No. 15-27

In The Supreme Court of the United States

STATE OF UTAH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
BRIDGET K. ROMANO
Chief Civil Deputy
ANTHONY RAMPTON
KATHY A. F. DAVIS
Assistant Attorneys General
Counsel for Petitioner
350 N. State Street, Ste. 230
Salt Lake City, UT 84114
Telephone: (801) 538-1191
tylergreen@utah.gov

*Counsel of Record

SEPTEMBER 24, 2015

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES – Continued

REPLY BRIEF

Nothing in the United States' Brief in Opposition (BIO) undermines the certworthiness of Utah's question presented. On the contrary, the BIO confirms that Utah cleanly presents a single significant legal issue: whether actions by the United States that raise a cloud on a State's title to real property create "a disputed title" sufficient to trigger federal jurisdiction for a Quiet Title Act (QTA) suit. 28 U.S.C. §2409a(a). "A disputed title" is one of two preconditions necessary to invoke jurisdiction for a QTA claim; the second is that "the United States claims an interest" in the property, *id.*, and because the BIO does not dispute that the United States failed to appeal an adverse decision on that second element, *see* Pet. 19, the United States has waived the issue, *see* this Court's Rule 15.2.

The BIO's actual contentions fare no better. Utah does not dispute its principal proposition (BIO 7-10, 13-14): that a QTA claim arises when there's a "controversy between the parties – *i.e.*, the United States and the party seeking to quiet title." BIO 8. *See*, *e.g.*, Pet. 20 ("[W]here a property owner's claim of interest in property and the United States' claim of interest in that property are incompatible, there is 'disputed title to' that property, which is all the QTA requires for an action to be maintained."). The BIO's focus on *which parties* must dispute title is argument based on a strawman that detracts from Utah's *actual* question of *what quantum of dispute* between a plaintiff and the United States triggers jurisdiction.

The BIO's remaining attempts to dissuade this Court from reviewing the Tenth Circuit's erroneous interpretation of §2409a(a)'s "disputed title" element – its holding that a QTA plaintiff "must show that the United States has either expressly disputed title or taken action that implicitly disputes it," App. 10a – are unavailing. Contrary to the BIO's claims (BIO 14-17), the Tenth Circuit's interpretation squarely conflicts with the Ninth Circuit's, which authorizes QTA jurisdiction *not only* when the United States explicitly or implicitly disputes title *but also* when actions by the United States result in a cloud on a plaintiff's title. *Leisnoi, Inc. v. United States*, 170 F.3d 1188, 1192 (9th Cir. 1999); *see infra* 3-6. And the Tenth Circuit's new jurisdictional rule threatens to make many QTA actions time-barred before they have even accrued – the United States' contrary view notwithstanding, *see* BIO 17-19.

The United States does not seriously dispute that this question is critically important – especially to States in the West – or that this vehicle is an ideal one to resolve it. As of 2010, the United States owned 628,801,639 acres in our Country; of those, 583,748,754 acres – a full 93 percent of the federal government's land holdings – are located within the 15 States constituting the Ninth and Tenth Circuits. Congressional Research Service, Federal Land Ownership: Overview and Data, Table 1 (Feb. 8, 2012), *available at* https://www.fas.org/sgp/crs/misc/R42346.pdf (last visited Sept. 22, 2015).

That these two circuits, which cover 93 percent of the land for which the United States could face QTA claims, employ incompatible tests for QTA jurisdiction is intolerable. The split is square. There is no need for further percolation. This Court should grant certiorari.

I. The Ninth And Tenth Circuits' Tests To Determine When "A Disputed Title To Real Property" Exists Directly Conflict And Lead To Disparate Outcomes On Identical Facts.

A. The Split Is Square.

The United States acknowledges that the Tenth Circuit expressly "reject[ed]" the Ninth Circuit's "'cloud on title'" standard in favor of requiring a plaintiff to "show that the United States has either expressly disputed title or taken action that implicitly disputes it." *See* BIO 6; App. 10a. But it suggests that review is not warranted because these Circuits do not "squarely" disagree. BIO 7, 16. Its efforts to distinguish the conflicting tests only confirm the split's existence and the need for review.

