

No. \_\_\_\_\_

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

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KANE COUNTY, UTAH, AND THE STATE OF UTAH,  
*Petitioners,*

v.

UNITED STATES OF AMERICA,  
SOUTHERN UTAH WILDERNESS ALLIANCE,  
AND THE WILDERNESS SOCIETY,  
*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

This petition addresses whether private special interest groups have an interest to intervene as of right in a quiet title action brought by a State and one of its counties against the United States of America.

Commencing in 2009, the Southern Utah Wilderness Alliance and The Wilderness Society, two special interest groups with no title to claim or defend in the suit, repeatedly attempted to intervene as of right under Federal Rules of Civil Procedure 24(a)(2). Their motions were denied twice in the district court and twice in the United States Court of Appeals for the Tenth Circuit.

On the third time on appeal in 2019, a divided panel of the Tenth Circuit held that the groups could intervene as of right because their “environmental concern” is a legally protectable interest and the arguably changed attitudes of the Trump administration demonstrated that the United States may no longer adequately represent the intervenors’ interest. The Tenth Circuit then deadlocked on petitions for *en banc* rehearing and the panel decision was upheld.

The questions presented are:

1. Whether Rule 24(a)(2) allows intervention as of right where the movant does not have a significant, cognizable interest in the lawsuit.
2. Whether the United States adequately represents its title, which is the only interest at issue in a quiet title suit.

## **PARTIES TO THE PROCEEDINGS**

Petitioner Kane County, Utah (“Kane County”), a Utah political subdivision, and plaintiff-intervenor the State of Utah (“State”), are the plaintiffs in the district court, and appellees in the Tenth Circuit. The United States of America is the defendant in the district court, and appellee in the Tenth Circuit.

Respondents the Southern Utah Wilderness Alliance and The Wilderness Society (collectively, “SUWA”) are the intervenor-defendants and appellants in the Tenth Circuit.

## **RELATED PROCEEDINGS**

United States District Court for the District of Utah:

*Kane Cty., Utah, et al. v. United States*, No. 2:08-cv-0315 CW

2009 WL 959804 2009 (D. Utah April 6, 2009)

2011 WL 2489819 (D. Utah June 21, 2011)

934 F. Supp. 2d 1344 (D. Utah 2013)

2013 WL 1180764 (D. Utah March 20, 2013)

2018 WL 3999575 (D. Utah September 8, 2018)

**RELATED PROCEEDINGS**—Continued

United States Court of Appeals for the Tenth Circuit:

*Kane Cty., Utah, et al. v. United States*, App. No. 09-4087

597 F.3d 1129 (10th Cir. 2010)

*Kane Cty., Utah, et al. v. United States*, Nos. 13-4108, 13-4109, 13-4110

772 F.3d 1205 (10th Cir. 2014), cert. denied, 136 S.Ct. 318, 319

*Kane Cty., Utah, et al. v. United States*, No. 18-4122

928 F.3d 877 (10th Cir. 2019)

950 F.3d 1323 (10th Cir. 2020)

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**PETITION FOR A WRIT OF CERTIORARI**

Kane County and the State respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

**OPINIONS BELOW**

The opinion of the Tenth Circuit is reported at 928 F.3d 877, and reproduced in the Appendix (“App.”) at 1-57. The Tenth Circuit’s published denial of the petitions for *en banc* review is reported at 950 F.3d 1323, and reproduced at App. 96-127. The underlying district court decision denying intervention is unreported but available at 2018 WL 3999575 (D. Utah September 8, 2018), and is reproduced at App. 58-67.

The district court’s first decision denying intervention is unreported but available at 2009 WL 959804 (D. Utah April 6, 2009), and is reproduced at App. 68-76. The Tenth Circuit’s first decision denying intervention is reported at 597 F.3d 1129, and is reproduced at App. 77-93. The Tenth Circuit’s second denial of intervention, an order issued September 2, 2014, while the case was pending on appeal in Nos. 13-4108, 13-4109, and 13-4110, is unreported but reproduced at App. 94-95.



