

No. _____

**In The
Supreme Court of the United States**

◆

SCOTT TIMBER CO. AND
CARPENTERS INDUSTRIAL COUNCIL,

Petitioners,

v.

OREGON WILD AND CASCADIA WILDLANDS,

Respondents.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

◆

PETITION FOR A WRIT OF CERTIORARI

◆

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QUESTION PRESENTED

An order remanding a decision to an administrative agency may be appealed under 28 U.S.C. § 1291 if the order has the hallmarks of finality, or under 28 U.S.C. § 1292(a)(1) if the order has the effect of an injunction.

The Ninth Circuit, straying from this Court’s jurisprudence, Federal Rule of Civil Procedure 24, and in tension with at least two other courts of appeals, has established a “general rule” that private-party intervenor defendants may not appeal a purported administrative remand order, regardless of the order’s practical finality or injunctive effect. Applying this rule to this case, the Ninth Circuit held, in conflict with the Tenth Circuit, that an order setting aside an agency’s approval of a project on public land, and preventing the project from proceeding unless a multiyear Environmental Impact Study is completed, may only be appealed by the agency, not by the project’s private proponents that were granted intervention as of right.

The question presented is: Does jurisdiction under 28 U.S.C. §§ 1291 or 1292(a)(1) over a defendant-intervenor’s appeal in an action challenging an agency decision depend on whether the government chose to appeal, or is jurisdiction based on, respectively, a “practical finality” test, or whether the order effectively grants an injunction?

PARTIES TO THE PROCEEDING

Petitioners, intervenor-defendant-appellants below, are Scott Timber Co. and Carpenters Industrial Council (Carpenters).

Respondents, plaintiffs-appellees below, are Oregon Wild and Cascadia Wildlands.

The United States Bureau of Land Management (BLM), defendant in the district court, voluntarily dismissed its appeal prior to commencement of briefing in the Ninth Circuit.

RULE 29.6 STATEMENT

Scott Timber Co., an Oregon corporation, is a subsidiary of RLC Industries Co. and neither corporation issues shares to the public. No publicly-held corporation owns 10% or more of Scott Timber Co.'s or RLC Industries Co.'s stock. Carpenters Industrial Council is an Oregon non-profit corporation that does not issue stock.

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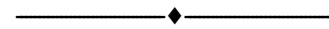
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PETITION FOR A WRIT OF CERTIORARI

Scott Timber Co. and Carpenters Industrial Council respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.



OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1) is not reported in the Federal Reporter, but is available at *Oregon Wild v. Bureau of Land Management*, 690 Fed. Appx. 987 (9th Cir. May 11, 2017).

The opinion of the district court (Pet. App. 4) is unreported, but is available at *Oregon Wild v. Bureau of Land Management*, No. 6:14-CV-0110-AA, 2015 WL 1190131 (D. Or. Mar. 14, 2015).



JURISDICTION

Jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. § 704. The United States Court of Appeals for the Ninth Circuit entered its judgment on May 11, 2017 and denied a timely petition for rehearing on July 19, 2017. (Pet. App. 40-41.) On October 12, 2017, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 16, 2017. *See* No. 17A389.

This Court has jurisdiction under 28 U.S.C. § 1254(1).



**CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED**

Sections 1291 and 1292(a)(1) of title 28, United States Code, provide in relevant part as follows:

The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * .

28 U.S.C. § 1291.

(a) * * * [T]he courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions * * * .

28 U.S.C. § 1292(a)(1).



STATEMENT OF THE CASE

I. The context design and implementation of the White Castle timber sale.

The case presents the important legal issue of whether there is jurisdiction for intervenor-defendant's appeal when an agency decides not to appeal. The "general rule" applied by the Ninth Circuit wrongfully premises jurisdiction on the identity of the appellant, not on the effect of a ruling on the parties.

The underlying litigation concerns a small timber sale in the midst of 2.1 million acres of timberlands in Western Oregon. Congress has long designated the lands for timber production under the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 (O&C Act), 50 Stat. 876 (Aug. 28, 1937), 43 U.S.C. §§ 2601-2605.¹ The O&C Act mandates that these lands "shall be managed, . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the princip[le] of sustained yield. . . ." *Id.* § 2601. Congress made clear that timber production was to be the "dominant use" of "a vast, self-sustaining timber reservoir for the future." *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 914 F.2d 1174, 1184 (9th Cir. 1990) (quoting H.R. Rep. 75-1119, at 2 (1937)).

In 2010, former Secretary of the Interior Kenneth Salazar directed the Bureau of Land Management in southwest Oregon to develop demonstration pilot

¹ *Formerly codified as* 43 U.S.C. §§ 1181a-1181f.

projects to examine variable retention timber harvest as advocated by forestry professors Dr. Jerry F. Franklin and Dr. K. Norman Johnson. *See* Jerry F. Franklin and K. Norman Johnson, *A Restoration Framework for Federal Forests in the Pacific Northwest*, 110 J. FORESTRY 429 (2012). Unlike clearcutting, variable retention harvest retains “significant elements of the preharvest stand . . . to enrich the biodiversity, ecological processes, and structural diversity of the postharvest stand.” *Id.* at 433-34.

