juan Cnty.* v. *United States*, 503 F.3d 1163 (10th Cir. 2007) (en banc), and has now denied en banc rehearing by an equally divided five-five vote, Pet. App. 120a. The court's decisions reflect an entrenched division of authority warranting this Court's review. Not only does this case exemplify significant confusion in the courts of appeals about the fundamental nature of intervention; it arises in an important context involving massive numbers of claims to title involving federal lands and substantially undermines the United States' ability to resolve such claims appropriately. This Court's review is warranted.

A. The Court Of Appeals Erred In Granting Intervention Of Right In This Quiet-Title Action Based On The Wilderness Group's General Environmental Concerns

Intervention is the "legal procedure by which . . . a third party is allowed to become a party to the litigation." *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 933 (2009) (quoting *Black's Law Dictionary* 840 (8th ed. 2004)). And like any other "'party' to litigation," a person who intervenes under Rule 24 becomes "'[o]ne by or against whom [the] lawsuit is brought,'" *i.e.*, a plaintiff who brings, or a defendant against whom is brought, one or more claims for relief in the case. *Ibid.* (citation omitted; first set of brackets in original). The drafters of Rule 24 thus understood that intervention is "the procedural device whereby a stranger can present a claim or defense in a pending action" and thereby "become a party *for the purpose of the claim or defense presented*." James Wm. Moore & Edward H. Levi, *Federal Intervention: I. The Right to Intervene and Reorganization*, 45 Yale L.J. 565, 565

(1936) (*Intervention I*) (emphasis added).[1] That claim-or-defense requirement plays a critical role in Rule 24, and it serves as the predicate for Rule 24(a)(2)'s further requirement that a putative intervenor must "claim[] an interest relating to the property or transaction that is the subject of the action," Fed. R. Civ. P. 24(a)(2).

Rule 24's text and structure, related provisions within the Federal Rules of Civil Procedure, the evolution of those rules since 1937, and the decisions of this Court all demonstrate that the "interest" required by Rule 24(a)(2) for a person to intervene as of right in a pending action is an interest that is protected by a claim—or by a defense to a claim the existing plaintiff is already asserting in the action—that substantive law confers on that person. The assertion of such a claim or defense then forms the basis for the person's intervention as a party. The Tenth Circuit's approach to Rule 24 erroneously fails to require that "interest" to be one

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[1] Professor Moore served as the head research assistant to the Reporter of the Advisory Committee appointed by this Court to draft the Federal Rules of Civil Procedure. Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271, 312 (2020). Moore and future Attorney General Levi "devoted particular attention to intervention" and jointly published a two-part article on the topic contemporaneously with the new rules. *Id.* at 312-313 & n.183. The Advisory Committee's notes on Rule 24 accordingly cite their 1936 article to illustrate that Rule 24 "amplifies and restates the [preexisting] federal practice at law and in equity," Fed. R. Civ. P. 24 advisory committee's note (1937), and the Committee's Reporter later cited both articles at the American Bar Association's proceedings on the then newly adopted Federal Rules of Civil Procedure to demonstrate that Rule 24 "cover[ed] the existing law without very substantial change," *Intervention*, 106 Va. L. Rev. at 315 n.198 (citation omitted).

that the intervenor itself possesses and asserts as a legally cognizable claim or defense against an existing party to the action.

1. Rule 24 imposes a two-stage process for evaluating a request to intervene as a party to an action. A putative intervenor must first plead its own claim or defense for which it seeks to intervene, see Fed. R. Civ. P. 24(c), and then must satisfy, based on that claim or defense, the Rule's standards for determining whether intervention must or may be granted, see Fed. R. Civ. P. 24(a) and (b). Rule 24's text and structure embody the judgment that not all strangers to a civil action who could properly assert their own claim or defense in *some* case should be allowed to insert themselves into any particular civil action pending between others. And together with related rules of civil procedure governing pleading and the joinder of parties, Rule 24(a)(2) demonstrates that the type of "interest" it requires to intervene as of right is an interest that is protected by the relevant claim or defense that the intervenor is entitled to assert under substantive law.

a. Rule 24 provides that a putative intervenor's "motion to intervene * * * must * * * be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). That mandatory language ("must") makes it "incumbent" upon a person desiring intervention both to file an appropriate "motion" to intervene and specify "'the claim or defense for which [it seeks] intervention.'" *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 548 n.9 (1986) (quoting Rule 24(c)). A putative intervenor therefore has "no right to participate in the proceedings * * * without first filing an appropriate motion or pleading

setting forth the claim or defense that he desire[s] to assert." *Id.* at 548.

