Nos. 20-82 & 20-96

IN THE

Supreme Court of the United States

KANE COUNTY, UTAH, et al.,
Petitioners,

v.

UNITED STATES et al.,
Respondents.

UNITED STATES,
Petitioner,

v.

KANE COUNTY, UTAH, et al.,
Respondents.

On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Federal Rule of Civil Procedure 24(a)(2) authorizes intervention as of right by a party that "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." The questions presented are:

1. Whether Rule 24(a)(2) requires that a prospective intervenor be able to assert a claim, or have a claim asserted against it, under the substantive law governing the action.

2. Whether the Tenth Circuit correctly held that the United States may not adequately represent the interests of the two conservation groups that sought to intervene in this case.

RULE 29.6 STATEMENT

The Southern Utah Wilderness Alliance and The Wilderness Society are nonprofit organizations. They have no parent corporations, and no publicly held company has any ownership interest in them.

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INTRODUCTION

This case is about three narrow dirt rights-of-way traversing federal land in and near the Grand Staircase-Escalante National Monument. Utah and Kane County (collectively, Utah) filed suit to establish a right to widen and improve those rights-of-way, which would increase vehicle traffic and disturb some of the Nation's most remote and pristine public lands. The Southern Utah Wilderness Alliance and The Wilderness Society (collectively, SUWA) have fought for decades to protect those lands. The Tenth Circuit held that SUWA is entitled to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) because the litigation threatens to impair that conservation interest and because the United States may not adequately represent SUWA's interest.

The Government does not challenge those factbound conclusions. Instead, its petition rests on a revolutionary theory that was never raised below—and that contradicts the position the Government itself took in this Court just three years ago. The Government now asserts that Rule 24(a)(2) turns not on a practical assessment of a prospective intervenor's interest in the dispute, but instead on a formal inquiry into whether the intervenor could have brought a claim, or had a claim brought against it, under the substantive law governing the action. That test, and much of the argument supporting it, is drawn from a law review article published just a few months ago. Gov't Pet. 14, 23, 24, 25, 27, 30 (citing Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271 (2020)). As Professor Nelson candidly acknowledges, his new test would upend the approach to Rule 24 that has prevailed for half a century.

Such a radical proposal may make for interesting scholarship, but it makes a poor case for certiorari. As Professor Nelson recognizes, no court of appeals has adopted his test—indeed, lower courts have not even considered his arguments. Even if the Court were inclined to take up the Government's new theory, this unusual case would be a bad vehicle for considering sweeping changes to intervention law. And the Government's test is wrong. It contradicts both Rule 24(a)(2)'s text and this Court's precedents. It would also bar the courthouse doors to the paradigmatic class of intervenors to which SUWA belongs: parties who benefit from a government policy or action and seek to intervene as defendants when it is challenged in court. *See, e.g.*, *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2379 (2020).

Utah does not join the Government's effort to rewrite Rule 24(a)(2). Instead, Utah renews the case-specific arguments litigated below: It asserts that this suit will not impair SUWA's conservation interest and that the United States adequately represents that interest. Those factbound arguments do not warrant further review.

STATEMENT OF THE CASE

A. Legal background

1. The Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2743, governs the federal lands overseen by the Bureau of Land Management. FLPMA was a "statutory sea change." *SUWA v. BLM*, 425 F.3d 735, 741 (10th Cir. 2005). "Congress abandoned its prior approach to public lands," instituting in its place "a preference for retention of the lands in federal ownership, with an

increased emphasis on conservation and preservation." *Id.*

To accomplish that goal, FLPMA directs the Bureau's parent agency, the Department of the Interior, to "prevent unnecessary or undue degradation" of public lands. 43 U.S.C. § 1732(b). It also directs the Department to identify "roadless areas" with wilderness characteristics. 43 U.S.C. § 1782(a). The Department must manage those areas, called "wilderness study areas," "so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c).

2. As relevant here, FLPMA also repealed a Reconstruction-era law known as Revised Statute (R.S.) 2477. FLPMA § 706(a), 90 Stat. 2793. That law had provided, in its entirety: "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Mining Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253.

Although FLPMA repealed R.S. 2477, it preserved already-existing rights-of-way. 43 U.S.C. § 1769(a). Valid pre-FLPMA rights-of-way thus affect the Department's powers and duties under FLPMA. The Department has explained, for example, that R.S. 2477 rights-of-way could prevent it from "providing full protection to important geographic features" and "pose a particularly significant threat" in national parks, wilderness study areas, and other protected lands. Dep't of the Interior, *Report to Congress on R.S. 2477*, at 34 (1993) (*R.S. 2477 Report*) (reprinted at SUWA C.A. App. 201-60).

An R.S. 2477 right-of-way does not confer "fee simple ownership," which remains with the United States. *SUWA*, 425 F.3d at 747. Instead, "it is an

entitlement to use certain land in a particular way." *Id.* The scope of a right-of-way—including the extent of permissible expansions and improvements—is defined by what is "reasonable and necessary" in light of traditional uses when R.S. 2477 was repealed in 1976. *Sierra Club v. Hodel*, 848 F.2d 1068, 1083-84 (10th Cir. 1988).

3. "There have been few problems regarding R.S. 2477 rights-of-way in most public lands states." *R.S. 2477 Report* 2. To the extent that there has been "controversy," Utah has generally "been the focal point." *Id.* at 3. Since the 1980s, Utah and its counties have asserted R.S. 2477 rights-of-way to undermine federal land management under FLPMA and other statutes. Those efforts have spawned periodic litigation between Utah and its counties, the Department, and conservation groups like SUWA.

In the 1990s, for example, three southern Utah counties used heavy equipment to grade sixteen asserted rights-of-way on federal land without notifying the Department. *SUWA*, 425 F.3d at 742. The affected lands included wilderness study areas and the Grand Staircase-Escalante National Monument. *Id.* SUWA sued the counties and the Department, alleging that the Department had violated FLPMA by failing to prevent the counties' actions. *Id.* at 742-43. The Department, in turn, brought cross-claims against the counties for trespass. *Id.* The Tenth Circuit held that even if the counties' actions were within the scope of valid R.S. 2477 rights-of-way, they had to consult with the Department before undertaking improvements. *Id.* at 748. It then remanded for a trial to determine the existence and scope of the asserted rights-of-way. *Id.* at 788.

