No. 15-27

In The
Supreme Court of the United States

STATE OF UTAH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

To invoke a district court's jurisdiction under the Quiet Title Act to adjudicate the merits of a quiet title action, must a State establish facts that show affirmative action by the United States that demonstrates its claim to title in the property, or can a State rely on facts that raise a cloud on the State's title?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioner.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, and limited and ethical government.

Since its creation in 1977, MSLF and its attorneys have worked to prevent government infringement of constitutionally protected property interests. MSLF attorneys regularly litigate Quiet Title Act ("QTA") cases against the United States. *E.g.*, *Marvin*

[1] Pursuant to Supreme Court Rule 37.2(a), notice of MSLF's intent to file this brief was received by counsel of record for all parties at least ten days prior to the filing of this brief and all parties have consented to this filing. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014) ("*Brandt*"); *George v. United States*, 672 F.3d 942 (10th Cir. 2012) ("*George*"); *Fitzgerald Living Trust v. United States*, 460 F.3d 1259 (9th Cir. 2006); *McFarland v. Norton*, 425 F.3d 724 (9th Cir. 2005). The Tenth Circuit's decision represents a serious departure from previous QTA precedent and if allowed to stand, it will negatively impact future QTA litigation. Accordingly, MSLF respectfully submits this amicus curiae brief in support of Petitioner.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND.

In 1866, Congress passed an act, entitled "An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes." 14 Stat. 251 (July 26, 1866) ("1866 Act"). As its title suggests, Section 8 of the 1866 Act granted the right-of-way for the construction of highways over unreserved public lands. *Id.* at 253 (commonly referred to as "R.S. 2477").[2] Congress enacted R.S. 2477 to encourage westward expansion and development of the mineral riches located on public lands. R.S. 2477

[2] Matthew L. Squires, *Federal Regulation of R.S. 2477 Rights-of-Way*, 63 N.Y.U. Ann. Surv. Am. L. 547, 549 n.7 (2008) (Section 8 of the 1866 Act was originally codified in 1873 as section 2477 of the Revised Statutes, but re-codified in 1938.).

was a self-executing statute without formal requirements for accepting a right-of-way grant. The self-executing nature of R.S. 2477 rights-of-way has since created great uncertainty surrounding public thoroughfares. In 1976, Congress repealed R.S. 2477 subject to valid existing rights. Federal Land Policy Management Act of 1976 ("FLPMA"), Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2781, 2793; 43 U.S.C. § 1769(a). Thus, all R.S. 2477 rights-of-way perfected prior to 1976 remain valid today.

The QTA waives the United States' sovereign immunity, allowing "[t]he United States [to] be named as a party defendant in a civil action . . . 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 [may] challenge the United States' title to real property." *Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 286 (1983). Therefore, to formally quiet title to R.S. 2477 rights-of-way, entities such as Petitioner *must* use the QTA.

II. PROCEDURAL BACKGROUND.

In April 2008, Kane County, Utah initiated an action to quiet title to five roads/road segments against the United States. *Kane County, Utah v. United States*, 772 F.3d 1205, 1209 (10th Cir. 2014) ("*Kane County*"). Later, it amended its complaint to include fifteen roads. *Id.* In February 2010, Petitioner

intervened as a co-plaintiff. *Id.* Following a nine-day bench trial in August 2011, the district court issued two orders. First, it ruled that it had jurisdiction over the claims. *Kane County, Utah v. United States*, 934 F. Supp. 2d 1344 (D. Utah 2013). Second, it quieted title to twelve of the roads in favor of Petitioner/Kane County and three of the roads in favor of the United States. Petitioner's Appendix ("App.") 42-87.

On appeal, the United States argued that the district court lacked subject-matter jurisdiction to quiet title to six of the roads[3] – three of which the district court quieted in favor of the United States.[4] *Kane County*, 772 F.3d at 1210. Petitioner provided evidence that the Bureau of Land Management's ("BLM") publication of the 2008 Kanab Field Office Resource Management Plan ("2008 RMP") created a dispute regarding title of the Roads. App. 59-63. The BLM actions contrary to Petitioner's interests

[3] The six roads at issue are the Sand Dunes Road, Hancock Road, and the four Cave Lakes Roads (hereinafter "Roads").

