No. 21-1404

In The
Supreme Court of the United States

SUNOCO PARTNERS MARKETING & TERMINALS, L.P.; SUNOCO, INC. (R&M),

Petitioners,

v.

PERRY CLINE, on behalf of himself and all others similarly situated,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

RUSSELL S. POST
Counsel of Record
OWEN J. MCGOVERN
BECK REDDEN LLP
1221 McKinney Street
Suite 4500
Houston, TX 77010
(713) 951-3700
rpost@beckredden.com

Counsel for Respondent

July 15, 2022

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Is a court of appeals obligated to determine whether a basis exists to exercise appellate jurisdiction when an appellant disavows appellate jurisdiction contrary to Federal Rule of Appellate Procedure 28(a)(4)?

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STATEMENT OF THE CASE

A. Legal Background

1. Federal appellate courts have jurisdiction over, *inter alia*, "final decisions of the district courts of the United States." 28 U.S.C. § 1291. In the context of class action litigation, it is settled that an award of monetary relief that fails to allocate an aggregate sum among class members is not final. Wright & Miller, 15B Fed. Prac. &. Proc. § 3915.2 (2d ed.). Therefore, Tenth Circuit precedent (which Petitioner endorses) holds a class action judgment is final and appealable once the district court "establishes both the formula that will determine the division of damages among class members and the principles that will guide the disposition of any unclaimed funds." *Strey v. Hunt Int'l Res. Corp*., 696 F.2d 87, 88 (10th Cir. 1982).

2. In each federal appeal, an appellant's brief must (i) state "the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction," and (ii) set forth "an assertion that an appeal is from a final order or judgment" (or assert another basis for appellate jurisdiction). Fed. R. App. P. 28(a)(4)(B), (D). As Justice Gorsuch explained while still a member of the Tenth Circuit, this duty falls on the appellant and not the court of appeals:

> Where an appellant fails to lead, we have no duty to follow. It is the appellant's burden, not ours, to conjure up possible theories to invoke our legal authority to hear her appeal.

Raley v. Hyundai Motor Co., Ltd., 642 F.3d 1271, 1275 (10th Cir. 2011). The decision below represents a straightforward application of these settled principles to a case in which the appellant *disclaimed* finality.

B. Factual and Procedural Background

1. Oklahoma's Production Revenue Standards Act ("PRSA"), 52 Okla. Stat. § 570.1 *et seq*., mandates the payment of interest to oil and gas owners when proceeds are paid late. *Id*. § 570.10.D. The law was passed because the oil and gas companies responsible for the payment of royalties had a history of failing to pay proceeds on time. Okla. Att'y Gen. Op. 2015-6, 2015 Okla. AG LEXIS 8, at *2-3. "When payment was finally made, the holders often refused to make interest payments on the funds withheld." *Id*. at *3.

Section 570.10 outlaws these practices. In general, Section 570.10 provides that royalty payments must commence no later than six months after the first sale, and thereafter no later than two months after any subsequent sales. 52 Okla. Stat. § 570.10.B.1. It also provides that a company that pays such proceeds late "shall be liable to such owners for interest" as specified by the statute. *Id*. § 570.10.E.1.

2. Unfortunately, Sunoco did not get the message. For years, it maintained a deliberate business practice of refusing to pay interest when it paid proceeds late, waiting to see if owners were attentive enough to demand the interest. "In this case, a farmer

named Perry Cline call[ed] Sunoco to task on this practice." Dkt.298.at.1.[1]

Cline sued Sunoco for willfully violating the PRSA, Dkt.2-2.at.1-3, alleging that its uniform practice of withholding interest on late payments of proceeds was ideally suited for a class action. Dkt.2-2.at.5-9.

The district court found that the case satisfied all the criteria for class certification. Dkt.126.at.1-17. Because Cline's claims were "based on Sunoco's single, uniform practice," if Sunoco is required to pay interest without a request, "all the class members prevail." Dkt.126.at.6. This core question predominated over all others in the litigation. Dkt.126.at.11-14.

The district court ruled as a matter of law that the PRSA "requires Sunoco to make statutory interest payments automatically with the late payment." Dkt.298.at.2. Sunoco admittedly did not do so:

> Recognizing that the law mandated interest, Sunoco has adopted a policy only to pay if the well owner requests an interest payment. Since most well owners do not know they can get the payment, few request their interest, and Sunoco keeps the money. It amounts to millions of dollars each year. . . . Sunoco simply keeps the money for its own use, knowing two things: that most owners will not request

[1] "Dkt." refers to the district court docket, No. 17-cv-313-JAG (E.D. Okla.).

> interest, and that eventually the owners' potential claims will die at the hands of the statute of limitations. And when that happens, Sunoco will have irrevocably pocketed the money.

Dkt.298.at.1.

The district court then conducted a bench trial to determine whether Cline could prove late payments to the class members and how much interest was owed. Following the trial and extensive post-trial briefing, the court issued an opinion summarizing the facts and finding Sunoco liable for damages to the class. Dkt.298.at.9-16, 25-37, 39-48. It entered judgment awarding the class (1) $80,691,486 in actual damages and (2) $75,000,000 in punitive damages. App.37.

3. Sunoco appealed the day judgment was entered. Dkt.309. But its notice of appeal was premature because the district court had not yet entered an order regarding distribution of the damages to the class. Thus, Sunoco moved to abate its appeal, arguing that the judgment was not yet final within the meaning of 28 U.S.C. § 1291. CA10.No.20-7055.9.16.2020.Br.; CA10.No.20-7055.9.21.2020.Br.