As Utah has explained, *see* Pet. 13-18, the Ninth Circuit held in *Leisnoi, Inc. v. United States* that federal district courts have "initial jurisdiction" over QTA claims when there is "a conflict in title between the United States and the plaintiff" – and that even "a third party's claim of an interest of the United States can suffice" to establish such a conflict "if it

clouds the plaintiff's title." 170 F.3d 1188, 1192 (9th Cir. 1999) ("*Leisnoi I*").

No later Ninth Circuit case law departs from that standard.

The Ninth Circuit next cited *Leisnoi I* in *Alaska v. United States*, 201 F.3d 1154 (9th Cir. 2000), holding that the district court lacked jurisdiction over Alaska's QTA claim to the Black River because "there has never been a dispute between the United States and the State of Alaska" over title to the Black River. *Id.* at 1164-65. "A title cannot be said to be 'disputed' by the United States if it has never disputed it." *Id.* at 1165. *Alaska* thus could not have altered *Leisnoi I* because *Alaska* turned on the *absence* of any dispute regarding title – not on whether the *degree* of the dispute sufficed to create QTA jurisdiction.

Nor did the Ninth Circuit abandon *Leisnoi I*'s "cloud on title" standard when those same parties later returned to that court. *See Leisnoi, Inc. v. United States*, 267 F.3d 1019, 1023 (9th Cir. 2001) ("*Leisnoi II*") (applying *Leisnoi I* to hold that the district court had jurisdiction over the plaintiff's QTA claim because "there was a continuing dispute between the asserted interests of Leisnoi and the United States in the property at issue").

And contrary to the United States' suggestion, *see* BIO 14-16, the Ninth Circuit's decision in *Mills v. United States*, 742 F.3d 400 (9th Cir. 2014), comports with *Leisnoi I*. *Mills* reiterated that "[f]or a title to be disputed for purposes of the QTA, the United States

must have adopted a position in conflict with a third party regarding that title." 742 F.3d at 405. No such conflict existed in *Mills* because the United States neither "expressly dispute[d] the existence" of the claimed right-of-way underlying plaintiff's QTA claim nor took "an action that implicitly dispute[d]" it. *Id.*

Nothing in *Alaska*, *Leisnoi II*, or *Mills* suggests – let alone holds – that the Ninth Circuit has abandoned *Leisnoi I*'s cloud-on-title standard as a way to establish the requisite conflict in title. That *Mills* does not even cite *Leisnoi I*, much less purport to overrule it, is fatal to any claim that *Leisnoi I* did not survive *Mills*; in the Ninth Circuit, "a three judge panel is bound by an earlier precedential decision." *Ceron v. Holder*, 747 F.3d 773, 781 (9th Cir. 2014).

To be sure, *Mills* described *other* ways to establish the necessary conflict: plaintiffs can cite evidence that the United States expressly disputed the plaintiff's title or acted in a way that implicitly disputed it. *See* 742 F.3d at 405-06. But neither *Mills* nor any other case the United States cites suggested that those are now the *exclusive* ways a Ninth Circuit plaintiff can establish the requisite conflict in title; rather, they are alternative ways – coordinate with showing a "cloud on title" – to do so.

The United States thus errs the same way the Tenth Circuit did – by reading *Mills* as abandoning the cloud-on-title standard, rather than as supplementing it. *See* BIO 14-16; App. 10a. And this error necessarily leads to the conclusion that the split is square: QTA plaintiffs in the Tenth Circuit have *fewer*

ways to establish "a disputed title" than do plaintiffs in the Ninth Circuit. Tenth Circuit QTA plaintiffs "must show that the United States has either explicitly disputed title or taken action that implicitly disputes it," App. 10a, while Ninth Circuit QTA plaintiffs may make either of those showings *or* point to action that creates a cloud on their title, *Leisnoi I*, 170 F.3d at 1192.

This conflict between the Ninth and Tenth Circuits cannot stand. A plaintiff's ability to invoke 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. & Sch. Lands*, 461 U.S. 273, 286 (1983), should not turn on the happenstance of which circuit the disputed property is located in.

B. The Split Is Outcome Determinative.

As even the United States concedes, *see* BIO 4-7, this case confirms that the Ninth and Tenth Circuits' conflicting tests lead to disparate outcomes on identical facts. Under the Ninth Circuit's cloud-on-title test, a "disputed title" exists – thus triggering QTA jurisdiction – when the United States discloses its view that it *can* unilaterally take actions inconsistent with a QTA plaintiff's right-of-way, even if it has not taken them *yet*. The Tenth Circuit's contrary standard limits QTA jurisdiction to instances where the United States *has* taken such actions in furtherance of a dispute.