In the 2000s, Utah and its counties began filing Quiet Title Act suits to establish R.S. 2477 rights-of-way. *See SUWA v. Automated Geographic Res. Ctr.*, 200 P.3d 643, 646-47 (Utah 2008). The Utah Legislature has adopted a series of statutes authorizing and funding those suits. Utah Code § 63C-4a-402, -403. The current version of the law declares that it is "the policy of the state to claim and preserve by lawful means the rights of the state and its citizens to determine and affect the disposition and use of federal lands within the state." *Id.* § 63C-4a-103.

In 2011 and 2012, with that legislative blessing, the State and its counties filed roughly two dozen lawsuits asserting R.S. 2477 claims to approximately 12,000 alleged rights-of-way throughout the state. *Garfield Cty. v. United States*, 2015 WL 1757194, at *1 & n.2 (D. Utah Apr. 17, 2015). Those cases are now governed by "a comprehensive case management order" overseen by a single district judge. *Id.* at *1. The court has established "a 'bellwether' process to litigate a limited number of claims," which may "allow for resolution of other claims without protracted litigation." Pet. App. 519a.[1]

B. The present controversy

This case predates Utah's 2011 and 2012 claims and has been proceeding separately from the main bellwether process. It originally involved fifteen asserted rights-of-way. After a trial and three trips to

[1] References to "Pet. App." refer to the appendix to the petition in No. 20-96.

the Tenth Circuit, all that remains to be resolved is the scope of three established rights-of-way.

1. This suit was filed in 2008. Pet. App. 2a. Utah asserted fifteen rights-of-way, several of which weaved through wilderness study areas and the Grand Staircase-Escalante National Monument. *Id.* 97a.

SUWA first moved to intervene shortly after the suit was filed. Pet. App. 3a & n.1. SUWA is a 14,000-member nonprofit association dedicated to "the preservation of the outstanding wilderness and other sensitive public lands" in southern Utah. *Id.* 501a-02a. SUWA spearheaded the movement to establish the Monument, which was created in 1996 to confer special protection on "this unspoiled natural area." 61 Fed. Reg. 50,223 (1996). SUWA has long worked to preserve the Monument and surrounding lands. Pet. App. 501a-03a.[2]

Since 1966, Rule 24(a)(2) has allowed a party to intervene as of right if it "claims an interest relating to the property or transaction that is the subject of the action," and if "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." Rule 24(a)(2) also requires the movant to demonstrate that the existing parties do not adequately represent its interests.

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[2] The Wilderness Society is a nonprofit association founded in 1935 to "protect America's wilderness." Pet. App. 503a. Like SUWA, it has long worked to preserve Utah's wild lands, including the lands at issue here. *Id.* In this litigation, SUWA and The Wilderness Society are represented by the same attorneys and have submitted all filings jointly.

The district court denied SUWA's motion to intervene, and the Tenth Circuit affirmed. Pet. App. 96a-110a. The Tenth Circuit assumed that SUWA had a sufficient interest in the litigation. *Id.* 103a. But the court held that SUWA had "failed to establish, at th[at] stage of the litigation, that the federal government would not adequately protect its interest." *Id.* 107a.

2. In 2013, after a trial, the district court found that Utah had established title to twelve rights-of-way. Pet. App. 63a. The court then determined the scope of each of those rights-of-way. *Id.* In 2014, the Tenth Circuit affirmed in part, reversed in part, and remanded. *Id.* 61a-95a. The Tenth Circuit held that the district court had no jurisdiction as to six rights-of-way. *Id.* 69a-74a. It also reversed the district court's scope determination for three of the remaining rights-of-way: the North Swag, Swallow Park, and Skutumpah Roads. *Id.* 92a.

"North Swag Road is a narrow dirt road" with "a travel surface of ten feet." Pet. App. 91a. Swallow Park Road is another narrow dirt road with "a 10-12 foot travel surface with vehicles unable to pass." *Id.* Skutumpah Road is a two-lane road "with a travel surface of 24-28 feet." *Id.* The district court had granted rights-of-way more than twice as wide: "24-foot rights-of-way on Swallow Park and North Swag Road and a 66-foot right-of-way on Skutumpah Road." *Id.*

The Tenth Circuit agreed with the district court that the scope of an R.S. 2477 right-of-way "is not limited to the actual beaten path as of October 21, 1976," when the statute was repealed. Pet. App. 92a. It held, however, that any widening of the roads must

be limited to what is "reasonable and necessary" in light of "the pre-1976 use." *Id.* 92a-93a.

The Tenth Circuit also held that FLPMA's "emphasis on conservation and preservation" must "inform [the] determination of the scope of R.S. 2477 rights-of-way." Pet. App. 93a-94a. In particular, those policies "call for caution in allowing improvements or expansions beyond the width of R.S. 2477 roads in 1976." *Id.* 94a. The court then remanded to allow the district court to determine the scope of the three rights-of-way under the correct standard. *Id.* 95a.

3. On remand, "the case slowed until September 2017," when the district court ordered the parties to file briefs. Pet. App. 7a. Days later, the parties jointly moved for a stay, "stating that they had begun settlement discussions and were 'optimistic' that they could 'reach agreement.'" *Id.* 7a-8a (citation omitted).

Soon after, SUWA "request[ed] 'an opportunity to attend and participate in such discussions,' but received no response." Pet. App. 8a (citation omitted). While the case was stayed, the President flew to Utah and announced his decision to cut the Grand Staircase-Escalante National Monument nearly in half. *Id.* That change stripped protected status from almost a million acres, including the land encompassing two of the three rights-of-way at issue on remand. *Id.* 8a-9a.

Given those developments, SUWA again sought to intervene as of right. Pet. App. 54a. The district court again denied intervention. *Id.* 52a-60a.