Moreover, "[t]he words 'claim[] or defense[]'" in Rule 24 "'manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit.'" *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 n.18 (1997) (quoting *Diamond* v. *Charles*, 476 U.S. 54, 76 (1986) (O'Connor, J., concurring in part and concurring in the judgment)). A "pleading that states a claim for relief must contain" a statement of the claim showing that "the pleader"—not some other person—"is entitled to relief." Fed. R. Civ. P. 8(a)(2). A pleader that submits a responsive pleading "must" similarly state "*its* defenses" to "each claim *asserted against it*." Fed. R. Civ. P. 8(b)(1)(A) (emphases added); see *Black's Law Dictionary* 419 (6th ed. 1990) ("Defense" means "[t]hat which is offered and alleged *by the party proceeded against* in an action or suit, as a reason in law or fact why the plaintiff should not recover or establish what he seeks.") (emphasis added); *Black's Law Dictionary* 345 (1st ed. 1891) (same). Rule 24's requirement that a putative intervenor submit a "pleading" that sets out the "defense" that it would assert if allowed to become a party defendant, Fed. R. Civ. P. 24(c), accordingly requires the "defense" to be based on its own substantive legal rights in opposition to a claim in the pending action that could have been asserted against it. That has been the case since the Court first adopted Rule 24 in 1937. See 308 U.S. 649, 690-691 (1937) (rule as adopted); Edward H. Levi & James Wm. Moore, *Federal Intervention: II. The Procedure, Status, and Federal Jurisdictional Requirements*, 47 Yale L.J. 898, 904-905 (1938) (explaining that "[t]he proposed complaint or answer of the intervenor must state a well

pleaded claim or defense" and that the question whether "a good defense is stated is, of course, a problem of substantive law").

b. A putative intervenor's proffered pleading that specifies its claim or defense that it would assert in the case as a party then forms the basis for intervention.

For intervention of right under Rule 24(a)(2), "the claim or defense for which intervention is sought," Fed. R. Civ. P. 24(c), must be such that the person who seeks to intervene (1) "claims an interest relating to the property or transaction that is the subject of the action" and (2) "is so situated that disposing of the action may as a practical matter impair or impede [its] ability to protect its interest." Fed. R. Civ. P. 24(a)(2). Even if those requirements are met, there is no right to intervene if the "existing parties [in the action] adequately represent that interest." *Ibid.* In other words, the requisite "interest" must be one that the putative intervenor itself would have the "ability to protect" through the assertion of its own legal rights.

c. This Court's decision in *Donaldson* v. *United States*, 400 U.S. 517 (1971), confirms that conclusion. In *Donaldson*, the government petitioned a district court to enforce administrative summonses that the IRS issued to Donaldson's former employer (Acme) and its accountant (Mercurio) to acquire testimony and documentary evidence about Donaldson's tax liability. *Id.* at 518-520. The employer and accountant, as the witness-respondents against whom the government sought judicial relief, had the right to "challenge the summons[es] on any appropriate ground," including the "defense[]" that they were issued for an "improper purpose." *Id.* at 526. But neither opposed enforcement, as both were willing to comply with any court order. *Id.* at 521 n.5,

531. Donaldson filed a Rule 24(a)(2) motion to intervene as of right in the enforcement proceedings with a "proposed answer" asserting a defense that the witness-respondents themselves could have raised, *i.e.*, that the summonses were allegedly invalid under the governing statute because they "were not issued for any [proper] purpose." *Id.* at 521.

