NO. 17-756

In the
Supreme Court of the United States

PUBLIC SERVICE COMPANY OF NEW MEXICO,
a New Mexico Corporation,
Petitioner,

v.

LORRAINE BARBOAN, *et al.*,
Respondents.

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

BRIEF FOR *AMICI CURIAE* EDISON ELECTRIC INSTITUTE, ASSOCIATION OF OIL PIPE LINES, AND AMERICAN GAS ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amici are three of the largest energy trade associations in the United States. Edison Electric Institute ("EEI") is the national association of U.S. shareholder-owned electric utilities, their affiliates, and industry associates worldwide. Its members provide electricity in 50 states and the District of Columbia. They generate approximately 70 percent of all electricity generated by electric companies and service about 70 percent of all retail customers in the Nation. They own about 60 percent of transmission lines in the country. EEI members are extensively regulated at both the federal and state levels.

The Association of Oil Pipe Lines ("AOPL") is a nonprofit, national trade association that represents the interests of energy liquid pipeline owners and operators before Congress, regulatory agencies, and the judiciary. Liquid pipelines bring crude oil to the Nation's refineries and important petroleum products to our communities, including all grades of gasoline, diesel, jet fuel, home heating oil, kerosene, propane, and biofuels. These pipelines safely, efficiently, and reliably deliver approximately 18 billion barrels of crude oil and petroleum products each year through pipelines that extend approximately 213,000 miles

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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*, their members, and their 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.

across the United States. AOPL strives to ensure that the public and all branches of government understand the benefits and advantages of transporting crude oil and petroleum products by pipeline as the safest, most reliable, and most cost-effective method of serving energy consumption demand.

The American Gas Association ("AGA"), founded in 1918, represents more than 200 state-regulated or municipal natural gas distribution companies. AGA members serve 95 percent of the 72 million natural gas customers in the United States, representing more than 160 million people who daily rely on natural gas service as a basic life necessity or use natural gas for business purposes. AGA and its members are deeply committed towards improving the safety performance of the natural gas industry. Numerous AGA programs and activities focus on the safe and efficient delivery of natural gas to customers. Safety is the leading priority for AGA member utilities.

Amici have a strong interest in this case because a number of their members either have facilities that cross parcels of allotted land pursuant to longstanding rights-of-way—a significant number of which will soon expire—or otherwise operate in areas where acquiring rights-of-way over allotted parcels is imperative. The Tenth Circuit's decision threatens the ability of *amici*'s members to renew existing rights-of-way and to acquire new rights-of-way, all of which imperils their efforts to provide cost-effective electricity and energy to consumers around the country in a safe, continuous, and reliable manner. Accordingly, *amici* file this brief in support of the petition for certiorari.

INTRODUCTION

In the late 19th century, Congress began allotting individual parcels of reservation land to individual members of Indian tribes, thereby initiating the so-called Allotment Era. *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 254 (1992). At the dawn of the 20th century, Congress passed a statute providing that any "[l]ands allotted … to Indians may be condemned for any public purpose" in accordance with state law. 25 U.S.C. §357. There is no dispute here that state and federal statutes provide petitioner and other public-utility companies with such authority so they can acquire and maintain rights-of-way for power transmission lines and other facilities that provide electricity and other services to Indian and non-Indian consumers alike. Nor is there any dispute that the parcels at issue in this case were allotted to individual Indians during the Allotment Era long ago. This therefore should have been an easy case.