4. While the appeal was pending, the district court approved a Plan of Allocation governing distribution of the monetary award to the class members. App.31. The Plan assigns payments to the class members. *Id.*; *see also* Dkt.317-1. The Plan specifically states that it calculates "each Class member's proportionate share of the damages awarded by the Court,

based on each Class member's individual award of damages." Dkt.317-1.at.3. It includes an exhibit that identifies class members by unique numbers and states their percentage of the total proceeds. Dkt.317-1.at.Ex.1. Here is the first entry of that 621-page list:

Class Member Owner No.	**% of Judgment for Distribution**
0000001115	0.0044446425%

As the Plan of Allocation explains, this itemization "could be used by the Judgment Administrator to perform a straightforward, mechanical calculation of the amount of money to be distributed to each Class member." Dkt.317-1.at.3. "The calculation would simply require the Judgment Administrator to identify each Class member's fractional interest and then multiply that amount by the total amount of damages to be distributed to the Class." *Id*.

The district court reiterated this explanation in its Plan of Allocation order. It explained that the Plan "calculated the amount of damages owed to each individual class member" and also "summed those figures to determine the amount of damages owed to the class." App.33. After adjusting for the accrual of additional interest, the Plan "divided the updated damage figure for each class member by the total amount of damages awarded to the class, and thereby determined each class member's proportional share of the Judgment." App.34. "The result of this formulaic approach is a list containing each class member's fractional share of the

total amount of damages." *Id*. "The Judgment Administrator need only multiply the fractional share for each class member expressed in [the Plan of Allocation] by the Net Class Award in order to arrive at the exact dollar amount that each class member shall be paid." *Id*.

In addition, the Plan of Allocation order sets forth procedures for distribution of the judgment proceeds. App.34-36. It names a judgment administrator who, working in consultation with class counsel, shall be "responsible for applying the mathematical principles established in the Plan of Allocation to ascertain the precise amounts of the Net Class Award allocable to each class member." App.34. Based on that analysis, "the Court will enter a Final Distribution Order establishing the allocation for purposes of disbursements to Class Members" and the judgment administrator will distribute the proceeds. App.34-35.

The Plan of Allocation order directly addresses the disposition of unclaimed funds, anticipating that such funds will be sent to state unclaimed-property funds (the same place Sunoco sent its proceeds payments for those class members):

> Consistent with the Court's prior statements on the matter, (*see* ECF No. 298, at 42), the Court anticipates that any residual unclaimed funds will be sent to the same place that Sunoco remitted the underlying proceeds payments, including the appropriate state accounts for unclaimed property. But the Court retains discretion to select a different method

> of distribution that best serves the interests of the class once all relevant information is available.

App.35-36.

5. Sunoco appealed the Plan of Allocation order the same day it was entered. Dkt.340. Three days later, the Tenth Circuit dismissed Sunoco's earlier appeal (the appeal Sunoco had filed prematurely before entry of the Plan of Allocation order). App.13. It explained that a class action award "is not final [and] appealable 'until the district court establishes both the formula that will determine the division of damages among class members and the principles that will guide the disposition of any unclaimed funds.'" *Id*. (quoting *Strey*, 696 F.2d at 88). Noting that the district court "had not yet issued a plan to allocate the damages it awarded when Appellants filed their notice of appeal," App.13, the court dismissed the first appeal. *Id*.

That same day, the Tenth Circuit instructed the parties to file briefs in the second appeal addressing whether the Plan of Allocation was a final judgment. Sunoco argued that the order still failed to address the distribution of unclaimed funds and still failed to allocate the damages in Sunoco's "undivided" account. CA10.No.20-7064.11.17.2020.Appellant.Br.7-15.

Cline argued that the order was a final judgment. CA10.No.20-7064.11.17.2020.Appellee.Br.1-7.

6. Meanwhile, Sunoco's post-judgment motions in the district court asserted the very same complaints

as challenges to the correctness of the judgment. Dkt.322, 323. The district court denied both motions and made clear that it considered the judgment final. *See* App.29 n.10 ("The Court also finds the Plan of Allocation adequate as it provides for the distribution of funds to state unclaimed property funds if the class member does not claim their funds or remains unidentified or unlocated.").

7. Sunoco then filed its third notice of appeal. Dkt.351. It also filed a supplemental brief in the second appeal, referring to the district court's ruling but disputing the district court's characterization of its legal effect. CA10.No.20-7064.12.9.2020.Br.1-3. Despite the district court's ruling, Sunoco persisted in arguing that the judgment was not yet final. *Id*. at 2. It argued "that the appeal should continue to be abated until [the court of appeals] rules on whether there is a final, appealable judgment in this case." CA10.No.20-7064.12.9.2020.Status.Report.1.

After considering these filings, the Tenth Circuit issued an order declaring that the "question regarding finality of the district court's judgment would benefit from the more plenary review available after the appeal has been fully briefed on the merits." CA10.No.20-7064.12.18.2020.Order.2. The issue was "referred to the panel of judges that will be later assigned to consider this appeal on the merits." *Id*.

8. Sunoco's appeals were consolidated and briefed on the merits. Sunoco's appellate briefs referred to the prior briefing on the question of finality and did not

identify any other basis for appellate jurisdiction. CA10.No.20-7072.Appellant.Br.15.

Ultimately, an oral argument panel was assigned and ordered the parties to address two questions:

1. Whether the Sunoco appellants have met their burden to show why the court has appellate jurisdiction?

2. If Sunoco has failed to meet this burden, what action should the court take?

CA10.No.20-7064.10.15.2021.Order.2.

Sunoco's response abandoned its prior argument about the plan for distribution of unclaimed funds. "Upon further reflection," it declared, "Sunoco believes that the District Court has adequately provided for the disposition of residual unclaimed funds." CA10.No.20-7064.10.20.2021.Br.5-6.

