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

REPLY BRIEF

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REPLY BRIEF

The Tenth Circuit placed Sunoco between a rock and a hard place by refusing to exercise its well-established jurisdiction to decide its own appellate jurisdiction. In his brief in opposition, Cline suggests that there is no way out. In his view, a party facing a district court order it firmly believes is non-final must abandon its finality objection as the price of obtaining an appeal on the merits. Cline's position is deeply flawed and underscores the importance of this Court's review. When a district court labels a non-final order final and ripe for execution, a defendant does not have to choose between its finality objection and its appellate rights on the merits. Instead, it may preserve both (while honoring its obligation to bring jurisdictional defects to the court's attention) by filing a protective notice of appeal. The court of appeals then has unquestioned jurisdiction to decide the finality question under its well-established jurisdiction to determine its own jurisdiction. If the court of appeals agrees that the order is non-final, it makes its view clear by dismissing the appeal as non-final, and the district court must redress the finality problem before allowing execution. If the court of appeals views the order as final, then it can address the appeal on the merits. By inexplicably deviating from these well-established principles, the decision below creates chaos: an order that the district court views as final and ripe for execution even though it has never been subjected to appellate testing on the merits.

Cline attempts to defend this as an admirable "case study in judicial restraint." BIO.12. But that ignores both the federal courts' "virtually unflagging

obligation" to exercise the jurisdiction they possess, *Mata v. Lynch*, 576 U.S. 143, 150 (2015), and the myriad filings necessitated by the Tenth Circuit's abdication. The result is not a model of judicial restraint, but a recipe for disaster, with a district court bound and determined to move forward with the execution of a damages award never subjected to appellate testing. The stakes and class-action nature of this case only heighten the need for this Court's review. As Cline himself recognizes, courts have imposed special finality requirements in the class-action context to protect defendants and absent class members. The decision below transforms those special protections into a trap that can deprive a defendant with good-faith concerns about finality of any ability to test a nine-figure damages verdict on appeal. That result is untenable. Whether via certiorari or mandamus, this Court should not allow the Tenth Circuit's refusal to exercise its appellate jurisdiction to determine its own jurisdiction to stand.

I. The Tenth Circuit's Refusal To Determine Its Own Jurisdiction Is Egregiously Wrong And A Stark Departure From Uniform And Long-Settled Practice.

1. Protective notices of appeal play an essential role in preserving appellate rights when a party seeks to appeal a district court order of uncertain appealability. Pet.24. In such circumstances, litigants are not forced to forgo good-faith objections to appealability in order to pursue an appeal on the merits. To the contrary, as officers of the court, would-be appellants are duty-bound to notify the appellate court of potential jurisdictional defects. The solution

to this potential dilemma is straightforward: Appellants in such circumstances are advised to "consider a protective appeal." Fed. Ct. App. Manual §1:9 (7th ed.); *see also, e.g.*, *Hentif v. Obama*, 733 F.3d 1243, 1245 (D.C. Cir. 2013). That makes particular sense in the context of a money judgment that the district court labels "final," but that a would-be appellant believes is not. Absent a protective appeal, the would-be appellant would either have to suppress its good-faith concerns about finality or face a district court that views its order as ripe for execution even though it raises serious finality problems and has never been subjected to appellate review. A protective notice of appeal invoking the court of appeals' jurisdiction to determine its own jurisdiction eliminates that dilemma.

That is exactly the course Sunoco pursued here, explicitly invoking the Tenth Circuit's jurisdiction to determine its own jurisdiction by clarifying whether the district court had issued a final and appealable judgment. *See* Pet.15-16. And the first time around, the Tenth Circuit properly exercised its jurisdiction to determine its jurisdiction and agreed with Sunoco that the district court's "Rule 58" judgment was non-final.[1] But when confronted with two subsequent dubious efforts to cure the finality problem, the Tenth Circuit inexplicably changed course and refused to exercise

[1] Respondent suggests that Sunoco noticed that first appeal "prematurely," BIO.7, but he ignores that the district court explicitly labeled the order from which Sunoco appealed a "JUDGMENT" entered "pursuant to … Rule … 58." Pet.App.37. No rational party would take the risk of leaving such an order unappealed; the only thing premature was the district court's Rule 58 order.

the jurisdiction that Sunoco invoked. That was a blatant violation of the court's virtually unflagging duty to exercise the jurisdiction it possesses.