4. SUWA appealed, and the Tenth Circuit reversed. Pet. App. 1a-51a. As relevant here, the court first held that SUWA "possesses an interest that may be impaired by the litigation." *Id.* 20a. The court

explained that Rule 24(a)(2) requires a court to exercise "practical judgment" in "determining whether the strength of the interest and the potential risk of injury to that interest justify intervention." *Id.* 20a-21a (citation omitted). In assessing SUWA's interest, the court relied on its en banc decision holding that SUWA had a sufficient interest to intervene in a prior R.S. 2477 case, *San Juan County v. United States,* 503 F.3d 1163, 1199-1203 (10th Cir. 2007) (en banc).

In *San Juan County*, the Tenth Circuit emphasized that although "SUWA d[id] not claim that it ha[d] title" to the disputed right-of-way, Rule 24(a)(2) "requires only that the applicant for intervention 'claim an interest *relating to* the property or transaction which is the subject of the action.'" 503 F.3d at 1200. As in *San Juan County*, the Tenth Circuit found that SUWA satisfied that standard. It noted that SUWA has a "decades-long history of advocating for the protection of these federal public lands." Pet. App. 22a. The court explained that it is "indisputable that SUWA's environmental concern is a legally protectable interest." *Id.* 21a (quoting *San Juan Cty.*, 503 F.3d at 1199). And the court had no difficulty concluding that Utah's claims threaten that interest: Utah's "stated objective" is to "widen[] these roads," allowing "more traffic" and greater "impact on the natural wilderness." *Id.* 15a, 22a.

The Tenth Circuit also held that the United States may not adequately represent SUWA's interest. Pet. App. 22a-32a. The court explained that although the United States and SUWA "had identical interests in the title determination"—the only issue when SUWA first moved to intervene—"they do not on scope." *Id.* 26a. "SUWA's goal is to limit as much

as possible the number of vehicles on the roads, but the United States' objectives 'involve a much broader range of interests, including competing policy, economic, political, legal, and environmental factors.'" *Id.* (citation omitted). The court also observed that, "[w]hen pressed at oral argument," the Government had conceded that its approach to this case is influenced by its interest in conserving "its own litigation resources." *Id.* 28a.

Judge Tymkovich dissented. Pet. App. 33a-51a. He principally argued that SUWA lacked standing. *Id.* 33a-42a. He also would have treated the district court's order as a denial of reconsideration reviewable only for abuse of discretion. *Id.* 42a-44a. And he would have upheld the order under that deferential standard. *Id.* 44a-51a.

5. The Tenth Circuit denied rehearing en banc over another dissent by Judge Tymkovich. Pet. App. 119a-148a. In a portion of his dissent joined by two other judges, Judge Tymkovich argued that SUWA lacked Article III standing. *Id.* 137a-43a. In the portion addressing Rule 24(a)(2), which was joined by four other judges, he argued only that SUWA had not satisfied the rule's inadequate-representation requirement. *Id.* 143a-48a. The en banc dissent did not address the panel's holding that SUWA has an interest sufficient to satisfy Rule 24(a)(2). *Id.*

REASONS FOR DENYING THE WRIT

I. The Tenth Circuit's holding that SUWA satisfies Rule 24(a)(2)'s interest requirement does not warrant review.

The Government's petition does not present either of the issues raised by the en banc dissenters. The Government does not deny that SUWA has Article III standing. It also does not deny that the United States may not adequately represent SUWA's interest. In this Court, the Government argues only that SUWA lacks an interest sufficient to support intervention under Rule 24(a)(2).

What's more, the Government does not challenge the Tenth Circuit's holding that, as a practical matter, this suit threatens SUWA's interest in preserving the public lands it has long fought to protect. Instead, the Government stakes its petition on a revolutionary theory neither pressed nor passed upon below. According to the Government, Rule 24(a)(2) allows a party to intervene as a plaintiff only if it could have brought the suit itself, and allows a party to intervene as a defendant (as SUWA seeks to do) only if a claim in the suit "could have been asserted against it." Pet. 16. That new theory does not warrant this Court's review.

A. No court of appeals has adopted the Government's novel theory.

The Tenth Circuit's "interest" holding broke no new ground. It followed directly from an en banc decision issued thirteen years ago. *See San Juan Cty. v. United States*, 503 F.3d 1163, 1199-1203 (10th Cir. 2007) (en banc). As the Government acknowledges, *San Juan County* accords with the interpretation of

Rule 24(a)(2) that has governed in the D.C. Circuit for more than 50 years. Pet. 24-25. And even Professor Nelson—whose article is the source of the Government's proposed rule—describes those D.C. Circuit decisions as the leading circuit-court precedents on intervention. Nelson, *supra*, at 355-56.

The Government asserts that the Fifth, Eighth, and Eleventh Circuits have departed from that consensus and, unbeknownst to Professor Nelson, adopted the restrictive rule he advocates. Pet. 26-29. They have not. Each of those circuits applies the same practical approach as the Tenth and D.C. Circuits and has often granted intervention as of right to parties that do not meet the Government's test.

1. The Fifth Circuit has specifically rejected the standard the Government attributes to it. In *Texas v. United States*, 805 F.3d 653 (5th Cir. 2015), the court held that "an interest is sufficient if it is of the type that the law deems worthy of protection, even if the intervenor does not have an enforceable legal entitlement or would not have standing to pursue her own claim." *Id.* at 659. Like the Tenth Circuit, the Fifth Circuit has stated that Rule 24 "is to be construed liberally." *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 248 (5th Cir. 2009) (citation omitted); *cf.* Gov't Pet. 12, 21, 23. And, as Professor Nelson acknowledges, the Fifth Circuit has long characterized the test as "a flexible one" that "must be measured by a practical rather than technical yardstick." *City of Hous. v. Am. Traffic Solutions, Inc.*, 668 F.3d 291, 293 (5th Cir. 2012) (citation omitted); *see* Nelson, *supra*, at 296 n.102.

The Fifth Circuit has also repeatedly granted intervention to parties that would flunk the Govern-

ment's test. In *City of Houston*, for example, the Fifth Circuit allowed citizens to intervene because they had organized the campaign to enact the city charter amendment challenged in the litigation. 668 F.3d at 293-94. Those citizens could not have been original parties to the suit, which arose out of a dispute between the city and its contractor. *Id.*

Similarly, in *Brumfield v. Dodd*, 749 F.3d 339 (5th Cir. 2014), the Fifth Circuit allowed parents to intervene to defend a school voucher program based on their interest in continued receipt of the vouchers. *Id.* at 344-45. The parents could not have been defendants in the original action, which was a desegregation suit against school boards. *Id.* at 340-41.