The district court applied *Leisnoi I* and held that Utah satisfied §2409a(a)'s "disputed title" element by showing the United States had placed a cloud on title to six of its R.S. 2477 rights-of-way in Kane County – the Hancock and Sand Dunes roads and four Cave Lakes roads.

The district court found that the United States placed a cloud on Utah's title to the Hancock and Sand Dunes roads by omitting those roads from an official Bureau of Land Management field plan. The necessary "legal ramifications" of that omission were that "the roads are 'closed,' even though, as a factual matter, the BLM has taken no step to enforce the closure." *Id.* at 70a. "Because Kane County does not have to wait until the United States *acts* to close a road, the designation in the" field plan "constituted notice of an adverse claim." *Id.* at 70a-71a.

The district court found a cloud on title to the four Cave Lakes roads because the United States' answer to Kane County's complaint "denied they were R.S. 2477 roads." *Id.* at 72a. It further found a cloud on title based on the United States' issuing Title V permits that "give a private entity the power to manage, develop, and modify" Utah's R.S. 2477 roads, *id.* – thereby "put[ting] the United States in the position of directing what occurs on those roads," *id.* at 72a-73a.

Applying its contrary test, the Tenth Circuit rejected the district court's view that these clouds on title created QTA jurisdiction. The Court of Appeals agreed that the United States' actions resulted in

"ambiguity" about "the legal status" of the Hancock and Sand Dunes roads, but held that such "ambiguity is insufficient to constitute a 'disputed title' under §2409a(a)." App. 13a (internal quotation marks omitted). The Court of Appeals specifically noted that the United States took "no action to limit travel" on those two roads. *Id.*

With respect to the four Cave Lakes roads, the Tenth Circuit concluded that the United States' admissions in its answer could not create an "explicit or implicit dispute" regarding title because "requiring the United States to either admit allegations or waive sovereign immunity under §2409a(a) would place a tremendous and unfair burden upon it at the pleading stage." *Id.* at 15a. (This is one of the Tenth Circuit's most puzzling holdings; it is hard to imagine how the United States could have more concretely and "expressly disputed title," App. 10a, than these admissions in litigation.) The Court of Appeals further concluded that the United States did not implicitly dispute title by issuing the Title V permits, reading those permits as a "deliberate attempt *not* to dispute Kane County's title" because "they *explicitly* state they are 'superseded' by any R.S. 2477 rights-of-way." *Id.* at 16a. The Court of Appeals also faulted Kane County for "produc[ing] no evidence as to how the permits interfered with any development plans." *Id.* at 17a.

The Tenth Circuit's reading does violence to the plain meaning of the term "disputed" in §2409a(a). As relevant, it means "to call into question (as the validity

or the existence of something)." Webster's Third New Int'l Dictionary 655 (1963); *see also* Webster's New Int'l Dictionary 752 (2d ed. 1936) (defining "dispute" as "To oppose by argument or assertion; . . . controvert; to call in question; to deny the truth or validity of; as, . . . a *disputed* title"). The Ninth Circuit's rule, unlike the Tenth Circuit's, is consistent with those definitions; it recognizes that the United States' actions or conduct that call into question or deny the validity or existence of Utah's R.S. 2477 rights-of-way – *i.e.*, that place a cloud on Utah's title – create a justiciable "dispute[ ]" under §2409a(a) even absent evidence that the United States has yet "taken action that implicitly disputes" Utah's rights-of-ways. App. 10a.

In short, a "dispute" can exist before a party to it has "taken action," App. 10a, in furtherance of it. This Court should review the Tenth Circuit's contrary holding.

II. Under The Tenth Circuit's Rule, The QTA's Statute Of Limitations May Run Before A Court Obtains Jurisdiction To Adjudicate A QTA Claim.

The Tenth Circuit's erroneous reading of §2409a(a) also warrants review because it could improperly bar a QTA plaintiff from bringing *any* quiet title claim. The United States' efforts to avoid that result, *see* BIO 17-19, are not persuasive.