This Court rejected Donaldson's argument that he was entitled to intervene under Rule 24(a)(2) because he "possesse[d] 'an interest relating to the property or transaction which is the subject of the [enforcement] action,'" *Donaldson*, 400 U.S. at 527 (second set of brackets in original). See *id.* at 530-531. Donaldson's "only interest," the Court explained, lay in the fact that the records in question "presumably contain[ed] details of Acme-to-Donaldson payments possessing significance for federal income tax purposes." *Ibid.* But Donaldson lacked either a "proprietary interest" in his employer's records or any legally recognized "privilege," *id.* at 530, such that the information in question "would not be subject to suppression [in later proceedings] if the Government [had] obtained it by other routine means," *id.* at 531. The Court thus determined that Donaldson's claimed interest under Rule 24(a) amounted to simply a desire to "counter and overcome Mercurio's and Acme's willingness, under summons, to comply and to produce records." *Ibid.* "This interest," the court then held, "cannot be the kind contemplated by Rule 24(a)(2)" when it speaks of an "'interest relating to the property or transaction which is the subject of the action,'" because that language "obviously" refers to "a significantly protectable interest." *Ibid.*

In other words, as the Court later explained, *Donaldson* "held that the employee's interest was not *legally protectible*" as required by Rule 24(a)(2). *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 315 (1985) (emphasis added); see *Diamond*, 476 U.S. at 75 (O'Connor, J., concurring in part and concurring in the judgment) ("Clearly, *Donaldson*'s requirement of a 'significantly protectable interest' calls for a direct and concrete interest that is accorded some degree of legal protection."). *Donaldson* also demonstrates that a putative intervenor's interest cannot piggyback on the fact that an existing defendant possesses a legally protected right to defend itself against relief. 400 U.S. at 526; see *id.* at 521. Donaldson could not intervene as of right because he himself lacked any legal right to "overcome [the defendants'] willingness, under summons, to comply." *Id.* at 531.

Thus, *Donaldson* confirms that Rule 24(a)(2)'s requisite "interest" must be protected by a claim or defense that, under the relevant substantive law, belongs to the intervenor itself. Here, the Wilderness Groups have no legally protected interest under substantive law that they can assert as a defense to a title dispute between the United States and the State and County.

2. Related rules governing the joinder of parties likewise show that Rule 24(a)(2) requires that an intervenor be a proper party to the suit based on its own legal rights under substantive law.

Rule 19(a)(1)(B)(i) defines a category of persons who are required to be joined as parties if feasible by referring to a person who "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect

the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). That text is materially similar for present purposes to Rule 24(a)(2)'s criteria for intervention of right. In fact, the Rules' drafters specifically adopted that parallel text in the 1966 amendments to Rules 19 and 24 to show that Rule 24(a)(2) is "a kind of counterpart to Rule 19(a)(2)(i) [now Rule 19(a)(1)(B)(i)] on joinder of persons needed for just adjudication," and thus allows persons to intervene as of right when their "position is comparable to that of a person under Rule 19(a)[(1)(B)(i)], as amended, unless his interest is already adequately represented in the action by existing parties." Fed. R. Civ. P. 24 advisory committee's note (1966). That textual connection shows two things relevant here.

First, Rule 19(a)(1)(B) demonstrates that an "interest relating to the subject of the action" is an interest protected by substantive legal rights. The other category of parties who must be joined under Rule 19(a)(1)(B)—aside from those under Rule 19(a)(1)(B)(i), quoted above—are those who claim such an "interest" and are so situated that disposing of the action in their absence may "(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations *because of the interest*." Fed. R. Civ. P. 19(a)(1)(B)(ii) (emphasis added). In order for that "interest" to create a risk of inconsistent obligations, it necessarily must be one protected by substantive law that could govern the rights and obligations of the existing parties to the case. Here, the Wilderness Groups' asserted environmental concerns have no bearing on the title dispute between the existing parties to this action.

Second, if a person can intervene as of right under Rule 24(a)(2), the parallel text in Rule 19(a)(1)(B)(i)

would suggest that the same person must be involuntarily joined as a party if it is feasible to do so. So if, as the court of appeals held, a person without any claim to title can intervene as of right in this quiet-title action based on a general environmental "interest" in lands surrounding the property in dispute, then the parallel language in Rule 19(a)(1)(B)(i) would suggest that such persons would also be required parties that must be joined as a party. Fed. R. Civ. P. 19(c)(1) and (2). Such joinder, however, would make no practical sense under the Tenth Circuit's so-called "liberal" approach to determining what constitutes an "interest" common to Rules 19 and 24. Under that approach, numerous private persons with general interests in the outcome of the quiet-title action—such as local residents wanting to use the roads or prevent public use of them, neighbors whose property values could be affected favorably or adversely, ATV enthusiasts intending to access the dirt roads for recreation—would seemingly have sufficient "interests" that would require that they too be joined as parties to (or be allowed to intervene in) the quiet-title action, even though they all lack any claims or defenses relevant to a quiet-title action concerning title to the property.