## **JURISDICTION**

The Tenth Circuit issued its opinion and judgment on June 25, 2019. The Tenth Circuit entered its order denying petitions for rehearing filed by Kane County, the State, and the United States on February 27, 2020. App. 96-127. This Petition is timely filed under Supreme Court Rule 13 and this Court's order dated March 19, 2020, which extended the deadline for filing any petition for writ of certiorari due after the date of the order. The Court has jurisdiction under 28 U.S.C. § 1254(1).



## **STATUTORY PROVISION AND RULES INVOLVED**

The Quiet Title Act provides in relevant part that the “United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest. . . .” 28 U.S.C. § 2409a(a).

Intervention as of right is governed by Federal Rules of Civil Procedure 24(a)(2), which provides:

On timely motion, the court must permit anyone to intervene who: . . . (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The pleading required to be submitted with the motion to intervene is governed by Federal Rules of Civil Procedure 24(c), which provides:

Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

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## STATEMENT OF THE CASE

### A. The Quiet Title Act.

Kane County and the State sued the United States under the Quiet Title Act, 28 U.S.C. § 2409a (“QTA”), to quiet title to 15 roads crossing federal land. Until 1972, the doctrine of sovereign immunity left parties asserting title to lands claimed by the United States without recourse to the courts. *Block v. North Dakota*, 461 U.S. 273, 282 (1983). Title claimants had limited options, such as requesting special legislation from Congress consenting to specific lawsuits, or inducing the United States to file a quiet title action against them. *Id.* at 280.

To remedy this situation, Congress enacted the QTA as a narrow waiver of sovereign immunity and authorized the United States to “be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest.” 28 U.S.C. § 2409a(a).

The QTA is the “exclusive means by which adverse claimants [can] challenge the United States’ title to real property” (*Block*, 461 U.S. at 286), and an “adverse claimant” means a plaintiff who asserts “a claim to property antagonistic to the Federal Government’s.” *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 219-20 (2012). The legislative history of the QTA shows “that Congress thought itself to be authorizing bread-and-butter quiet title actions, in which a plaintiff asserts a right, title or interest of his own in” land in which the United States claims an interest. *Id.* at 219, n.5.

The QTA’s limited waiver of sovereign immunity is “strictly” construed. *Block*, 461 U.S. at 287. The QTA does not grant title, rather it allows “claimants to confirm their existing title interests on lands owned by the United States.” *Kane Cty. (1) v. United States*, No. 2:08-CV-0315, 2013 WL 1180764, at \*1 (D. Utah Mar. 20, 2013), *rev’d and remanded on other grounds sub nom. Kane Cty., Utah v. United States*, 772 F.3d 1205 (10th Cir. 2014). Moreover, the district court’s limited jurisdiction under the QTA does not allow it to consider environmental or public land management issues—it solely authorizes the district court to adjudicate title, being the “existence or non-existence of a right-of-way and its length and its breadth.” *San Juan Cty. v. United States*, 503 F.3d 1163, 1171 (10th Cir. 2007) (*en banc*). Adjudicating an existing title is the only issue before the district court in this case.

## **B. The Grant Of Title At Issue.**

Kane County and the State claim title to the rights-of-way for the 15 roads pursuant to a land grant statute commonly known as R.S. 2477. “In 1866, Congress passed an open-ended grant of ‘the right of way for the construction of highways over public lands.’” *Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 740 (10th Cir. 2005) (“SUWA”) (quoting the Mining Act of 1866, Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, codified at 43 U.S.C. § 932 (repealed 1976)).

R.S. 2477 “remained in effect for 110 years, and most of the transportation routes of the West were established under its authority.” *Id.* Congress repealed R.S. 2477 on October 21, 1976, when it enacted the Federal Land Policy and Management Act of 1976 (“FLPMA”), Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793. Nevertheless, FLPMA preserved all then-existing R.S. 2477 rights-of-way as valid existing rights (43 U.S.C. § 1769(a)), and required the Bureau of Land Management (“BLM”) to manage the public lands “subject to valid existing rights.” FLPMA § 701(h), 90 Stat. 2786, 43 U.S.C. § 1701 historical note (h). Wilderness study areas, like all public lands, are subject to these valid existing rights. *Kane Cty.*, 772 F.3d at 1217.

