No. 20-96

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

KANE COUNTY, UTAH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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This case presents the question of when a stranger has a right to insert itself into ongoing federal litigation. The answer is significant not only to the federal government but also to federal litigation more generally. An intervenor of right may take steps available only to a party, including complicating discovery, filing dispositive motions, opposing settlement, and appealing from a judgment that the original parties are content to let stand. That significant role can be appropriate when the intervenor asserts its own substantive right or legally protected interest relating to the property or transaction at issue. But if a prospective intervenor does not have such a legal stake in the outcome, its proper role is simply that of an amicus curiae.

That conclusion is vividly illustrated by this case. This is a quiet-title action in which state and local governments challenge the United States' claim of prop-

erty rights to land. The Tenth Circuit held that Wilderness Groups—which claim no property right in that land and no other substantive rights relevant to the disposition of the title dispute—nevertheless have a procedural right to intervene, based simply on an asserted environmental interest in the uses of federal land. That ruling is deeply flawed, reflects substantial confusion in the courts of appeals, and warrants this Court's review.

1. As the certiorari petition explains (Pet. 13-26), the text of Rule 24(a)(2), other provisions of the Federal Rules of Civil Procedure, the legal background of those rules, and this Court's decisions all demonstrate that Rule 24(a)(2) requires that a putative intervenor of right have its own legally protected "interest" under substantive law. Respondents' contrary arguments (Br. 24-33) underscore the need for review.

a. Respondents contend (Br. 24-26) that it is sufficient under Rule 24 for the putative intervenor of right to "file [a] pleading[]" that identifies a claim or defense belonging to someone else—here, the United States' defense of *its* title in this Quiet Title Act suit. But Rule 24 specifically requires a "pleading that sets out the claim or defense for which intervention is sought," Fed. R. Civ. P. 24(c), and Rule 8 in turn requires that a party's pleading state a "claim showing that the *pleader* is entitled to relief" or state "*its* defenses to each claim asserted against *it*," Fed. R. Civ. P. 8(a)(2) and (b)(1)(A) (emphases added). See Pet. 15-17. Respondents have no answer to that straightforward textual point. They instead urge a strange interpretation of Rule 24 under which Rule 24(a)(2) is different in this respect from Rule 24(b), which, they admit (Br. 26), requires that a permissive intervenor assert its own "claim or defense,"

Fed. R. Civ. P. 24(b)(1)(B). Respondents offer no reason why Rule 24 would *require* a court to grant party status to putative intervenors that do *not* have legally protected interests at stake but only *permit* the court to grant party status to those that *do* assert their own legal rights. To the contrary, Rule 24 requires both categories of putative intervenors to assert their own claims or defenses: a court must grant intervention when disposing of the action would impair or impede the putative intervenor's ability to protect an interest related to the particular property or transaction at issue that is safeguarded by substantive law (unless it is already adequately represented), Fed. R. Civ. P. 24(a)(2), and the court has discretion to grant intervention (for efficiency's sake) if the claim or defense shares a "common question of law or fact" with "the main action," Fed. R. Civ. P. 24(b)(1)(B).

b. As the certiorari petition explains (at 17-19), respondents' position cannot be reconciled with *Donaldson* v. *United States*, 400 U.S. 517 (1971). *Donaldson* held that a taxpayer's "interest" in preventing the government from subpoenaing others for information about his income was not a "significantly protectable interest" and therefore "cannot be the kind contemplated by Rule 24(a)(2) when it speaks in general terms of 'an interest relating to the property or transaction which is the subject of the action.'" *Id.* at 531 (quoting Rule 24(a)(2)); see *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 315 (1985) (*Donaldson* required a "legally protectible" interest in the "outcome" of the proceeding). Just as the interest of the taxpayer in *Donaldson* in preventing others from disclosing information relevant to his tax liability was insufficient because he lacked legal rights protecting that interest,

so too respondents' general environmental interest in the use of federal lands confers no legal rights relevant to this quiet-title action. Contrary to respondents' assertion (Br. 28), *Donaldson's* observation that the Federal Rules of Civil Procedure apply to summons proceedings where not limited "by local rule or by order," 400 U.S. at 528, does not diminish *Donaldson's* significance, because no such limit applied and the Court directly construed and applied Rule 24(a)(2). *Id.* at 530-531.