Rather than defend what the Tenth Circuit actually did, Cline attempts to shift the blame, faulting Sunoco for failing to shoulder the appellant's duty to establish appellate jurisdiction. BIO.15-16, 26-27 (citing Fed. R. App. P. 28(a)). But Sunoco did exactly that (virtually identically in all three appeals): It expressly addressed the Tenth Circuit's jurisdiction to determine its own jurisdiction and explained that it filed a protective appeal because the district court had issued a damages order that it views as final and ready for execution, but that Sunoco believes is not. CA10.No.20-7072.03.03.21.Br.15; CA10.No.20-7064.11.17.20.Br.; Pet.App.8.n.5. Neither Rule 28(a) nor anything else required Sunoco to do anything more, and Sunoco was certainly not required to tell the Tenth Circuit that the district court order was final and appealable when it believed in good faith that it was neither.

Cline's contrary insistence that Sunoco was obligated to make a "declaration" to the Tenth Circuit that "the appeal is from a final order or judgment," BIO.27 (quoting Fed. R. App. P. 28(a)), conflates jurisdiction to determine jurisdiction with jurisdiction over the merits and ignores the important office of a protective appeal. Such an appeal is protective precisely because the appellant believes that jurisdiction over the merits is lacking. The only jurisdiction the appellant must—and can in good faith—invoke is the court's jurisdiction to determine its own jurisdiction. Otherwise, the appellant would

be forced to choose between forfeiting its appellate rights on the merits and violating its duty to bring jurisdictional defects to the court's attention. Protective appeals eliminate those dilemmas, while the decision below entrenches them. The result is grossly unfair to litigants and decidedly unhelpful to courts that are duty-bound not to exercise jurisdiction where it is lacking.

Cline has no answer to any of that. He does not deny that "a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002). Nor does he deny that, "when a federal court has jurisdiction, it also has a 'virtually unflagging obligation ... to exercise' that authority." *Mata*, 576 U.S. at 150. And he neither identifies what more Sunoco could or should have done to invoke the Tenth Circuit's jurisdiction to decide jurisdiction nor grapples with the problem that his rule would force parties to suppress valid objections to appellate jurisdiction.

2. Cline's remaining efforts to fault Sunoco all share the common defect that a party aggrieved by an order that it believes is neither final nor correct is not forced to abandon one objection to pursue the other. Cline insists that courts do not ordinarily "maintain[] [their] jurisdiction *sua sponte*" when "the appellant ha[s] not established appellate jurisdiction." BIO.21. But Sunoco did not ask the Tenth Circuit to identify some source of jurisdiction itself. Sunoco asked the Tenth Circuit to exercise its jurisdiction to determine its own jurisdiction—jurisdiction that Cline nowhere disputes exists.

The Tenth Circuit's refusal to exercise that jurisdiction conflicts with the approach of every other circuit to consider the issue. While Cline faults Sunoco for not citing more circuit cases exercising jurisdiction to determine jurisdiction after the appellant identified a finality or other jurisdictional defect,[2] he conspicuously fails to produce a single other case in which a court of appeals asked to exercise that jurisdiction refused to do so.

Instead, Cline counters with inapposite cases involving appeals that were not protective and did not invoke the appellate courts' limited jurisdiction to determine jurisdiction, but instead involved avowed efforts to obtain a merits appeal without identifying a proper basis for it even after appellate issues had been raised by the appellate court. *See* BIO.1-2, 15-18, 27, 28 n.4, 29. For instance, in Cline's favorite case, *Raley v. Hyundai Motor Co.*, the appellant noticed an appeal even though she was no longer a named party to the district court proceedings. 642 F.3d 1271 (10th Cir. 2011) (Gorsuch, J.). When the court expressly asked the parties to address whether it had "legal authority" to hear the appeal, the appellant "had nothing to say