As directed by the Secretary, BLM’s Roseburg District developed the Roseburg Secretarial Demonstration Pilot Project (Roseburg Pilot Project), comprised of the Buck Rising and White Castle timber sales. The proposed White Castle timber sale involves 265 acres of forest, retains 78 acres uncut, and applies variable retention harvest to 187 acres. These 187 acres, an area about the size of a typical golf course, also are less than 0.1% of the 211,000-acre Myrtle Creek, Little River, and Mid South Umpqua planning area for the Roseburg Pilot Project, and less than 0.002% of the critical habitat designation for the northern spotted owl. *Cf. Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 2 (D.C. Cir. 2017) (describing critical habitat designation as “a huge swath of forest lands”). The proposed Buck Rising sale included an additional 78 acres of variable retention harvest and variable density thinning.

Before deciding to proceed with the Roseburg Pilot Project, BLM evaluated the project’s environmental consequences as required by the National

Environmental Policy Act (NEPA). Under NEPA, federal agencies must prepare an environmental impact statement (EIS) for “major Federal actions significantly affecting the quality of the human environment. . . .” 42 U.S.C. § 4332(2)(C). “An agency is not required to prepare a full EIS if it determines – based on a shorter environmental assessment (EA) – that the proposed action will not have a significant impact on the environment.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 16 (2008); see 40 C.F.R. § 1501.4(b). In such cases, the agency may issue a Finding of No Significant Impact (FONSI). 40 C.F.R. § 1508.13.

BLM issued an EA and FONSI for the Roseburg Pilot Project in June 2012, and a decision record authorizing the White Castle timber sale that August. BLM “tiered” the EA to an EIS it had previously prepared for the governing land management plan, which provided additional environmental review and designated the Roseburg Pilot Project’s area of O&C lands for timber production.

BLM also consulted with the Fish and Wildlife Service (Service) under Section 7 of the Endangered Species Act regarding the effect of the project on the spotted owl and its critical habitat. 16 U.S.C. § 1536(a)(2). Although the project is located within designated “critical habitat” for the northern spotted owl, the Service concluded the project would not jeopardize the continued existence of the owl, nor would it adversely modify the owl’s critical habitat. The Service further concluded the small scope of the project would not result in any “take” of owls; that is, it would not

“harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” any owls. *See* 16 U.S.C. § 1532(19) (definition of take). Nor would the project result in any “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” *See* 50 C.F.R. § 17.3 (regulatory definition of “harm”).

Scott Timber purchased, at auction, the White Castle timber sale, for a bid price of \$1,335,553.70. The sale is expected to provide 6.4 million board feet of timber to supply mills in Douglas County, Oregon operated by Scott Timber’s sister company, Roseburg Forest Products. These mills employ over 2,700 people, providing family-wage jobs otherwise in short supply in rural southwest Oregon. The mills also employ 1,600 members of Carpenters Industrial Council, a labor union that represents forest products workers in Oregon, Washington and northern California. Carpenters is chartered by the United Brotherhood of Carpenters and Joiners of America. Carpenters’ members have suffered job losses as a result of restrictions in timber harvest over the past two decades, with few prospects to replace their lost jobs at a comparable wage in their home towns. Projects like White Castle support this employment and the stability of these rural communities.

Because the White Castle timber sale occurs on O&C land, 50% of the timber revenue (or about \$668,000) is distributed directly to local counties. *See* 43 U.S.C. § 2605(a). These monies fund essential

county services including schools, road maintenance, and the sheriff's department.

II. Litigation in the district court.

Respondents, two environmental groups, filed a Complaint challenging the White Castle timber sale in January 2014. They alleged BLM violated NEPA by failing to prepare an EIS, failing to take a "hard look" at the consequences of the project, and failing to consider a reasonable range of alternatives. They also alleged that BLM violated the governing land use plan, and by extension the Federal Land Policy & Management Act (FLPMA), 43 U.S.C. § 1701 et seq., by failing to credit results of "citizen surveys" for red tree voles, a spotted owl prey species.

Before BLM answered, Scott Timber and Carpenters moved to intervene pursuant to Fed. R. Civ. P. 24(a)(2). They demonstrated that their interests in the timber from the project could be impaired by the disposition of the action, and that BLM would not adequately protect those interests, as BLM was obligated to represent the broader public interest and BLM had, in the past, cancelled timber sales over the objection of Scott Timber. The district court granted the motion.

The parties filed cross-motions for summary judgment. On March 14, 2015, the district court granted in part plaintiffs' motions, and denied the Government's and intervenors' independent motions. (Pet. App. 39.)

The district court held that an EIS was “required” under NEPA in light of several “intensity” factors. (Pet. App. 20.) Specifically, the court found that the “controversy” and “uncertainty” factors weighed in favor of an EIS, despite the fact this project uses well-understood techniques on lands that have long been designated for timber production. (Pet. App. 23-24, 26.) It also found the “precedent” and threatened species factors favored preparation of an EIS, though it conceded this project will not bind any further actions and there would be no injury (take) to northern spotted owls. (Pet. App. 29-30.) For similar reasons, the court found BLM failed to consider a reasonable range of alternatives and had not taken a “hard look” at the project’s environmental consequences. (Pet. App. 13-18, 31-33.) It did not reach the FLPMA claims.

The district court also expressly denied intervenors’ summary judgment motion and entered judgment against Scott Timber and Carpenters in addition to BLM.