The grant of an R.S. 2477 right-of-way was self-executing and there were no federal actions or records involved. “R.S. 2477 rights-of-way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no

formal act of public acceptance on the part of the states or localities in whom the right was vested.” *SUWA*, 425 F.3d at 741. Title to the highway rights-of-way vested by operation of law upon being “laid out, erected and maintained, while others exist merely through public use.” *Kane Cty., Utah v. United States*, No. 2:08-CV-00315, 2011 WL 2489819, at \*4 (D. Utah June 21, 2011). “Yet, both types are deemed public highways.” *Id.*

Kane County and the State jointly own title to the R.S. 2477 rights-of-way. Utah Code Ann. § 72-5-302(2). *SUWA* and all other “[m]embers of the public . . . do not have a ‘title’ in public roads.” *Kinscherff v. United States*, 586 F.2d 159, 160 (10th Cir. 1978); *Sw. Four Wheel Drive Ass’n. v. Bureau of Land Mgmt.*, 363 F.3d 1069, 1071 (10th Cir. 2004) (no title). While Kane County and the State own joint title, Kane County is the “governing body [charged with] sole jurisdiction and control of county roads.” Utah Code Ann. § 72-3-103(4). This responsibility includes road maintenance, repair, “installing culverts, and performing other necessary work for public safety purposes.” *Kane Cty., Utah v. United States*, No. 2:08-CV-00315, 2011 WL 2489819, at \*2 (D. Utah June 21, 2011).

### **C. Procedural Background.**

*SUWA* filed its first motion to intervene in 2009 and argued that it had an interest in the lawsuit because of “its long and extensive role in protecting wilderness lands in southern Utah.” App. 70. In

considering the motion, the district court reviewed the intervention-related factors established by the Tenth Circuit in *San Juan County*. App. 70-71 (citing *San Juan Cty.*, 503 F.3d 1163). The district court then denied SUWA’s first motion to intervene.

The district court held that in “this case, it is evident that SUWA does not have a ‘legal interest’ in the usual understanding of that word in a title context.” App. 71. SUWA “conceded” that the only issue “is whether the United States or Kane County holds title” and SUWA could not “proffer any evidence to which it would have access about the historical use of the roads that is not available to the United States . . . [nor] evidence that it has any special expertise, experience or knowledge with respect to the historic use of the roads that would not be available to the United States.” App. 73.

“While SUWA obviously has an interest in the sense that it cares deeply about the outcome of the decision, it does not claim title to the roads at issue.” *Id.* Accordingly, the district court held that “SUWA has not established the element of having an impaired interest in the litigation.” App. 72.

The district court further held that because the only issue in the case was who owned title—not land management or wilderness issues—the United States could adequately represent its title. App. 73. SUWA’s land management and wilderness related arguments “would be irrelevant and not admissible in evidence.” App. 74. *See also San Juan Cty.*, 503 F.3d at 1203



“Nothing we have said would contravene the holding that Rule 24(a)(2) does not require intervention as of right for the purpose of presenting only irrelevant argument or evidence.” (citation omitted)).

SUWA appealed and the Tenth Circuit issued its decision in 2010, which proceeded directly to the question of adequate representation. App. 77, 86. “Even if an applicant satisfies the other requirements of Rule 24(a)(2), it is not entitled to intervene if its ‘interest is adequately represented by existing parties.’” App. 86 (citation omitted). After reviewing the divided opinions stated in *San Juan County*, the court held that “SUWA has failed to establish that its interest in the instant case will not be adequately represented by the federal government.” App. 87.

The lawsuit proceeded to trial in 2011 during which SUWA appeared as *amicus curiae* and filed several briefs. App. 5, n.2. Through a full trial on the merits, Kane County and the State proved their pre-1976 title to 12 of the 15 R.S. 2477 roads in the suit. App. 5. *See also Kane Cty. (1) v. United States*, No. 2:08-CV-315, 2013 WL 1180764 (D. Utah Mar. 20, 2013) (merits decision); *Kane Cty. (1) v. United States*, 934 F. Supp. 2d 1344 (2013) (jurisdictional decision).