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[2] The universe of such cases is hardly limited to those cited in the petition. *See, e.g.*, *Berkshire Env't Action Team, Inc. v. Tenn. Gas Pipeline Co., LLC*, 851 F.3d 105, 107 (1st Cir. 2017) (resolving appellate jurisdiction where "petitioners themselves argue that we lack jurisdiction"); *Crucible Materials Corp. v. U.S. Int'l Trade Comm'n*, 127 F.3d 1057, 1060 (Fed. Cir. 1997) (resolving appellate jurisdiction where appellant filed "protective" appeal and both sides argued that decision was non-final); *Zeigler Coal Co. v. Kerr*, 240 F.3d 572, 573 (7th Cir. 2000) (per curiam) (resolving appellate jurisdiction and "agree[ing]" with petitioners that decision was not final and appealable).

on the subject" and simply declined to address it. *Id.* at 1275. The court quite understandably declined to "conjure up possible theories" of jurisdiction over the merits on her behalf, but did not cast the slightest doubt over the propriety of protective appeals in the process. *Id.* Similarly, in *Stephens v. Jones*, the court of appeals dismissed for "failure to prosecute" where the appellant "presented no argument, in either his jurisdictional brief or his merits briefs, regarding" the court's appellate jurisdiction. 494 F.App'x 906, 908 (10th Cir. 2012).[3]

Cline cannot produce a comparable case because there is none. The decision below is utterly incompatible with precedents of this Court and other circuits (as well as the Tenth Circuit's handling of the first appeal in this very case and one of the cases giving rise to the applicable class-action finality rules, *see Strey v. Hunt Int'l Res. Corp.*, 696 F.2d 87 (10th Cir. 1982)). Indeed, it is telling that even Cline himself did not seek dismissal of Sunoco's protective appeals on the ground that Sunoco needed to do something more to establish appellate jurisdiction. To

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[3] The other cases Cline cites are even further afield. *MacArthur v. San Juan County* dismissed an appeal for the appellant's "inexcusable" "omission" of the "standard of review" from his brief. 495 F.3d 1157, 1161 (10th Cir. 2007). *United States v. Ceballos-Martinez* dismissed an appeal for the appellant's failure to "establish compliance with the mailbox rule." 387 F.3d 1140, 1145 (10th Cir. 2004). The remaining cases involve either failure to follow basic rules like including necessary elements in a brief, *see, e.g.*, *Reyes-Garcia v. Rodriguez & Del Valle, Inc.*, 82 F.3d 11, 13, 16 (1st Cir. 1996), or failure to address known jurisdictional issues, *see, e.g.*, *United States v. 24.30 Acres of Land*, 105 F.App'x 134, 135 (8th Cir. 2004) (per curiam).

the contrary, Cline insisted that the district court's orders were final and appealable (and correct on the merits). But the Tenth Circuit refused to address the parties' extensive arguments on finality, appellate jurisdiction, or the merits, all because Sunoco maintained its good-faith objection to finality. That refusal cannot be squared with this Court's precedents or with the well-established practice of courts exercising their jurisdiction to decide jurisdiction to resolve protective appeals. Moreover, it leads directly to the untenable dynamic here, where a district court that views its order as final allows execution of an order that has not been subjected to appellate testing precisely because the defendant views it as non-final and shared that good-faith belief with the court of appeals.

In short, no amount of obfuscation or efforts to shift the blame can change the reality that the Tenth Circuit's refusal to exercise its undisputed jurisdiction to determine its jurisdiction is as indefensible and outlying as it is inexplicable. Simply put, Sunoco did not have to pretend to agree with the district court just to get the Tenth Circuit to determine whether the district court had issued a final judgment.

II. Left Standing, The Decision Below Will Sow Confusion And Chaos.

The practical consequences of the decision below are enormous. One need look no further than Cline's ongoing efforts to execute a $155 million damages award that has never been subjected to appellate review and that Sunoco continues to believe is non-final. But the consequences are hardly limited to Sunoco.

