No. 17-756

IN THE

Supreme Court of the United States

PUBLIC SERVICE COMPANY OF NEW MEXICO,
Petitioner,

v.

LORRAINE BARBOAN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE NAVAJO NATION AND INDIVIDUAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit correctly ruled, consistent with the only other circuit court to address the issue, that a condemnation action under 25 U.S.C. § 357 is unavailable against an Indian tribe that holds an undivided beneficial interest in the targeted land, which is held in trust by the United States.

2. Whether a proceeding under 25 U.S.C. § 357 may move forward if a tribe holding an undivided interest in the land invokes sovereign immunity, and whether this Court should consider that question despite the fact that it was not reached by the Tenth Circuit.

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INTRODUCTION

Petitioner Public Service Company of New Mexico (PNM) asks this Court to review a unanimous panel decision on a narrow and rarely raised question as to which there is no split: the Tenth Circuit's interpretation of a statutory provision authorizing only the condemnation of "[l]ands allotted in severalty to Indians." 25 U.S.C. § 357. The Tenth Circuit held that Section 357's limited authorization does not permit the condemnation of trust land in which an Indian tribe, in this case the Navajo Nation, holds an undivided interest. Instead, a utility seeking access to such land must do what it normally does in these situations and what—in fact—PNM has done in the

past. It must negotiate for the consent of the Nation and a sufficient number of the individual owners of the land.

Petitioner does not suggest that the Tenth Circuit's interpretation of Section 357 diverges from the decision of any other circuit. Nor could it. The only other circuit to reach the question, the Eighth Circuit, reached exactly the same conclusion as the Tenth Circuit here. That was over thirty years ago. Thus, for decades, precedent has dictated that if a utility wishes to obtain access to trust land in which an Indian tribe holds an interest, it must follow a different (and statutorily prescribed) path for obtaining a right of way over tribal trust land by obtaining the consent of "proper tribal officials" and, in most cases, the majority of the "individual Indian owners." *Id.* § 324.

Undeterred, Petitioner asks this Court to grant certiorari to make new law allowing utilities to dispense with these established consent requirements for gaining access to tribal trust lands. And Petitioner goes even further, urging this Court to grant review of a second question concerning joinder and sovereign immunity in Section 357 actions that the Tenth Circuit did not even reach.

Petitioner justifies these bold requests almost entirely by reference to a series of ostensibly dire consequences for utilities that Petitioner claims will result from the Tenth Circuit's opinion. The sky is not falling, in fact. The Eighth Circuit adopted the same interpretation of Section 357 thirty-five years ago. Since then, the issue has only arisen in a handful of district court cases. *None* of those courts has adopted the interpretation of Section 357 that Peti-

tioner now espouses, and *none* of the results that Petitioner now forecasts have occurred.

Stripped of its hyperbole, the petition amounts to a request for splitless error correction in the absence of any error and—in the case of the second question presented—in the absence of even a holding from the court of appeals. Certiorari should be denied.

STATEMENT

A. Historical Background

1. The United States spent much of the Nineteenth Century engaged in open hostilities toward Indian tribes, including the Navajo Nation. *See Williams* v. *Lee*, 358 U.S. 217, 221 (1959). As the last century came to a close, Congress changed tacks, choosing forced assimilation as the lodestar of federal Indian policy. Assimilation was to be accomplished primarily by allotment: that is, allocating reservation "lands to tribe members individually." *Cty. of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 254 (1992). "The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Id.*

"[E]arly efforts" at allotment "were marked by failure," in part because "many of the early allottees quickly lost their land" to non-Indians. *Id.* Congress attempted to ameliorate the problem by passing the General Allotment Act of 1887, better known as the Dawes Act. *Id.* The Dawes Act gave the President the authority "to allot most tribal lands nationwide without the consent of the Indian nations involved," but, to prevent the allottees from immediately losing newly acquired lands, the Act "restricted immediate

alienation or encumbrance by providing that each allotted parcel would be held by the United States in trust for a period of 25 years or longer" before "a fee patent [would] issue to the Indian allottee." *Id.*

This, too, failed. "As allotments spread throughout the country, Indians continued to lose land" until "as much as two-thirds of allotted lands had passed out of Indian ownership." Pet. App. 9a (citing Felix S. Cohen, Cohen's Handbook of Federal Indian Law § 1.04 (Nell Jessup Newton et al. eds., 2012 ed.) ("Cohen's")). In addition, the trust status of the allotted lands that remained in the hands of individual Indians gave rise to a new difficulty: The trust lands could not be "alienated or partitioned." *Hodel* v. *Irving*, 481 U.S. 704, 707 (1987). Thus, as land was passed on to new generations, it could not be divided and parceled out among family members. Instead, each acquired an undivided interest in the land. The result was "some parcels having hundreds, and many parcels having dozens, of owners." *Id.*

2. The allotment era drew to a close in 1934, when "perhaps for the first time in American history, the congressional pendulum swung decisively toward favoring tribal sovereignty." Pet. App. 11a. Through the 1934 Indian Reorganization Act, "Congress halted allotments, began restoring unallotted surplus land to tribal ownership, and indefinitely extended the twenty-five-year trust period for allotted lands." *Id.*

In recent decades, Congress has taken more aggressive "action to ameliorate the problem of fractionated ownership of Indian lands," *Hodel*, 481 U.S. at 709, and to return formerly-allotted land to tribes. For example, it passed the Indian Land Consolida-

tion Act in 1983, amending it in 1984 and again in 2000. That statute, as amended, provides both the federal government and tribes multiple tools "to eliminate undivided fractional interests in allotments and consolidate tribal land holdings." Cohen's § 15.07[2].