On the other hand, Sunoco adhered to its position that the Plan of Allocation order erroneously directed approximately $16 million to the "undivided" accounts "in which Sunoco aggregates monies that it *does not divide* among owners of mineral interests because Sunoco has no name, address, or other information identifying such owners." *Id*. at 6. Sunoco reasoned that the Plan of Allocation order thus failed to divide the proceeds among all class members. *Id*. at 6-10. But rather than dismiss its appeal for lack of finality, Sunoco urged the court to grant it affirmative relief by either vacating the award to the "undivided" accounts for lack of standing or instructing the district court to

allocate the damages among mineral interest owners "or, if such an allocation cannot be done . . . eliminate those damages from the District Court's Judgment Order and Plan of Allocation." *Id*. at 10.

Cline maintained his consistent position that the judgment is final. CA10.No.20-7064.10.25.2021.Br.

9. After receiving these briefs, the court of appeals "dismiss[ed] [Sunoco's] consolidated appeals because Sunoco did not meet its burden to establish appellate jurisdiction." App.5. The court explained that Sunoco had denied finality and had identified no other basis for appellate jurisdiction. App.5-10. "We thus dismiss these consolidated appeals." App.10.

In addition, the court observed that "Sunoco did not pursue the options available to it to establish appellate jurisdiction" over a non-final order. App.9. It stated "Sunoco had at least four ways to attempt to invoke our jurisdiction" over such an order, App.9 n.6, but it "pursued none" of these options. *Id.*

Sunoco petitioned for both panel rehearing and rehearing *en banc*. CA10.No.20-7064.11.11.2021.Br. In that petition, for the first time, Sunoco asked the court of appeals to treat its appeal "as also requesting mandamus relief directing the District Court to enter final judgment." *Id.* at 17, 21, 23. The Tenth Circuit denied all these requests for relief. App.11.

Sunoco then filed a petition for a writ of mandamus directing the district court to enter a final

judgment. App.1. The Tenth Circuit denied the petition. App.2.

10. Unwilling to accept that the judgment is final, Sunoco moved to modify the Plan of Allocation order, Dkt.372, and stay enforcement proceedings. Dkt.376. The district court refused to modify its final judgment, Dkt.407, but stayed enforcement for 60 days to allow time for mediation with a magistrate judge. Dkt.405. The court then lifted its stay of enforcement. Dkt.420. Sunoco appealed all three orders to the Tenth Circuit, where its fate will turn on its tactical decision to argue the Plan of Allocation order is not a final judgment. *See* CA10.No.22-7017, 22-7018, & 22-7030.

REASONS FOR DENYING THE PETITION

As Justice Gorsuch explained when writing for the Tenth Circuit in one of the leading cases cited by the opinion below:

> Where an appellant fails to lead, we have no duty to follow. It is the appellant's burden, not ours, to conjure up possible theories to invoke our legal authority to hear her appeal.

Raley v. Hyundai Motor Co., Ltd., 642 F.3d 1271, 1275 (10th Cir. 2011). Sunoco asks the Court to flip this well-established rule on its head by holding that it is the court of appeals, not the appellant, that has the duty to assert and establish appellate jurisdiction. *See* Pet. i-ii. That proposition has not been accepted by this

Court and has been affirmatively rejected by courts of appeals across the federal system.

The petition should be denied for several reasons:

First, it presents a false issue. The decision below was a technically sound application of briefing rules to the facts of this case. It has nothing to do with the viability of protective appeals.

Second, Sunoco's experienced counsel has failed to identify any circuit split on the rule of decision below. The supposed "universal and long-standing practice" requiring courts to examine jurisdiction *sua sponte* when an appellant makes a tactical choice to disavow its burden to assert jurisdiction does not exist.

Third, the decision below was technically sound. Rule 28(a)(4) of the Rules of Appellate Procedure and a long line of decisions require the party seeking to invoke appellate jurisdiction, not the court of appeals, to establish the basis for jurisdiction. Those decisions faithfully apply this Court's precedent.

In truth, Sunoco made a tactical choice to disavow the existence of finality—despite the district court's unequivocal ruling that it was finished with the case, except for issues of enforcement—because Sunoco hoped to repackage merits-based arguments about the "undivided" accounts as jurisdictional defects that could stave off the day of judgment. Its tactical choice does not warrant an exception from Rule 28(a)(4).

Far from an egregious error, the decision below is a case study in judicial restraint. Sunoco affirmatively

disclaimed finality and invited dismissal of its appeal. The court of appeals simply accepted Sunoco's position at face value. Because it was not necessary to decide the ultimate issue of finality, the court did not do so.

I. Sunoco's petition presents a false issue that is unworthy of review.

This case presents a mundane issue about the obligation of an appellant to establish the basis for appellate jurisdiction as required by Federal Rule of Appellate Procedure 28(a)(4). Sunoco does not argue that it satisfied this obligation, and it could not do so—it disavowed the existence of appellate jurisdiction no less than four times in the court of appeals. *See* App.7 ("Sunoco filed four briefs arguing or implying we *lack* jurisdiction."); App.10 ("Sunoco has repeatedly argued that we lack jurisdiction.").

Having elected to disclaim appellate jurisdiction in the court of appeals, Sunoco is forced to allege that appellate courts owe a "duty" or a "common practice" to assume the appellant's burden and determine the basis for jurisdiction in cases where "an appellant files a protective appeal reflecting its good-faith belief that a district court order is not final." Pet. i-ii. But there is no such "duty" and no circuit split on this issue.

Sunoco's argument for review opens not with any allegation of a circuit split but with an explicit request for error correction on the basis that the decision below frustrates the practice of protective appeals when appellate jurisdiction is in doubt. Pet. 20-25. This is a

false issue, as it does not accurately reflect the court of appeals' holding.

A. The decision below was based on Sunoco's decision to disavow appellate jurisdiction, not a rejection of protective appeals.

The decision below focuses on an appellant's duty to establish appellate jurisdiction—not the viability of protective appeals. The appeal was dismissed solely "because Sunoco did not meet its burden to establish appellate jurisdiction." App.5; *see* App.7-10. Far from rejecting the common practice of protective appeals—which it did not even mention—the court of appeals simply applied black-letter briefing rules to the facts of this case and held that Sunoco failed to meet its burden to establish jurisdiction. Pet. 17-18.