Kane County, the State, and the United States filed cross appeals. On appeal, SUWA again filed a motion to intervene and the court required the parties to brief the appeals as if SUWA were a party. App. 95. Ultimately, the Tenth Circuit denied SUWA’s second motion to intervene. *Id.*

As relevant here, the Tenth Circuit reversed the district court’s decision as to the width of the Skutumpah, Swallow Park and North Swag roads. *Kane County*, 772 F.3d at 1224.<sup>1</sup> On remand, all that is left is “setting the widths of the rights-of-way” for these three roads. *Id.*

Because Kane County does not intend to upgrade or realign<sup>2</sup> the three roads, and the parties’ efforts have been focused on a different bellwether trial involving an additional fifteen of Kane County’s and the State’s roads, this case has essentially remained dormant following the Tenth Circuit’s remand—except for SUWA’s motion to intervene. This lawsuit is now stayed and is expected to remain stayed for quite some time.

In 2018, SUWA moved to intervene yet again, now asserting that the “United States’ litigation position” had changed. App. 60. SUWA argued that the “recent change in administration and the fact that the United States has entered into active settlement discussions”

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<sup>1</sup> The Tenth Circuit reversed the district court’s finding of subject matter jurisdiction to resolve title to six of the 15 roads on grounds that there was no disputed title. App. 6, n.3; see *Kane Cty., Utah v. United States*, 772 F.3d 1205, 1210-14 (10th Cir. 2014). Kane County and the State “unsuccessfully” petitioned this Court for a writ of certiorari on this jurisdictional issue. App. 8, n.5.

<sup>2</sup> SUWA wrongly argued and the Tenth Circuit stated that “Kane County and the State of Utah seek to double the width of Swallow Park and North Swag roads, which are both dirt roads, and to more than double the width of Skutumpah Road.” App. 15. There are no such plans, nor was evidence presented, and yet this became a significant part of the Tenth Circuit’s impaired interest analysis.

were changed circumstances, and that the district court should “reconsider its conclusion that SUWA has no impaired interest.” App. 61.

The district court denied SUWA’s motion “because SUWA has not presented circumstances under which this court, exercising its discretion, is compelled to revisit its prior ruling and disregard the ruling of the Tenth Circuit.” App. 61. Specifically, “SUWA’s argument that the issue of scope is distinct from the issue of title is unavailing.” App. 63. Additionally, SUWA’s argument that “a change in administration” (App. 65) should justify intervention was “unsupported by any evidence other than statements by the parties that settlement may be possible.” *Id.* Of course, in 2018 when the district court considered SUWA’s third motion to intervene, all that was left to do was decide the widths of three rights-of-way.

A divided panel of the Tenth Circuit reversed the district court and, notwithstanding its prior rulings, held that SUWA could intervene as of right. App. 2. Noting that the Tenth Circuit “has historically taken a liberal approach to intervention and thus favors the granting of motions to intervene” (App. 21 (citation omitted)), the court held that SUWA’s environmental concern is a legally protectable interest that might be impaired in the litigation. App. 23. The court also held that the United States would not adequately defend its title. App. 34-35.

Chief Judge Tymkovich dissented. App. 36. First, Judge Tymkovich noted that SUWA’s “environmental

concern” in *San Juan County* was unique to the “specific lands at issue in that case” and that six Tenth Circuit judges had disagreed that SUWA had an interest in any event. App. 50 (citing *San Juan Cty.*, 503 F.3d at 1208). It is “hard to see how SUWA . . . can be considered a party to the question of what real property the United States owns, or whether the United States granted an easement to [the County] decades ago.” App. 50, n.3 (quoting *San Juan Cty.*, 503 F.3d at 1210 (McConnell, J., concurring in the judgment)).