More recently, the federal government settled a major class action, *Cobell* v. *Salazar*, 679 F.3d 909 (D.C. Cir. 2012), in part by creating "a $1.9 billion Trust Land Consolidation Fund for the purchase of fractional interests from willing sellers to consolidate property rights in Indian tribes." Cohen's § 15.07[2] n.45. Congress ratified that settlement in the Claims Resolution Act of 2010. Pub. L. No. 111-291, § 101(e), 124 Stat. 3064, 3067. As of April 2017, through the *Cobell* land buy-back program, "more than $1.1 billion has been paid to landowners, over 680,000 fractional interests have been consolidated (representing a 23 percent reduction), and the equivalent of nearly 2.1 million acres of land have been transferred to tribal governments." Land Buy-Back Program for Tribal Nations Under Cobell Settlement, 82 Fed. Reg. 17,681-01, 17,681 (Apr. 12, 2017).

B. Statutory Framework

1. At the dawn of the Twentieth Century, as the network of public utility infrastructure spread across the country, it became clear that utilities would sometimes need access to land owned and held in trust for tribes and individual Indians in order to accommodate utility wires, pipelines, and other facilities. Over the next few decades, Congress enacted a series of statutes designed to help companies obtain that access by authorizing rights-of-way. *See, e.g.*, 25 U.S.C. § 312 (authorizing rights-of-way

for "railway, telegraph, and telephone line[s] through any Indian reservation in any State or Territory, except Oklahoma, or through any lands reserved for an Indian agency or for other purposes in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty"); *id.* § 319 (similar provision for rights-of-way for telephone and telegraph lines); *id.* § 321 (similar provision for oil and gas pipelines).

In 1948, Congress sought to standardize and streamline these laws. It passed a single statute authorizing the Secretary of the Interior "to grant rights-of-way for all purposes * * * over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes * * * or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes * * * and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians." *Id.* § 323. Before the Secretary can grant any right-of-way over "any lands belonging to a tribe organized under the" Indian Reorganization Act, the statute requires consent from "proper tribal officials" and, under most circumstances, the consent of any individual Indian landowners. *Id.* § 324.

2. Congress has also provided for a narrowly limited condemnation power in 25 U.S.C. § 357. First enacted in 1901, Section 357 provides that "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located[.]" Act of Mar. 3, 1901, ch. 832, § 3, 31 Stat. 1058, 1084. Unlike Sections 323 and 324, Section 357 imposes no consent require-

ment—but it also pertains to a narrower class of lands. While Sections 323 and 324 explicitly apply to a variety of lands including "lands now or hereafter held in trust * * * for individual Indians or Indian tribes"; Section 357 references only "lands allotted in severalty to Indians."

C. Factual Background

In 1960, the Bureau of Indian Affairs granted Petitioner Public Service Company of New Mexico "a fifty-year right of way easement * * * authorizing PNM to construct, maintain, and operate an electric transmission line in northwestern New Mexico." Pet. App. 92a. PNM used the easement to build an approximately 60-mile transmission line known as the AY Line. *Id.* "The Navajo Nation and its members benefit from the support that the AY Line provides to PNM's electricity distribution system." *Id.* at 93a.

As the expiration date for the original easement approached, PNM began the process of negotiating for a new right-of-way. *Id.* At first, PNM "obtained written consent from the requisite percentage of Allotment owners." *Id.* In addition, the Navajo Nation "gave written consent for the right-of-way through lands in which the United States holds the entire interest in trust" for the Nation—that is, lands that have never been allotted. *Id.* at 13a. PNM then submitted its renewal application to the Bureau. *Id.* at 93a.

During the extended pendency of that application, certain individual landowners revoked their consent, leaving PNM just shy of the requisite number of consents in five parcels. *Id.* at 13a-14a. As relevant to this Petition, the Navajo Nation owns an undivid-

ed, partial interest in two of those parcels, one through conveyances from beneficial owners under the Indian Land Consolidation Act and the other through intestate descent under the American Indian Probate Reform Act of 2004. *Id.* at 43a; D. Ct. Dkt. 149 at 6, 8.[1] PNM alleges that it made an abbreviated effort to negotiate the renewal of a temporary easement with certain individuals who own interests in the two parcels. Pet. App. 44a & n.2. But the Nation has *no* record of any attempt by PNM to engage in negotiations with the Nation regarding the parcels at issue. *See id.*

D. Procedural Background

Rather than attempting to negotiate with the Nation or otherwise continuing efforts to secure consents, PNM turned to the courts. It filed this condemnation action under Section 357 against the Navajo Nation, the United States as title holder, and the individual owners. In its lawsuit, for the first time, PNM sought a *perpetual* easement, even though it had never attempted to negotiate that right with either the Nation or the individual allottees. *Id.* at 44a. The Nation moved to dismiss with respect to

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[1] Since the Tenth Circuit's ruling, the Nation has also obtained partial interests in two more parcels implicated in PNM's right-of-way request, through the land buy-back program. *See* D. Ct. Dkt. 149, at 13. 16. Contrary to Petitioner's oblique suggestions, these transfers were not part of a strategic effort to manipulate jurisdiction, but rather part of a congressionally endorsed program to bring previously-allotted lands back into the hands of the tribes.

the two parcels in which it held an ownership interest (referred to below as the "Two Allotments"). *Id.*

1. In a thorough opinion, the District Court granted the Nation's motion. Drawing on decades-old Eighth Circuit precedent, it held that "PNM lacks the authority to condemn the Two Allotments because the portion of the Two Allotments owned by the Nation are now considered 'tribal land,' as opposed to allotted land." *Id.* at 120a (citing *Nebraska Pub. Power Dist.* v. *100.95 Acres of Land in Thurston Cty.*, 719 F.2d 956, 961 (8th Cir. 1983)). In the alternative, it held that the Nation's sovereign immunity had not been waived or abrogated with respect to Section 357 actions because neither that provision nor any other congressional act unequivocally strips tribes of immunity for such actions. *Id.* at 119a. Accordingly, the Nation had to be dismissed as a party to the suit. *See id.* The court then held that the suit could not proceed without the Nation because it is a necessary party under Rule 19(a). The court explained that "[t]he Nation's interest in being immune from condemnation actions and even its interest in adequate compensation cannot be adequately protected" unless it is a participant in the suit. *Id.* at 124a. Together, these two findings—that the Nation was a necessary party that could not be involuntarily joined—dictated dismissal. *See id.* at 128a.