3. Rule 24's drafting history also confirms that the Tenth Circuit erred in its reading of Rule 24(a)(2)'s "interest" requirement. As initially adopted in 1937, Rule 24(a)(2) provided that intervention of right would be warranted "when the representation of the applicant's *interest* by existing parties is or may be inadequate and the applicant is or may be bound by the judgment in the action." Fed. R. Civ. P. 24(a)(2) (1937) (emphasis added). The 1966 amendments to Rule 24 updated its

text to specify that the relevant "interest" is an "interest relating to the property or transaction that is the subject of the action," Fed. R. Civ. P. 24(a)(2), but that revision served to state more specifically the required nexus to the actual subject of the existing action. "[T]he *kind* of interest necessary was not [itself] affected." *New Orleans Pub. Serv., Inc.* v. *United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir.) (*NOPSI*) (en banc), cert. denied, 469 U.S. 1019 (1984)). And that "interest" had long been understood to refer to the legally protected interests of a person who asserts a claim or asserts a cognizable defense against a claim already made in the case.

Like Rule 24(a)(2), the codes and rules of procedure that were its textual antecedents similarly limited intervention to a person who has "an interest in the matter in litigation." John Norton Pomeroy, Jr., *Remedies and Remedial Rights by the Civil Action* § 413, at 475 (3d ed. 1894) (discussing California and Iowa codes). And under those provisions, it was understood that "[t]he intervenor's interest must be such, that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought," and "if the action had first been brought against him as the defendant, he would have been able to defeat the recovery in part at least," *id.* § 430, at 490; see *Smith* v. *Gale*, 144 U.S. 509, 517-518 (1892) (discussing Code of Civil Procedure of the Territory of Dakota § 90 (1877)). And in federal cases governed by Equity Rule 37, which authorized intervention for "[a]nyone claiming an interest in the litigation," 226 U.S. 627, 659 (1912) (adopting Rule 37), it was "well settled that the only interest which w[ould] entitle a

person to the right of intervention in a case is a legal interest," not interests of a more "general" character which "do not give rise to definite legal rights." *Radford Iron Co.* v. *Appalachian Elec. Power Co.*, 62 F.2d 940, 942-943 (4th Cir.) (finding company's interest in continued use of a river for transportation was insufficient for intervention because it would not "entitle the [company] to bring a suit in its name"), cert. denied, 289 U.S. 748 (1933); see *Intervention*, 106 Va. L. Rev. at 307-308 (explaining that courts interpreted "interest" in Equity Rule 37 to mean "a 'legal interest,' as those words are understood in the law") (citation omitted).

When Rule 24 was adopted in 1937, its drafters understood that longstanding practice recognized intervention of right when "the intervenor claims an interest in property subject to the control of a court" and, in that context, the "kind of an interest" that the intervenor must have was "[o]bviously * * * an interest known and protected by that law: a claim of ownership, or a lesser interest, sufficient and of the type to be denominated a lien, equitable or legal." *Intervention I*, 45 Yale L.J. at 582-583. The Reporter of the Advisory Committee that drafted Rule 24(a)(2)'s 1966 amendments likewise emphasized that the amendment did not expand the concept "interest," because "the interest spoken of in the new rule finds its own limits in the historic continuity of the subject of intervention" as well as "in the concepts of [the 1966 amendments to] rule 19, to which intervention looks for analogy." Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 405 (1967).