Protective notices of appeal are an essential feature of a multi-tiered judicial system, especially one that seeks to develop uniform rules for what makes a district court order "final" for purposes of appeal and execution. The Tenth Circuit's refusal to determine its own jurisdiction undermines the entire basis for protective appeals in situations where an appellant doubts that a judgment labeled "final" really is. Left standing, that bizarre decision will force appellants in Sunoco's position to choose between misrepresenting their views on finality and forfeiting their appellate rights. If the price of raising a finality objection is to plead an appellant out of appellate court, then would-be appellants will have little practical choice but to keep their jurisdictional qualms to themselves. That result not only is incompatible with lawyers' obligations to the courts, but directly increases the risk of courts of appeals' exercising jurisdiction erroneously.

The problem is particularly acute in the class-action context. Cline himself recognizes that courts impose special finality rules in the class-action context, BIO.1—rules designed to protect defendants and absent class members. But the decision below transforms those protections into jurisdictional traps. If a district court refuses to honor those heightened requirements for class actions—say, by allocating millions of dollars to accounts that involve the undifferentiated claims of thousands of unidentified class members—a defendant could not raise an objection without forfeiting its right to appeal on the merits. Thus, the decision below eviscerates not only appellate rights, but also the important safeguards reflected in class-action finality requirements.

Implicitly recognizing the inequity of depriving a defendant of its right to appeal a nine-figure damages award, Cline once again attempts to shift the blame to Sunoco, suggesting that Sunoco's position on finality was really the product of some sort of "tactical" gamesmanship. BIO.32-33. But Cline fails to identify what Sunoco could possibly have gained from calling the Tenth Circuit's attention to its finality concerns.[4] After all, what Sunoco wanted more than anything else was to preserve its right to appellate review of a massive damages verdict. That is why it filed protective appeals of orders it did not believe were final under Tenth Circuit precedent, lest it be deemed to have waited too long to appeal. Sunoco informed the Tenth Circuit of its good-faith belief that its own appeals were premature as part of its obligations to the court, not out of some clever stratagem to plead itself out of court. Moreover, Sunoco fully briefed both the jurisdictional issues and the merits issues for the Tenth Circuit. There was no effort to hide the ball or repackage jurisdictional objections as merits objections or vice-versa. All Sunoco sought to do was to abide by its obligations to the courts—which, again, demand candor about possible jurisdictional defects—

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[4] Cline also fails to acknowledge the most glaring finality problem. While he misleadingly suggests that all damages have been allocated to *class members*, BIO.4-6, in reality there is no dispute that damages have been allocated only to *accounts*, two of which are undivided accounts that represent *numerous* class members, leaving more than $16 million unallocated on a class-member basis. That problem is easy to solve, and Sunoco has offered solutions, yet Cline continues to resist them—not because he disagrees with the solutions, but because he recognizes that fixing this problem would ensure that Sunoco could appeal.

while preserving its right to a single bite at the appellate apple.

If anyone is engaged in gamesmanship, it is Cline, who is actively seeking to execute a judgment that has never been subjected to appellate testing. Cline urges the Court to deny the petition because the "wheel is still in spin" in the lower courts, as Sunoco is diligently seeking to get the Tenth Circuit to prevent the execution of a damages award that remains non-final and has never survived appellate testing on the merits. BIO.34-35. But while Cline emphasizes those ongoing proceedings, he neglects to mention that he is urging the Tenth Circuit to dismiss those proceedings for lack of jurisdiction (over Sunoco's objection). CA10.22-7017.07.14.22.Appellee.Br.3-9. And in the meantime, Cline continues to move full speed ahead (with the district court's blessing) with his aggressive efforts to seize Sunoco's assets and execute the $155 million damages award.

Make no mistake, Cline's position is not just that the Tenth Circuit was correct to dismiss Sunoco's earlier appeals. Cline's position is that by failing to abandon its good-faith belief that the $155 million damages award is non-final, Sunoco has somehow forever lost its right to appeal that award on the merits. That position is the very definition of gamesmanship, and it would work the very unfairness that protective appeals are designed to ameliorate. By denying Sunoco's protective appeals and refusing to exercise its virtually unflagging obligation to exercise its jurisdiction to determine its own jurisdiction, the Tenth Circuit has worked a great unfairness and created perverse incentives for future litigants to

withhold jurisdictional defects from the courts. Whether via mandamus, summary reversal, or plenary review, the time to intervene and restore appellate rights is now.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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