[4] The district court saw through the United States' procedural games. *See Kane County, Utah*, 934 F. Supp. 2d at 1358 (finding the United States position "problematic," where the United States changed its argument 180-degrees one week before trial after previously denying the Cave Lakes Roads were R.S. 2477 rights-of-way for more than three years). Indeed, a week before trial, the United States argued for the very first time that because it left some of the Roads "open" in the 2008 RMP, it had not actually disputed title to those roads. *Id.* Interestingly, the United States chose to challenge the district court's subject-matter jurisdiction instead of merely disclaiming its interest in the Roads. *See* 28 U.S.C. § 2409a(e).

included: (1) publishing maps identifying certain of the Roads as within areas where "off-highway vehicle use is 'Limited to Designated Open Roads and Trails,'" App. 60-61; (2) publishing additional maps identifying certain of the Roads as open "Class 3 primary roads," *id.* at 61; and (3) issuing FLPMA Title V special use permits to private parties for three of the Roads, *id*. at 62-63; *see* 43 U.S.C. §§ 1761-71 (authorizing the BLM to issue special use permits for the use of roads across public lands).

Despite the evidence in the record, the Tenth Circuit overturned the district court's order quieting title to the Roads, holding that the district court lacked subject-matter jurisdiction over Petitioner's QTA claims because the United States had not sufficiently "disputed title" to the Roads. *Kane County*, 772 F.3d at 1213-14. This left the question of Petitioner's property interest in the Roads undecided and has substantially increased the burden on plaintiffs wishing to bring future QTA claims. *Id.* at 1211-12.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision conflicts directly with this Court's understanding of the QTA, and with existing precedent from the Tenth Circuit and other circuit courts of appeals. The intra-circuit split created by the Tenth Circuit's decision creates a trap for the unwary, whereby the QTA's statute of limitations could run *before* a federal court has jurisdiction to

quiet title to real property. Moreover, in wrongfully determining what constitutes "disputed title," the Tenth Circuit has created a palpable fracture between itself and other circuit courts of appeals. Worse, the Tenth Circuit's construction of "disputed title" re-writes the plain language of the QTA in defiance of the QTA's legislative history. Even more striking, the Tenth Circuit's new "disputed title" standard effectively places property owners within its jurisdiction into a pre-QTA era – with no ability to quiet title against the United States.

REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT'S DECISION CREATES A TRAP FOR THE UNWARY.

A. The Tenth Circuit's New Standard Conflicts With Previous Tenth Circuit Decisions.

Under the QTA, an action "accrue[s] on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g). The statute of limitations runs for twelve years from the date a QTA claim accrues. *Id.* Prior to the challenged decision, the Tenth Circuit applied a relaxed standard to QTA claims: "'All that is necessary is a reasonable awareness that the government claims some interest adverse to the plaintiffs.'" *Vincent Murphy Chevrolet Co. v. United States*, 766 F.2d 449, 452 (10th Cir. 1985) ("Whether

the interest claimed amounts to legal title in the United States is irrelevant if it constitutes a cloud on plaintiffs' title." (quoting *Knapp v. United States*, 636 F.2d 279, 283 (10th Cir. 1980))). Defying logic, in the instant case, the Tenth Circuit held that actions taken by the United States creating ambiguity to title are insufficient to grant a federal court jurisdiction to hear QTA claims. *Kane County*, 772 F.3d at 1212. The panel's ruling that title to the Roads was not disputed severely departs from previous precedent. *Id.* at 1213-14.

For example, in *George*, the Tenth Circuit ruled that the mere publication in the *Federal Register* of a regulation affecting a landowner's rights constituted a "claim" under the QTA sufficient to begin the running of the statute of limitations. 672 F.3d at 944-46. The court relied on *Knapp* for the proposition that a "claim need not be clear and unambiguous[,]" nor is a "range war" necessary. *Id.* at 946-47 (internal citation omitted). Instead, where the United States has "'some interest adverse to the plaintiff's,'" a plaintiff may pursue QTA claims. *Id*. (quoting *Knapp*, 636 F.2d at 283). Stated plainly, "the trigger for starting that [12]-year clock running is an exceedingly light one." *George*, 672 F.3d at 947.