The District Court denied reconsideration, *id.* at 85a, but certified four questions for interlocutory appeal under 28 U.S.C. § 1292(b). The first asked whether Section 357 "authorize[s] a condemnation action against a parcel of allotted land in which the United States holds fee title in trust for an Indian tribe, which has a fractional beneficial interest in the

parcel." The remaining three asked whether the District Court had properly concluded that the Nation was a necessary party to the condemnation action, and whether the Nation was protected from participation by its sovereign immunity. Pet. App. 83a.

2. The Tenth Circuit accepted the appeal, but ultimately found that it only needed to address the first question to affirm. *Id.* at 17a. In a unanimous opinion, the court held that PNM did not have a cause of action under Section 357. *Id.* at 7a.

The court's analysis began with the plain text of the statute. *Id.* at 17a. It recognized that " '[a]llotment' is an Indian-law term of art that refers to land awarded to an individual allottee from a common holding." *Id.* at 18a. In light of that definition, the Court found it significant that Section 357 exclusively authorizes condemnation of "allotted" lands. *Id.* "[S]tarkly absent from" Section 357 "is any similar authorization for tribal lands." *Id.* The court noted that this "sharply contrasts with the paragraph immediately preceding § 357, which is part of the same section of the [1901] Act, but is codified at 25 U.S.C. § 319." That preceding provision "authorized * * * certain rights-of-way *over reservations and other lands held by tribes*, as well as allotted lands." *Id.* (emphasis added). The court therefore rejected "PNM's proposed rule that once an allotment always an allotment" because it would require "disregard[ing] or slant[ing] § 357's plain language." *Id.* at 19a (internal quotation marks omitted).

The court also rejected PNM's contention that the Nation's undivided interest could somehow be dis-

aggregated from the remainder of the property. *Id.* at 23a. In reaching this conclusion, it was guided by the Eighth Circuit's decision in *Nebraska Public Power*. There, the Eighth Circuit determined that where a tribe held only future, reversionary interests in a parcel, "those future interests sufficed to make the relevant parcels tribal land." Pet. App. 21a. The Tenth Circuit emphasized the Eighth Circuit's holding that tribal land includes "land *or any interest therein*, title to which is held by the United States in trust for a tribe." *Id.* (quoting *Nebraska Pub. Power*, 719 F.2d at 962) (emphasis added by Tenth Circuit). In so holding, both the Eighth and Tenth Circuits looked to Bureau of Indian Affairs regulations that use the same definition for other tribal right-of-way provisions. *Id.* at 21a-22a; *Nebraska Pub. Power*, 719 F.2d at 962. But the Tenth Circuit was careful to observe that those regulations had only "a limited impact on [its] interpretation of § 357 because they do not apply to condemnation actions." Pet App. 22a.

The Tenth Circuit was further persuaded by the fact that "Congress has known about the Eighth Circuit's case for 34 years and has not amended § 357 to allow condemnation of tribal lands." *Id.* at 23a. Nor did the more recent "Acts creating tribal buy-back and consolidation programs say [any]thing about allowing condemnation on tribes' reacquired land." *Id.* at 23a-24a. The court was similarly unmoved by PNM's assertion that negative consequences would ensue if it could not condemn the tribal land. As the court put it, PNM's remedy for any "negative policy effects it claims may follow * * * lies elsewhere." *Id.* at 24a.

Having resolved the case on the first issue, the Tenth Circuit did "not reach the other questions

raised on appeal," including the Rule 19(b) question or the tribal sovereign immunity issue, observing only that it found the District Court's opinion to be "thorough and well-reasoned" on both. *Id.* at 17a n.2. It did not issue any holdings on those questions, although it pointed out that PNM "would still have had a long, difficult road ahead before its condemnation action could proceed" even if it had "prevailed on the § 357 statutory question." *Id.*

The Tenth Circuit subsequently denied PNM's request for rehearing and rehearing *en banc*, *id.* at 164a, and its motion to stay the mandate, *id.* at 143a. Petitioner timely sought certiorari.

ARGUMENT

Petitioner asks this Court to consider two questions regarding the interpretation and application of Section 357. Neither is worthy of this Court's review. The first question—regarding the reach of Section 357's condemnation power—asks the Court to decide a splitless question of statutory interpretation that only two circuit courts have had to address in the more than 100 years since the statute became law. And the second question—regarding joinder and sovereign immunity—is even less cert-worthy because the Tenth Circuit did not reach it.

Petitioner barely disputes any of this. Instead, it suggests that the Court must grant certiorari to avoid the purportedly dire consequences of the Tenth Circuit's holding on the country's power grid. But the Tenth Circuit's analysis implemented the same understanding of Section 357 that courts have followed for the last thirty-plus years, without any apparent effect on the power grid. The Court should deny review of both questions presented.

I. THERE IS NO REASON TO REVIEW THE SPLITLESS QUESTION REGARDING THE TENTH CIRCUIT'S CORRECT INTERPRETATION OF SECTION 357.