4. The quite different and self-styled "liberal approach to intervention" followed by the court of appeals

in this case, Pet. App. 19a, 31a (citations omitted), descends from a line of authority originating in the late 1960s and 1970s when some courts began to interpret Rule 24 "to give outsiders broad rights to become parties to pending lawsuits." *Intervention*, 106 Va. L. Rev. at 271, 337-338 (emphasis omitted). In analysis emblematic of the era, the D.C. Circuit analyzed Rule 24(a)(2) by focusing on what it perceived to be the "policies behind the 'interest' requirement" after the Rule's 1966 amendments, rather than analyzing Rule 24's actual text in light of its context in the Federal Rules of Civil Procedure and its antecedents. *Nuesse* v. *Camp*, 385 F.2d 694, 700 (1967). Those perceived policies led the court to determine that "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving *as many apparently concerned persons as is compatible with efficiency and due process*." *Ibid.* (emphasis added). That extraordinarily broad formulation for granting party status led the court to view the "nature of [a putative intervenor's] 'interest'" as simply "play[ing] a role in determining the *sort of intervention* which should be allowed," such as whether the intervenor "should be permitted to contest all issues," rather than "a determinative criterion for intervention." *Smuck* v. *Hobson*, 408 F.2d 175, 179-180 (D.C. Cir. 1969) (en banc) (three-judge plurality) (emphasis added). And under that approach, the court determined that Rule 24(a)(2)'s application is "not necessarily limited to those situations when the trial court should compel [a person] to become a party under Rule 19" and that "the fact that the two rules are entwined does not imply that an 'interest' for the purpose of one is precisely the same as for the other." *Id.* at 178. See generally

Intervention, 106 Va. L. Rev. at 355-356 (discussing *Nuesse* and *Smuck*).

The Tenth Circuit's en banc decision in *San Juan County*, which is the foundation for the decision in this case, is cut from the same cloth. The seven judge majority noted that "courts of appeals have struggled to reach a definitive interpretation of Rule 24(a)(2)," yet it accepted the expansive view that the Rule's "'interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process,'" and ultimately determined that Rule 24(a)(2) is simply intended to cover contexts in which "the practical effect on the prospective intervenor justifies its participation in the litigation" as a party. *San Juan Cnty.*, 503 F.3d at 1192, 1195. The Tenth Circuit's amorphous test now only requires some "interest that could be adversely affected by the litigation" and purports to require a "practical judgment * * * in determining whether the strength of the interest and the potential risk of injury to that interest justify intervention." *Id.* at 1199.

But as six other judges in *San Juan County* explained, the Tenth Circuit's flawed standard erroneously grants party status to SUWA in a quiet-title action, even though SUWA "claims no legal or equitable interest in the title to the [relevant] land"; relies on SUWA's general environmental interest "not related to the property rights" being litigated; and adopts a "vague and malleable 'practical effect' test" the application of which will have "substantial" effect on litigation generally. 503 F.3d at 1208-1209 (Kelly, J., concurring in the judgment). Indeed, in a "case about title to real property," "it is hard to see how SUWA * * * can be considered a *party* to the question of what real property

the United States owns," or "whether the United States granted an easement," based on environmental concerns that allow it to litigate different "statutory rights regarding how the land is administered *if* the United States owns the land," when SUWA has "no legal rights regarding *whether* the United States owns the land." *Id.* at 1210-1211 (McConnell, J., concurring in the judgment) (six-vote opinion). Here, "SUWA lacks the legal interest necessary to intervene in a case involving solely the question of real property ownership." *Id.* at 1211.

5. The Tenth Circuit's expansive application of Rule 24(a)(2) here stretches the Rule beyond its permissible bounds. The Federal Rules of Civil Procedure were adopted under the authority of the Rules Enabling Act, 28 U.S.C. 2071 *et seq.*, which provides that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. 2072(b). But in granting party status to a putative intervenor that lacks its own substantive rights, enabling it to assert its own defense in a property-rights case in which judicial relief is sought against another (the United States), the Tenth Circuit has granted such parties the right to assert substantive rights belonging to others. Defining who possesses a claim to relief or a defense thereto lies at the heart of substantive law. The Rules Enabling Act thus "forbids interpreting" Rule 24(a)(2), as the Tenth Circuit has done, to allow new parties to assert "defenses" that do not belong to them. See *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 367 (2011).

