No. 17-756

In the Supreme Court of the United States

PUBLIC SERVICE COMPANY OF NEW MEXICO,
Petitioner,

v.

LORRAINE BARBOAN, *et al.*,
Respondents.

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

BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AND THE OKLAHOMA OIL AND GAS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Andrew W. Lester
Counsel of Record
SPENCER FANE LLP
9400 North Broadway Extension
Suite 600
Oklahoma City, OK 73114
405.844.9900
alester@spencerfane.com

Barry L. Pickens
SPENCER FANE LLP
9401 Indian Creek Parkway
Suite 700
Overland Park, KS 66210
913.345.8100
bpickens@spencerfane.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

CORPORATE DISCLOSURE STATEMENT

Interstate Natural Gas Association of America ("INGAA") is an incorporated, not-for-profit trade association representing virtually all of the interstate natural gas transmission pipeline companies operating in the United States. INGAA has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock. Most INGAA member companies are corporations with publicly traded stock.

The Oklahoma Oil and Gas Association ("OKOGA") is an incorporated, not-for-profit trade association. It is not publicly held, has no parent corporation, and no publicly held corporation owns 10% or more of the stock of OKOGA.

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INTEREST OF *AMICI CURIAE*[1]

Interstate Natural Gas Association of America ("INGAA")[2] is a trade association representing the interstate natural gas pipeline industry in North America, including virtually all of the interstate pipelines operating in the United States. Its members transport over 95% of the nation's natural gas through a network of over 200,000 miles of pipelines.

The Oklahoma Oil and Gas Association ("OKOGA") is a trade association that was formed in 1919 under a prior name (the Mid-Continent Oil and Gas Association). It is one of the oldest oil and gas industry associations in the United States. Through the work of OKOGA, oil and gas producers, operators, purchasers, pipelines, transporters, refiners, processors and service companies representing a substantial sector of Oklahoma's oil and gas industry discuss industry issues of concern and work toward the advancement and improvement of the domestic oil and gas industry.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received notice of the intent to file this brief at least 10 days before it was due and have consented to this filing.

[2] Most, but not all, of INGAA's members supported filing this brief.

The Tenth Circuit's decision in this case will impact the *amici* and their members in two ways. With respect to existing pipelines that traverse lands allotted to individual Native Americans, the decision will all but eliminate pipelines' ability to obtain extensions of necessary right-of-way easements prior to their expiration. Under the decision below, a single allottee can prevent condemnation by transferring to a tribe even an infinitesimally tiny fractional interest in the allotted lands traversed by an existing pipeline, eliminating the ability to condemn the land, and thereby wreaking havoc on the pipeline company who would then have either to relocate the pipeline prior to expiration of its right-of-way easement or to pay whatever exorbitant amount is demanded of it to extend the necessary easements. Relocating an existing pipeline is not a realistic option because natural gas customers – local gas utilities, manufacturers and industrials, gas-fired generators – rely on that natural gas transportation service to meet their home heating, cooling, and manufacturing needs. All owners of existing right-of-way easements for natural gas pipelines that traverse allotted lands will face the Hobson's choice put to them by the beneficial owners of these allotted lands when the easement term expires.

The Tenth Circuit's decision inevitably will impact *amici* and their members in a second important way. As the nation's demand for natural gas continues to grow as it is projected to do over the next decade,[3] *amici* and their members will have to expand the capacity of their pipeline infrastructure. Unless new pipelines avoid allotted lands altogether by routing along an inefficient path, they will face a similar Hobson's choice to the one they face for existing pipelines when the easement expires (i.e., either remove pipelines from service if renegotiations fail or agree to pay whatever costs are demanded by allottees). Under Bureau of Indian Affairs (the "BIA") regulations, right-of-way agreements on individually owned Indian land are limited to 20-year terms for oil and gas purposes. *See* 25 C.F.R. § 169.201(c). Accordingly, pipelines will continually and increasingly face this Hobson's choice if the Tenth Circuit's decision stands.

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[3] The Government Accountability Office has estimated that demand for natural gas will rise by 35 percent through 2030. GAO, *Pipeline Permitting: Interstate and Intrastate Natural Gas Permitting Processes Include Multiple Steps, and Time Frames Vary*, at 1 (Feb. 2013) [hereinafter "GAO"].