At issue in *George*, was a regulation published in the *Federal Register* in 1977, which purportedly affected a property not acquired by the plaintiff until 2005. *Id.* at 944-45. Although the government did not enforce the 1977 regulation against the plaintiff until 2006, the Tenth Circuit held that plaintiff's QTA

claim accrued in 1977 when the regulation was published – nearly 30 years *before* the plaintiff had acquired her property. *Id.* at 946.

In the instant case, and in direct conflict with *George*, the Tenth Circuit held that no disputed title existed vis-à-vis the Roads because the United States had not expressly limited or denied the public access to them. *Kane County*, 772 F.3d at 1213, 1218. In *George*, the Tenth Circuit held that the government's delay in enforcing a federal regulation did not delay the running of the statute of limitations. 672 F.3d at 946. Therefore, the United States need not expressly limit access to the Roads for a QTA claim to accrue. In *Kane County*, the Tenth Circuit deemed the legal status of the roads ambiguous, yet shockingly held that the ambiguity did not rise to the level of "disputed title." 722 F.3d at 1212.

The 2008 RMP alone demonstrates that title to the Roads is disputed. The 2008 RMP includes maps identifying certain of the Roads as within areas where "off-highway vehicle use is 'Limited to Designated Open Roads and Trails.'" App. 59-60. The BLM later published additional maps identifying certain of the Roads as open "Class 3 primary roads." *Id.* at 60-61. The BLM asserted jurisdiction over the Roads – interfering with Petitioner's title – by issuing FLPMA Title V special use permits to private parties for three

of the Roads.[5] *Id.* at 62-63. These actions sufficiently demonstrate the United States claimed "*some* interest *adverse* to" Petitioner's interests. *Vincent*, 766 F.2d at 452 (emphasis added). The Tenth Circuit's decision, however, allows the United States to avoid QTA claims unless it unilaterally agrees to be sued, despite Congress's waiver of sovereign immunity. *See Alaska v. United States*, 201 F.3d 1154, 1162 (9th Cir. 2000) ("Since the [QTA] provides that the United States can destroy jurisdiction by filing a disclaimer, it would be illogical to construe it to mean that the United States can destroy jurisdiction by filing a refusal to make a disclaimer."). The Tenth Circuit's severe departure from prior precedent should be reversed.

B. The Tenth Circuit's Decision Creates A Trap Whereby The QTA's Statute Of Limitations Can Expire Before A Claimant Can Initiate A QTA Suit.

It is axiomatic that certainty of title to property is paramount. *Brandt*, 134 S. Ct. at 1268 (reiterating "'the special need for certainty and predictability where land titles are concerned.'" (quoting *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979))). This is especially true regarding certainty of title to important government infrastructure, like roads. The

[5] It goes without saying that the BLM should not be issuing permits for use of property it does not own.

Tenth Circuit's decision has created a trap, whereby the QTA's statute of limitations may run *before* a claimant can have his or her QTA claim heard. Congress would not have purposefully created such a trap for the unwary. *See United States v. Locke*, 471 U.S. 84, 123 (1985) (Stevens, J., dissenting) ("I would not presume that Congress deliberately created a trap for the unwary. . . ."). In fact, it is an "odd result" to have a statute of limitations running before a plaintiff's cause of action has accrued. *Reiter v. Cooper*, 507 U.S. 258, 267 (1993) (declining to countenance the "odd result" that a cause of action would accrue at one point in time and the statute of limitations would begin running at a different point in time "absen[t] . . . any such indication in the statute"); *see Johnson v. United States*, 544 U.S. 295, 305 (2005) (calling it "highly doubtful" that Congress would intend for a time limit on pursuing a claim to expire before the claim arose).