B. The Court Of Appeals' Holding Implicates A Conflict In The Circuits

The Tenth Circuit's approach to Rule 24(a)(2), like that of the courts that follow the D.C. Circuit's intervention precedents developed in the late 1960s and

early 1970s, fails to properly require an intervenor to have an "interest" that it may protect under substantive law through a claim or defense in the legal dispute. The ensuing doctrinal confusion is reflected in the Tenth Circuit's seven-to-six en banc opinion in *San Jan County* and its equally divided denial of en banc rehearing in this case. See also *Intervention*, 106 Va. L. Rev. at 274 ("The law governing [intervention] motions is a mess."). It also reflects a division of authority with decisions of the Fifth, Eighth and Eleventh Circuits warranting this Court's review.

The Fifth Circuit has long held that Rule 24(a)(2) requires an "interest" in the underlying action that "the *substantive* law recognizes as belonging to or being owned by the [putative intervenor]." *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 250 (5th Cir. 2009) (quoting decision that quotes the Fifth Circuit's en banc decision in *NOPSI*, 732 F.2d at 464). As a result, the Fifth Circuit has held that Rule 24(a)(2) does not authorize a person to intervene in order to "'assert a right if it is not his own'" and that "intervention is [therefore] improper where the intervenor does not itself possess the only substantive legal right it seeks to assert in the action." *NOPSI*, 732 F.2d at 464, 466 (citation omitted). Under that rule, it follows, for instance, that a "purely economic interest" in a contract dispute between the original parties, where the putative intervenor is not a third-party beneficiary that could assert its own rights in the action, is insufficient to warrant intervention of right. *Id.* at 466-467, 469-470. See also, *e.g.*, *Saldano* v. *Roach*, 363 F.3d 545, 551-552 (5th Cir.) (denying intervention in habeas action to district attorney's office that prosecuted the criminal case because, under state law,

the state attorney general has the right to oppose habeas claims), cert. denied, 543 U.S. 820 (2004).

The Eighth Circuit has similarly held that the intervenor's Rule 24(a)(2) interest must be one "legally protectable" in the underlying action. *United States* v. *Metropolitan St. Louis Sewer Dist.*, 569 F.3d 829, 839 (8th Cir. 2009) (quoting *NOPSI*, 732 F.2d at 464 (en banc)). In other words, the intervenor's "asserted interest" must be "bound up with the subject matter of the litigation" and be an "interest upon which [the intervenor] could seek judicial relief in a separate lawsuit," because the purpose of Rule 24(a)(2) is to allow persons "'who might otherwise have to bring a lawsuit on their own to protect their interests or vindicate their rights'" to be able to "'join an ongoing lawsuit instead.'" *Id.* at 840 (citation omitted). An association of businesses thus lacked the requisite "interest" to intervene in a Clean Water Act action filed by the United States against the sewer district that serviced the businesses —notwithstanding the risk that the a ruling against the district could result in an increase in rates paid by the businesses—because those businesses had no "property or other legal rights" protecting their asserted interest that could be asserted in the suit. *Id.* at 839. For the same reason, the desire of student groups to "maintain[] the quantum of their funding" from their university was an insufficient "interest" to warrant intervention in a lawsuit challenging the university's use of student fees to fund those same groups, because their interest in maintaining funding is not a "legally protectable" one. *Curry* v. *Regents of the Univ. of Minn.*, 167 F.3d 420, 422 (8th Cir. 1999).

The Eleventh Circuit has similarly held that the "interest" required by Rule 24(a)(2) must itself "derive[]

from a legal right" asserted in the action by the intervenor, which substantive law "'recognizes as belonging to [it].'" *Mt. Hawley Ins. Co.* v. *Sandy Lake Properties, Inc.*, 425 F.3d 1308, 1311 (2005) (per curiam) (quoting *United States* v. *South Fla. Water Mgmt. Dist.*, 922 F.2d 704, 710 (11th Cir.), cert. denied, 502 U.S. 953 (1991)). Accordingly, an intervenor who would be economically affected by the resolution of an insurance coverage dispute involving others could not intervene as of right where it lacked any "legally protectable interest in that insurance policy." *Ibid.* Similarly, farming organizations that depended on water from a water district lacked a requisite "interest" to intervene as of right as defendants with respect to claims against the district, because the organizations could identify no "substantive legal protection" of their interests and no "legal right" to the water services in dispute. *South Fla. Water Mgmt. Dist.*, 922 F.2d at 710-711.