SUMMARY OF ARGUMENT

Amici file this brief to alert this Court of the significant harm the Tenth Circuit's decision will inflict on their member companies and numerous other industries whose operations depend upon right-of-way easements across allotted lands. Industries that must obtain right-of-way easements will now be forced either to re-route their infrastructure to avoid paths that would traverse allotted lands or, where that is impossible, to pay whatever exorbitant prices may be demanded to obtain such easements. Unless this Court accepts review to put things right, the extra burdens and expenses that would flow from electing either option will result in significant harm to these *amici*, other impacted industries, customers of all those industries, and as a result, the nation.

Those consequences are both unnecessary and avoidable. The Tenth Circuit's construction of 25 U.S.C. § 357 is improper based on its plain text. In 1901, Congress enacted Section 357 to expressly authorize condemnation *generally* of allotted lands under state eminent domain law. The Tenth Circuit, however, engrafted an exception onto the law that is not supported by the plain text of the statute. Indeed, the Tenth Circuit acknowledged the silence of this section. The Tenth Circuit did so even though there is no conflict between Section 357 and another section that court considered, a section that governs the voluntary grant of certain right-of-way easements. This Court should reverse the Tenth Circuit's impermissible construction of Section 357 before it is too late to avoid the considerable harm that is sure to follow from the Tenth Circuit's decision if this Court does not do so.

ARGUMENT

I. The Tenth Circuit's Opinion Creates a Serious Threat to the Natural Gas Industry's Ability to Provide a Needed Source of Energy for the Nation.

The Tenth Circuit's opinion does not merely jeopardize the ability of electric utilities to continue to provide electrical services from overhead transmission lines that cross lands allotted to Native Americans. It also threatens other sectors that require right-of-way easements across allotted lands to provide vital services. *Cf. Yellowfish v. Stillwater*, 691 F.2d 926, 931 (10th Cir. 1982) (discussing the importance of condemnation of rights-of-way under Section 357 "for necessary roads or water and power lines"). In addition to the impact on electric utilities, roads, and water lines, the Tenth Circuit's decision will endanger substantial portions of the infrastructure necessary for natural gas transmission.

The problems caused by the Tenth Circuit's decision, as described below, will be felt even more acutely because many of the allotted lands are located within the states that make up the Tenth Circuit. The BIA has determined that 99.7 percent of allotment lands eligible for its Buy-Back Program are located within three federal circuits – the Eighth, Ninth and Tenth Circuits. U.S. Dep't of Interior, 2016 Status Report, *Land Buy-Back Program for Tribal Nations*, p. 16 (Nov. 1, 2016).[4] Under its Buy-Back program, the

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[4] https://www.doi.gov.sites/doi.gov/files/uploads/2016_buyback_program_final_0.pdf.

BIA has designated allotted lands located in New Mexico, Oklahoma, Utah and Wyoming for priority implementation, based on the severity of the problem with fractional interests in the allotted lands identified for first priority, and other factors. U.S. Dep't. of Interior, Press Release (July 31, 2017).[5]

One INGAA member has already been impacted by the decision of a district court located in the Tenth Circuit. *See Enable Oklahoma Intrastate Transmission, LLC v. A 25 Foot Wide Easement*, No. CIV-15-1250-M, 2016 WL 4402061 (W.D. Okla. Aug. 18, 2016), *reconsideration denied*, 2017 WL 4334227 (W.D. Okla. July 21, 2017).[6] The district court in that condemnation case was fully aware of the Tenth Circuit's ruling when, on rehearing, that court concluded the natural gas pipeline operator could not condemn new rights-of-way for its existing pipeline on allotted lands after an original 20-year easement for that pipeline expired. The district court rejected Enable's new trial motions based specifically on the Tenth Circuit's decision.

As was true in Enable's condemnation proceeding, existing terms for rights-of-way easements on allotted lands will continue to expire. If the Tenth Circuit's opinion stands, the natural gas pipeline industry will face a growing crisis as it attempts to renegotiate easements for existing, in service, pipelines that are

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[5] https://www.doi.gov/pressreleases/interior-announces-revised-strategy-policies-more-effectively-reduce-fractionation.