c. The Tenth Circuit's approach to Rule 24 vastly expands the right of intervention to entities asserting only a generalized "interest" in the case. Respondents thus do not dispute that, even though this quiet-title action concerns only governmental property interests in land, the Tenth Circuit's decision would entitle numerous private persons with no substantive rights at stake to intervene: local residents favoring or opposing roads, ATV enthusiasts, and others with some similar "interest." See Pet. 21. Such entities may properly participate as amici curiae, but not as parties that can, *inter alia*, appeal a judgment resolving only the property rights of others.

That open invitation to intervene is seriously misguided. Like several other courts of appeals, the Tenth Circuit has adopted the expansive view that Rule 24(a)(2)'s "interest test" is designed to "'dispos[e] of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *San Juan County* v. *United States*, 503 F.3d 1163, 1195 (2007) (en banc) (citation omitted); see Pet. 23-25. That formulation finds its roots in the model of "'public law litigation'" in vogue in the 1960s and 1970s, under which a civil action is reconceptualized as "a

grievance about the operation of public policy" and the proper "party structure is sprawling and amorphous." Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284, 1302 (1976). But that view has not withstood the test of time. Federal courts are "'neutral arbiter[s]'" that "'do not, or should not, sally forth each day looking for wrongs to right.'" *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (citations omitted). "[O]ur system" rests on the premise that the actual parties whose rights are disputed "'know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.'" *Ibid.* (citation omitted).

Respondents contend (Br. 28-29) that the government's position would foreclose any intervention in suits against the government under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, because an APA suit can only be brought against a federal agency and a putative intervenor therefore would have no defense to an APA claim. That contention is misplaced. Rule 24(a)(2)'s "interest" encompasses that of a putative intervenor asserting its own rights relating to the property or transaction that is the subject of the case. For instance, if a plaintiff brings an APA suit challenging an agency's issuance of a permit to a particular person for the use of federal land, the permit would typically confer a specific right on the permit holder. And correspondingly, the private conduct authorized by the permit would be the basis for the plaintiff's claim of injury. Cf. *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 491, 494 (2009). Thus, where the permit holder would have a legally protected interest in engaging in the conduct authorized by the permit, it could intervene under Rule 24(a)(2) in the APA suit to defend its conduct as lawful

if the other requirements for intervention are met. Respondents' observation (Br. 28) that an APA claim may be filed "only against the Government" does not undermine that conclusion. In the example just described, the plaintiff's claim seeks relief only against the government, but it also necessarily proceeds on the premise that the putative intervenor's injury-causing actions authorized by the permit are unlawful. Thus, contrary to respondent's contention (Br. 11, 13, 15-16), the approach the government urges does not turn on whether the precise claim the plaintiff already presents in the case could also be brought directly against the putative intervenor.

d. Respondents' reliance (Br. 27) on *Trbovich* v. *United Mine Workers of America*, 404 U.S. 528 (1972), and *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967) (*Cascade*), is misplaced. The statute in *Trbovich* gave "individual union members certain rights against their union" and, "for purposes of enforcing those rights," "'the Secretary of Labor in effect becomes the union member's lawyer.'" 404 U.S. at 538-539 (citation omitted). "The Secretary d[id] not contend that [the member's] interest in th[e] litigation [wa]s insufficient," and the Court therefore resolved only the Rule 24(a)(2) issue of "adequacy of representation." *Id.* at 538. The Court held that "the member who initiated the entire enforcement proceeding" by bringing his claim to the Secretary could intervene to vindicate his own rights if he had "a valid complaint about the performance of 'his lawyer'" (*i.e.*, the Secretary). *Id.* at 539. Here, respondents have no such "rights" at stake in the property dispute and neither the United States nor its attorneys are respondents' lawyer.