1. The decision below relied on the express terms of Federal Rule of Appellate Procedure 28(a)(4), App.5, which provides that an appellant's brief "must" state "the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction" and "an assertion that an appeal is from a final order or judgment" (or information providing another basis for appellate jurisdiction). Fed. R. App. P. 28(a)(4)(B), (D). As the Tenth Circuit summarized these briefing rules, "[i]t is the appellant's burden, not ours, to conjure up possible theories to invoke our legal authority to hear [its]

appeal." App.5 (quoting *Raley*, 642 F.3d at 1275 (Gorsuch, J.)).

Leaving no doubt about the basis for its decision, the court stated that "[i]t is indisputably within our power as a court to dismiss an appeal when the appellant has failed to abide by the rules of appellate procedure. . . ." App.5-6 (quoting *MacArthur v. San Juan Cty.*, 495 F.3d 1157, 1161 (10th Cir. 2007)).

2. Applying this standard, the Tenth Circuit made a fact-bound determination that Sunoco had failed to satisfy its burden to establish appellate jurisdiction. App.5. This holding was not based on any oversight by the appellant, but on Sunoco's tactical decision to disavow the existence of appellate jurisdiction. As the Tenth Circuit noted, "Sunoco filed four briefs arguing or implying that we *lack* jurisdiction." App.6.

Rather than asserting that jurisdiction was proper on the current state of the record, Sunoco argued that "'there is appellate jurisdiction *if* this Court takes the actions requested'" to finalize the judgment. App.8-9. The court of appeals held "that conditional assertion does not show that we have jurisdiction" and reasoned "Sunoco, not us or Appellee Cline, must 'conjure up possible theories to invoke our legal authority to hear [its] appeal.'" App.9 (quoting *Raley*, 642 F.3d at 1275).

Thus, the decision below was narrowly focused on the strict letter of the Rules of Appellate Procedure and Sunoco's tactical decision to disclaim jurisdiction. App.10 ("Sunoco has repeatedly argued that we lack jurisdiction. It has not therefore met its burden to

establish appellate jurisdiction. We thus dismiss these consolidated appeals."). Sunoco denied finality for its own reasons, and the court of appeals accepted its position at face value. Whether right or wrong, such fact-bound application of well-settled rules to the circumstances of a particular case is not certworthy.

B. The decision below does not render protective appeals a "dead letter" in the Tenth Circuit.

Contrary to Sunoco's assertion, the Tenth Circuit did not "los[e] sight of the bedrock rule that a court *always* has jurisdiction to decide its own jurisdiction." Pet. 21. Rather, the court explicitly acknowledged its jurisdiction to decide its own jurisdiction, App.8 n.5, but rejected Sunoco's "attempt[] to shift the burden of establishing appellate jurisdiction to this court. . . ." App.8. This fact-bound ruling had nothing to do with *whether* jurisdiction exists and everything to do with *who* has the burden to establish it. The Tenth Circuit simply held that it had no independent obligation to explore potential grounds for appellate jurisdiction when such jurisdiction had been disavowed repeatedly by the appellant. *See Raley*, 642 F.3d at 1275 ("Where an appellant fails to lead, we have no duty to follow.").

The rule of decision applied by the court of appeals had nothing to do with disavowing protective appeals, which the opinion did not even mention. Litigants in the Tenth Circuit retain the ability to notice an appeal when the existence of appellate jurisdiction is in doubt

and to call the jurisdictional question to the attention of the court of appeals. They need only comply with the strictures of Rule 28(a)(4) and assert the existence of appellate jurisdiction as opposed to disclaiming it. There is a material difference between an appellant that seeks appellate review but acknowledges doubts about the basis for jurisdiction—the ordinary context of a protective appeal—and an appellant that actively disclaims appellate jurisdiction. In the latter scenario, an appellant cannot complain if the court of appeals accepts the appellant's jurisdictional disclaimer on its own terms and dismisses the appeal.

II. Sunoco has failed to identify any circuit split, much less a meaningful and entrenched split requiring this Court's attention.

There is no circuit split on the rule of decision applied below, so there is no reason for review.

A. There is no circuit split on the actual rule of decision applied by the court of appeals.

1. As discussed, the rule of decision applied below is that while federal appellate courts have jurisdiction to consider their own jurisdiction, they do *not* have an independent duty to invent a basis for jurisdiction when the appellant fails to establish jurisdiction as required by the Rules of Appellate Procedure. App.5 ("It is the appellant's burden, not ours, to conjure up

possible theories to invoke our legal authority to hear [its] appeal.") (quoting *Raley*, 642 F.3d at 1275).

2. Criticizing that holding, Sunoco suggests that appellate courts have a *duty* to ignore Rule 28(a)(4) and investigate grounds to assert jurisdiction *even if* the appellant disclaims it. But Sunoco cannot identify a single circuit that recognizes such a duty. Instead, every circuit to consider the question has confirmed its right to dismiss an appeal when an appellant fails to satisfy the requirements of Rule 28(a)(4). Consider:

- *Reyes-Garcia v. Rodriguez & Del Valle, Inc.*, 82 F.3d 11, 13, 16 (1st Cir. 1996) (dismissing for failure to comply with appellate briefing rules).
- *Taylor v. Harbour Pointe Homeowners Ass'n*, 690 F.3d 44 (2d Cir. 2012) ("appellant's failure to comply with Rule 28 invites dismissal").
- *J.C. Penney Life Ins. Co. v. Pilosi*, 393 F.3d 356, 368 n.4 (3d Cir. 2004) (holding that adherence to Rule 28 is "non-discretionary").
- *Abraugh v. Altimus*, 26 F.4th 298, 304-05 (5th Cir. 2022) ("We do not have a constitutional duty to *accept* subject matter jurisdiction based on theories not actually presented by the parties.").
- *Taylor v. KeyCorp*, 680 F.3d 609, 615 n.5 (6th Cir. 2012) ("Our duty to consider unargued *obstacles* to subject matter jurisdiction does not affect our discretion to decline to consider waived arguments that might have *supported* such jurisdiction.").