[6] *See also Davilla v. Enable Midstream Partners*, 247 F. Supp. 3d 1233 (W.D. Okla. 2017) (involving the same parties and same allotted lands). Enable filed timely notices of appeal in both cases. *See* 10th Circuit Appeal Nos. 17-6088 and 17-6188.

providing critical natural gas to existing customers who cannot afford to have the pipeline be taken out of service. At the same time, the demand for natural gas is projected to rise by 35 percent through 2030. GAO, *supra* note 3, at 1. To accommodate the increased demand, *amici*'s members will need to build significant miles of new and expanded interstate pipelines in coming years. Many of the new or expanded pipelines in the west will have to traverse allotted lands, unless the pipelines are rerouted entirely using a much less optimal path. Yet, under the Tenth Circuit's construction, a tribe could prevent condemnation of any of the necessary right-of-way easements across allotted lands simply by acquiring a tiny fractional interest in the parcels.

Leaving the Tenth Circuit's opinion in place will substantially disrupt the ability of *amici* and their members to meet the nation's needs for natural gas. In sum, the Tenth Circuit's decision will have a devastating impact on the provision of natural gas services through existing, new, and expanded pipelines needed to meet the projected growth in demand for natural gas.

Accordingly, this Court should grant the Petition and correct the Tenth Circuit's erroneous construction of Section 357 so that electric utilities, natural gas pipelines, and other industries can continue to provide much-needed services throughout the parts of the United States where such services cannot be provided without right-of-way easements through allotted lands.

II. The Tenth Circuit's Opinion Is an Impermissible Exercise of Judicial Policymaking under the Guise of Statutory Construction.

When concluding that the allotted lands at issue were not subject to state-law condemnation powers, the Tenth Circuit engrafted an exception onto 25 U.S.C. § 357 that it acknowledged was "unmentioned" in the plain text of that statute. Petitioner's Appendix ("App.") at 18a ("Tribal lands go unmentioned"). The Tenth Circuit erroneously construed Section 357 as inapplicable to condemnation of lands where a tribe has reacquired any fractional interest in lands previously allotted in severalty to individual Indians.

Construed properly, Section 357 gives Petitioner a right to use state law eminent domain powers to condemn easements over the properties at issue. On its face, Section 357 specifically allows condemnation of "lands," without exception or qualification, if they were previously allotted to individual owners: "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located . . . ." 25 U.S.C. § 357.

The Tenth Circuit's construction of Section 357, however, conflicts with the statute's plain language. Where a federal court can apply the statute's plain language, it must do so without resorting to other canons in aid of construction. *See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). While the Tenth Circuit acknowledged the "plain language" standard for statutory construction, it failed to construe Section 357 based on its plain language. Instead, it improperly created an exception

for "lands allotted . . . to Indians," if a tribe ever reacquires any interest in those lands. App. at 20a. It improperly concluded its construction was required because of the "statutory silence for condemnation of tribal lands." *Id*. at 19a.

However, this Court has consistently rejected such judicial policy-making, masquerading as statutory construction, which creates exceptions to Congressionally-authorized powers. *See, e.g.*, *E.P.A. v. EME Homer City Generation, L.P.*, ___ U.S. ___, 134 S. Ct. 1584, 1588 (2014) ("However sensible the [] Circuit's exception to this [statutory prescription] may be, a reviewing court's 'task is to apply the text [of the statute], not to improve upon it'"; citing *Pavelic & LeFlore v. Marvel Entm't Group, Div. of Cadence Indus. Corp.*, 493 U.S. 120, 126 (1989)); *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. 'It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result'" (citation omitted)).

The Tenth Circuit acknowledged that Section 357 "permits condemnation of any land parcel previously allotted," albeit only so long as its "current beneficial owners" are "individual Indians." App. at 18a. In acknowledging that authority, the Tenth Circuit ignored any "statutory silence" regarding transfers that may have occurred between "individual Indians"

(whether by operation of an individual Indian's will or through the relevant laws of intestate succession).[7]

The Tenth Circuit correctly observed that the phrase "[t]ribal lands" is "unmentioned" in Section 357. App. at 18a. In other words, the statute's plain language will not support an exception based upon the land's (partial) status as "tribal lands." Notwithstanding this omission, the Tenth Circuit nevertheless concluded an exception for "tribal lands" should be implied. *Id.* To accomplish this judicial sleight of hand, the Tenth Circuit compared Section 357 to 25 U.S.C. § 319, "the paragraph immediately preceding § 357." *Id*. The comparison, however, is uncalled for, and is unnecessary in light of the plain language of Section 357.