As stated by Judge Tymkovich, “[q]uieting title does not bring any new rights into existence or require evaluation of the public interest, it merely clarifies already existing property rights based on historical uses.” App. 51-52 (Tymkovich, J., dissent). Thus, the district court’s decision that SUWA lacked an interest should have been upheld. *Id.* at 52.

Judge Tymkovich further dissented on grounds that the Tenth Circuit “presume[s] adequate representation ‘when the objective of the applicant for intervention is identical to that of one of the parties.’” App. 52 (quoting *San Juan Cty.*, 503 F.3d at 1204). Moreover, SUWA’s arguments about a changed presidential administration were irrelevant in a title suit and were essentially recast arguments of land management differences with past administrations that were unpersuasive the first time SUWA moved to intervene. App. 54.

The United States, the State and Kane County petitioned for rehearing. App. 96. In a five to five evenly

divided opinion, the Tenth Circuit declined to grant rehearing. *Id.* Remarkably, the crux of the dispute involved the Tenth Circuit sitting *en banc* disagreeing with what was and was not decided in its prior *en banc* intervention decision, *San Juan County*. Cf. App. 106-110 (discussing *San Juan Cty.*) with App. 112-13, 122-24 (dissent discussing same).



### **REASONS FOR GRANTING THE PETITION**

This petition brings to the Court an issue for which there is substantial need for clear direction and it appears that this Court has not provided guidance on the proper application of Rule 24(a)(2) intervention as of right in over 40 years. The “Supreme Court has provided little guidance about the nature of the ‘interest’ required for intervention of right. Nor has the Supreme Court ever clarified exactly how the relevant interest must ‘relat[e] to’ a particular transaction or item of property.” Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271, 276 (2020) (footnote omitted).

In the absence of this Court’s direction, the lower “courts have developed no discernible standards or criteria, other than [a few] general guidelines . . . , which would explain their divergent rulings in cases involving similar types of litigation and proposed intervenors.” Eunice A. Eichelberger, Annotation, *What Is “Interest” Relating to Property or Transaction Which Is Subject of Action Sufficient to Satisfy That Requirement for Intervention as Matter of Right Under Rule*

*24(a)(2) of Federal Rules of Civil Procedure*, 73 A.L.R. Fed. 448, § 2(a) (2020). This petition presents the Court with “divergent rulings” all within the same lawsuit. The Tenth Circuit twice denied SUWA’s motions to intervene, and then a divided panel let them in on the third appeal.

In doing so, the Tenth Circuit held that it is “indisputable that SUWA’s environmental concern is a legally protectable interest.” App. 23 (citation omitted). The environment is not an issue in this quiet title suit and nothing about the environment will come before the district court. As noted above, the Tenth Circuit previously held that Rule 24(a)(2) is not satisfied, due to the lack of a protectable interest, if intervention is sought for the purpose of presenting “irrelevant argument or evidence.” *San Juan Cty.*, 503 F.3d at 1203 (Hartz, J. plurality), citing *Alameda Water & Sanitation District v. Browner*, 9 F.3d 88, 91 (10th Cir. 1993). Thus, what, exactly, will SUWA do in this title suit where its environmental concern is irrelevant?

Moreover, there are myriad groups having a wide range of land use or environmental concerns and the decision below would seem to open the courtroom doors to an enormous class of “concerned” parties. By granting this petition, the Court can provide long-needed guidance about the type and degree of interest warranting intervention.

The Tenth Circuit additionally decided that the changed administration was a new circumstance rebutting any presumption that the United States would

adequately defend its title and any interest SUWA had in the lawsuit. This, of course, raises the inevitable question of what to do if this fall's election brings about another change in administration. Should SUWA be dismissed from the lawsuit in the event of another changed administration? This title suit does not involve the changing policies of the Executive Branch. It is simply an action to resolve a title dispute, which is not a political issue. A change in administration is not a proper basis to find that the United States will not defend its title.

The single issue before the district court is who owns title to the roads, being the length and breadth of the roads. This petition asks the simple question of whether an interest group that has no title to claim or defend has a right to participate as a party.