- *Travelers Prop. Cas. v. Good*, 689 F.3d 714, 718 (7th Cir. 2012) ("The court need not bend over backwards to construct alternative theories to persuade itself that subject matter jurisdiction exists. . . .").
- *United States v. 24.30 Acres of Land*, 105 F. App'x 134, 135 (8th Cir. 2004) (failure to brief jurisdiction of the lower court is a waiver).
- *In re O'Brien*, 312 F.3d 1135, 1136 (9th Cir. 2002) ("[F]ailure to comply with Rule 28, by itself, is sufficient ground to justify dismissal of an appeal.").
- *Cadlerock III, LLC v. Harry Brown & Co., LLC*, 754 F. App'x 780, 782 (11th Cir. 2018) (dismissing for violations of Rule 28(a)).
- *SafeTCare Mfg., Inc. v. Tele-Made, Inc.*, 497 F.3d 1262, 1267 (Fed. Cir. 2007) (appellant has the burden to establish appellate jurisdiction).
- *NetworkIP, LLC v. FCC*, 548 F.3d 116, 120 (D.C. Cir. 2008) ("arguments in favor of subject matter jurisdiction can be waived by inattention or deliberate choice").

Sunoco has failed to identify a single circuit that has embraced its proposed "duty" to investigate the potential grounds for appellate jurisdiction when the appellant claims that such jurisdiction does not exist. Given the acknowledged expertise of Sunoco's counsel, this failure to identify a circuit split speaks volumes.

3. Likewise, nothing in the decision below conflicts with the basic principle that "a federal court always has jurisdiction to determine its own jurisdiction," Pet. 23, or decisions applying that principle. In fact, the opinion below acknowledges and accepts that rule. *See* App.8 n.5. But as discussed in Part I.A, *supra*, that rule was not implicated by the decision below, which turned on Sunoco's disclaimer of jurisdiction—not the court's power to consider the question.

Similarly, the decision below does not conflict with the venerable rule that "federal courts 'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given,' " Pet. 23, or decisions applying that rule. The court of appeals did not refuse to exercise "jurisdiction which is given"; it simply held Sunoco had failed to establish that any "jurisdiction" had been "given" in these circumstances. App.10 & n.6. Holding that a litigant failed to invoke jurisdiction is a far cry from refusing to exercise it.

The lack of *amicus* support in this Court highlights the fallacy of Sunoco's effort to conjure a conflict with these first principles of federal jurisdictional doctrine. A deviation from established norms of the magnitude alleged by Sunoco would attract widespread attention. But even though it had *amici* in the court of appeals on other issues (including the Chamber of Commerce), Sunoco has been unable to attract any *amicus* support for its novel jurisdictional theory in this Court.

B. The claim that the decision below defies a "uniform and long-standing practice" is simply incorrect.

Knowing it cannot identify a genuine circuit split, Sunoco argues that the Tenth Circuit departed from a supposed "uniform and long-settled practice" by which federal appellate courts consider themselves bound to "resolve jurisdictional disputes in the context of protective appeals, even when the appellant who initiated the appeal is the one arguing that the court lacks jurisdiction to resolve the merits." Pet. 25. Sunoco's proof of such a "practice" is unimpressive.

As discussed in Part II.A, it is the "uniform and long-standing practice" of the federal appellate courts to dismiss appeals when an appellant fails to establish the existence of jurisdiction. Against this authority, Sunoco has been able to identify only four opinions—three of which were unpublished, and one of which involved a *pro se* appellant—where a court of appeals maintained its jurisdiction *sua sponte* even though the appellant had not established appellate jurisdiction. This handful of cases does not even support the claim of a "uniform and long-settled practice" within the respective circuits that issued them, much less across the federal system. They hardly evidence the sort of substantial and entrenched division of authority that warrants a grant of certiorari.

1. *United States v. Sunset Ditch Co.*, 472 F. App'x 472, 473 (9th Cir. 2012) (Pet. 25), is an unpublished opinion that contains no analysis of the legal question

at issue here—whether an appellate court is entitled to dismiss an appeal when the appellant fails to assert a basis for appellate jurisdiction. It does not conflict with the opinion below on any issue.

Moreover, the unpublished ruling in *Sunset Ditch* is an outlier in the Ninth Circuit, which repeatedly declares that "failure to comply with Rule 28, by itself, is sufficient ground to justify dismissal of an appeal." *O'Brien*, 312 F.3d at 1136; *see also Atlantic Recording Corp. v. Chan*, 94 F. App'x 531, 532 (9th Cir. 2004) (dismissing appeal where brief did not state the facts establishing jurisdiction as required by Rule 28(a)(4)). *Sunset Ditch* does not establish the "common practice" alleged by Sunoco in the Ninth Circuit, much less a "uniform and long-standing practice" contrary to the decision below.

2. Sunoco's citation to *Nat'l Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio, Tex.*, 40 F.3d 698, 705 (5th Cir. 1994) (Pet. 25), is no better, as that case does not concern an appellant's failure to adequately brief the basis of appellate jurisdiction. On the contrary, the appellants in that case originally asserted appellate jurisdiction under Rule 28(a)(4), then tried to disclaim it at oral argument. The court of appeals rejected that late disclaimer. *Id.* at 706 ("That Plaintiffs instigated this appeal and invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1291 suggests that they themselves believed the district court's judgment to be final."). Nothing in that case conflicts with the rule of decision that an appeal may be dismissed when an appellant fails to brief a basis for

jurisdiction—a practice the Fifth Circuit follows. *See*, *e.g.*, *Abraugh*, 26 F.4th at 304-05 ("We do not have a constitutional duty to *accept* subject matter jurisdiction based on theories not actually presented by the parties."); *Thibodeaux v. Vamos Oil & Gas Co.*, 487 F.3d 288 (5th Cir. 2007) (stating that the court "will not 'explore jurisdictional bases the appellant does not address' ").