In *Texas*, the Fifth Circuit allowed immigrants who had received deferred action to intervene to defend the DAPA program. 805 F.3d at 657-61. Again, the intervenors could not have been defendants in the original suit, which asserted that DAPA violated the Constitution and the Administrative Procedure Act (APA). *See Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015).

The Government ignores those recent cases. Instead, it relies primarily on language from *NOPSI v. United Gas Pipe Line Co.*, 732 F.2d 452 (5th Cir. 1984) (en banc). Pet. 27; *see Lease Oil*, 570 F.3d at 250 (quoting *NOPSI*). But *NOPSI* explicitly rejected a rule like the Government's, explaining that the interest supporting intervention need not "be of a legal nature identical to that of the claims asserted in the main action." 732 F.2d at 463 (citation omitted).

Instead, *NOPSI* simply held that a city's interest in paying lower electricity rates did not justify its intervention in a contract dispute between its utility

and the utility's fuel supplier. 732 F.2d at 463-66. All circuits, including the Tenth, recognize that such tangential economic effects do not justify intervention. *See, e.g.*, *San Juan Cty.*, 503 F.3d at 1202. That is because the financial effect of a judgment "can ramify throughout the economy, inflicting hurt difficult to prove on countless strangers to the litigation." *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009); *see id.* (collecting cases). *NOPSI* thus stands only for the uncontroversial proposition that an indirect economic interest in litigation does not justify intervention.[3]

2. The Eighth Circuit, like the Fifth and the Tenth, has stated that "Rule 24 should be construed liberally." *Nat'l Parks Conserv. Ass'n v. EPA*, 759 F.3d 969, 975 (8th Cir. 2014). And also like the Fifth Circuit, the Eighth Circuit has repeatedly granted intervention to parties that do not meet the Government's test.

For example, the Eighth Circuit allowed conservation groups to intervene to defend regulations restricting snowmobiling in a national park based on their interest in "vindicating a conservationist vision for the Park." *Mausolf v. Babbitt*, 85 F.3d 1295, 1302 (8th Cir. 1996). The court also allowed homeowners to intervene to defend the constitutionality of an ordinance restricting abortion clinics based on their

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[3] The Government also cites *Saldano v. Roach*, 363 F.3d 545 (5th Cir. 2004), in which a district attorney sought to intervene in a habeas case after the attorney general confessed error. Pet. 27-28. The court simply held that a state entity cannot intervene if state law gives another entity the exclusive right to represent the state. *Saldano*, 363 F.3d at 551-52.

interest in preserving their property values. *Planned Parenthood of Minn. v. Citizens for Cmty. Action*, 558 F.2d 861, 869 (8th Cir. 1977). And the court allowed corporations with an interest in maintaining the flow of the Missouri River to intervene to defend the Army Corps of Engineers' river management. *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1024 (8th Cir. 2003). Each case was a challenge to a government action; none involved any claim "that could have been asserted against" the intervenors. Gov't Pet. 16.

The Government's cases (Pet. 28) are not to the contrary. In *United States v. Metropolitan St. Louis Sewer District*, 569 F.3d 829 (8th Cir. 2009), the Eighth Circuit denied intervention to a trade association because its "[g]eneral economic interest[]" in lower utility rates was too "remote" and "contingent." *Id.* at 839-40 (citation omitted). Likewise, in *Curry v. Regents of the University of Minnesota*, 167 F.3d 420 (8th Cir. 1999), the Eighth Circuit denied intervention to student groups who worried that a challenge to the university's system for allocating student-activity fees could reduce their funding. *Id.* at 422. Like *NOPSI*, these cases simply stand for the proposition that an indirect economic interest in litigation, without more, does not satisfy Rule 24(a)(2).

3. The Eleventh Circuit has specifically rejected a rule like the Government's, holding that an intervenor's interests need not "be of a legal nature identical to that of the claims asserted in the main action." *Georgia v. U.S. Army Corps*, 302 F.3d 1242, 1251 (11th Cir. 2002) (citation omitted). The Eleventh Circuit has also endorsed the D.C. Circuit's view that "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many appar-

ently concerned persons as is compatible with efficiency and due process." *Worlds v. Dep't of Health & Rehab. Servs.*, 929 F.2d 591, 594 (11th Cir. 1991) (citation omitted); *cf.* Pet. 9, 24, 25.

Like the Fifth and Eighth Circuits, moreover, the Eleventh Circuit has repeatedly granted intervention in cases where the Government's rule would deny it. In *Howard v. McLucas*, 782 F.2d 956 (11th Cir. 1986), the court permitted employees to intervene as defendants in a discrimination suit because the proposed settlement would have decreased their chances of promotion. *Id.* at 958-59. The employees had "no vested right" to such promotions and could not have been defendants in the original suit. *Id.*

Similarly, in *Georgia*, the court allowed Florida and customers of a hydropower plant to intervene to protect their interests in the "quality and quantity" of water in a river. 302 F.3d at 1252; *see id.* at 1256-58. Those parties had no rights under the statute governing the dispute and could not have been defendants in the original suit against the Army Corps of Engineers. *See id.*

The Eleventh Circuit has also held that media organizations may intervene "to petition for access to court proceedings and records." *Comm'r, Ala. Dep't of Corr. v. Advance Local Media, LLC*, 918 F.3d 1161, 1171 (11th Cir. 2019) (citation omitted). Those organizations could not have brought or been defendants in the suit, which was a challenge to the state's lethal-injection protocol. *Id.* at 1163-64.

Once again, the Government's cases (Pet. 28-29) show only that the Eleventh Circuit, like other courts, denies intervention to parties who assert only indirect economic interests. In *Mt. Hawley Insurance*

Co. v. Sandy Lake Properties, Inc., 425 F.3d 1308 (11th Cir. 2005), the prospective intervenor asserted a "purely speculative" economic interest in an insurance policy that *might* have covered his wrongful-death claim. *Id.* at 1311-12. And in *United States v. South Florida Water Management District*, 922 F.2d 704 (11th Cir. 1991), the court held that agricultural customers of a water district could not intervene in contract and permitting claims seeking to restrict the district's discharge of polluted water. *Id.* at 710-11. The customers argued that the litigation could interfere with the district's ability to serve them, but the court held that those indirect economic interests were insufficient. *Id.* at 710.