Instead, the Tenth Circuit concluded below that petitioner (and all public-utility companies) may *never* invoke §357 to condemn lands previously allotted to individual Indians so long as one present-day fractional owner in the allotted parcel conveys even the slightest ownership interest to an Indian tribe. Put another way, "previously allotted land that a tribe reobtains *any* interest in becomes tribal land beyond condemnation under §357." Pet.App.23a (emphasis added). That decision cannot be reconciled with §357's plain text, which looks solely to the historical fact of allotment to determine condemnable status, not to 21st-century fractional ownership. To be sure, *amici*

agree that tribal sovereignty over Indian reservations should be respected, but that is not the issue here. When allotting reservation lands to individual Indians 100 years ago, Congress made clear its intent to "extinguish tribal sovereignty" over those lands. *Cty. of Yakima*, 502 U.S. at 254. And when Congress enacted §357, it made clear its intent to render allotted lands subject to condemnation upon payment of just compensation. Accordingly, while there may be room for debate as to whether an Indian tribe's present-day fractional ownership of an allotted parcel *should* exempt the land (or the tribe's interest in the land) from §357, that is simply not what the statute that Congress enacted in 1901 does.

The Tenth Circuit's reading of the statute—which also has been embraced by the Eighth Circuit, the other forum in which the issue is most likely to arise—is no mere academic error of statutory interpretation. It has profound consequences for providers of public-utility services as well as for their customers and consumers, who will ultimately experience needless service disruptions, market inefficiencies, or rate increases (or all three) if transmission lines, pipelines, and other critical infrastructure cannot be preserved or built, or can be preserved or built only at extraordinary cost. Petitioner and other utility companies have already been subject to trespass actions that seek outright removal of infrastructure from allotted land based on nothing more than the continued presence of the infrastructure on that land, even though they have lawfully maintained the infrastructure there for decades. And numerous rights-of-way that presently allow such infrastructure are slated to expire in the coming years, meaning

many utility companies could soon find themselves in the same unenviable position in which petitioner now finds itself. Add to the mix that the federal government recently allocated nearly $2 billion to help Indian tribes acquire interests in allotted lands, *see* Claims Resolution Act of 2010, Pub. L. No. 111-291, §101, 124 Stat. 3064, 3066-67, and the immense real-world impact of the decision below is plain.

This Court's review is all the more critical because the Tenth Circuit's atextual interpretation of §357 provides a blueprint for private parties to exploit not just utility companies, but the sovereign status of Indian tribes. Allotted parcels often have hundreds of individual fractional owners, and under the Tenth Circuit's view, any one of them may unilaterally veto a §357 action by conveying a minute ownership interest in the parcel to an Indian tribe. In other words, any individual fractional owner of an allotted parcel effectively now has third-party standing to raise the tribe's co-ownership (no matter how small) as a defense to a §357 action—and as a result may demand extortionate payments in exchange for consenting to a right-of-way—even if *the tribe itself* does not object to the right-of-way.

This case is illustrative. Petitioner had no trouble securing consent from the Navajo Nation to renew its right-of-way over land wholly owned by the tribe, Pet.App.13a, reflecting the reality that utility companies often work cooperatively with tribes and with proper sensitivity to tribal interests, and that petitioner's infrastructure is equally critical to the tribe's own membership. The problem arose only when some *non*-tribal owners of the parcels at issue

refused to consent, forcing petitioner to invoke §357. And the Tenth Circuit then interpreted §357 to flatly prohibit petitioner from condemning the parcels, *regardless of* whether the tribe itself has any objection to the right-of-way. Needless to say, it does not take any particular ingenuity for an objecting owner of allotted land to follow the roadmap that the decision below creates.

In sum, the decision below cannot be right, but in all events, its enormous economic and practical impact and the anomalous results it produces confirm the need for this Court's review.

REASONS TO GRANT THE PETITION

I. The Tenth Circuit's Decision Misconstrues The Plain Text Of 25 U.S.C. §357.

The statute at issue in this case provides that "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee." 25 U.S.C. §357. Congress passed that statute in 1901 in the middle of the so-called Allotment Era. During that period, "the prevailing national policy of segregating lands for the exclusive use and control of the Indian tribes gave way to a policy of allotting those lands to tribe members individually." *Cty. of Yakima*, 502 U.S. at 253-54. The Allotment Era is controversial, but the specific policy animating §357 should not be: to expand access to electricity, energy, public roads, and other basic necessities around the country, including to tribes and their members. *See, e.g.*, *United States v. Clarke*, 445

U.S. 253, 258 n.4 (1980) (explaining that legislative purpose of §357 included "[p]roviding for the opening of highways through like lands under State and Territorial laws and upon the payment of compensation" (citing H.R. Rep. No. 56-2064, at 3 (1900)).