This Court has noted that the QTA's 12-year statute of limitations is "unusually generous." *United States v. Beggerly*, 524 U.S. 38, 48-49 (1998). Accordingly, it is typically narrowly construed. *See id.* at 48-49; *but see id*. at 49-50 (Stevens, J., concurring) (indicating doctrines of fraudulent concealment or equitable estoppel may be raised as defenses to the running of the QTA's statute of limitations). If the waiver of sovereign immunity found in the QTA is to be construed narrowly, there must be consistency and clarity amongst federal courts as to when a QTA

claim accrues and when a plaintiff may pursue a QTA claim.

In *Vincent*, the Tenth Circuit construed the QTA's statute of limitations narrowly, to avoid "giv[ing] rise to an interpretation of the term 'claim' under § 2409a(f) which could extend the limitations period indefinitely." 766 F.2d at 452. Similarly in *George*, the Tenth Circuit reiterated that the QTA's statute of limitations has an exceedingly "light trigger" and begins to run whenever the plaintiff "knew or should have known of the existence of some assertion – some claim – by the government of an adverse right." 672 F.3d at 947; *Bd. of Comm'rs of Catron County, N.M. v. United States*, 934 F. Supp. 2d 1298 (D.N.M. 2013).

In contrast, the United States' actions in the instant case vis-à-vis the Roads were surely enough to pull the QTA's light trigger for claim accrual, yet the Tenth Circuit allowed the United States to escape litigating Petitioner's claims. *Kane County*, 772 F.3d at 1212. In defiance of this Court's decisions, the Tenth Circuit's decision has prevented Petitioner from having its property interests decided. *See Beggerly*, 524 U.S. at 49. The Tenth Circuit even wrongly espoused that "concerns about potential claims '[l]urking'" over the parties' shoulders "are ameliorated." *Kane County*, 772 F.3d at 1212 (quoting *Alaska*, 201 F.3d at 1161). Yet instead of ameliorating such claims, the Tenth Circuit's flawed reading of the QTA allows the United States to sit on the fence, preventing Petitioner's titles from being quieted unless and until the United States affirmatively consents to

litigation. *Vincent*, 766 F.2d at 452; *see* § III.B, *infra.* The Tenth Circuit's decision allows the United States to circumvent the QTA's statute of limitations indefinitely, thwarting the true purpose of the QTA. *See* § III, *infra.*

If the Tenth Circuit's decision remains, the United States may continue its pattern of neither claiming nor disclaiming its interests in response to QTA claims. As a result, the United States could trick a claimant into sitting on his or her rights until the QTA's statute of limitations has run. To say to a claimant "'[t]he joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970). Likewise, it is not worthy of our great government to sanction the United States' avoidance of deciding QTA claims. This Court should grant the Petition.

II. THE TENTH CIRCUIT'S DECISION CREATES AN INTER-CIRCUIT SPLIT.

Among the circuit courts of appeals there exists a spectrum of decisions construing "disputed title" in the QTA. 28 U.S.C. § 2409a(a). The instant case exhibits the strictest construction of "disputed title." The Tenth Circuit held that "disputed title" exists if the plaintiff shows: (1) "the United States has either expressly disputed title[;]" or (2) has "taken action that implicitly disputes it." *Kane County*, 772 F.3d at 1212. The Tenth Circuit narrowed this test further by

holding that "actions of the United States that merely produce some ambiguity regarding a plaintiff's title are insufficient to constitute 'disputed title.'" *Id*. Essentially, the Tenth Circuit's new standard requires the plaintiff to demonstrate that the United States has expressly disputed title, or took an unambiguous action that implicitly disputes title. As demonstrated below, the Tenth Circuit's construction of "disputed title" creates a circuit split.

A. The Tenth Circuit Explicitly Rejected The Ninth Circuit's "Cloud On Title" Standard, Thereby Implicitly Rejecting The First, Fourth, And Eleventh Circuits' "Doubt On Title" Standard.