4. All told, the Government has provided no reason to think that the Fifth, Eighth, or Eleventh Circuits would have denied intervention here. SUWA does not assert an economic interest, much less an indirect one. Instead, SUWA has a direct environmental interest like those the Eighth and Eleventh Circuits found sufficient to support intervention in *Mausolf* and *Georgia*. And like the parties the Fifth Circuit allowed to intervene in *City of Houston*, SUWA has "demonstrated [that] particular interest," 668 F.3d at 294, through its "decades-long history of advocating for the protection of these federal public lands," Pet. App. 22a.

Nor can there be any doubt that SUWA's interest is one that "the law deems worthy of protection." *Texas*, 805 F.3d at 659. "It is 'indisputable that SUWA's environmental concern is a legally protectable interest.'" Pet. App. 13a (citation omitted); *cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992). That interest is explicitly recognized in

FLPMA and the other federal laws protecting the lands at issue here. And the Tenth Circuit instructed that the pro-conservation policies reflected in those laws must "inform" the "determination of the scope of R.S. 2477 rights-of-way"—the specific issue that SUWA seeks to intervene to address. Pet. App. 94a.[4]

B. This case would be a poor vehicle for making broad law on intervention.

The United States did not advance its novel theory in the Tenth Circuit, even in seeking rehearing en banc. Gov't En Banc Pet. 13-16; *see* Gov't C.A. Br. 32-42. And even if it had, a quiet-title action would be an especially poor vehicle for considering transformative changes to intervention law. Instead, the proper forum for such a sweeping proposal is the Rules Committee's legislative process.

1. This Court often emphasizes that it is "a court of review, not of first view." *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1018 n.* (2020) (citation omitted). The Government's failure to raise its new theory below is thus by itself sufficient reason to deny the petition.

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[4] Utah does not endorse the Government's claimed circuit split. Instead, it briefly asserts that the decision below conflicts with decisions of the Third Circuit because it fails "to limit the concept of 'interest' to a legal interest in the lawsuit." Pet. 16-17. But the Third Circuit has disclaimed any such rule, holding that "[a] proposed intervenor's interest need not be a legal interest." *Benjamin v. Dep't of Pub. Welfare*, 701 F.3d 938, 951 (3d Cir. 2012). Like its sister circuits, the Third Circuit instead asks whether the proposed intervenor "will be practically disadvantaged by the disposition of the action." *Id.* (citation omitted).

That logic applies with special force here because it appears that *no* court has had the opportunity to consider the principal arguments the Government now advances. Those arguments come from Professor Nelson's article, which was published just a few months ago. That article expressly undertakes a revisionist project, asserting that "much modern doctrine about intervention" is "mistaken," and urging an upheaval in "current practice." Nelson, *supra*, at 277. This Court should be especially reluctant to take up a radical proposal on such a far-reaching issue before the relevant arguments have even begun to percolate.

Indeed, even the Government itself took a very different position just three years ago, urging this Court to hold that "Rule 24(a)(2)'s term 'interest' is naturally understood to mean the type of 'legally protectable interest' that can form the basis of Article III standing." Gov't Br. at 18, *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645 (2017) (No. 16-605) (citation omitted) (Gov't *Chester* Br.). Article III, of course, does not require a showing that the party has a cause of action or rights under the governing substantive law. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-93 (1998). Instead, it requires only an "injury in fact"—a standard long understood to include conservation interests. *Lujan*, 504 U.S. at 560; *see id.* at 562-63.

2. Even if the Court were inclined to take up the Government's novel proposal, this case would be the wrong vehicle in which to do it. Parties seek to intervene in virtually every type of civil case in federal court and assert a vast array of interests in doing so. The Government advocates a rigid test that

would govern in *all* of those contexts. But this unusual Quiet Title Act case would be a poor vehicle for considering such a sweeping proposal.

Throughout this litigation, the Government and Utah have argued that Quiet Title Act suits differ from "ordinary public law litigation"—and implicate a narrower range of interests—because they adjudicate only "title to real property." *E.g.*, Gov't C.A. Br. 38 (citation omitted). Of course, SUWA disagrees: Although the dispute is couched in property-rights terms, Utah seeks to establish a right to *use* federal lands in a way that directly threatens SUWA's interest in conserving those lands. But the relevant point here is that the Court should not make general law on intervention in an unusual case where one side's arguments are so pervasively colored by the specific legal context. As Judge McConnell cautioned, the special nature of a quiet-title action might lead a court to "inadvertently announce rules for [Rule] 24(a) intervention that are too stringent for other contexts." *San Juan Cty.*, 503 F.3d at 1211 (McConnell, J., dissenting).

3. The proper venue for the Government's broad proposal is the Rules Committee, not this Court's certiorari docket. The rules-amendment process established by Congress allows proposed amendments to be developed and vetted by committees of judges, lawyers, and academics, with input from the public. 28 U.S.C. § 2073; *see Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 48 (1995). That legislative process allows for careful consideration of all of the contexts in which a rule applies.

The superiority of the rulemaking process is especially clear here because of the breadth and

novelty of the Government's proposal. The Government's theory would transform intervention law not just for SUWA, but also for prospective intervenors ranging from the Chamber of Commerce, to the House of Representatives and the states, to the Wall Street Journal. The effect of the Government's rule in those myriad circumstances would be exceedingly difficult to predict—much less thoroughly assess—in the context of a single case. Instead, such a revolutionary proposal is best considered, if at all, "through rulemaking, with the opportunity for full airing it provides." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114 (2009); *cf. McKeever v. Barr*, 140 S. Ct. 597, 598 (2020) (Breyer, J., respecting the denial of certiorari) (arguing that "the Rules Committee both can and should revisit" an issue on which this Court denied certiorari).