By its own terms, the order was not a remand. Instead, the district court stated it “holds unlawful and vacates BLM’s analysis and approval of the White Castle Project.” (Pet. App. 38.) The order formally “SET[] ASIDE” the project. (Pet. App. 39.) *See* 33 Charles A. Wright, Charles H. Koch, Jr., Fed. Prac. & Proc. Judicial Review § 8312 (1st ed.) (stating a court may “Reverse and Vacate Completely” an agency action rather than remanding it). The court declined to issue an explicit injunction, as it found vacatur would supply all necessary relief. (Pet. App. 38-39.) This was because

“by law, BLM cannot proceed with the project until it complies with NEPA.” (Pet. App. 39.) The district court did not remand the EA/FONSI to BLM for the agency to review whether an EIS was required or take any other specific action. Instead, it held BLM “violated NEPA by not issuing an EIS.” (Pet. App. 33.)

III. Appeal and dismissal.

Initially, both intervenors and the Government filed notices of appeal. BLM subsequently withdrew its appeal. Respondents subsequently argued that Scott Timber’s and Carpenters’ appeal should be dismissed because the district court’s vacatur of the White Castle decision and EA was in fact a remand order that Scott Timber could not appeal.

Respondents relied primarily on *Alsea Valley Alliance v. Dep’t of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2004), which noted, “[a]lthough we conceive of none, there may be circumstances that would afford a non-agency litigant the ability to appeal a remand order, but we need not reach that question.” *Alsea* also makes the remarkable assertion that “only *agencies* compelled to refashion their own rules face the unique prospect of being deprived of review altogether.” *Id.*; cf. *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1075 (9th Cir. 2010) (stating that “generally, a remand order may be deemed a final order only where the *agency* appeals the remand”). Scott Timber maintained that jurisdiction attached under § 1291 because the district court

conclusively resolved the issue of whether an EIS was required, and under § 1292(a)(1) the order effectively enjoined BLM from proceeding with the project.

On May 11, 2017, the Ninth Circuit panel dismissed Scott Timber’s appeal. (Pet. App. 3.) The court recited its precedents that “[w]hen, as here, the agency subject to the remand order chooses not to appeal, private litigants generally cannot appeal the remand order.” (Pet. App. 2.) The panel relied on *Alsea*, 358 F.3d at 1184, and *Pit River*, 615 F.3d at 1074-77, for this “general” rule. (Pet. App. 2.) Thus, it dismissed the appeal without applying its three-part test for finality of a remand order. *See Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949). The failure to assess finality through the three-part test highlights the Ninth Circuit’s view that a private party simply cannot appeal if an agency chooses not to, which is illustrated by the statement in *Alsea* that though there may be circumstances in which a private party could appeal an agency remand order, “we conceive of none.” *Id.*

The court also declined to find jurisdiction under § 1292(a)(1). Although the court appeared to concede the district court order had the effect of an injunction, the panel declined to hold that the order precluding Scott Timber from harvesting timber under its contract was in effect an injunction because to do so “would effectively undo the general rule that private parties cannot appeal a remand order when the agency

decides not to appeal.” (Pet. App. 3.) *See also Pit River*, 615 F.3d at 1078 (declining to find jurisdiction under § 1292(a)(1) where challenged leases “could not be extended as a matter of law”). Scott Timber’s and Carpenters’ petition for rehearing *en banc* was denied in July 2017. (Pet. App. 40-41.)

Thereafter, BLM informed petitioners that White Castle could not proceed without a reversal of the district court’s opinion because of changes to the underlying land use plan. (Pet. App. 53-55.) Scott Timber sought recall of the mandate based on BLM’s letter confirming that there would be no remand proceedings, as the letter proved false the court of appeals’ assumption that Scott Timber could obtain relief via administrative proceedings on remand. Scott Timber again explained there would be no way to obtain review of the decision whether to prepare an EIS, as the district court explicitly held “BLM violated NEPA by not issuing an EIS.” (Pet. App. 33.) The court of appeals denied recall, without comment, on December 4, 2017.



REASONS FOR GRANTING THE PETITION

- I. **Lower courts are split on how to assess whether an order vacating and/or remanding an agency decision may be appealed under 28 U.S.C. §§ 1291 or 1292(a)(1), and this split has led to inconsistent results.**

The Ninth Circuit held below that “[w]hen, as here, the agency subject to the remand order chooses

not to appeal, private litigants generally cannot appeal the remand order.” (Pet. App. 3.) That decision contributes to a conflict among the lower courts on how to assess whether an order vacating an agency decision may be appealed by a defendant-intervenor under 28 U.S.C. §§ 1291 or 1292(a)(1). The Third and Tenth Circuits apply a flexible test for assessing the finality of a remand order. However, the Ninth Circuit applies a more rigid “general rule” – which has yet to be proven any less than absolute with respect to defendant-intervenors – that private litigants cannot appeal a remand order if the government chooses not to appeal. The Ninth Circuit’s rule improperly premises jurisdiction not on the effect of the district court’s order but rather on the identity of the appealing party.

As this case illustrates, these differing approaches to determining a remand order’s finality lead to inconsistent results in cases with similar facts. The Tenth Circuit has held that an intervenor may appeal an order requiring that a full, multiyear EIS be prepared before a project may proceed, even when the agency subject to the order does not appeal. However, the Ninth Circuit below, in accord with the Eighth and D.C. Circuits, ruled that an intervenor may not appeal an order vacating a project approval and requiring an EIS before the project may proceed.