The Ninth Circuit utilizes a more realistic standard to define "disputed title," i.e., the "cloud on title" standard. The "cloud on title" standard evidences Congress's intent that the QTA's waiver of sovereign immunity authorizes resolution of disputes over "interests that 'cloud title,' i.e., interests that raise questions that may *affect* the claim of title and pose problems in the future." *Robinson v. United States*, 586 F.3d 683, 687 (9th Cir. 2009) (emphasis in original). Under the "cloud on title" standard, a court has subject-matter jurisdiction over a title dispute between the plaintiff and the United States if: (1) the United States, itself, asserts a claim that "operates as a present cloud on the [plaintiff's] title[,]" *Alaska*, 201 F.3d at 1161; or (2) "a third party's claim of an interest of the United States . . . clouds the plaintiff's

title."[6] *Leisnoi I*, 170 F.3d at 1192; *see Leisnoi, Inc. v. United States*, 267 F.3d 1019, 1024 (9th Cir. 2001) (same). Granted, the "disputed title" element cannot be satisfied if the United States "has never disputed it." *Alaska*, 201 F.3d at 1165.

The First, Fourth, and Eleventh Circuit Courts of Appeals utilize a broad "doubt on title" standard,[7] similar to that of the Ninth Circuit. Focusing on the plain meaning of the QTA, the Fourth Circuit construed "disputed title" to mean "the dispute . . . *casts doubt* on the title or ownership of the property." *Ginsberg v. United States*, 707 F.2d 91, 93 (4th Cir. 1983) (emphasis added). The First Circuit adopted this "doubt on title" standard. *Cadorette v. United States*, 988 F.2d 215, 223 (1st Cir. 1993) (citing *Ginsberg*, 707 F.2d at 93). The First Circuit explained: "[t]he initial inquiry in any such action must therefore be, 'Who holds superior title to the property – the plaintiff or the United States?'" *Cadorette*, 988 F.2d at 223. Following the aforementioned circuits, the Eleventh Circuit adopted the "doubt on title" standard holding the QTA "'permits adjudications only when the title or ownership of real property is in

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[6] In creating the "cloud on title" standard, the Ninth Circuit warned that "[a]ny other conclusion would thwart the purposes of the [QTA]; an attributed but infirm interest of the United States could cloud the title but not be subject to challenge." *Leisnoi, Inc. v. United States*, 170 F.3d 1188, 1192 (9th Cir. 1999) ("*Leisnoi I*").

[7] The Sixth Circuit may use a "doubt on title" standard. *See Saylor v. United States*, 315 F.3d 664, 670 (6th Cir. 2003).

doubt' as between plaintiff and the United States." *McMaster v. United States*, 177 F.3d 936, 941, 942 (11th Cir. 1999) (quoting *Cadorette*, 988 F.2d at 223).

The Tenth Circuit expressly rejected the Ninth Circuit's "cloud on title" standard.[8] *Kane County*, 772 F.3d at 1212. Therefore, to the extent that the "doubt on title" standard is similar, the Tenth Circuit also

[8] The Tenth Circuit misread *Mills v. United States*, 742 F.3d 400 (9th Cir. 2014), in suggesting that the Ninth Circuit had recently applied a "disputed title" standard instead of the "cloud on title" standard. *Kane County*, 772 F.3d at 1211. *Mills* is inapposite. In *Mills*, the question on appeal was "whether an individual seeking access to his state mining claims over real property owned by the federal government and third parties can bring an action asserting a right-of-way over such real property." 742 F.3d at 402. Before the district court were two issues: (1) appeal of the BLM's denial of plaintiff's right-of-way claim, denied because the BLM "lacked the authority to approve a right-of-way," *id*. at 402-03; and (2) plaintiff's assertion that he had a right to cross federal land to access his mining claims pursuant to the State of Alaska's R.S. 2477 right-of-way. *Id.* at 404-05. The district court dismissed both actions holding that legal title to R.S. 2477 rights-of-way vested in Alaska, not in the plaintiff. *Id.* at 404. The Ninth Circuit upheld the district court's dismissal because the plaintiff, Alaska (not a party to the case), and the United States all agreed that an R.S. 2477 right-of-way existed across the road in question and vested in Alaska. *Id*. at 405-06. Moreover, in recognition of Alaska's R.S. 2477 right-of-way, the United States admitted that it "did not intend to prevent Mills from accessing" the road. *Id.* at 406. In short, the "cloud on title" standard was not applicable in *Mills* because the United States never disputed the existence of the R.S. 2477 right-of-way or its ownership by Alaska. In the instant case, Petitioner takes a position contrary to the United States regarding the existence of R.S. 2477 rights-of-way over the Roads.