C. The application of Rule 24(a)(2) in the specific context of R.S. 2477 litigation does not warrant review.

The Government focuses its question presented—and the bulk of its petition—on its sweeping new theory. But it closes by suggesting that the Tenth Circuit's application of Rule 24(a)(2) to quiet-title actions under R.S. 2477, on its own, merits review. Pet. 29-32. It does not.

1. The Ninth Circuit is the only other court of appeals that has applied Rule 24(a)(2)'s interest requirement in an R.S. 2477 case. In *United States v. Carpenter*, 526 F.3d 1237 (9th Cir. 2008), the court held that environmental groups, including The Wilderness Society (one of the respondents here), had an "interest in seeing that the wilderness area be preserved" that was "sufficient to allow them to

intervene." *Id.* at 1240. The court emphasized that its holding was "in accord with the only other circuit case to deal with intervention in a Quiet Title Act action," the Tenth Circuit's decision in *San Juan County*. *Id.*

2. The two circuits that encompass the vast majority of the Nation's public lands have thus been in accord on this issue for more than a decade. But there has been no flood of intervenors in R.S. 2477 cases. The class of potential R.S. 2477 claims is itself both closed and diminishing: The statute was repealed more than four decades ago. Pet. App. 3a. And nationwide, the ongoing R.S. 2477 litigation is almost entirely confined to Utah.

The Government emphasizes that Utah has sued to quiet title to thousands of other purported R.S. 2477 rights of way. Pet. 29. But the claims to which the Government refers are consolidated in roughly two dozen cases being overseen by a single district judge. *See Garfield Cty. v. United States*, 2015 WL 1757194, at *1 & n.2 (D. Utah Apr. 17, 2015). That litigation is undoubtedly complex, but no more so than many multidistrict cases and other sprawling disputes that federal courts routinely handle without difficulty. Indeed, the Department of the Interior recently wrote that the bellwether process could allow for resolution of Utah's pending claims "without protracted litigation." Pet. App. 519a.

The Government implies that the Tenth Circuit's decision will require that SUWA be allowed to intervene as of right in all pending R.S. 2477 cases. Pet. 13. But in the district court, Utah is insisting

that the Tenth Circuit's decision does not require that result.[5] And the United States, for its part, contends that SUWA's intervention should be restricted to issues of "scope," not title, and subject to strict limits.[6] SUWA disagrees, but both its right to intervene in other cases and the scope of that intervention if allowed remain to be determined by the district court.

Even if SUWA were granted intervention as of right in the other pending cases, the Government exaggerates the practical effect of that outcome. SUWA is already a permissive intervenor—and thus a party—in the main R.S. 2477 cases. Fourth Am. Intervention Order at 2, *In re Jointly Managed R.S. 2477 Road Cases*, No. 11-cv-1043 (D. Utah Sept. 9, 2019) (ECF 130). Even as an intervenor as of right, SUWA would not be able to block a settlement. Pet. App. 31a; *see Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986). And as this Court has emphasized, district courts have ample authority "to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016).

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[5] Kane Cty. Opp. to Mot. to Intervene at 1, *Kane Cty. v. United States*, No. 10-cv-1073 (D. Utah June 5, 2020) (ECF No. 649); *see* Utah Opp. to Mot. to Intervene at 2, *Kane Cty.*, *supra* (June 5, 2020) (ECF No. 646).

[6] Gov't Opp. to Mot. to Intervene at 2, *Kane Cty.*, *supra* (June 5, 2020) (ECF No. 645).

D. The Tenth Circuit's decision is correct.

The Tenth Circuit correctly concluded that SUWA has an interest sufficient for intervention as of right. The Government's novel argument to the contrary is foreclosed by Rule 24(a)(2)'s unambiguous text and this Court's precedents. The Government's proposed rule would also be a stark departure from settled intervention practice. And the Government's assortment of other arguments lacks merit.

1. The Tenth Circuit's approach follows directly from the text of Rule 24(a)(2).

a. This Court "give[s] the Federal Rules of Civil Procedure their plain meaning." *Bus. Guides, Inc. v. Chromatic Commc'ns Enters.*, 498 U.S. 533, 540 (1991). Rule 24(a)(2) authorizes intervention by a party that "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." Three aspects of that text refute the Government's rigid formal test and establish SUWA's right to intervene in this litigation.

First, the rule makes clear that "intervenors of right need only an 'interest' in the litigation—not a 'cause of action' or 'permission to sue.'" *Jones v. Prince George's Cty.*, 348 F.3d 1014, 1018 (D.C. Cir. 2003). Rule 24's drafters could have imposed such a requirement, but they did not. And the drafters' rejection of that "ready alternative" confirms that they "did not in fact want what the [Government] claim[s]." *Advoc. Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017).

Second, Rule 24(a)(2) requires an interest "relating to" the property or transaction at issue. As this Court has often recognized, that phrase is "deliberately expansive." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (citation omitted). The Tenth Circuit correctly held that SUWA has an interest relating to the property at issue here: an "interest in preservation" evinced by a "decades-long history of advocating for the protection of these federal public lands." Pet. App. 24. The Government, in contrast, ignores the phrase "relating to" and instead invents a requirement that SUWA claim an interest *in* the property at issue. Pet. 12.

Third, Rule 24(a)(2) directs a court to determine whether, "as a practical matter," the litigation "may" impair a prospective intervenor's ability to protect its interest. "Practical" would be a bizarre way to define the test if, as the Government insists, the cognizable interests were defined solely by a formal inquiry into whether the prospective intervenor could have brought or been sued in the litigation.

b. The Government scarcely acknowledges the text of Rule 24(a)(2), the provision actually at issue here. Instead, it tries to ground its new test in Rule 24(c)'s requirement that a party seeking intervention submit "a pleading that sets out the claim or defense for which intervention is sought." Pet. 15-16. But Rule 24(c) does not support the Government's position.

In fact, Rule 24(c) does not address the substantive standard for intervention at all. Instead, as the title makes clear, it is a "notice and pleading" requirement prescribing the procedure for intervening. A party satisfies that requirement by identifying the claim or defense it seeks to intervene to

address. Here, for example, SUWA complied with Rule 24(c) by filing pleadings specifying that it sought to join the Government in defending against Utah's Quiet Title Act claims. Pet. App. 453a-96a.