A. This Court has used a flexible test to assess a remand order's finality.

This Court has not yet addressed “the broad question whether remands to administrative agencies are always immediately appealable.” *Sullivan v. Finkelstein*, 496 U.S. 617, 623 (1990). It has, however, stated “there is, of course, a great variety of remands, reflecting in turn the variety of ways in which agency action may be challenged in the district courts and the possible outcomes of such challenges.” *Id.* The Court has taken a practical approach to assessing the finality of administrative remands. Thus, for example, the Court reversed the Ninth Circuit’s decision in *Forney v. Apfel*, 524 U.S. 266 (1998), that a remand to the Social Security Administration precluded an appeal by a prevailing party because she may secure all the relief she seeks. The Court explained that the remand only resulted in “further delay and risk” and provided the claimant with “half a loaf,” that is “some, but not all, of the relief she requested.” 524 U.S. at 271. Here, the district court’s order imposed similar delay and risk without any corresponding benefit.

B. The Third and Tenth Circuits have also adopted flexible tests for determining a remand order's finality.

Following *Finkelstein*, the Third and Tenth Circuits established a flexible test for assessing a remand order’s finality. According to the Third Circuit, agency remands are appealable final orders “when a district court finally resolves an important legal issue in

reviewing an administrative agency action and denial of an appeal would foreclose appellate review as a practical matter.” *Bridge v. U.S. Parole Comm’n*, 981 F.2d 97, 102 (3d Cir. 1992) (citing *Finkelstein*, 96 U.S. at 625-29).

Similarly, the Tenth Circuit “has developed a particular form of practical finality . . . specifically as a prudential limitation on the administrative-remand rule.” *Baca-Prieto v. Guigni*, 95 F.3d 1006, 1009 (10th Cir. 1996). “The practical finality rule ‘borrows some concepts from the collateral order doctrine’ but is broader and more practical in its application.” *Miami Tribe of Okla. v. United States*, 656 F.3d 1129, 1140 n.13 (10th Cir. 2011) (quoting *Graham v. Hartford Life & Accident Ins. Co.*, 501 F.3d 1153, 1158 n.3 (10th Cir. 2007)). So the “general proposition” that remands are not final “is not to be applied if it would violate basic judicial principles.” *Bender v. Clark*, 744 F.2d 1424, 1427 (10th Cir. 1984). As such, “[t]he critical inquiry is whether the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review.” *Id.* Prefiguring these cases, the Tenth Circuit permitted intervenor-defendants to prosecute an independent appeal of a remand in *Ringsby Truck Lines, Inc. v. United States*, 490 F.2d 620 (10th Cir. 1973), *cert. denied*, 419 U.S. 833 (1974). *Ringsby* held that “[t]o deny jurisdiction . . . would effectively signal the end of appellants’ cause of action without any judicial review,” 490 F.2d at 624, a holding which resonates in the present case.

The Tenth Circuit also takes a practical approach to “considering whether a remand has occurred in a given case, [under which] appellate courts must consider the nature of the agency action as well as the nature of the district court’s order.” *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 697 (10th Cir. 2009). Applying this approach, the court held that a district court order requiring BLM to prepare an EIS before allowing oil and gas development on public land was not an administrative remand but a final order reviewable under 28 U.S.C. § 1291. *Id.* at 698-99.

C. The Ninth Circuit has adopted a “general rule” that private litigants may not appeal when the government chooses not to.

The Ninth Circuit’s approach to assessing the finality of an order vacating an agency decision is far less practical and flexible than the tests applied by the Tenth and Third Circuits. The Ninth Circuit has developed a “general rule” that deprives a defendant-intervenor of an appeal of an agency remand order when the Government defendant chooses not to appeal. *See Pit River*, 615 F.3d at 1075 (“generally, a remand order may be deemed a final order only where the *agency* appeals the remand”). The Ninth Circuit in this case simply looked to the identity of the appellant and did not evaluate the nature of the “remand” to evaluate the finality of the district court’s order.

The Ninth Circuit also applies a rigid approach to assessing whether an order is a “remand” subject to its general rule. Indeed, in the decision below, the court held that the district court’s order was a “remand” even though the district court did not remand to BLM, the district court set aside BLM’s decision, and BLM could have and – indeed now has – decided not to conduct additional NEPA review.

D. The Ninth Circuit rule cannot be reconciled with the Tenth Circuit’s decision that a defendant-intervenor may appeal an order requiring an EIS before a project may proceed even though the government decided not to appeal.

As this case illustrates, application of the tests used by the Ninth and Tenth Circuits to assess whether a private litigant can appeal an order vacating an agency decision has yielded inconsistent results in cases with similar facts.

In the decision below, the Ninth Circuit found that Petitioners could not appeal an order that required BLM to complete an EIS before timber sales may proceed. According the court, “[a]lthough the district court here did not explicitly remand to the BLM for further proceedings, it functionally did so” by stating that “BLM cannot proceed with the project until it complies with NEPA.” (Pet. App. 3.) The Ninth Circuit’s decision is in accord with the Eighth and D.C. Circuits, which have ruled that an intervenor may not appeal an order

requiring that an EIS be prepared before a project may proceed, where the government does not appeal. *Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653, 658 (D.C. Cir. 2013); *Izaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751, 763 (8th Cir. 2009).