Petitioner's first question presented satisfies none of the conventional requirements for certiorari review. There is no circuit split with respect to the meaning of Section 357, nor does Petitioner point to any precedent of this Court with which the Tenth Circuit's opinion diverges. Instead, Petitioner's plea for review turns almost entirely on its assertion that the Tenth Circuit's holding will deprive it of a condemnation power it needs in order to avoid major consequences for this country's utility companies. That assertion is belied by the fact that the Eighth Circuit announced the same interpretation of Section 357 decades ago, and this is the first time that the issue has even reached the circuit courts since. It also ignores the reality that rights of ways are typically obtained not through involuntary condemnation, but rather through a negotiated consent process that Petitioner failed to pursue in this case, despite its successful negotiations with the Nation for *other* lands along this very transmission line.

Petitioner therefore asks this Court to engage in pure error correction. And because the Tenth Circuit's interpretation is dictated by the plain language of Section 357, there is no error to correct.

A. The Tenth Circuit's Decision Does Not Implicate Any Splits.

To begin, there is no split regarding the meaning of Section 357. Petitioner barely pretends otherwise. As it concedes, the Tenth Circuit predicated its decision in large part on the Eighth Circuit's thirty-

five year-old holding in *Nebraska Public Power*. Pet. 11. In that case, the Eighth Circuit held that a power company could not use Section 357 to condemn land that had been allotted to and was currently held by individual Indians because a tribe owned a future interest in that land. As the Eighth Circuit explained, by its terms, Section 357 "authorizes condemnation *only* of '[l]ands allotted in severalty to Indians * * *.'" *Nebraska Pub. Power*, 719 F.2d at 961 (emphasis added). It does not permit condemnation of tribal land, which includes "land *or any interest therein*, title to which is held by the United States in trust for a tribe." *Id.* (internal quotation marks omitted). Thus, when a tribe holds an interest in land, it becomes tribal land and "cannot be condemned pursuant to 25 U.S.C. § 357. Instead, consent of the Secretary and the proper tribal officials must be obtained pursuant to the 1948 Act." *Id.* at 961.

That is precisely what the Tenth Circuit held here, when it declined to permit PNM to use a narrow condemnation power limited to "lands allotted in severalty to Indians" to condemn land in which the Nation held an undivided fractionated interest. Petitioner observes that the Eighth Circuit's decision involved a slightly different type of partial interest in land—a reversionary future interest, rather than a fractionated present interest. Pet. 27-28. But Petitioner does not seriously argue that the Eighth Circuit would have reached a different conclusion on these facts. *See id.* Nor could it; the Eighth Circuit's decision defined "tribal land" as land in which a tribe

has "*any* interest." *Nebraska Pub. Power*, 719 F.2d at 962 (emphasis added).[2]

The only other circuit that Petitioner even mentions is the Ninth, which has not squarely addressed this question. Contrary to Petitioner's claim, however, what little that court has said suggests that it agrees with its sister circuits, including that Section 357 "does not apply to land held in trust for the Tribe." *United States* v. *Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1551-52 (9th Cir. 1994). Petitioner suggests that holding was dicta, but in fact it was one of the primary reasons that the Ninth Circuit vacated the lower court's ruling in that case. *Id.* Petitioner also points to other precedent from the Ninth Circuit endorsing the uncontroversial proposition that "allotted lands" receive "no special protection." Pet. 23 (quoting *S. Cal. Edison Co.* v. *Rice*, 685 F.2d 354, 356 (9th Cir. 1982) (emphasis omitted)). But, as the court below recognized, the case containing that statement did not consider the question decided by the Tenth Circuit here, which is whether land in which *a tribe* has acquired an ownership interest may still be subject to condemnation as "[l]and[] allotted in severalty to Indians." Pet. App.

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[2] Petitioner's other proffered distinction—that there was no pre-existing easement in *Nebraska Public Power*—is even less relevant. Petitioner offers no legal rationale for its curious thesis that the proper construction of the statute should somehow depend on whether the Nation should have expected "that [the utility] would seek to preserve" a pre-existing right of way set to expire. *See* Pet. 28-29.

18a-19a (emphasis added and internal quotation marks omitted).

Petitioner briefly attempts to excuse the absence of any real split, alleging that—because of the location of allotted lands—this is an issue that is only likely to arise in the Eighth, Ninth, and Tenth Circuits. But that does not change the fact that the two circuits that have addressed the question are in agreement, and the third has signaled that it will reach the same conclusion. Indeed, as the Tenth Circuit observed, Petitioner cannot cite a single case from any court adopting the view that Section 357 "allows condemnation of tribal land, whether the tribal interest is fractional, future, or whole." *Id.* at 24a.[3] *Accord Enable Okla. Intrastate Transmission, LLC* v. *A 25 Foot Wide Easement*, No. CIV-15-1250-M, 2016 WL 4402061, at *3 (W.D. Okla. Aug. 18, 2016) ("Because the Kiowa Tribe owns an undivided 1.1% interest in the tract that is held in trust, the Court finds that the tract is tribal land and cannot be condemned pursuant to 25 U.S.C. § 357."); *Bear* v. *United States*, 611 F. Supp. 589, 599 (D. Neb. 1985) ("As the United States owns the fee in tribal lands,

[3] Petitioner points (at 32) to *WBI Energy Transmission, Inc.* v. *Easement & Right of Way*, No. CV 14-130-BLG-SPW, 2017 WL 532281, at *4 (D. Mont. Feb. 8, 2017), but that unpublished district court case held that Section 357 "may not be employed to condemn an interest in allotted lands which is beneficially owned by an Indian tribe." *Id.* The *WBI* court also held that the interests of the individual owners could be condemned, but before the Tenth Circuit Petitioner expressly disclaimed that position, asserting that Section 357 must be read to permit the condemnation of the land as a whole. *See* pp. 29-30, *infra*.

the property cannot be condemned without the Secretary of the Interior's approval unless authorized by some other act of Congress."). Such uniformity demonstrates that there is no need for the Court's intervention.