Congress used the word "claim" in three QTA sections to trigger two different events. *See* Pet. 22-25. First, a necessary precondition to QTA jurisdiction under §2409a(a) is that "the United States claims an interest" in real property. Second, a QTA plaintiff must file suit within twelve years from when it "received notice of the Federal claims to the lands," §2409a(i), if it's a State; or for all other plaintiffs, within twelve years of when they "knew or should have known of the claim of the United States," §2409a(g).

The trouble arising from these similar statutory terms is the license the United States takes under them to contend both that a plaintiff's suit is time-barred under §2409a(g) or (i) – because the plaintiff knew or should have known of the United States' "claim" to the disputed property more than twelve years before filing suit – and that a court lacks jurisdiction under §2409a(a) because the United States purportedly "claims" no interest in the disputed property. The district court below balked at the United States' "temerity" for attempting to straddle both sides of that fence. App. 69a. The Ninth Circuit has too, adopting a district court's characterization of "the United States as 'playing dog in the manger.'" *Alaska*, 201 F.3d at 1159. "That refers to the dog that finds food for chickens and ducks in a manger, does not eat it, but keeps the ducks and chickens out so that they cannot eat the food to which they are entitled." *Id.*

Without acknowledging its manger-guarding, the United States assures this Court that the Tenth Circuit's error will not produce a wellspring of time-barred QTA claims because "[a]n action by the United States that does not explicitly or implicitly dispute a plaintiff's claim to an R.S. 2477 right-of-way provides no grounds for naming the United States in a suit to adjudicate title – and it would also not trigger the limitations period." BIO 19.

Even if the United States were abandoning wholesale its prior QTA litigation tactics, its assertion conflicts with binding statute-of-limitations precedent and thus cannot allay the problems Utah describes. The Tenth Circuit has held that any "interest claimed" by the United States triggers the statute of limitations so long as "it constitutes a cloud on the plaintiffs' title." *Knapp v. United States*, 636 F.2d 279, 282 (10th Cir. 1980); *see also George v. United States*, 672 F.3d 942, 944 (10th Cir. 2012) ("the trigger for starting that [QTA] twelve-year clock running is an exceedingly light one"). Decisions from the Fourth, Eighth, and Ninth Circuits are in accord. *See* Pet. 23 (citing cases).

The United States' assertion thus contravenes the Courts of Appeals' view that the QTA statute of limitations starts to run based on some act or conduct by the United States short of an "explicit[ ] or implicit[ ] dispute" regarding "a plaintiff's claim." BIO 19. Whatever the appeal of the United States' new litigating position, it is not binding on Utah and other QTA plaintiffs, who must follow circuit precedent.

The decision below – which imposes a higher threshold for jurisdiction to attach than for the statute of limitations to start running – thus warrants review. The Tenth Circuit's new QTA framework departs from this Court's repeated emphasis on "the standard rule that the limitations period commences when the plaintiff has a complete and present cause of action." *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418 (2005) (internal quotation marks omitted); *see also* Pet. 24-25 (citing cases).

The Tenth Circuit's framework also turns QTA analysis on its head. Construing §§2409a(a) and (g) together makes clear that a QTA claim can be "substantial enough for jurisdiction even if limitations against a private litigant has not yet begun to run." *Alaska*, 201 F.3d at 1164. Indeed, "[i]t makes no sense to start limitations running because of an event that creates no dispute and is not involved in the controversy against which a limitations defense is asserted." *Leisnoi II*, 267 F.3d at 1025. But the Tenth Circuit's framework does just that – an error arising from the Tenth Circuit's insistence on "'construing statutory phrases in isolation'" instead of "'reading statutes as a whole.'" *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984)).

The Tenth Circuit's crabbed reading of the QTA's jurisdiction provision threatens to dump in the time-barred dustbin untold numbers of QTA suits over

which district courts never could have exercised jurisdiction. This Court's review is warranted.

CONCLUSION

Utah's petition for a writ of certiorari should be granted.

Respectfully submitted,

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
BRIDGET K. ROMANO
Chief Civil Deputy
ANTHONY RAMPTON
KATHY A. F. DAVIS
Assistant Attorneys General
Counsel for Petitioner
350 N. State Street, Ste. 230
Salt Lake City, UT 84114
Telephone: (801) 538-1191
tylergreen@utah.gov

**Counsel of Record*