In *Sierra Club*, the court stated, “[t]here is a limited exception permitting a government agency to appeal immediately [from a remand order under § 1291], but that path is not normally available to a private party.” 716 F.3d at 656 (second alteration in original). The court explained that “[t]he reason for this asymmetry is that a government agency cannot later challenge its own actions complying with a remand order, whereas a private party dissatisfied with the action on remand may still challenge the remanded proceedings – as well as the remand order requiring them – after the proceedings are complete. *Id.* 656-57. Like the Ninth Circuit, the D.C. Circuit ignored the facts that a private litigant cannot challenge a remand order requiring an EIS rather than an EA after an agency has completed an EIS, or that an agency may decide not to conduct an EIS and instead abandon the project.

By contrast, in *Richardson*, the Tenth Circuit held that a private litigant could appeal an order that required BLM to prepare an EIS before oil and gas lease sales could proceed. 565 F.3d at 697. The court reasoned that the NEPA review and decision-making process was not a decision adjudicating private rights of the sort that the administrative remand rule usually applies, and that BLM retained the option of refusing to conduct additional environmental review and

instead abandoning its proposal to allow for oil and gas leasing. *Id.* at 698. The court noted that accepting the contrary argument would result in “drastic” consequences such that nearly every APA case would conclude with a non-appealable remand. *Id.* at 699.

II. The Ninth Circuit’s rule is contrary to the plain language of 28 U.S.C. §§ 1291 and 1292.

The Ninth Circuit’s “general rule” departs from the plain language of 28 U.S.C. §§ 1291 and 1292(a)(1) and engrafts a new requirement that undermines the statutory directives. These statutes are clear that courts of appeals “*shall* have jurisdiction” from all final decisions of the district courts and from interlocutory orders that have the “practical effect” of granting injunctions. *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981). The statutes do not make a private party defendant-intervenor’s right to appeal contingent on a decision of the Government defendant to appeal. No reference to an *agency* decision to appeal is not found in the plain language of the statutes. Rather, jurisdiction is based upon decisions of the *district court* irrespective of who brings the appeal.

To be sure, an intervenor that seeks to appeal must have Article III standing to do so. *Diamond v. Charles*, 476 U.S. 54, 62, 68-69 (1986). Here, no one disputes petitioners’ standing. Scott Timber has a timber sale contract with BLM that cannot proceed under the district court’s opinion and order. Thus, both Scott Timber, which owns the contract, and Carpenters, whose

members will be paid to process the timber, are injured by the judgment below. They have the “direct stake” required to seek appeal or review. *Cf. Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

Sections 1291 and 1292(a)(1) govern the class of decisions that may be appealed. Section 1291 permits appeal of “all final decisions of the district courts of the United States. . . .” 28 U.S.C. § 1291. The statute promotes efficiency by providing for a single appeal in the ordinary course. *Microsoft v. Baker*, 137 S. Ct. 1702, 1712 (2017). And it is to be given “a practical rather than a technical construction.” *Id.* (quoting *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 171 (1974)). Thus whether an order constitutes a “final decision” involves consideration of the posture of the case, the interests of the parties, and other factors. Section 1292(a)(1) permits appeal of orders “granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.” 28 U.S.C. § 1292(a)(1). The terminology of the order is not controlling if it has the “practical effect” of an injunction; jurisdiction is available if the order would have serious consequences and would not otherwise be appealable. *Carson*, 450 U.S. at 83-84. The Ninth Circuit’s rule departs from the language and purpose of both statutes.

A. The Ninth Circuit’s “general rule” results in the erroneous determination that the district court’s order requiring preparation of an EIS is not a final decision under § 1291.

The Ninth Circuit’s rigid view that remand orders are not final where the agency does not appeal ignores the “great variety of remands” the Court recognized in *Finkelstein*. It ignores “[t]he reality . . . that NEPA cases frequently pit private, state, and federal interests against each other. Rigid rules in such cases contravene a major premise of intervention – the protection of third parties affected by pending litigation. Evenhandedness is of paramount importance.” *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 971 (3d Cir. 1998). The decision below also ignores the type of order at issue here, which is a complete vacatur of an agency action pending conduct of *additional* procedure (preparation of an EIS) which may never happen.

There is little question that under the rule espoused by the Eighth, Ninth, and D.C. Circuits, the decision below would be appealable by an agency. See *Izaak Walton League*, 558 F.3d at 763 (holding that finality “might apply, for example, if the *Forest Service* had appealed to argue that it should be permitted to consider whether a modified EA and FONSI would be sufficient, rather than a more costly and time-consuming EIS.”) (emphasis added). Were this Court to require the courts of appeals to apply a context-specific test, there also would be jurisdiction over Scott Timber’s and Carpenters’ appeal.

All three finality factors are present here. First, the district court conclusively resolved a simple, discrete, and separable legal issue when it held that the agency must prepare an EIS rather than an EA for a 187-acre project with no injury to owls. (Pet. App. 33.) The district court entered final judgment for plaintiffs and against Scott Timber, conclusively resolving the merits issue at the heart of the appeal. Second, the decision below forces application of an erroneous rule which may result in a wasted proceeding if not reversed. A decision that the EA and FONSI are sufficient would avoid the need to prepare a voluminous, time-consuming, and expensive EIS. Third, review will be foreclosed if immediate appeal is unavailable since BLM will not proceed with the White Castle project and the timber sale unless the appeal is successful. Further, the issue of whether BLM must prepare an EIS in the first instance would be moot once the EIS is prepared.