This Court has held that lower courts must assume Congress meant to use the language in one section but not in the other: "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *see also Sandoz Inc. v. Amgen Inc.*, __U.S. __, 137 S. Ct. 1664, 1677 (2017) (citing *Russello*). In determining the import of Congressional silence

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[7] Previously, the Tenth Circuit correctly construed Section 357 as authorizing condemnation of all allotted lands even where an interest in the lands had been transferred to a new beneficial owner. *See Transok Pipeline Co. v. Darks*, 565 F.2d 1150 (10th Cir. 1977).

within another section of the same statutory scheme, the *Russello* Court further observed: "Had Congress intended to restrict [a section without the omitted language], it presumably would have done so expressly as it did in the" other section. *Id*. (citing *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982); *United States v. Naftalin*, 441 U.S. 768, 773–74 (1979)).

This Court's observation in *Naftalin* is thus equally applicable with regard to the Tenth Circuit's effort to engraft language from Section 319 into Section 357. "The short answer is that Congress did not write the statute that way for a reason so that Congress intended not to include such a limit in the latter by its omission." 441 U.S. at 773-74.

In an older line of cases, this Court also similarly warned federal courts against assuming that Congress implied limitations of a power that it expressly authorized. Where Congress has enacted a statute expressly authorizing certain powers and duties, "it cannot be lightly assumed that restrictions on that authority are to be implied." *Fed. Hous. Admin., Region No. 4 v. Burr*, 309 U.S. 242, 245 (1940) (rejecting implied exceptions to FHA's power "to sue and be sued"). Instead, if authority "is to be delimited by implied exceptions," then it "must be clearly shown that" certain exercises of the authority "are not consistent with the statutory . . . scheme" among other possible exceptions not applicable here. *Id*.

The Tenth Circuit's decision was hardly necessary to avoid an inconsistency between Section 357 and the rest of the statutory scheme Congress adopted in 1901. Sections 319 and 357 are readily harmonized without employing the Tenth Circuit's judicial machinations.

These sections serve entirely different purposes and govern different methods for acquiring a property interest in lands held in trust by the United States. *See S. California Edison Co. v. Rice*, 685 F.2d 354, 357 (9th Cir. 1982) (Section 357 provides "an alternative method for the acquisition of an easement across allotted Indian land"); *see also Nicodemus v. Washington Water Power Co.*, 264 F.2d 614, 618 (9th Cir. 1959); *Yellowfish*, 691 F.2d at 930.

Section 357 governs involuntary condemnation of an interest in allotted lands under state law. In sharp contrast, Section 319 governs voluntary grants of a certain kind of property right (right-of-way easements) in lands held in trust by the United States (and whether they are beneficially owned by a tribe or by individual Native Americans) under Federal law. That Section 319 establishes procedures for the Secretary of the Interior's voluntary grant of an easement in a broader category of properties in no way conflicts with Section 357's grant of condemnation authority over allotted lands.

Given that the sections can be read consistently, the Tenth Circuit erred by engrafting an exception onto Section 357 based upon Section 319. If such an exception for "tribal lands" were to be added to Section 357, Congress must do so – not the federal courts under the guise of statutory construction. This Court should thus grant the Petition for a Writ of Certiorari, in order to undo the Tenth Circuit's judicial creation of an impermissible exception to Section 357.

CONCLUSION

The Tenth Circuit's decision threatens to wreak havoc across numerous industries whose operations depend upon right-of-way easements across allotted lands. That result is contrary to the result Congress prescribed in 1901 in Section 357, a statute that expressly authorizes the condemnation of allotted lands as permitted by state law. The Tenth Circuit engrafted an exception onto the statute which is not supported by the text of the statute. It did so even though there is no conflict between the sections it considered. This Court should review and reverse the Tenth Circuit's impermissible construction of Section 357 in order to protect the nation's continued supply of electricity, natural gas, water, and other important services across allotted lands that benefit the nation, but which are placed at serious risk by the decision below.

Respectfully Submitted,

Andrew W. Lester
Counsel of Record
SPENCER FANE LLP
9400 North Broadway Extension
Suite 600
Oklahoma City, OK 73114
405.844.9900
alester@spencerfane.com

Barry L. Pickens
SPENCER FANE LLP
9401 Indian Creek Parkway
Suite 700
Overland Park, KS 66210
913.345.8100
bpickens@spencerfane.com

Counsel for Amici Curiae