Indeed, one of the root sources of the decision rule applied by the Tenth Circuit is a Fifth Circuit case. *See Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1539 (10th Cir. 1992) ("[O]ur responsibility to ensure . . . that we have subject matter jurisdiction . . . differs from our discretion to eschew untimely raised legal theories which may support that jurisdiction. We have no duty under the general waiver rule to consider the latter.") (citing *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1207 n.16 (5th Cir. 1992)). Far from revealing a variance with a "uniform and long-standing practice," therefore, comparison with the Fifth Circuit confirms that the decision below conforms to established practices.

3. *Arnold v. Indianapolis Airport Auth.*, 7 F.3d 238 (7th Cir. 1993) (Pet. 26), is an unpublished case where appellants denied finality, filed protective appeals, and sought dismissal of their appeals. The court of appeals agreed and dismissed their appeals. *Id*. at *3. In substance, that is exactly what the Tenth Circuit did in this case. *Arnold* does not support the assertion that a court of appeals must *maintain* jurisdiction when an appellant has disclaimed it. On the contrary, the Seventh Circuit regularly holds that it has no duty

to investigate its jurisdiction when an appellant has failed to establish jurisdiction. *See*, *e.g.*, *Travelers*, 689 F.3d at 718 ("The court need not bend over backwards to construct alternative theories to persuade itself that subject matter jurisdiction exists. . . ."); *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001) ("noncompliance with Rule 28 will result in dismissal of the appeal"); *Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir. 1986) ("It is not the obligation of this court to research and construct the legal arguments open to parties, especially when they are represented by counsel.").

4. *Truesdale v. U.S. Dep't of Justice*, No. 12-5012, 2012 WL 3791281, at *1 (D.C. Cir. August 15, 2012) (Pet. 26), is an unpublished opinion rejecting a *pro se* appellant's attempt to disavow appellate jurisdiction. But the order at issue in *Truesdale* "explicitly state[d] that judgment is entered for the appellees and that '[t]his [order] is a final, appealable order,'" *id*., meaning that jurisdiction was apparent from the face of the order. The court of appeals thus had no occasion to consider its discretion to dismiss an appeal when an appellant fails to comply with Rule 28. When faced with that issue, the D.C. Circuit has held repeatedly that "arguments in favor of subject matter jurisdiction can be waived by inattention or deliberate choice." *NetworkIP*, 548 F.3d at 120; *Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686, 696 (D.C. Cir. 2022) (same). Thus, *Truesdale* creates no conflict with the decision below and fails to support Sunoco's assertion that there is a "common practice" to investigate bases of jurisdiction that are disclaimed by an appellant.

At most, it is fair to say federal appellate courts *occasionally* exercise discretion to identify a basis for jurisdiction when the appellant has failed to do so. Such decisions reflect the general principle that courts *may* overlook forfeitures in rare cases, but there is no bright-line rule that they *must* do so. This is a far cry from a "uniform and long-settled practice," Pet. 23, obligating courts to consider grounds for appellate jurisdiction that were not set forth by the appellant. Rather, the common practice is to dismiss an appeal when the appellant fails to establish a valid basis for appellate jurisdiction as required by Rule 28(a)(4). Any departure from that general practice is a matter of discretion in particular cases—which is a very thin, fact-bound, and unimportant basis for certiorari.

III. The decision below is correct.

Lacking a circuit split, Sunoco's petition reduces to a naked plea for correction of an "egregious[]" error. Pet. 23. Error correction is rarely a basis for certiorari and this case is no exception. There is no error at all, much less an "egregious" error that cries out for relief.

The court of appeals based its decision on the rule that the appellant—not the court of appeals—has the "duty" to establish appellate jurisdiction. That rule is explicit in the text of Rule 28(a)(4) and deeply rooted in this Court's jurisprudence—which explains why it is followed by every circuit to consider the question. *See* Part II.A, *supra*. Far from an act of "madness," Pet. 3, the decision below is a strict application of the rules for

jurisdictional statements in appellate briefs. Were this not a large-dollar case, no one would give it a second thought.

Sunoco's contrary rule would push the law beyond any prior decision and it would nullify Rule 28(a)(4). This Court has never held "a federal court of appeals *always* has both the power *and the duty* to determine definitively whether it possesses jurisdiction over an appeal" when an appellant disclaims finality, Pet. 23 (emphasis added), and it should not do so now.

A. The holding that appellate courts need not consider unasserted arguments for jurisdiction is technically sound.

The Tenth Circuit's holding that "Sunoco, not us or Appellee Cline, must 'conjure up possible theories to invoke our legal authority to hear [its] appeal,'" App.9, is grounded in the text of Rule 28 and deeply rooted in the precedent of this Court. The holding may be strict, but it is not error.

1. Rule 28(a) is unambiguous and mandatory, providing that "[t]he appellant's brief "must contain" certain items. Fed. R. App. P. 28. When a rule uses such mandatory language, the courts "must give effect to that intent." *Miller v. French*, 530 U.S. 327, 336 (2000). Accordingly, it is universally recognized that failure to comply with Rule 28 is a basis for dismissal. *See* Part II.A.1, *supra* (collecting authorities).