B. The Ninth Circuit’s “general rule” erroneously holds that a district court’s order requiring preparation of an EIS is not an injunction under § 1292(a)(1).

The rule espoused by the court below, and by the Eighth and D.C. Circuits, improperly subsumes jurisdiction under § 1292(a)(1) into the “general rule” that an intervenor may not appeal a “remand” order. The Ninth Circuit reasons that if there is no finality jurisdiction under § 1291, that dictates there is no injunction jurisdiction under § 1292(a)(1) and it need not

assess whether the order has the practical effect of an injunction. “Were we to accept Appellants’ argument that jurisdiction exists under § 1292(a)(1) because the remand order had the practical effect of enjoining the BLM from carrying out the project until it complies with NEPA, we would effectively undo the general rule that private parties cannot appeal a remand order when the agency decides not to appeal.” (Pet. App. 3.) The Eighth and D.C. Circuits also render § 1292(a)(1) meaningless and contingent on the jurisdictional inquiry under § 1291. In *Izaak Walton League*, the court issued an injunction, but that was held not to give jurisdiction as “the Forest Service would have authority to halt further activity on the proposed trail pending its completion of an EIS.” 558 F.3d at 763. And in *Sierra Club*, the D.C. Circuit refused to consider, for jurisdictional purposes, the injunction entered against the Rural Utilities Service, reasoning that “the injunction against the Service serves no function beyond the remand order.” 716 F.3d at 660.

As with § 1291 jurisdiction, a context-specific test for appealability under § 1292(a)(1) would have allowed Scott Timber and Carpenters to appeal even if the agency did not. The context-specific test of whether an order has the practical effect of an injunction should not be abandoned in evaluating jurisdiction for defendant-intervenor appeals of orders validating agency decisions. Under this test, an order satisfies § 1292(a)(1) if it (1) has the practical effect of entering an injunction, (2) has serious, perhaps irreparable, consequences, and (3) is such that an immediate appeal is

the only effective way to challenge it. *Alsea*, 358 F.3d at 1186. “In determining the appealability of an interlocutory order under 28 U.S.C. § 1292(a)(1),” courts “look to its substantial effect rather than its terminology.” *Turtle Island Restoration Network v. U.S. Dep’t of Commerce*, 672 F.3d 1160, 1165 (9th Cir. 2012) (quoting *Armstrong v. Wilson*, 124 F.3d 1019, 1021 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998)).²

With respect to the first factor, the district court expressly acknowledged that its vacatur of BLM’s decision, and holding that an EIS is required, had the practical effect of an injunction. Indeed, the court refused to grant injunctive relief because “the vacatur of BLM’s inadequate EA and authorization of the White Castle project will provide sufficient relief, since, by law, BLM cannot proceed with the project until it complies with NEPA.” (Pet. App. 39.) This is a prime example of an order that has the practical effect of an injunction. *See Comm. on Judiciary of U.S. House of Reps. v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (holding a declaratory judgment was “the functional equivalent of an injunction” since “we have long presumed that officials of the Executive Branch will adhere to the law as declared by the court”). Here, it stood to reason, and came to pass, that BLM would prohibit further

² *Accord United States v. Cities Serv. Co.*, 410 F.2d 662, 663 n.1 (1st Cir. 1969); *McCoy v. La. St. Bd. of Educ.*, 345 F.2d 720, 721 (5th Cir. 1965) (quotation omitted); *Ne. Ohio Coal. for Homeless & Serv. Employees Int’l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1005 (6th Cir. 2006); *Adams v. Vance*, 570 F.2d 950, 953 (D.C. Cir. 1978).

work on White Castle absent judicial blessing of its NEPA documentation.

The second and third factors, evaluate whether there will be serious or irreparable harm if the appeal is dismissed and whether immediate appeal is the only effective way to challenge the validity of the EA and FONSI. The Court has emphasized that serious or irreparable harm relates to the *merits* of the controversy and whether denial of jurisdiction will irreparably foreclose appellant from obtaining a ruling on its legal claims. *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 482 (1978); *see Armstrong*, 124 F.3d at 1022. Plainly, resolution of the legal issue of whether an EIS is required cannot be delayed until after an EIS is prepared without foreclosing review. *Armstrong* set forth the rule that where delay of the appeal will not “clarify the questions on appeal” and will not change the “appellate perspective,” the appeal may proceed under § 1292(a)(1). *Id.* (quoting *Frederick L. v. Thomas*, 557 F.2d 373, 380 (3d Cir. 1977)). Preparation of an EIS will not change the appellate perspective. In fact, review will be foreclosed if BLM never prepares an EIS because the issue of the validity of the EA and FONSI becomes moot. Plainly, resolution of the legal issue of whether an EIS is required cannot be delayed until after an EIS is prepared without foreclosing review.

III. The rule below is contrary to intervenors' rights under Rule 24 and this Court's decisions.

In addition to departing from the plain language of jurisdictional statutes, the decision below conflicts with the rights of intervenors under Rule 24 and with this Court's intervention jurisprudence.