Under those decisions of other courts of appeals, the Wilderness Groups would have no right to intervene under Rule 24(a)(2).

C. Review Is Warranted To Resolve An Important And Recurring Question Governing The Scope Of Intervention

The court of appeals' holding also raises important issues with wide-ranging and serious implications for the United States' conduct of litigation. In the context of R.S. 2477 right-of-way claims alone, the United States is litigating thousands of right-of-way claims in the Western States, including more than 12,000 claims in just the State of Utah. See Pet. App. 28a, 134a n.1.[2]

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[2] See also Pls. Proposed Findings of Fact and Conclusions of Law 2, *Kane County* v. *United States*, No. 2:10-cv-1073 (D. Utah. July 3, 2020) (*Kane County II*) (State and County's filing explaining that

Litigation at that scale is inordinately burdensome, and R.S. 2477 claims are particularly resource-intensive because the validity of each claim in Utah turns on historical facts, often developed through the testimony of aging witnesses, about road-use activity at specific locations 44 years or more ago. See p. 3, *supra*.

If allowed to stand, the court of appeals' decision in this case will significantly and adversely change the dynamics of litigation. See *Intervention*, 106 Va. L. Rev. at 271 (stating that decisions that confer broad rights to intervention "affect[] the dynamics of a lot of cases, including many of the highest-profile cases that the federal courts hear") (emphasis omitted). The Tenth Circuit's decision, for instance, threatens to render the resolution of this massive quiet-title litigation effort significantly more difficult and time-consuming for the only parties whose property rights are actually at issue—and for the court—by expanding the scope of discovery, complicating factual development, lengthening trials, and complicating settlement negotiations with the addition of environmental groups. Cf., *e.g.*, Pet. App. 31a (stating that, as a party, "SUWA will be 'entitled to present evidence and have its objections heard at the hearings on whether to approve' [any] settlement" in this case) (citation omitted). Even as a permissive intervenor, in another quiet-title action filed by the County against the United States, SUWA has already filed "*four times* as many motions as any other party," prompting the district court to state that it now recognizes "how much SUWA has [come to] dominate[] the proceedings" and that, "[i]n hindsight," it "should have

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County has sued to quiet title on 775 roads and that the State and 21 other Utah counties have separately sued to quiet title for approximately 12,000 right-of-way).

stopped its filings earlier."[3] SUWA appears to oppose the statutory right-of-way grants on principle, see SUWA, *Hoax Highways (RS 2477)*, https://suwa.org/issues/phantom-roads-r-s-2477/ (last visited July 20, 2020), but the post-trial judgment and merits appeal in this case illustrate that the State and County have been found to present meritorious right-of-way claims, even when those claims have been opposed and litigated by the United States. See, *e.g.*, Pet. App. 63a, 71a, 74a, 90a. The judicious settlement of such claims is in the interest of all the governmental parties with property interests and of the courts, particularly because there are simply too many claims to realistically litigate through trial. The court of appeals' decisions threaten the federal, state, and county governments' ability to efficiently reach such desirable settlements.

Such federal title issues are not only important, they fall overwhelmingly within the territorial jurisdictions of the Ninth and Tenth Circuits. The United States owns roughly 640 million acres of land, nearly 28% of the Nation's entire land area, the great majority of which (93%) is within the Ninth and Tenth Circuits. See Congressional Research Serv., *Federal Land Ownership: Overview and Data* 1, 7-8 (Feb. 21, 2020), https://crsreports.congress.gov/product/pdf/R/R42346. The Tenth Circuit alone contains 29% of all federal lands in the contiguous United States. See *id.* at 7-8. The divided decision in this case will therefore have a disproportionate effect on the government's ability to litigate

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[3] 9/5/19 Opinion 30, *Kane County II*, *supra*; see *id.* at 35-37 (discussing litigation delays involving SUWA, "question[ing] whether SUWA shares the goal of a timely and fair resolution of the dispute," and ordering new conditions on SUWA's participation in light of SUWA's litigation conduct).

title disputes over federal lands, including in R.S. 2477 disputes. Before the United States is required to operate under the Tenth Circuit's misguided approach to intervention of right, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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