Moreover, even in the Eighth, Ninth, and Tenth Circuits, the question has reached a court of appeals *exactly twice* in the last thirty-five years. That suggests that the absence of a split is not a product of geography, but rather a signal that the question rarely comes up *at all*. And if there is any merit to Petitioner's speculation that this issue is likely to become more common, Petitioner will be able to use that fact to make its case for policy change to the appropriate audience: Congress.

2. Petitioner also tries to make up for the absence of a split on the actual question presented by gesturing toward a split on the application of the Indian canon, which dictates that ambiguous statutes should be construed in favor of tribes.

This argument fails out of the gate because the only discussion of the Indian canon in the decision below was pure dicta. The court's clear holding was that the "plain language" of Section 357 dictated its result. Pet. App. 20a. It considered the Indian canon only in the alternative, stating that "[e]ven if § 357 were ambiguous, [it] still would apply the Indian-law canon to rule in favor of tribal sovereignty and against a permanent anti-tribal-land classification." *Id.* Thus, any split with respect to the Indian canon plainly is not implicated.

In any event, there is no split on the Indian canon. Petitioner suggests that the circuit courts are divided as to whether the Indian canon applies only to stat-

utes passed for the benefit of the tribes, or whether it may be applied more generally. But as Petitioner admits, this Court has repeatedly cited *both* formulations. In a 1918 case, *Alaska Pacific Fisheries* v. *United States*, the Court described the canon as a presumption favoring tribes when a statute has been "passed for the benefit" of tribes. 248 U.S. 78, 89 (1918); *see also Bryan* v. *Itasca Cty.*, 426 U.S. 373, 392 (1976); *Negonsott* v. *Samuels*, 507 U.S. 99, 110 (1993) (both using the *Alaska Pacific Fisheries* formulation). In a 1985 case, *Montana* v. *Blackfeet Tribe of Indians*, the Court cited *Alaska Pacific Fisheries*, but dropped the qualifier, articulating the canon as a generally applicable presumption in favor of tribes. 471 U.S. 759, 766, 768 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); *see also Yakima*, 502 U.S. at 269; *Chickasaw Nation* v. *United States*, 534 U.S. 84, 93-94 (2001) (both using the *Blackfeet Tribe* formulation).

All of this precedent springs from a single earlier case, *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912), which broadly held that "in the government's dealings with the Indians the rule is * * * liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of" the Indians. *Id.* Given this common ancestry, there is no reason to think that *Alaska Pacific Fisheries* and *Blackfeet Tribe* are in tension with one another, or that they are attempting to articulate different rules of law. And there is certainly no well-developed split in the lower courts on the issue.

Petitioner claims (at 34) that the split is "best demonstrated" by comparing the positions of the Tenth Circuit (which PNM claims applies the canon

to all statutes) and the D.C. Circuit (which allegedly only applies the canon to statutes that benefit tribes). But the D.C. Circuit case Petitioner points to makes it quite clear that, like the Tenth Circuit in this case, it considered the statute to be unambiguous, and only addressed the applicability of the Indian canon in dictum. *See El Paso Nat. Gas Co.* v. *United States*, 632 F.3d 1272, 1278 (D.C. Cir. 2011) ("[The statute] is unambiguous. In addition, even were [the statute] ambiguous, the presumption applies only to statutes 'passed for the benefit of dependent Indian tribes.' ").

The remaining two cases that the Petitioner claims are on the D.C. Circuit's side of the split involve statutes that *were* passed for the benefit of Indian tribes. *See Penobscot Nation* v. *Mills*, 861 F.3d 324, 327 (1st Cir. 2017) (construing the Maine Indian Claims Settlement Act); *Gaming Corp. of Am.* v. *Dorsey & Whitney*, 88 F.3d 536, 539 (8th Cir. 1996) (construing the Indian Gaming Regulation Act). Therefore, nothing in those cases turned on which formulation of the Indian canon the courts applied.

In short, there is no split on the question presented, and even the side-split that Petitioner describes is illusory.

B. Petitioner Greatly Exaggerates the Importance of the Tenth Circuit's Holding.

Its gestures at a split aside, Petitioner's primary argument in favor of review rests on the dire consequences it claims will follow from the Tenth Circuit's interpretation of Section 357. Petitioner suggests that electricity companies will be forced to reroute their lines and that gas companies will have to dig

up their pipelines nationwide. Petitioner is simply wrong.

1. First and foremost, Petitioner misrepresents the nature of the problem it faces. It suggests that, unless it is able to condemn land partially held in trust for the Navajo Nation using Section 357, it will be forced to reroute its power lines entirely. That is not so; Petitioner has a far simpler option. It may negotiate for the consent of the Tribe and the requisite number of individual allottees. That is the path that Petitioner pursued at the beginning of the renewal process, when it *successfully* negotiated for the consent of both the Nation and individual allottees, including obtaining consent from the Nation for parcels consisting entirely of tribal trust land. Pet. App. 13a, 93a. Yet PNM has never alleged that it approached the Nation to resume negotiations once it learned that it had lost the requisite number of consents, or that it has sought and been denied the Nation's assistance in obtaining consent from the individual owners. *Id.* at 44a n.2. Petitioner cannot claim that it faces an insuperable obstacle while eschewing a readily available option for surmounting it.

Petitioner's failure to pursue good faith negotiations is particularly striking for two reasons.