A fundamental premise of intervention is the right to an independent appeal. “[I]ntervenors are considered parties entitled, among other things, to seek review by this Court. . . .” *Diamond*, 476 U.S. at 68 (citing *Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338 (1945)). Justice Jackson wrote for this Court, construing Rule 54(b), that “[t]he liberalization of our practice to allow more issues and parties to be joined in one action and to expand the privilege of intervention by those not originally parties has increased the danger of hardship and denial of justice through delay if each issue must await the determination of all issues as to all parties before a final judgment can be had.” *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). The 1966 adoption of expanded provisions of Rule 24 responded to similar concerns. The amended rule “provides that an applicant is entitled to intervene in an action when [its] position is comparable to that of a person under Rule 19(a)(2)(i), as amended, unless [its] interest is already adequately represented in the action by existing

parties.” Advisory Committee Note, 1966 Amendment to Fed. R. Civ. P. 24.

The decision below, made in the face of this Court’s liberalizing decisions in *Finkelstein* and *Forney*, is part of an unfortunate trend whereby the appellate courts have continued to resist the full import of Rule 24, and undermine the rights of intervenors when an agency is a defendant (or when the case challenges agency action). This Court emphasized in *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528 (1972), that a party seeking intervention easily meets the adequacy-of-representation requirement “if the applicant shows that representation of [its] interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.” *Id.* at 538 n.10. From that point, however, the courts of appeals developed a set of presumptions that slowly elevated this “minimal” burden. The Ninth Circuit has stated a presumption of adequate representation by the Government “when the government is acting on behalf of a constituency that it represents,” and is “charged by law with representing the interests of the absentee.” *United States v. City of Los Angeles*, 288 F.3d 391, 401 (9th Cir. 2002) (internal quotation marks omitted).

The growth of the government presumption in the courts of appeals had little basis in Supreme Court jurisprudence. The Ninth Circuit caselaw developed from *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976), which relied on dictum from *Sam Fox Publishing Co. v. United States*, 366 U.S. 683,

689 (1961). *See Forest Conserv. Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) (quoting *Rizzo*, 530 F.2d at 505); *City of Los Angeles*, 288 F.3d at 401. *Sam Fox* was decided before the 1966 establishment of Rule 24 in present form.

The Seventh Circuit has taken the logic of this presumption to the extreme, holding that no private party can intervene in NEPA litigation. *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982) (holding “[i]n a suit such as this, brought to require compliance with federal statutes regulating governmental projects, the governmental bodies charged with compliance can be the only defendants”); *accord 1000 Friends of Wisc. Inc. v. U.S. Dep’t of Transp.*, 860 F.3d 480, 482 (7th Cir. 2017) (holding that NEPA “applies only to the national government” and dismissing, for lack of standing, Wisconsin’s appeal of a decision halting a highway project).³

The decision below highlights a departure from this Court’s precedents that is unlikely to resolve without intervention from the Court. Certiorari is warranted.

³ Judge Feinerman, sitting by designation from the Northern District of Illinois, dissented. He noted “the district court entered judgment against both USDOT and WisDOT, and that the judgment prohibits Wisconsin from proceeding with the project even with its own money. . . .” *1000 Friends*, 860 F.3d at 488.

IV. Review is important to ensure that appeal of agency action is not controlled by the whims of the agency.

The question presented here is fundamentally important. First, the decision below meaningfully abridges the rights of parties affected by litigation with the government (that is, intervenors), improperly and inequitably denying them access to the appellate courts. Second, this case raises issues on the proper construction of sections 1291 and 1292, which the Court has repeatedly recognized to be of fundamental importance. Third, the underlying environmental law issues are of national importance.

The Ninth Circuit's rule premises jurisdiction not on the effect of the district court's order, but rather on the identity of the appealing party. In doing so, it gives certain parties veto power over which cases reach the appellate courts, resulting in caselaw that is skewed in one direction. The essence of BLM's approval of White Castle was the decision not to prepare an EIS (the FONSI). The decision not to prepare an EIS is recognized as a separate and final agency action subject to judicial review under the APA's "arbitrary and capricious" standard. *Rattlesnake Coal. v. E.P.A.*, 509 F.3d 1095, 1104 (9th Cir. 2007); *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 763-64 (2004). It is unjust to close the court of appeals' doors to defendant-intervenors that support the agency NEPA decision while swinging them wide open to plaintiffs that want to invalidate the decision.

The rule advanced by the Ninth Circuit ensures that district court orders striking down decisions to forego an EIS will be insulated from appellate review, while orders affirming such agency decisions will always be appealable. This prevents review of district court decisions, including the one below, where the court substituted its judgment for that of the agency and independently evaluated the significance factors, rather than deferring to the agency's evaluation. On the other hand, a plaintiff group that loses a challenge to a decision not to prepare an EIS will virtually always have the right of appellate review. This, over time, diminishes the proportion of such decisions that survive judicial scrutiny skews the law in favor of requiring an EIS and undermines the deference owed to the agency's decision not to prepare an EIS.

The government has unique constraints in seeking to appeal adverse decisions. Each decision to appeal, by every agency and every litigating component of the Justice Department, must be approved by the Office of the Solicitor General. United States Attorney's Manual § 2-2.121. The Rules of Civil and Appellate Procedure make allowances for the government's difficulties by providing additional time when a government agency is involved. *See, e.g.*, Fed. R. App. P. 4(a)(1)(B), 40(a)(1) & Advisory Committee Note to 2011 Amendments; Fed. R. Civ. P. 4(i), 12(a)(2), (3).