The Allotment Era ended in 1934. *See* 25 U.S.C. §5101 ("On and after June 18, 1934, no land of any Indian reservation … shall be allotted in severalty to any Indian."). And the Allotment Era by no means allotted all tribal land; sizeable Indian reservations composed of *un*allotted land continue to exist to this day, and there is no dispute in this case that reservation lands are beyond the scope of §357. Yet, even as it elected not to pursue further allotment after 1934, "Congress … chose *not* to return allotted land to pre-General Allotment Act status." *Cty. of Yakima*, 502 U.S. at 264 (emphasis in original); *see also Babbitt v. Youpee*, 519 U.S. 234, 238 (1997) ("Congress ended further allotment in 1934. But that action left the legacy in place." (citation omitted)). Nor did Congress repeal §357. As a result, lands remain subject to condemnation under §357 for "public purpose[s]" so long as they were originally "allotted in severalty to Indians," as the parcels at issue in this case undisputedly were. 25 U.S.C. §357. The plain text of the statute admits of no other conclusion.

Rather than accept this straightforward reading, the Tenth Circuit concluded that previously allotted lands are categorically *exempt* from §357's reach whenever a tribe reobtains "any interest" in the previously allotted parcel—even an interest as small as 0.14%. Pet.App.23a; PetApp.12a. Thus, under the

Tenth Circuit's reasoning, land must satisfy *two* conditions to fall under §357's umbrella: (1) the land must have been originally allotted in severalty to individual Indians and (2) the land must be presently and completely owned by individual Indians or individual heirs. *See, e.g.*, Pet.App.26a ("[U]nder §357, we look not only to what lands are at issue, but to their ownership").

That interpretation has no support in §357. Although the Tenth Circuit purported to apply the "plain language" of the statute, Pet.App.23a, the plain language simply does not say what the Tenth Circuit interpreted the statute to mean: The statute includes the Tenth Circuit's first condition but excludes the second, *see* Pet.22 (§357 "speaks of 'land' with a history of having been removed from a reservation and 'allotted … to Indians,' without regard to the identity of the owner at the time of condemnation" (alteration in original)). Indeed, the Tenth Circuit did not deny as much. Instead, seizing on the purported "statutory silence" regarding "condemnation of tribal lands," Pet.App.19a, the court determined that it had no choice but to invoke the "canon of construction favoring tribal sovereignty," Pet.App.24a. But that gets things exactly backwards. As this Court has already explained, the entire purpose of allotting reservation lands to individual Indians was to "extinguish tribal sovereignty" over those lands and "erase reservation boundaries." *Cty. of Yakima*, 502 U.S. at 254. Whatever one may think about that policy choice today, it is difficult to imagine that Congress intended to shield allotted lands from §357 entirely whenever one fractional owner in an allotted

parcel re-conveyed "any interest" in the parcel to those same tribes.

Simply put, had Congress wanted to exempt allotted lands from §357 based on the vicissitudes of future ownership, surely it would have said so at some point during the past 116 years. That it has chosen not to do so confirms that §357 means exactly what it says: "Lands allotted in severalty to Indians" during the Allotment Era "may be condemned for any public purpose," regardless of who owns those lands today. 25 U.S.C. §357.

II. The Tenth Circuit's Decision Will Severely Impact Public-Utility Companies And Their Customers.

The Tenth Circuit casually disregarded not only the text of the statute, but also the "negative policy effects" of its decision. Pet.App.24a. The practical impact, however, is substantial and cannot be so lightly set aside. While it may be tempting to dismiss such representations as overblown rhetoric given that the Tenth Circuit pointed to just one other "major decision" involving a §357 dispute over allotted lands fractionally owned by an Indian tribe, *id.* (citing *Neb. Pub. Power Dist. v. 100.95 Acres of Land in Thurston Cty.*, 719 F.2d 956 (8th Cir. 1983)), the reality is that such disputes are bound to spike in the very near future.