The Government's contrary reading of Rule 24(c) cannot be correct. That provision applies to *all* intervenors, including parties given a "right to intervene by a federal statute." Fed. R. Civ. P. 24(a)(1), (b)(1)(A). That category indisputably includes parties who could not have brought or been sued in the original action. Most notably, the United States is entitled to intervene in "any action" in which the constitutionality of a federal statute is drawn into question, whether or not it could have been an original party. 28 U.S.C. § 2403(a).

Similarly, as the Government appears to concede (Pet. 15), its interpretation would vitiate the significant differences between Rules 24(a)(2) and 24(b). Rule 24(a)(2) turns on "interest" and "adequate[] represent[ation]." Rule 24(b)'s standard for permissive intervention uses conspicuously different language, requiring a "claim or defense" that shares a "common question of law or fact" with the main action. Fed. R. Civ. P. 24(b)(1)(B). The Government's reading ignores those stark textual differences, erroneously locating the most important substantive requirement for *both* kinds of intervention in Rule 24(c).[7]

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[7] The Government seeks to bolster its interpretation by quoting dicta from *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997), which in turn quotes Justice O'Connor's concurrence in *Diamond v. Charles*, 476 U.S. 54, 76-77 (1986). Pet. 16. But neither opinion addressed the interest required to intervene under Rule 24(a)(2).

2. The Government's test contradicts this Court's precedents.

This Court has squarely addressed intervention under Rule 24(a)(2) in three cases. The Government ignores two of them and misconstrues the third.

This Court's decision in *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), forecloses the Government's approach. In *Trbovich*, the statute at issue granted the Labor Secretary the "exclusive" right to challenge union elections. *Id.* at 531 (citation omitted). Union members had no right to bring such claims, yet this Court held that they could intervene under Rule 24(a)(2). *Id.* at 538-39. As the Government itself told the Court in 2017, *Trbovich* thus establishes that a person may "intervene as a plaintiff" even if "no statute authorized him to initiate his own cause of action." Gov't *Chester* Br. at 14 n.2. The Rules Committee, of course, could amend Rule 24(a)(2) to abandon *Trbovich.* But because it has not, the Court would have to overrule *Trbovich* to adopt the Government's new reading.

The Government's rule also conflicts with this Court's analysis in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967). The Court allowed a customer of a merged corporation to intervene in a challenge to the merger brought by the United States. *Id.* at 135-36. The Court did not ask, as the Government now insists it should have, whether the customer could have brought the action itself. Instead, this Court's inquiry focused on the practical effect of the proposed remedy on the customer. *Id.*

Rather than grappling with *Trbovich* and *Cascade*, the Government relies on language plucked

from *Donaldson v. United States*, 400 U.S. 517 (1971). But *Donaldson* involved an attempt to intervene in a summary proceeding to enforce a summons, not a conventional lawsuit. This Court emphasized that the Rules of Civil Procedure do not apply with full force in such proceedings. *Id.* at 528-29. And the Court also relied on that special posture in emphasizing that the putative intervenor would have been able to "assert [any] interest" in the confidentiality of the requested documents in a "subsequent trial." *Id.* at 531.

Even setting aside *Donaldson*'s unusual posture, it does not help the Government. This Court stated that Rule 24(a)(2) requires only "a significantly protectable interest." 400 U.S. at 531. Nothing about that language departs from the practical approach adopted in *Cascade* and later reinforced in *Trbovich*—much less demands a showing that the prospective intervenor could have brought the suit or had the suit brought against it.

3. The Government's test contradicts long-standing practice.

The Government's rule would be a radical departure from decades of practice, precluding intervention by many parties who routinely participate in litigation in the federal courts, including this Court. Just last Term, for example, the Court granted a petition from the Little Sisters of the Poor, who had intervened to defend regulations affording them a religious exemption. *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2379 (2020). The Little Sisters would not have met the Government's test: The claims in that case were brought under the APA, which allows suits only against the Government. *Id.* at 2378; *see* 5 U.S.C. § 702. Those claims

thus could not have been "asserted against" the Little Sisters. Gov't Pet. 16.

Similarly, in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), the Court granted a petition from a trade association that had intervened to defend a Freedom of Information Act (FOIA) suit after the Government declined to appeal. *Id.* at 2362. Like the APA, FOIA allows suits only against the Government. 5 U.S.C. § 552(a)(4)(B). Like the Little Sisters, therefore, the Food Marketing Institute could not have had any claim "asserted against" it. Gov't Pet. 16.

This Court expressed no doubt that the Little Sisters and the Food Marketing Institute were entitled to intervene. And as those recent examples illustrate, the Government's rule would bar a classic category of intervenors: Beneficiaries of government policies or actions who intervene as defendants when those policies or actions are challenged by others.

That practice is so frequent and uncontroversial that Professor Nelson adopts a special carve-out to preserve it. He acknowledges that even a party who could not have been an original defendant should sometimes be allowed to intervene to defend a government agency's action. In his view, intervention is appropriate so long as the intervenor *would have had a claim* if the agency had originally done what the plaintiff now seeks to compel it to do. *See* Nelson, *supra*, at 389 (explaining that courts should "ask whether [the intervenor] would have a cause of action for judicial review if the agency were to do what [the plaintiff] is seeking").

The Government conspicuously ignores that crucial caveat. For good reason: With the caveat,

SUWA satisfies Professor Nelson's test. If the Department of the Interior had done "what [Utah] is seeking," Nelson, *supra*, at 389, by recognizing the existence and scope of Utah's asserted rights-of-way, SUWA could have challenged that determination in court—as it has done in the past.[8]

The Government's partial adoption of Professor Nelson's test would thus make for an even more radical transformation of current practice than the one Professor Nelson actually proposes.