implicitly rejected that standard and created a conflict amongst the circuits. The cases demonstrate that had Petitioner's claims been brought in one of the other aforementioned circuit courts of appeals, the actions taken by the BLM regarding the Roads would have sufficed to place a "cloud" or "doubt" on title, thereby conferring subject-matter jurisdiction on a district court.

B. The Tenth Circuit's Decision Conflicts With Decisions In The Second And Seventh Circuits.

The Second Circuit has determined that the QTA's "statutory language casts a wide jurisdictional net." *United States v. Bedford Assocs.*, 657 F.2d 1300, 1316 (2d Cir. 1981). This determination greatly informed its construction of the language "adjudicate a disputed title," which the Second Circuit held encompasses a "variety of suits . . . in which adverse claimants to real property seek an adjudication of title as between themselves." *Id*. As such, actions seeking to remove clouds on title fall within the jurisdictional ambit of the QTA. *Id*. at 1315-16. Similarly, the Seventh Circuit determined that the QTA casts a wide jurisdictional net. *Wisconsin Valley Improvement Co. v. United States*, 569 F.3d 331, 333 (7th Cir. 2009). The Seventh Circuit has held that the QTA "permits the adjudication of quiet-title actions in which the United States claims an interest in real property. No more is needed for subject-matter jurisdiction." *Id.* Unlike the Second and Seventh Circuits,

the Tenth Circuit has narrowly construed jurisdiction under the QTA. Thus, there exists a major conflict between these circuits.

C. The Tenth Circuit's Decision Conflicts With The Decision Of The Fifth Circuit.

The Fifth Circuit has focused its construction of "disputed title" on which parties dispute title, meaning "the title dispute must be between the plaintiff – an adverse claimant – and the United States." *Lonatro v. United States*, 714 F.3d 866, 870 (5th Cir. 2013). Interestingly, the Fifth Circuit found support for its focus on adversity in this Court's holding in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012). *Lonatro*, 714 F.3d at 872 ("Th[is] Court held that the QTA only applies when the plaintiff asserts her own right in the disputed property, 'repeat[ing]' that the QTA only applies to 'adverse claimants, meaning plaintiffs who themselves assert a claim to property antagonistic to the Federal Government's.'" (quoting *Patchak*, 132 S. Ct. at 2207)).

Unlike the Fifth Circuit, the Tenth Circuit ignores Petitioner's assertion of rights and allows the United States to take a neutral position, thereby divesting the court of subject-matter jurisdiction. This one-sided approach requires the plaintiff to show that the United States has explicitly or implicitly demonstrated adversity between itself and the plaintiff. The foregoing demonstrates that the Tenth Circuit's

decision conflicts with decisions from seven other circuits. Such uncertainty regarding when a claimant may seek to quiet title against the United States cannot be tolerated. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 123-131 (C. B. Macpherson ed., 1980) (1690) (The principle function of government is to protect private property rights – not destroy them.). This Court should grant the Petition to clarify this issue. *See United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 230-31 (1958) (granting certiorari because of importance of uniform application of the law).