First, negotiated consent—rather than involuntary condemnation—is the means that Congress set out for obtaining a right-of-way over land in which a tribe holds an interest. 25 U.S.C. §§ 323-324. Sections 323 and 324 specifically pertain to "lands now or hereafter held in trust by the United States for individual Indians *or Indian tribes*." *Id.* (emphasis added). Section 323 gives the Secretary of the Inte-

rior the power to "grant rights-of-way for all purposes" over those lands. Section 324 then specifies that, in most cases, a right of way should be granted only with the consent of the relevant tribal officials and a majority of individual owners. 25 U.S.C. § 324.

Petitioner and its fellow utilities would undoubtedly prefer to avoid the consent requirement entirely, but Petitioner may not ask this Court to give it a condemnation power that Congress has not, and Congress made Sections 323 and 324—but *not* Section 357—applicable to land held in trust for Indian tribes.

Second, Petitioner's failure to engage in good faith negotiations erects an independent state law bar to the successful resolution of its condemnation action. Under New Mexico law, "an action to condemn property may not be maintained * * * unless the condemnor made a good faith effort to acquire the property by purchase before commencing the action." N.M. Stat. Ann. § 42A-1-6(A). Because Petitioner did not even try to negotiate with the Nation before filing its condemnation action, it could not prevail even if Section 357 were applicable to lands in which a tribe holds an undivided interest.[4]

2. Petitioner therefore attempts to steer well clear of the actual facts of this case, instead raising the specter of failed negotiations with recalcitrant own-

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[4] This issue was pled as an affirmative defense below, *See* C.A. Appellant's App'x 68-69, but, because the District Court granted the motion to dismiss, the parties were never required to proceed to briefing on this defense.

ers that will force utilities to reroute their infrastructure. Those fears have no real basis in fact.

Section 324's consent requirement for tribal land has existed since 1948, and utilities are by now very familiar with the process of negotiating consent. Moreover, in most cases, parties on both sides have a strong interest in reaching an equitable agreement because the rights-of-way are necessary in part to provide power and other services to the tribes and individual owners.

Nor is there anything new about applying the consent requirement to formerly-allotted lands in which a tribe holds an undivided interest. It has been thirty-five years since the Eighth Circuit held that the Section 357 condemnation power may not be used with respect to land in which a tribe holds "any interest." Yet Petitioner and its amici can point to only a *single* example of a time where a utility company faced the prospect of rerouting an existing utility line in an ongoing case that has yet to reach a final conclusion. Pet. 15 n.6. And even then, they have provided no reason why that case cannot be resolved through the ordinary process of negotiations. *See id.*

Petitioner's inability to point to a single instance where the dramatic consequences it foresees have occurred in the three decades since *Nebraska Public Power* make it highly unlikely that they will suddenly begin to manifest now.

3. Petitioner also raises the possibility (at 13) that manipulative individual owners will transfer land to the tribes in order to prevent utilities from using their Section 357 condemnation power. Again, Petitioner points to no evidence that individual

owners are indulging in such schemes, which would require them to cede a share of their ownership rights purely to defeat a utility's desired right of way. (The cunning landowners Petitioner hypothesizes also presumably could have been ceding away their ownership rights for this purpose from the moment the Eighth Circuit decided *Nebraska Public Power* in 1983.) The tribal shares in this case were obtained through land consolidation laws and programs approved by Congress to ameliorate problems of land fractionation in Indian Country, not by way of some irrational anti-utility gambit. D. Ct. Dkt. 149.

4. In the end, Petitioner is forced to admit that the majority of its fears are not the product of new precedent from the Tenth Circuit. Rather, they are the result of Congress' deliberate choice to address the historic problem of fractionation in Indian trust lands and to promote land consolidation for the benefit of tribal self-governance.

Petitioner points out that recent statutory land buy-back and consolidation programs have significantly increased the number of formerly allotted lands which are now owned at least in part by a tribe. *See* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, § 102, 114 Stat. 1991, 1992; American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, 118 Stat. 1773; Claims Resolution Act of 2010, Pub. L. No. 111-291, § 101(e), 124 Stat. 3064, 3067. Petitioner apparently fears that Congress' new interest in promoting tribal government ownership will diminish the reach of its condemnation power. But the fact that Congress has passed new legislation demonstrating an interest in consolidating tribal ownership is scarcely a reason for this Court to adopt a novel interpretation of

Section 357 that would authorize the condemnation of tribal trust land, contrary to the statute's plain text. If Congress perceives there to be a tension between its recent buy-back and consolidation legislation and Section 357's narrow purview, Congress can fix it.

C. The Decision Below Reinforces the Reasonable, Longstanding Interpretation of Section 357.

In a last-ditch effort to obtain certiorari, Petitioner asserts that the Tenth Circuit's interpretation of Section 357 is simply wrong, and that the Court should grant certiorari to adopt Petitioner's alternative reading. Even if this Court were in the business of error correction, there is no wrong here to right. The Tenth Circuit's interpretation hews to the language of the statute. Petitioner's arguments to the contrary reveal that its true quarrel is with the text of the statute, not the reasoning of the Tenth Circuit.

1. The Tenth Circuit's holding is based on the plain text of Section 357, considered in light of the surrounding provisions. That text refers exclusively to the states' power to condemn "allotted" lands. 25 U.S.C. § 357. It makes no mention of tribal trust land. *See id.* By contrast, as the Tenth Circuit observed, the immediately preceding paragraph of the Act authorized the Secretary of the Interior to grant rights-of-way "through any Indian reservation" and "any lands held by an Indian tribe or nation in the Indian territory" *in addition to* "any lands which have been allotted in severalty to any individual Indian." Act of Mar. 3, 1901, ch. 832, § 3, 31 Stat. 1058, 1083 (codified as amended at 25 U.S.C. § 319). Other right-of-way provisions contain a similarly

exhaustive list. *See* 25 U.S.C. §§ 312, 321. Congress therefore well knew how to make a textual distinction between allotted lands and tribal trust lands when it wanted to. *Cf. Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252 (2010) (recognizing the significance of Congress' choice to omit a phrase when that phrase is included in an adjacent Code provision). In the case of Section 357, it chose to allow the condemnation of allotted lands, full stop. And because every interest in trust land is undivided, if a tribe holds an ownership interest in a parcel of land, condemning that land inevitably involves condemning tribal land held in trust, contrary to the express statutory scheme.