As petitioner has explained, while much of the Nation's critical infrastructure is presently subject to longstanding right-of-way agreements that were negotiated decades ago, many of those agreements are set to expire in the immediate future. *See, e.g.*, Pet.15,17. Indeed, petitioner itself has rights-of-way

across 160 *additional* parcels of allotted land that will terminate in 2018 alone, and a number of *amici*'s members are in comparable positions. Accordingly, while this issue may not have arisen with great frequency over the past few decades, that is just a product of timing, not a reflection of how much infrastructure the decision below stands to impact. And now that both of the two circuits in which the issue is most likely to arise have weighed in, there is nothing to be gained from allowing the issue to percolate further; to the contrary, failure of this Court to intervene now will only exacerbate the problem, as it will leave owners of infrastructure with soon-to-expire right-of-way agreements forced to negotiate new agreements under the manifestly incorrect interpretation of §357 that the Eighth and Tenth Circuits have embraced.

Indeed, utility companies are already experiencing the damaging effects of that interpretation. As this very case illustrates, without the aid of §357, power companies face *trespass* actions on account of the mere continued existence of infrastructure—infrastructure that is every bit as critical to tribal members as to the rest of the general public—that has existed on allotted lands for decades pursuant to longstanding rights-of-way. Pet.10. The power transmission line at issue in this case, for instance, has crossed over the two disputed parcels since the Eisenhower Administration. *See* Pet.5

(noting petitioner has operated the AY transmission line since 1960); Pet.10.[2]

And power companies are not alone. A federal district court in Oklahoma recently relied on the Tenth Circuit's decision to preclude a §357 condemnation action brought by a company operating a natural gas pipeline that "ha[d] been in continuous operation since its installation in the early 1980's" because an Indian tribe obtained a 1.1% interest in one allotted parcel through which the pipeline crossed. *See Enable Okla. Intrastate Transmission, LLC v. A 25 Foot Wide Easement*, No. CIV-15-1250-M, 2016 WL 4402061, at *1 (W.D. Okla. Aug. 18, 2016); *see also Enable Okla. Intrastate Transmission, LLC v. A 25 Foot Wide Easement*, No. CIV-15-1250-M, 2017 WL 4334227, at *1 (W.D. Okla. July 21, 2017). The court concluded that the gas company was trespassing on the allotted land and that it "should be required *to move the pipeline within six (6) months*." *Davilla v. Enable Midstream Partners, L.P.*, 247 F. Supp. 3d 1233, 1239 (W.D. Okla. 2017) (emphasis added). By this same reasoning, there is nothing to stop a court in a §357 action from requiring a utility company to dig up or reroute other infrastructure, such as an energy facility, water pipeline, or public road, because a tribe obtains "any interest" in one allotted parcel along a previously negotiated right-of-way.

That is reason enough to grant certiorari. But this Court's review is all the more warranted by the perverse incentives the decision below creates for

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[2] The Navajo Nation also acquired fractional interests in two additional parcels of allotted land during the Tenth Circuit proceedings. Pet.14.

individual fractional owners of allotted parcels. Under the Tenth Circuit's reasoning, any individual fractional owner of an allotted parcel (and there may be thousands of them) can effectively veto §357's application through the simple expedient of conveying a microscopic interest in the parcel to an Indian tribe. Remarkably, *even if the tribe has no objection to a right-of-way*, individual allottees may still invoke tribal co-ownership as a defense to a §357 action—and may withhold consent to a right-of-way unless and until the utility company pays whatever compensation they demand. *See* Pet.24-25 ("[I]t matters not at all whether the objection to the right-of-way comes from an individual allottee or from the Indian tribe that has acquired some portion of the individual's interest."). That is because, under the Tenth Circuit's view, a tribe's fractional interest in an allotted parcel categorically renders the parcel "beyond the reach of condemnation," regardless of whether the tribe asserts its fractional co-ownership. Pet.App.25a.