III. THE TENTH CIRCUIT'S CONSTRUCTION OF "DISPUTED TITLE" SAPS THE QTA OF ITS NATURAL AND OBVIOUS IMPORT.

In 1972, Congress passed the QTA to open the doors of federal courts to property owners wishing to resolve real property disputes with the United States. *See Block*, 461 U.S. at 280, 282. To accomplish this, Congress waived the United States' sovereign immunity from suit. *See* 28 U.S.C. § 2409a(a). The new "disputed title" standard created by the Tenth Circuit contravenes congressional intent by applying the principle, that waivers of sovereign immunity should be construed in favor of the United States, as "a judicial vise," which "squeeze[d] the natural and obvious import out of" the QTA and "sap[ped] its language of its normal and sound legal meaning. . . ." *Herren v. Farm Sec. Admin., Dep't of Agric., U.S.A.*, 153 F.2d 76, 78 (8th Cir. 1946) (citing *Moore v. United*

States, 249 U.S. 487, 489 (1919)); *cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (discussing duty to construe federal statutes to achieve their intended purpose).

A. Congress Intended To Waive The United States' Sovereign Immunity From Suits To Eliminate Clouds On Title Regardless Of The United States' Litigating Position.

The QTA waives the United States' sovereign immunity in actions "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). The plain language envisions that a property owner will be able to settle a dispute over an interest in real property directly with the United States. On its face, the QTA does not require a showing that "the United States has either expressly disputed title or taken action that implicitly disputes it." *Kane County*, 772 F.3d at 1212. Rather, the plain language requires that a plaintiff merely show "the United States claims an interest." 28 U.S.C. § 2409a(a). The most natural reading of 28 U.S.C. § 2409a(a) requires the existence of a dispute over real property interests, but not because the United States unambiguously says so. *Cf. American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) ("Going behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of

circumstances." (quoting *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 26 (1977))).

The QTA's legislative history also supports a more relaxed standard than the Tenth Circuit's. In the House Report to the QTA, Congress provided:

> [I]ndividual citizens are presently unable to bring an action to quiet title in which the United States can be joined as a party defendant. The doctrine of sovereign immunity presently prevents suits of this type from being brought against the United States. This history of this type of action goes back to the Courts of England. Suits to quiet title or to remove a cloud on title originated in the equity court of England. They were in the nature of bills quia timet, which allowed the plaintiff to institute suits when an action would not lie in a court of law. For instance, a plaintiff whose title to land was *continually being subjected to litigation in the law courts* could bring suit to quiet title in a court of equity in order to obtain an adjudication on title and relief against further suits. Similarly, *one who feared that an outstanding deed or other interest might cause a claim to be presented in the future* could maintain a suit to remove a cloud on title.

H.R. REP. NO. 92-1559, at 5-6 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 4547, 4551-52 (all emphasis added). Simply, Congress vested federal courts with jurisdiction over suits to remove a cloud on title between the United States and "one who feared that

an outstanding deed or other interest might cause a claim to be presented in the future." *Id*.

When viewing the QTA as a whole, Congress's clear scheme becomes even more apparent. *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme. . . .'" (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995))). Under 28 U.S.C. § 2409a(e), Congress allows the United States to "disclaim[ ] all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which i[f] confirmed by order of the court" will block jurisdiction. *Id*. The disclaimer provision presumes the existence of a dispute if the United States claims an interest in the real property. Where no dispute exists, the United States can file a disclaimer. *See Alaska*, 201 F.3d at 1162 ("Since . . . the United States can destroy jurisdiction by filing a disclaimer, it would be illogical to construe it to mean that the United States can also destroy jurisdiction by filing a refusal to make a disclaimer.").

The Tenth Circuit's construction of "disputed title" is contrary to the plain language and legislative history of the QTA. The Tenth Circuit's "disputed title" standard ignores the natural and obvious import of the QTA by further conditioning the QTA's waiver of sovereign immunity. *Compare* H.R. REP. NO. 92-1559 at 6 *as reprinted in* 1972 U.S.C.C.A.N. at 4552 ("Similarly, one who feared that an outstanding

deed or other interest might cause a claim to be presented in the future could maintain a suit to remove a cloud on title."), *with Kane County*, 772 F.3d at 1212 ("However, actions of the United States that merely produce some ambiguity regarding a plaintiff's title are insufficient to constitute 'disputed title.' This accords with both the purpose of the QTA – allowing parties to settle disputes with the United States over land – and the principle that waivers of sovereign immunity are construed narrowly.").