Specifically, an appellant's brief "must" set forth both the "facts establishing jurisdiction" and, for cases in which finality is the basis for appellate jurisdiction, "an assertion that the appeal is from a final order or judgment. . . ." Fed. R. App. P. 28(a)(4)(B), (D). In turn, Subsection (B) provides that the facts recited by the appellant must "establish" (*i.e.*, "prove" or "convince [the court] of"[2]) the existence of appellate jurisdiction, while Subsection (D) makes clear that simply reciting jurisdictional facts is not sufficient. The brief must affirmatively make "an assertion" (*i.e.*, "a declaration" that something is the case"[3]) "that the appeal is from a final order or judgment." Fed. R. App. P. 28(a)(4)(D).

In other words, the plain language of Rule 28(a)(4) requires an appellant to affirmatively declare the existence of appellate jurisdiction and to allege facts proving that assertion. The court of appeals cannot be faulted for recognizing that Sunoco failed to meet the requirements of Rule 28.

2. The Tenth Circuit's rule of decision—based on Justice Gorsuch's opinion in *Raley*, 642 F.3d at 1275—has deep roots in this Court's precedent.

Raley's holding that "[t]he party claiming appellate jurisdiction bears the burden of establishing our subject-matter jurisdiction" traces directly back to *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,

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[2] *Establish*, Black's Law Dictionary (11th ed. 2019).

[3] *Merriam-Webster.com*, www.merriam-webster.com/dictionary ("assertion"); *see also Assertion*, Black's Law Dictionary (11th ed. 2019) ("A declaration or allegation.")

377 (1994) (Scalia, J.).[4] *Kokkonen* observed that "[f]ederal courts are courts of limited jurisdiction" and "[i]t is to be presumed that a cause lies outside this limited jurisdiction." *Id.* (citation omitted). As such, "the burden of establishing [federal jurisdiction] rests upon the party asserting jurisdiction." *Id*. Authorities supporting this "placement of the burden are legion." 13E Fed. Prac. & Proc. Juris. § 3602.1 & n.24 (3d ed.) (collecting authorities).

Importantly, Justice Scalia grounded the burden to establish jurisdiction—the heart of the decision rule in this case—on this Court's decision in *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). That case involved a statutory limit on the jurisdiction of federal district courts: the amount-in-controversy requirement for diversity jurisdiction. *See id*. at 179 ("The question arises whether the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, so as to give the District Court jurisdiction."). There, this Court held the burden to establish the predicates for jurisdiction falls on—and remains on—"the party who seeks the exercise of jurisdiction in his favor." *Id*. at 189.

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[4] *Raley* cited *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1143 (10th Cir. 2004), for the principle that "[t]he party claiming appellate jurisdiction bears the burden of establishing our subject-matter jurisdiction." That case cited *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002) ("The burden of establishing subject-matter jurisdiction is on the party asserting jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L.Ed.2d 391 (1994).").

It is entirely reasonable to apply the rationale of *Kokkonen* and *McNutt* to the finality requirement of 28 U.S.C. § 1291. Just as the amount-in-controversy is a statutory predicate to federal jurisdiction imposed by 28 U.S.C. § 1332, "[f]inality of judgment" is also a statutory "predicate for federal appellate jurisdiction." *Abney v. United States*, 431 U.S. 651, 656 (1977). Thus, the Tenth Circuit did not err by holding that an appellant bears the burden to establish the existence of a final judgment in order to invoke 28 U.S.C. § 1291, and then dismissing this appeal for failure to do so.

3. The Tenth Circuit was likewise on solid ground when it held that appellate courts have "'discretion to decline to consider waived arguments that might have *supported* . . . jurisdiction.'" App.10 at n.6 (quoting *Tompkins v. United States Dep't of Veterans Affairs*, 16 F.4th 733, 735 n.1 (10th Cir. 2021)). Once again, that proposition was recognized by Justice Gorsuch in *Raley*, 642 F.3d at 1275-76 ("arguments in support of jurisdiction may be waived like any other contention") and it is legally sound. It turns on a basic distinction between a court's constitutional duty to ensure that it does not exceed its jurisdiction under Article III and the absence of any similar duty to assert jurisdiction when a party has failed to invoke it adequately:

> Our duty to consider unargued *obstacles* to subject matter jurisdiction does not affect our discretion to decline to consider waived arguments that might have *supported* such jurisdiction.

United States ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1518 n.2 (10th Cir. 1996). Thus, appellate courts have discretion to explore other bases for jurisdiction, but no obligation to do so. *Id*.

This distinction is theoretically sound and it is followed in other federal circuits. *See* Part II.A, *supra*. One of the leading cases drawing this distinction—and the source of the Tenth Circuit rule on this issue—comes from the Fifth Circuit:

> Because of our limited jurisdiction, we must always be vigilant to ensure that we have subject matter jurisdiction, addressing the issue *sua sponte* if need be. But, this discipline is separate from our declining to address untimely raised legal theories in support of that jurisdiction. We cannot allow such legal theories to crop up at any point during the appeal; *it is not our role to exercise jurisdiction over any disputes that might possibly fall within our limited reach*.

Ceres Gulf, 957 F.2d at 1207 n.16 (emphasis added) (cited in *Daigle*, 972 F.2d at 1539).

This distinction logically follows from the rule that "[f]ederal courts are courts of limited jurisdiction" and "[i]t is to be presumed that a cause lies outside this limited jurisdiction." *Kokkonen*, 511 U.S. at 377. Unless federal courts have discretion not to consider grounds for subject matter jurisdiction that a litigant failed to establish, that presumption is a dead letter—courts would be duty-bound to do the litigant's work, essentially nullifying the *Kokkonen* proposition that "the

burden of establishing [jurisdiction] rests upon the party asserting jurisdiction." *Id.*

Thus, the Tenth Circuit did not err by holding that federal appellate courts have discretion to decline to consider possible arguments for appellate jurisdiction that an appellant has failed to establish. That holding presents no conflict with any decision of this Court.