That understanding of the limits of the Section 357 power is particularly persuasive in light of the fact that in the almost four decades since it was first adopted by the Eighth Circuit, Congress has made no effort to amend the statutory scheme to expand Section 357's reach. *Johnson* v. *Transp. Agency, Santa Clara Cty.*, 480 U.S. 616, 629 n.7 (1987) (where "Congress has not amended the statute to reject [the Court's] construction, nor have any such amendments even been proposed, * * * we therefore may assume that our interpretation was correct"). That silence is telling; for in the same time frame, Congress has repeatedly endorsed land consolidation programs that have increased the number of formerly allotted lands in which tribes now hold an interest. It has also considered—and, to date, rejected—proposals to authorize condemnation of tribal trust lands. *See* U.S. Dep't of Energy, Energy Policy Act of 2005, Section 1813 Indian Land Rights-of-Way

Study: Report to Congress (May 2007).[5] Congress has therefore "acted against the background" of *Nebraska Public Power* without "declar[ing] an intention * * * to alter it." *Kiowa Tribe of Okla.* v. *Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998). That choice should be respected.

2. Against this text and context, Petitioner asserts that "lands allotted in severalty" *must* include lands that were previously "allotted" to individual Indians, even if a tribe now holds an ownership interest in that land. As the Tenth Circuit put it, this position "requires inserting language that is not there": namely, it requires reading "lands allotted in severalty" to mean "[All Tribal] lands [ever] allotted in severalty to Indians." Pet. App. 20a n.3 (internal quotation marks omitted). That is not the language Congress chose, and that alone is reason to reject Petitioner's construction.

a. Perhaps in search of a legal backdrop to make this atextual reading more plausible, Petitioner turns to property law. It argues (at 21-23) that the ability to condemn property is a characteristic that "runs with the land." But Petitioner offers no citation to property law principles to support that contention even generally, let alone in the context of tribal trust land. And Petitioner fails to explain how this principle—which, if it exists at all, presumably hails from the common law—could override the clear text of a statute. *See Pasquantino* v. *United States*,

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[5] *Available at:* https://www.energy.gov/sites/prod/files/oeprod/DocumentsandMedia/EPAct_1813_Final.pdf.

544 U.S. 349, 359 (2005) (recognizing that clear statutory text can displace common law).

Petitioner then turns to a series of irrelevant analogies. First it compares this action to the condemnation of lands owned by a tribe in fee. Pet. 22-23. But that ignores the historic difference between *fee* land and the *trust* land at stake here. Pet. App. 12a (recognizing the trust status of the parcels at issue) Lands held in trust for a tribe are typically subject to far greater federal protection from state regulation than lands held by a tribe in fee. *See Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 328-329 (2008). For example, this Court has determined that land held in fee by a tribe may be subject to state taxation which is not permissible with respect to tribal trust land. *See, e.g.*, *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114-115 (1998). Some lower courts have extended that proposition to permit state condemnation laws to reach lands held in *fee* by a tribe, holding that those fee lands should be treated no differently than privately-owned lands. *See Oneida Tribe of Indians of Wis.* v. *Village of Hobart, Wis.*, 542 F. Supp. 2d 908, 915-916 (E.D. Wis. 2008); *Anderson & Middleton Lumber Co.* v. *Quinault Indian Nation*, 929 P.2d 379, 873-874 (Wash. 1996) (en banc). Whether or not those cases are correct, they cannot be read to permit the condemnation of tribal *trust* land, which is unquestionably subject to greater federal protection.[6]

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[6] For the same reason, Petitioner's invocation (at 23-24) of the law of alienability is beside the point. If the federal government has approved land for free alienation, it has

Petitioner then attempts an inappropriate and inapt invocation of legislative history. As an initial matter, because the statutory text here is clear, there is no call to resort to legislative history at all. *See, e.g.*, *Milner* v. *Dep't of Navy*, 562 U.S. 562, 572 (2011). And Petitioner's effort is deficient in any event. It relies not on any traditional tool of legislative history—such as a conference or committee report—but on a vague notion that "Congress was less sympathetic to the role of Indian tribes in 1901 than it is today." Pet. 24. This highly "ambiguous legislative history" should not be allowed "to muddy clear statutory language." *Milner*, 562 U.S. at 572. Petitioner's appeals to other congressional policies and this Court's "general principles" are just as unavailing; whatever their weight in the abstract, they cannot supplant the text that Congress enacted into law. These arguments are especially unpersuasive given that Congress recently has endorsed an extensive land buy-back program as part of a landmark settlement of the *Cobell* class action without making any changes to Section 357. *See* p. 5, *supra*.

b. Petitioner's remaining efforts to sharpshoot the Tenth Circuit's reasoning are equally unpersuasive. Petitioner first chastises the Tenth Circuit for citing the Eighth Circuit's precedent in *Nebraska Public Power* as persuasive authority, contending that the Eighth Circuit wrongly relied on a definition from federal regulations that do not implement Section

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lost its protected trust status. *See Plains Commerce*, 554 U.S. at 328-329. But land does *not* lose trust status just because it was once allotted to individual Indians, and the land at issue here remains trust land. *See* Pet. App. 12a.