In *Cascade*, this Court had previously held that El Paso, a natural-gas company, violated the Clayton Act, 15 U.S.C. 12 *et seq.*, through its anticompetitive acquisition of a pipeline company (Pacific Northwest) and directed the district court on remand to "order divestiture without delay." 386 U.S. at 131 (citation omitted). Cascade, a natural-gas distributer, held contract rights with Pacific Northwest, its sole gas supplier. Rather than seeking to pursue an independent Clayton Act action, cf. 15 U.S.C. 15(a) and 26, Cascade moved to intervene on remand, arguing for different particulars of divestiture. See 386 U.S. at 133. This Court stated—without discussing the scope of Rule 24's interest requirement—that "Rule 24(a)(2) is broad enough to include Cascade," and then concluded that the existing parties did not adequately represent its interests. *Id.* at 136. Because *Cascade* predated *Donaldson* and its requirement that the putative intervenor have a legally protected interest in the outcome of the case, *Cascade's* unelaborated disposition does not constitute a definitive exposition of what is required to intervene of right. It therefore does not support respondents' position.

Respondents similarly err (Br. 19, 28-29) in relying on the fact of intervention and the government's position in *Food Marketing Institute* v. *Argus Leader Media*, 139 S. Ct. 2356 (2019) (*FMI*), and *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017). In *FMI*, the government as amicus curiae advanced the same Rule 24(a) arguments it makes here, and explained that FMI's intervention was erroneous but that any objection to intervention had been forfeited on appeal and in this Court. U.S. Amicus Br. at 32-34, *FMI*, *supra* (No. 18-481). The Court accordingly did not address Rule 24(a). And in *Town of Chester*, the intervenor pleaded

its own "regulatory takings claim" based on its security interest in the relevant property, which, it argued, made it "'the equitable owner'" of the property. 137 S. Ct. at 1649 (citation omitted). The government did not suggest that such a "claim" was unnecessary. It simply argued that a Rule 24(a)(2) interest must "at least satisf[y] the requirements for Article III standing" and thus should also be "the type of 'legally protected interest' that can form the basis of Article III standing." U.S. Amicus Br. at 4, 18, *Town of Chester*, *supra* (No. 16-605) (citation omitted).

2. Review is warranted to resolve confusion and divergent decisions in the circuits and a recurring question about the scope of intervention of right. Pet. 25-32. The en banc Tenth Circuit has itself recognized that the "courts of appeals have struggled to reach a definitive interpretation of Rule 24(a)(2)," *San Juan County*, 503 F.3d at 1192, and that struggle is reflected in its own seven-to-six decision in *San Juan County* and its five-to-five denial of rehearing in this case.

Respondents err in contending (Br. 12-17) that the Fifth, Eighth, and Eleventh Circuits follow the same approach as the Tenth Circuit. For example, respondents identify no Fifth Circuit decision retreating from that court's en banc ruling that Rule 24(a)(2) requires that "the [putative intervenor's] interest be one which the *substantive* law recognizes as belonging to or being owned by [it]" and does not allow such an entity "'to assert a right if it is not [its] own.'" *New Orleans Pub. Serv., Inc.* v. *United Gas Pipe Line Co.*, 732 F.2d 452, 464 (5th Cir.) (citation omitted), cert. denied, 469 U.S. 1019 (1984). See Pet. 22, 27. Respondents instead identify (Br. 12-13) decisions that did not resolve whether the relevant Rule 24(a) "interest" must be supported by

a putative intervenor's own claim or defense. In *Brumfield* v. *Dodd*, 749 F.3d 339 (5th Cir. 2014), for instance, the issue was not discussed, presumably because the intervenor parents invoked the rights of their children to "equal protection of the laws" in opposing modification of a scholarship program in post-judgment proceedings, which threatened "existing scholarship[s]" and prospective interference with education opportunities. *Id.* at 343-344. In *City of Houston* v. *American Traffic Solutions, Inc.*, 668 F.3d 291 (5th Cir. 2012), the court concluded that individuals who sponsored a successful public referendum over a city's strong opposition were "unique" and entitled to intervene in a challenge to the resulting law, but did not address whether they needed to assert a claim or defense reflecting their own rights. *Id.* at 294; cf. *Hollingsworth* v. *Perry*, 570 U.S. 693, 706-707 (2013). In *Texas* v. *United States*, the court determined that an asserted interest can be "'legally protectable'" "even if the intervenor does not have an enforceable legal entitlement." 805 F.3d 653, 659 (5th Cir. 2015). But even if that conclusion were correct, the court did not suggest a person may intervene as of right to invoke *someone else's* rights, as respondents seek to do here.