For similar reasons, the government often is not an adequate representative of private parties, such that intervention under Fed. R. Civ. P. 24(a) is warranted. "The Government's acquiescence in the district

court judgment effectively is the same as promulgating a regulation that is contrary to the [intervenor's] position.” *Didrickson v. U.S. Dep’t of Interior*, 982 F.2d 1332, 1339 (9th Cir. 1992). Absent the ability to appeal on its own, an intervenor cannot otherwise challenge the government’s determination that the project at issue has significant environmental impact. *See id.* (noting government litigation decisions are committed to agency discretion by law). The decision below enables withdrawal of certain decisions without the public participation that would ordinarily occur.

The Ninth Circuit’s rule creates similar due process concerns as those underlying both *Sackett v. E.P.A.*, 566 U.S. 120 (2012), and *U.S. Army Corps of Eng’rs v. Hawkes*, 136 S. Ct. 1807 (2016). *Hawkes* noted this Court’s “‘pragmatic’ approach . . . to finality.” 136 S. Ct. at 1815 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). *Hawkes* found reviewable an action that “not only deprives respondents of a five-year safe harbor from liability under the Act, but warns that if they discharge pollutants onto their property without obtaining a permit from the Corps, they do so at the risk of significant criminal and civil penalties.” 136 S. Ct. at 1815. Here, the decision of the district court deprives Scott Timber and Carpenters of the ability to harvest and process timber, and provides the agency with notice that it must perform specified procedures (an EIS) prior to proceeding. Any pragmatic view would find this order to be final.

Such finality questions have long vexed the judiciary and this Court. As the court lamented over a

century ago and has repeated since: “Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. . . . The cases, it must be conceded, are not altogether harmonious.” *Dickinson*, 338 U.S. at 511 (quoting *McGourkey v. Toledo & O.C. Ry. Co.*, 146 U.S. 536, 544-45 (1892)) (omissions in original). Combined with the great variety of remands, the continuing difficulty of assessing finality will and should merit this Court’s repeated attention. And the Court has accepted a case regarding finality this very month. *Salt R. Proj. Agric. Improvement & Power Dist. v. SolarCity Corp.*, No. 17-368, ___ S. Ct. ___, 2017 WL 3980792 (Dec. 1, 2017). As the petition in *Salt River* recounted, the Court has granted certiorari on a healthy number of cases to consider the applicability of the collateral-order doctrine. *Id.*, Pet. at 20-21. The decision below glibly, and wrongly, waves these urgent and complex questions aside.

The underlying issues of environmental law and administration of the public lands are of significant national importance. As the “basic national charter for protection of the environment[,]” 40 C.F.R. § 1500.1(a), NEPA applies to every federal agency. The dividing line between an EIS and an EA implicates significant consequences as to public staff, time, and resources. For example, a Government Accountability Office report found that the average EA, supporting a FONSI, takes about 18 months, whereas an EIS can take up to four-and-a-half *years* to prepare. Rept. No. GAO-14-370, Apr. 2014, at 14-15, *available at* <http://www.gao.gov>.

gov/assets/670/662546.pdf. An EIS also can easily cost ten times as much as an EA. *Id.* at 13. These questions resonate in the forestry context, as BLM and the Forest Service can account for one-third or more of the EISs produced by the entire national government in a given year. *Id.* at 11.

It is no surprise that questions of NEPA compliance and scope of review have often come before the Court. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360 (1989); *Public Citizen, supra*. The Court’s intervention now will prevent erroneous district court decisions distorting this national “charter” from evading appellate review sought by directly impacted private litigants.

V. This case is an excellent vehicle.

This case is well positioned to resolve the question presented. There are no evidentiary issues, such as those that derailed the Court’s review in *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017). Nor is there any danger that the case will become moot during its pendency. BLM has stated unequivocally that it cannot proceed unless Scott Timber and Carpenters win this appeal. (Pet. App. 53-55.) The trees will not be cut without the Court’s intervention. On the other hand, since there is no replacement volume available to substitute for the timber, there is no danger of mootness from relinquishment of the contract.

And this case squarely presents the question of whether the identity of the appellant, rather than the effect of the decision, determines finality. There is no question that Scott Timber and Carpenters have standing to appeal, and that BLM would have been able to appeal under governing precedent. The only thing holding back the appeal is the identity of the appellant.

Although the decision below is not published, that is no impediment to the Court's review. By Ninth Circuit rule, unpublished opinions merely restate existing precedent. Ninth Cir. R. 36-3. As shown above, the circuit split and petitioners' grievance arise from the underlying precedent, *Pit River* and *Alsea*. This case is the third Ninth Circuit disposition in recent years dismissing an intervenor's appeal of a "remand" order all in unpublished orders. *League of Wilderness Defs./Blue Mtns. Biodiversity Proj. v. U.S. Forest Serv.*, Order Granting Motion to Dismiss, No. 15-35427 (9th Cir. Oct. 20, 2015) (citing *Alsea* and *Pit River*); *Bundorf v. Jewell*, Order Granting Motion to Dismiss, Nos. 15-17361, 15-17539 (9th Cir. Oct. 26, 2016) (same). It should be the last.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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