357. Petitioner cites commentary from a recent Bureau of Indian Affairs update to those regulations, clarifying that the rule "do[es] not provide guidance on § 357." Pet. 28 (quoting Rights-of-Way on Indian Land, 80 Fed. Reg. 72,492, 72,517 (Nov. 19, 2015)). This objection is beside the point for two reasons.

First, the Tenth Circuit's decision *already* recognized that the regulations are not binding because they implement a different part of U.S. Code. Pet. App. 22a. Nor was the court's discussion of the regulations determinative of its result, since it concluded that the "plain language" of Section 357 was all that it needed to reach its conclusion. *Id.* at 20a.

And second, even if the Eighth Circuit was wrong to look to the regulations in the first instance, in the thirty-five years since it did so no court of appeals has questioned it. The heavy presumption in favor of *stare decisis* in statutory cases suggests that Congress' failure to act is significant. *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (noting that, in statutory cases, the Court's "critics * * * can take their objections across the street, and Congress can correct any mistake it sees"); *accord Kiowa Tribe*, 523 U.S. at 758-759.

Petitioner's parting shot at the Tenth Circuit is that it failed to consider a "midpoint" reading of the statute that would allow the condemnation of the individual interests in the land but not the interests held by the Nation in the same land. Pet. 32-34. That suggestion is surprising, given that Petitioner argued *against* such a middle-ground approach in the lower court. C.A. Appellant's Reply Br. 17 (dismissing the approach as "illogical" and urging the

Court to reject it). As a result, Petitioner has waived that argument in this Court. *See Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2083 (2015) (refusing to consider argument that petitioner had waived below); *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325, 330 n.3 (1960) (respondent waived argument concerning adequacy of notice "by expressly disclaiming surprise at the trial"). That waiver would pose an insurmountable vehicle problem even if the Court were interested in the case, as one of the statutory readings that Petitioner now champions is not even properly before the Court.

II. THIS COURT SHOULD NOT REVIEW AN ISSUE THAT WAS NOT DECIDED BY THE COURT BELOW.

In a final effort to obtain review, Petitioner asks this Court to grant certiorari on a second question presented regarding mandatory joinder and tribal sovereignty—one the Tenth Circuit did not decide. In keeping with its longstanding practice, this Court should decline that invitation.

With refreshing candor, Petitioner repeatedly acknowledges that the Tenth Circuit did not reach this second question. *See, e.g.*, Pet. 9 (conceding that "the panel that actually heard the case * * * reached only the first question"); *id.* at 36 (acknowledging that the Tenth Circuit "was only deciding whether § 357 authorizes a condemnation action against a parcel of allotment land once an Indian tribe has acquired a fractional interest in that land"). These concessions are dispositive. This is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). It does "not decide in the first

instance issues not decided below." *Nat'l Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999).

Petitioner hardly disputes this. Deprived of any ordinary path to this Court, it resorts to two equally fruitless gambits. It first tries to ride the coattails of *Upper Skagit Indian Tribe* v. *Lundgren* (No. 17-387). Petitioner filed an amicus brief arguing that the Court's resolution of that case *might* have an impact on the second question presented here—the one the court below did not reach. But even Petitioner recognizes that *Upper Skagit* has no relevance to its first question presented. Br. of *Amicus Curiae* Pub. Serv. Co. of N.M. in Support of Respondents at 3, *Upper Skagit Indian Tribe* v. *Lundgren*, No. 17-387 (U.S. Feb. 28, 2018). It is also irrelevant to the Petitioner's second question. *Upper Skagit* involves fee land; even the respondents in that case do not argue that their rule would apply to trust land like the parcels at issue here. *See* Br. for the Respondents at 33, *Upper Skagit Indian Tribe* v. *Lundgren*, No. 17-387 (U.S. Feb. 21, 2018). It is also not a Section 357 condemnation proceeding, *id.* at 4, and this Court has *already* decided that Section 357 suits involving trust land cannot proceed without sovereign landowner parties, as the power to condemn under Section 357 depends on *in personam* jurisdiction. *Minnesota* v. *United States*, 305 U.S. 382, 386-389 (1939). *Upper Skagit* does not invite the Court to revisit that conclusion.

Unable to claim any real connection to *Upper Skagit,* Petitioner is left with its contention that the Court should consider its second question to avoid a return to the Tenth Circuit if it is able to prevail on its first question presented. Pet. 36-37. This concern, which is shared by *any* litigant confronting a

possible remand, is not nearly enough to justify jettisoning this Court's consistent policy of declining to decide questions that were not reached below.

Petitioner complains that the Tenth Circuit suggested (in a footnote) that it would likely have agreed with the District Court *if* it had reached the sovereign immunity question. The court's inclination makes sense. The District Court's well-reasoned opinion builds on this Court's conclusion in *Minnesota* that sovereign landowners are necessary parties and the "settled" principle that "a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978) (internal quotation marks omitted); *see also* Pet. App. 115a (citing *Santa Clara Pueblo*). Because the Nation is a sovereign that holds an ownership interest in the relevant trust land and Section 357 contains no unequivocal waiver of immunity, the District Court had little difficulty concluding that the Nation's sovereign immunity remains intact with respect to such condemnation actions. Pet. App. 119a.

At this stage, however, the soundness of the District Court's reasoning on these issues is beside the point. Musings in a footnote are not a holding, and the Tenth Circuit has not constrained itself to adopt a particular position on the second question in the highly conditional event that this Court [1] grants certiorari *and* [2] reverses on the splitless question of statutory interpretation that the Tenth Circuit actually decided. There is therefore no more reason for this Court to grant certiorari on the second question presented than on the first.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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