**I. The Decision Below Conflicts With This Court's Decision In *Donaldson v. United States* Which Requires A Significant Interest For Intervention.**

The QTA's jurisdiction extends solely "to quiet title to an estate or interest in real property in which an interest is claimed by the United States." 28 U.S.C. § 1346(f). Rule 24(a)(2) allows intervention by one who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its

interest, unless existing parties adequately represent that interest.”

SUWA readily admits that it does not claim title. App. 73. Moreover, the core title to the roads has already been quieted in Kane County and the State, and all that is left to do in the lawsuit is to determine the width of title to three roads. Recognizing that SUWA lacks any title to claim or defend, the Tenth Circuit held that it is “indisputable that SUWA’s environmental concern is a legally protectable interest.” App. 23 (citing *San Juan Cty. v. United States*, 503 F.3d 1163, 1199 (10th Cir. 2007)). The problem is that the interest upon which SUWA was allowed to intervene is not an interest “relating to the property or transaction that is the subject of the action.” Fed. R. Civ. P. 24(a)(2). Nor will disposing of this action “impair or impede” any land use or environmental concern SUWA may have.

Unlike the undefined interest that SUWA claims supports its intervention here, this Court has held that an applicant must assert an interest that is “significantly protectable.” *Donaldson v. United States*, 400 U.S. 517, 531 (1971). In *Donaldson*, the Internal Revenue Service issued summonses to obtain employee records and the employee attempted to intervene to block the summonses and collection of his records. *Id.* at 518-19. In rejecting the attempt to intervene, this Court held that when Rule 24(a) “speaks in general terms of ‘an interest relating to the property or transaction which is the subject of the action’ . . . [w]hat is obviously meant there is a significantly protectable interest.” *Id.* at 531.



Here, on the other hand, SUWA would be hard pressed to describe what its interest is, let alone show a “significantly protectable interest” in the lawsuit. *Id.* The Tenth Circuit formerly required that an interest for purposes of intervention be “‘direct, substantial, and legally protectable.’” *San Juan Cty.*, 503 F.3d at 1192 (citation omitted). However, the Tenth Circuit chose to part ways with what it called the “DSL” test, in part because it believed that Rule 24 should not be read in an “overly technical manner.” *Id.* at 1196 (Hartz, J., plurality opinion).

The words in Rule 24(a)(2) have limits and allowing an entity to become a full party because it feels concerned surely exceeds the boundaries of the rule. This is further confirmed by Fed. R. Civ. P. 24(c), which requires an intervenor to provide “a pleading that sets out the claim or defense for which intervention is sought.” In a quiet title suit, where SUWA claims no title, what can it legitimately plead as claim or defense?

Other courts, however, have regularly confirmed that an interest for purposes of Rule 24(a)(2) intervention means “a cognizable legal interest, and not simply an interest of a general and indefinite character.” *Brody By & Through Sugzdinis v. Spang*, 957 F.2d 1108, 1116 (3d Cir. 1992) (internal quotation marks and citation omitted); *see also Commonwealth of Pennsylvania v. President United States of Am.*, 888 F.3d 52, 58 (3d Cir. 2018) (“An applicant must therefore demonstrate that its interest is ‘specific to [it], is capable of definition, and will be directly affected in a

substantially concrete fashion by the relief sought.’” (citation omitted)). The Tenth Circuit, however, failed to limit the concept of “interest” to a legal interest in the lawsuit and has impermissibly expanded intervention of right to include parties without any legal interest in the lawsuit itself.

Accordingly, this Court should grant the petition to provide nationwide guidance regarding the proper interpretation of “interest” under Rule 24(a)(2).