The Tenth Circuit's "disputed title" standard renders the QTA's disclaimer provision meaningless. For instance, if the United States does not expressly or unambiguously take action that implicitly disputes title to the real property then, according to the Tenth Circuit, a federal court lacks jurisdiction under 28 U.S.C. § 2409a(a). *Kane County*, 772 F.3d at 1212. The United States may divest a federal court's jurisdiction under the QTA by playing within the joints of the Tenth Circuit's newly created standard, and by taking actions that create *some* ambiguity as to the ownership of a property, but that do not rise to the level of an explicit or unambiguously implicit title dispute – no disclaimer necessary. Consequently, this new standard allows the United States to place a cloud on a plaintiff's title, thereby triggering the 12-year statute of limitations, without also affording the plaintiff recourse under the QTA. *Id.*; s*ee* § I.B, *supra*; *cf. Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) ("There is a basic difference between filling a gap left by Congress' silence and rewriting

rules that Congress has affirmatively and specifically enacted."). This is not what Congress intended.

B. The Tenth Circuit's Construction Of "Disputed Title" Has Swung The Pendulum To An Era When Quiet Title Suits Against The United States Were Foreclosed By Sovereign Immunity.

Before passage of the QTA, property owners disputing their property interests against the United States, had little to no ability to quiet title to property. H.R. REP. NO. 92-1559 at 5-6 *as reprinted in* 1972 U.S.C.C.A.N. at 4551-52. Congress enacted the QTA to provide necessary recourse and alleviate the need to use creative methods to overcome the doctrine of sovereign immunity. *See, e.g.*, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Malone v. Bowdoin*, 369 U.S. 643 (1962). But, with the Tenth Circuit's construction of "disputed title," the pendulum has now swung in the opposite direction to a pre-QTA era.

In *Larson*, the plaintiff sought to enjoin the chief of the War Assets Administration from selling or delivering coal that had already been sold to plaintiff. 337 U.S. at 684. The district court dismissed the complaint for lack of subject-matter jurisdiction based on sovereign immunity, which the court of appeals reversed. *Id*. at 684-85. This Court then held that plaintiff's suit was in effect against the United

States, because the officer's actions were the actions of the sovereign and not unconstitutional:[9]

> [T]he action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for a specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.

Id. at 701-02. Therefore, suit could not be maintained against the United States or its officers without a waiver of sovereign immunity. Then, in *Malone*, this Court extended the *Larson* holding to common law actions for ejectment against officers of the United States. 369 U.S. at 645; *see Block*, 461 U.S. at 281.

Larson and *Malone* severely limited a property owner's ability to remove clouds on title to real property caused by the United States. *Block*, 461 U.S. at 282 ("The *Larson-Malone* test plainly made it more difficult for a plaintiff to employ a suit against federal officers as a vehicle for resolving a title dispute with the United States."). Property owners' options were all but illusory – "they could attempt to induce the

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[9] This Court distinguished *Larson* from *United States v. Lee*, 106 U.S. 196 (1882), a suit that acknowledged the "constitutional exception to the doctrine of sovereign immunity" because the Court found no unconstitutional impropriety in *Larson*. *Larson*, 337 U.S. at 696-97.

United States to file a quiet title action against them, or they could petition Congress or the Executive for discretionary relief." *Id*. at 280.

Congress enacted the QTA to rectify this. *Block*, 461 U.S. at 282. The QTA's waiver of sovereign immunity removed the obstacles created by *Larson* and *Malone* – now property owners could resolve title disputes with the United States. *See* 28 U.S.C. § 2409a(a). Yet, by requiring the plaintiff to show the United States either "expressly disputed title or [has unambiguously] taken action that implicitly disputes it," the Tenth Circuit has closed the door opened by the QTA. *Kane County*, 772 F.3d at 1212. This is not what Congress envisioned. In light of the Tenth Circuit's decision, property owners within the jurisdiction of the Tenth Circuit now face an intolerable barrier to bringing QTA claims against the United States – thereby harkening back to a pre-QTA era. Because the Tenth Circuit has effectively rewritten the QTA, this Court should grant the Petition.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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