This case perfectly illustrates this anomaly. When petitioner sought to renew its right-of-way for its power transmission line in New Mexico, "[t]he Navajo Nation gave written consent for the right-of-way through lands in which the United States holds the entire interest in trust." Pet.App.13a. Problems arose only when "individual" fractional owners in allotted parcels that were also fractionally co-owned by the Navajo Nation "revoked their consent." Pet.App.14a. The Tenth Circuit's decision thus transforms §357 from a statute designed to expand access to such basic necessities as electricity and energy into a vehicle for opportunistic private parties to net a profit on the backs of Indian tribes.

After all, if the transfer of "any interest" in a parcel—no matter how small—to a tribe suffices to render §357 off-limits, then rational fractional owners will no doubt begin transferring minuscule interests in their property to tribes, and then demanding exorbitant sums to provide consent for the right-of-way. The only way out of this dilemma will be for a utility company to physically relocate the infrastructure, but that may not be a technically (or economically) viable option in many circumstances—or an environmentally desirable outcome—as it is no easy feat to dig up and reroute an operational transmission line, distribution line, pipeline, road, or other infrastructure. And no matter the "option" a utility company selects, the company's customers and consumers (Indian and non-Indian alike) will ultimately be the ones who bear the brunt of this opportunistic behavior, as disrupted services and resultant market inefficiencies will lead to increased outlays and economic loss. And for some utilities, such as electric utilities, companies will have little choice but to pass increased costs down to the retail level. Needless to say, none of that could have been what Congress envisioned when it chose to make allotted lands subject to condemnation upon payment of just compensation.

Yet, absent this Court's review, such results will become routine in the years ahead as more and more rights-of-way just like the one in this case expire. And recent incentives from the federal government will only hasten transfers of fractional interests in allotted lands to Indian tribes. The government recently set aside $1.9 billion for tribes to purchase fractional interests from individual allottees, and this program

is slated to run through November 2022.[3] *See* Claims Resolution Act of 2010, Pub. L. No. 111-291, §101, 124 Stat. 3064, 3066-67; Dep't of Interior, *Land Buy-Back Program for Tribal Nations: Frequently Asked Questions* (last updated Nov. 16, 2017), https://on.doi.gov/2BTxyr4. Already, tribes have acquired 700,000 fractional interests from individual fractional owners, which amounts to "the equivalent of over 2.1 million acres of land." *See* Dep't of Interior, *Interior Announces Revised Strategy, Policies to More Effectively Reduce Fractionation of Tribal Lands* (July 31, 2017), https://on.doi.gov/2kY1n6o.

To be clear, *amici* take no issue with the government's admirable decision to help return allotted land to the tribes. *Amici*'s members have been negotiating rights-of-ways with tribes for years, and have no doubt that they will continue to be able to do so when a tribe is a majority owner. But under the Tenth Circuit's reading of the statute, every allotted parcel affected by this government-sponsored buy-back program is now beyond the reach of §357, *regardless of* how minute the tribe's interest in the parcel may be, and *regardless of* whether the tribe itself has any objection to the right-of-way. Those results simply cannot be reconciled with the statute Congress wrote, and in all events have such

[3] The fact that the 111th Congress decided in 2010 to help tribes acquire interests in previously allotted lands has no bearing on the interpretation of §357, which was passed in 1901 by the 56th Congress pursuant to a different set of policy goals. As the Tenth Circuit recognized below, the 2010 law "say[s] nothing" about the answer to the question presented. Pet.App.23a-24a.

extraordinarily important implications to the Nation's critical infrastructure to warrant this Court's review.

* * *

The circuits where the vast majority of allotted lands are located have already weighed in on the question presented, *see* Pet.21; Pet.23 n.13, and that question stands to impact critical infrastructure with rapidly increasing frequency over the coming years. Accordingly, the time has come for this Court to decide whether private parties really can fundamentally disrupt the provision of public-utility services throughout the United States through the simple expedient of conveying infinitesimal fractional interests in allotted lands to Indian tribes.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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