## **II. The Decision Below Held That The United States Does Not Adequately Represent The United States’ Title And Should Be Reviewed To Provide Much Needed Guidance On What “Adequate Representation” Means Under Rule 24.**

Even if an applicant has a significant interest in the litigation, intervention is improper if that interest is “adequately represented by existing parties.” Fed. R. Civ. P. 24(a)(2). More than 45 years ago, this Court minimally discussed the adequate representation issue in *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528 (1972). There, a union member sought to intervene in an election dispute filed by the Secretary of the Department of Labor. *Id.* at 529. Although the lower court had not addressed the question of adequate representation, this Court held that there was “sufficient doubt about the adequacy of representation to warrant intervention.” *Id.* at 538. This Court then cited a legal treatise for the proposition that “the Rule is satisfied if the

applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.” *Id.* at n.10 (citing 3B J. Moore, Federal Practice 24.09–1 (4) (1969)).

“It may be time for the Supreme Court to provide guidance to the lower courts on the meaning of ‘unless existing parties adequately represent that interest’ in Fed. R. Civ. P. 24(a)(2).” *Barnes v. Sec. Life of Denver Ins. Co.*, 953 F.3d 704, 705 (10th Cir. 2020) (Hartz, J., dissent). In both *Kane Cty.*, here, and in *Barnes*, the Tenth Circuit has been all but equally divided *en banc* on the proper standards for intervention. See *Barnes*, 953 F.3d at 705 (four judges dissenting); *Kane Cty.*, App. 111 (five judges dissenting). In particular, the Tenth Circuit previously held that “where the applicant for intervention has the same objective as one of the parties, a ‘general presumption’ exists that representation is adequate.” App. 122 (Tymkovich, J., dissent). In his panel dissent, Judge Tymkovich noted the inconsistency of the majority position because it first acknowledged that both SUWA and the United States were committed to retaining the maximum amount of property, versus the majority’s “later conclusion that the United States may not adequately represent SUWA’s interest.” App. 38 (Tymkovich, J., dissent).

As stated by the First Circuit, “[g]enerally, our decisions have proceeded on the assumption, subject to evidence to the contrary, that the government will adequately defend its actions, at least where its interests appear to be aligned with those of the proposed

intervenor.” *State v. Dir., U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 19 (1st Cir. 2001). “The facts of these cases vary greatly and whether the proposed intervenors’ explanation of inadequacy suffices must be determined ‘in keeping with a commonsense view of the overall litigation.’” *Id.* (citation omitted). The commonsense view of an action to quiet title is that the United States can adequately defend its title.

Granting this petition in a straightforward title lawsuit, one where the United States does not represent a range of interests, will serve to define “adequate representation” for the lower courts and presents a clear background for deciding this issue. In this lawsuit there is the single question of title to be decided by the court, and the simple question is whether the United States can adequately defend its title.

### **III. This Petition Presents A Recurring And Important Question Of Federal Law That Merits This Court’s Review.**

This Court’s guidance on the proper interpretation of Rule 24(a)(2) will aid the courts nationwide. To at least one author, the law regarding motions to intervene “is a mess.” Caleb Nelson, *Intervention*, 106 Va. L. Rev. at 274. Perhaps due to the fact-specific nature of the motions, and the fact that appellants often have larger issues to pursue on appeal, this issue is not often pressed before this Court. The simple title question presented in this petition, along with the lengthy record involving SUWA’s intervention in this lawsuit,

presents a good vehicle for this Court's review of Rule 24(a)(2).

Additionally, there are a number of other QTA suits winding their way through the courts below. This includes a significant number of similar QTA lawsuits pending in Utah district court that will be affected by this Court's decision. For example, Kane County and the State recently completed a three-week bellwether trial in the case styled as *Kane Cty. (2) v. United States*, 2:10-cv-1073 CW (D. Utah). *Kane Cty. (2)* includes the remaining R.S. 2477 roads in the county. Upon the Tenth Circuit's denial of *en banc* rehearing, SUWA moved to intervene as of right in *Kane Cty. (2)* and has stated that it intends to file a motion for a new trial because it should have been a full party in the lawsuit.

Separately, the State and other Utah counties have filed more than 21 QTA suits to quiet title to their R.S. 2477 roads. Those cases remain pending and SUWA is sure to move to intervene in those lawsuits as well. Thus, this Court's decision will provide nationwide guidance and will also have a direct impact on a large number of lawsuits.



**CONCLUSION**

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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