4. The Government's remaining arguments lack merit.

a. Lacking an argument based on Rule 24(a)(2)'s current text, the Government relies heavily on the legislative history of the 1966 amendments and the restrictive rules governing intervention before Rule 24 was adopted in 1937 and rewritten in 1966. Pet. 21-24. But those arguments could not justify a departure from the plain text of the current rule. And in any event, the advisory committee notes confirm the clear text: The 1966 amendments expanded intervention by "import[ing] practical considerations" into the interest requirement. Fed. R. Civ. P. 24

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[8] If the Department had formally recognized Utah's claimed rights-of-way, SUWA would have been able to challenge that final agency action under the APA. *See* 68 Fed. Reg. 496-99 (2003); *see also* 43 C.F.R. § 1864.0-1 *et seq.* And if the Department had merely acquiesced in Utah's improvement of the rights-of-way, SUWA would have been entitled to sue the Department for violating FLPMA—as it did in *SUWA v. BLM*, 425 F.3d 735, 742-43 (10th Cir. 2005), and *Sierra Club v. Hodel*, 848 F.2d 1068, 1073-74 (10th Cir. 1988).

advisory committee's note (1966). That expansion reflected a deliberate decision to depart from the "unduly restricted" pre-1966 rule. *Id.* As this Court recognized the next year, "elasticity was injected" by the amendments. *Cascade*, 386 U.S. at 134.[9]

b. Looking beyond Rule 24, the Government asserts that Rule 19's compulsory-joinder provision mandates its restrictive reading of Rule 24(a)(2). Pet. 19-21. The Government starts from the premise that any person who has an interest sufficient to support intervention under Rule 24(a)(2) also qualifies as a party who *must* be joined under Rule 19. The Government then asserts that the Tenth Circuit's approach to Rule 24(a)(2) would make "no practical sense" in the context of Rule 19 because it would mandate the joinder of every person with a sufficient pragmatic stake in a case—a class that could include an implausibly large number of parties. Pet. 21.

But reading Rule 24(a)(2) to exactly mirror Rule 19 would be nonsensical even under the Government's narrow view of Rule 24(a)(2). According to the Government, a party has a sufficient interest to intervene in a case if it could have brought the claim

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[9] The Government errs in asserting that the Reporter of the 1966 amendments believed that those amendments "did not expand the concept of 'interest.'" Pet. 23. In fact, he explained that the amendment was intended "to drive beyond the narrow notion of an interest in specific property" and that the new Rule 24 "invites" consideration of the "practical consequence to the applicants of being denied intervention" in the "case to case" intervention inquiry. 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).

itself. Pet. 14. In many cases challenging government action, that describes thousands of parties. The Endangered Species Act's (ESA) citizen-suit provision, for example, authorizes suits by "any person" with Article III standing. 16 U.S.C.§ 1540(g). Yet no one would suggest that Rule 19 mandates that all persons with standing be located and joined in every ESA case.

Fortunately, the Government's premise is wrong: The circumstances when a party "should be allowed to intervene under Rule 24 are not necessarily limited to those situations when the trial court should compel him to become a party under Rule 19." *Smuck v. Hobson*, 408 F.2d 175, 178 (D.C. Cir. 1969). Both rules focus on the nonparty's interest, but they use different text and do not refer to each other (as many rules do). And even the commentary on which the Government relies says only that the two rules are "comparable" or "a kind of counterpart" to one another—not that they mandate the same test. Fed. R. Civ. P. 24 advisory committee's note (1966).

c. Finally, there is no merit to the Government's brief assertion that the Tenth Circuit's decision violated the Rules Enabling Act. Pet. 26. A rule violates the Rules Enabling Act only if it changes substantive "rules of decision." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality opinion) (quoting *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 445 (1946)). For example, in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the Court rejected an interpretation of Rule 23 that would have changed the law governing the action by depriving Wal-Mart of its "statutory defenses." *Id.* at 367. This case is entirely different:

SUWA's participation does not alter in any way the substantive law that will determine the scope of Utah's rights-of-way.

II. The Tenth Circuit's holding that the United States may not adequately represent SUWA's interest does not warrant review.

Utah also seeks review of the Tenth Circuit's additional holding that the United States may not adequately represent SUWA's interest. But the Government does not seek further review of that factbound conclusion, which is entirely distinct from the interest issue on which its petition focuses. And that separate question does not warrant review: There is no circuit split; the unusual posture of this case would make it a bad vehicle for addressing Rule 24(a)(2)'s inadequate-representation requirement; and the Tenth Circuit's decision is correct.

1. Utah does not suggest that the Tenth Circuit's decision conflicts with any decision from another court of appeals. Utah Pet. 17-18. Instead, Utah emphasizes only the disagreement among the judges of the Tenth Circuit about whether intervention was appropriate in particular cases. *Id.* But such intra-circuit disagreements do not warrant this Court's attention. Sup. Ct. R. 10; *see Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

2. Even if Rule 24(a)(2)'s adequacy requirement warranted this Court's attention, this case would be a poor vehicle in which to expound upon it. The Tenth Circuit's analysis was closely bound up in the history of the Government's approach to this case and the specific nature of R.S. 2477 litigation. Pet. App. 26a-31a. The en banc dissenters did not disagree with the

panel's general approach to adequacy. Instead, their disagreement rested on their different view of the relationship between "title" and "scope" in R.S. 2477 litigation, *id.* at 144a-46a, and their different assessment of the implications of the Government's conduct of the litigation and related actions, *id.* at 146a-47a. A decision from this Court reprising those unusual case-specific issues would be unlikely to provide meaningful guidance for other cases.

3. Finally, the Tenth Circuit's decision is correct. Rule 24(a)(2) requires a prospective intervenor to show only that existing parties' representation "may be" inadequate. *Trbovich*, 404 U.S. at 538 n.10 (citation omitted). This Court has instructed that "the burden of making that showing should be treated as minimal." *Id.* The Tenth Circuit cited a long line of precedent, including *Trbovich*, recognizing that the Government's broad and cross-cutting interests may prevent it from adequately representing the interests of private parties. Pet. App. 27a-28a. That logic applies with full force here: SUWA seeks "to limit as much as possible the number of vehicles on the roads," but the Government's objectives "involve a much broader range of interests, including competing policy, economic, political, legal, and environmental factors." *Id.* 26a (citation omitted).

Utah does not respond to that analysis. Indeed, it does not advance *any* developed argument that the Tenth Circuit's assessment of adequacy is incorrect. Utah Pet. 18-19. Utah's failure to mount a meaningful challenge to that aspect of the Tenth Circuit's fact-bound decision confirms that it does not warrant further review.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

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