Respondents cite (Br. 14-15) Eighth Circuit decisions that either did not address the issues here or have been overtaken by the court's subsequent precedents cited in the petition. See Pet. 28. In *Mausolf* v. *Babbitt*, for instance, the court simply resolved whether the intervenors had to establish Article III standing and whether their asserted interest would be adequately protected by the existing parties. 85 F.3d 1295, 1298-1304 (1996). The court observed in passing—and without analysis—that it agreed with the district court that

environmentalists could intervene based on an "interest in preventing unrestricted snowmobiling" in a park. *Id.* at 1302. But the court did not address the role of the intervenors' claim or defense because the parties did "not dispute" whether the intervenors had a "protectable interest." Reply Br. at 1-2, *Mausolf*, *supra* (No. 95-1201); see Br. of Appellees at 8-13, 18-23, *Mausolf*, *supra*. See also *South Dakota* v. *Ubbelohde*, 330 F.3d 1014, 1024-1025 (2003) (holding that putative intervenors "presented sufficient evidence" that they would be harmed if a final court ruling allowed decreased river flowage, without addressing whether an interest in the river's operation was a sufficient interest under Rule 24(a)(2)), cert. denied, 541 U.S. 987 (2004); *Planned Parenthood, Inc.* v. *Citizens for Cmty. Action*, 558 F.2d 861, 869 (1977) (holding that property owners could intervene in action seeking to authorize development that would reduce their property values).

The fact that the Eleventh Circuit has concluded that an intervenor's interest need not "be of a legal nature *identical* to that of the claims asserted in the main action," *Georgia* v. *United States Army Corps of Eng'rs*, 302 F.3d 1242, 1251 (2002) (citation omitted; emphasis added), likewise does not undermine the requirement that the "interest" be "'one which the *substantive* law recognizes as belonging to or being owned by the [intervenor],'" *ibid.* (citation omitted) (noting requirement). Cf., *e.g.*, *id.* at 1248, 1250-1252 (concluding that the intervening State had a "right" to water flows governed by an interstate compact that could be harmed by resolving the case); *id.* at 1257-1258 (association had "legally protectable interest" in hydroelectric-power generation and was claiming a "right to seek preclusion of unlawful [water] uses"). Indeed, the other Eleventh

Circuit decisions that respondents cite involved intervenors asserting their own rights. See *Commissioner, Ala. Dep't of Corr.* v. *Advance Local Media, LLC*, 918 F.3d 1161, 1166, 1173 (2019) (media intervenor asserted its own "right to access judicial records"); *Howard* v. *McLucas*, 782 F.2d 956, 958-959 (1986) (intervenors' contention that "consent decree [would] adversely affect their rights" by denying them "promotions solely on account of race").

Finally, respondents argue (Br. 18) that the Rules Committee is the proper body to resolve questions concerning the scope of Rule 24. But it is this Court that decides the meaning of the Rules that it has adopted. This Court's review is necessary to resolve the lower courts' existing confusion over Rule 24(a)(2)'s interest requirement. The government argued below that respondents' environmental interest was insufficient and that the en banc decision in *San Juan County* should not control this case. Gov't C.A. Br. 39-40. After the panel disagreed, the government continued to argue that respondents' "environmental interests" are insufficient under Rule 24(a)(2) because they are not legally protected interests relevant to this "dispute about legal title to property," where respondents claim "no ownership in the disputed property" and cannot properly assert the government's "defenses to its own title." U.S. C.A. Reh'g Pet. 13, 15-16. The property-rights context of this case cleanly presents the Rule 24(a)(2) issue for this Court, which should resolve the question presented before the United States must litigate more than 12,000 R.S. 2477 right-of-way claims under the Tenth Circuit's misguided approach to intervention. Pet. 29-32.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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NOVEMBER 2020