4. For the foregoing reasons, Sunoco's assertion that an appellate court "always has both the power *and the duty* to determine definitively whether it possesses jurisdiction over an appeal," Pet. 23 (emphasis added), is simply wrong. No one questions that a federal appellate court always has jurisdiction to determine its own jurisdiction, nor is it disputed that a court is bound to exercise jurisdiction *if that jurisdiction has been established*. *Id*. (citing cases). But neither of those first principles is at issue here. The question is whether a federal appellate court *must* search for grounds to sustain jurisdiction when it has not been established by the appellant. No decision of this Court adopts such a rule; it would be a novelty.

If Sunoco were correct that the court of appeals has a duty to establish its own jurisdiction in every case, then appellants would have no duty at all. Indeed, under Sunoco's view, an appellant need not even file a jurisdictional statement—it could simply rely on the court of appeals to determine jurisdiction on its behalf. Such a conclusion cannot be squared with the "legion" of authorities holding that appellants have the burden

of persuasion on the issue of appellate jurisdiction. 13E Fed. Prac. & Proc. Juris. § 3602.1 (3d ed.).

Finally, Sunoco's proposed rule is impractical and contrary to the basic tenets of our adversary system. Federal courts must consider *obstacles* to jurisdiction *sua sponte* because they have an obligation to respect the limited power granted by Article III and Congress. *See Kokkonen*, 511 U.S. at 377. But requiring courts to undertake a new duty of affirmatively searching out grounds to assert jurisdiction on behalf of one party (at the expense of another) would transform courts from neutral arbiters into active players in the drama. That would be unwise. *See Raley*, 642 F.3d at 1275.

B. The decision below is a result of Sunoco's deliberate tactical decisions.

It should not be overlooked that the decision below resulted from Sunoco's deliberate tactical decisions. Sunoco strategically chose to disclaim finality, challenging the damages awarded to the so-called "undivided" accounts on finality grounds rather than taking the district court's finality ruling at face value and attacking it on the merits. This tactical choice led Sunoco to refrain from an assertion that the judgment is final and appealable as Rule 28(a)(4)(D) requires, inviting dismissal of its appeal without any decision on the ultimate question of finality.

The court of appeals held Sunoco to its position and dismissed its appeal on the basis of its assertion that the judgment is not final. Sunoco cannot complain

that the court declined to go further and determine whether the judgment is, in fact, final because it was unnecessary for the court to resolve that question.

1. As Sunoco's petition explains, the district court awarded $16 million—roughly 10% of the damages—to class members that Sunoco cannot identify or locate due to its defective records (the "undivided" accounts). Pet. 13. The dispute over these "undivided" accounts did not originate with the disagreement about finality; it has pervaded this case. Sunoco contended in the district court that the "undivided" account claimants were not "ascertainable," so no class could be certified. The district court disagreed.

On appeal, Sunoco argued that awarding damages to these class members violated principles of standing, CA10.No.20-7072.Appellant.Br.at.34, 47-50, liability, *id.* at 34, 44, 46, and the class definition, *id.* at. 38, 43, along with its challenge to certifiability, *id.* at 83.

2. Sunoco's challenge to finality simply repackaged these merits arguments. It contended that the award to these accounts "in which Sunoco aggregates monies that it *does not divide* among owners of mineral interests because Sunoco has no name, address, or other information identifying such owners," CA10.No.20-7064.10.20.2021.Br.6, failed to divide the proceeds among all the class members as required to achieve a final judgment. *Id.* at 6-10.

The real strategy behind this gambit is clear from Sunoco's solution to the supposed "finality" problem. Sunoco urged the Tenth Circuit to secure finality by

(1) vacating the awards to the "undivided" accounts for lack of standing or (2) ordering the district court to "eliminate those damages." *Id.* at 10. In other words, Sunoco argues that damage awards to claimants who are part of the "undivided" accounts can *never* be final; in substance, its finality challenge is another attempt to cut its losses on the merits.

In sum, Sunoco elected to disavow finality because doing so allowed it to repackage its complaints about the damages awarded to the "undivided" accounts. Whether or not that decision was a shrewd strategy, it left open the very scenario that ultimately resulted: the court of appeals held that Sunoco had failed to establish appellate jurisdiction and had no right to "shift the burden of establishing appellate jurisdiction to this court," App.8, so it dismissed Sunoco's appeal without deciding whether the judgment was final. Because it was not necessary for the court of appeals to determine the finality question, the court prudently declined to address that question and confined itself "to deciding only what is necessary to the disposition of the immediate case." *Whitehouse v. Ill. Cent. R. Co.*, 349 U.S. 366, 372-73 (1955) (Frankfurter, J.).

IV. This petition presents a poor vehicle because Sunoco is currently attempting to relitigate its finality argument.

Due to Sunoco's tactical choice to disclaim finality and the court of appeals' narrow decision in this case, the litigation is still ongoing. The wheel is still in spin,

as Sunoco sought relief from the district court based on its contention that the judgment is not yet final and is now appealing the district court's adverse ruling. *See* p. 11, *supra*. This Court should not grant certiorari to review this disciplined application of Rule 28(a)(4) while Sunoco is trying to relitigate the ultimate issue. There is no reason for this Court to intervene now.

* * *

In sum, the Tenth Circuit issued a straightforward and fact-bound ruling based on the orthodox principle, memorialized in Rule 28(a)(4) and amply supported by this Court's cases, that the appellant bears the burden to establish appellate jurisdiction. Sunoco's decision to disclaim appellate jurisdiction for tactical reasons is unlikely to recur frequently and poses no important question of federal law—much less one on which the circuits are divided in any meaningful way. Finally, Sunoco is now seeking to relitigate the finality issue in the Tenth Circuit. Given all these circumstances, review is unwarranted.

CONCLUSION

The petition should be denied.

Respectfully submitted,

RUSSELL S. POST
Counsel of Record
OWEN J. MCGOVERN
BECK REDDEN LLP
1221 McKinney Street
Suite 4500
Houston, TX 77010
(713) 951-3700
rpost@beckredden.com

Counsel for Respondent