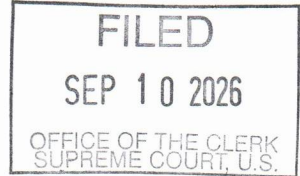


26-388

No. _____



IN THE
Supreme Court of the United States

SHARON AUBOL, et al.,

Petitioners,

v.

ANDEAVOR LOGISTICS, L.P., et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has recognized that, where Indians hold a possessory interest in land that derives exclusively from federal law rather than from state law, federal common law supplies a cause of action in trespass permitting the Indian owners to protect that federal right of possession. In the decision below, the Eighth Circuit recognized the existence of this “federal common law trespass cause of action.” App.23a. But it understood this Court’s prior cases to be limited to trespass claims brought by tribes asserting aboriginal title, and thus concluded that the cause of action is not available to petitioners here—individual Indian allottees with possessory rights based on a federal statute. The upshot is that the allottees in this case have no way to vindicate their own property rights against an undisputed, decade-long, still-continuing trespass. That result contravenes this Court’s cases, decisions of the Ninth and Tenth Circuits, the considered position of the United States, and background principles of property law.

The question presented is:

Whether individual Indian allottees with a current right of possession conferred by federal law have a federal common-law cause of action for trespass on their allotments.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners, listed below, were plaintiffs in the district court and plaintiffs-appellants in the court of appeals:

Sharon Aubol; Margo Bean; Janet Benton; Amanda Bird Bear; Roger Bird Bear; Thomas Bird Bear; Inez Burr; Denise Cavanaugh; Doreen Charging; JoAnn Chase*; Heather Demaray; Joyce Eakin; Darlene Edley; Donovan Fast Dog; George Fast Dog; Gloria Fast Dog; Estate of Nelson Fredericks; Sandra Gillette; Elsie Hapip, in her capacity as Personal Representative of the Estate of Josephine Inez Parenteau, Deceased; Valeri Hosie; Mavis Huber; Karen Koite; Linda Kroupa; Jamie Lawrence; Evelyn Lone Bear; Betty Matthews; Joan Matthews; Kenneth Matthews, Sr.; Sheridan Matthews; Herbert Pleets; Monique Pleets; Marion Rasmuson; Deborah Staples; Darryl Turner; Anthony White Owl; Eugene White Owl; Eunice White Owl; Kathleen White Owl; Wilson White Owl; Albert Whitman; Rae Ann Williams; Tiffany Williams; Arnold Young Bird; Betty Young Bird; Joan Young Bird; Murphy Young Bird; Noreen Young Bird; and Waylon Young Bird.

* Ms. Chase has passed away. A motion to appoint a personal representative of her estate is currently pending in New York state court. Once a representative is appointed, petitioners will move to substitute the representative as a party pursuant to Supreme Court Rule 35.1. Pursuant to Fed. R. Civ. P. 25(a)(1), petitioners have filed an unopposed notice advising the district court of Ms. Chase's death.

Respondents, listed below, were defendants in the district court and defendants-appellees in the court of appeals:

Andeavor Logistics, L.P.; Andeavor, formerly known as Tesoro Corporation; Tesoro Logistics GP, LLC; Tesoro Companies, Inc.; and Tesoro High Plains Pipeline Company, LLC.

(Continued from previous page.)

Similarly, Josephine Inez Parenteau died on June 20, 2024, and on August 19, 2026, Elsie Hapip was appointed under the laws of the State of North Dakota as the personal representative of her estate. On September 10, 2026, the district court granted petitioners' unopposed motion to substitute Elsie Hapip, in her capacity as Personal Representative of the Estate of Josephine Inez Parenteau, Deceased, as a party in this matter. *See* D. Ct. Dkt. 153.

STATEMENT OF RELATED PROCEEDINGS

U.S. District Court for the District of North Dakota:

- *Chase et al. v. Andeavor Logistics, L.P., et al.*, No. 1:19-cv-00143-DLH-CRH (judgment entered Aug. 8, 2023)

U.S. Court of Appeals for the Eighth Circuit:

- *Chase et al. v. Andeavor Logistics, L.P., et al.*, No. 20-1747 (judgment entered Sept. 13, 2021)
- *Chase et al. v. Andeavor Logistics, L.P., et al.*, No. 23-3019 (judgment entered Jan. 30, 2026; rehearing denied Apr. 13, 2026)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Sharon Aubol, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

INTRODUCTION

“[T]he ‘*sine qua non*’ of property” is “the right to exclude”; indeed, that right inheres in “the very idea of property.” *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149-50 (2021) (citation omitted). Just as fundamental is a means of enforcing that right: settled, centuries-old law holds that an individual with a right to possess a piece of property may, as an inherent aspect of that possessory interest, obtain judicial relief for unauthorized entries onto her land by an action in trespass. And that right has never depended upon the nature of the possessor’s title in the disputed lands. The right to sue for trespass arises from a right of *possession*, not ownership.

Those principles apply equally to possessory interests in land held by Indian tribes and their members. In *Oneida Indian Nation of New York v. County of Oneida* (“*Oneida I*”), 414 U.S. 661 (1974), and *County of Oneida v. Oneida Indian Nation of New York* (“*Oneida II*”), 470 U.S. 226 (1985), this Court held that an Indian tribe holding a right of possession that federal law conferred and never extinguished—and thus which was not subject to state law—could bring a claim for trespass derived from federal common law to protect that possessory interest. Together, these cases hold that, where Indians assert “a current right to possession conferred by federal law, wholly independent of state law,” *Oneida I*, 414 U.S. at 666, the “Indians have a federal common-law right to sue to enforce” that

possessory right, *Oneida II*, 470 U.S. at 235.

That principle should have resolved this case. Petitioners are 48 individual Indians who possess and hold beneficial title to federal trust allotments on an Indian reservation in North Dakota. Since 2013, respondent Andeavor Logistics, L.P. and its co-defendants (collectively, “Andeavor”) have maintained a crude-oil pipeline across petitioners’ allotments without a valid right-of-way. No one disputes that Andeavor’s occupation of that land is unauthorized or that petitioners have suffered over a decade of damages as a result. And no one disputes that petitioners’ possessory interests derive only from federal, not state, law. In these circumstances, *Oneida I* and *II* recognize that petitioners may sue respondents for trespass under federal law.

Yet the Eighth Circuit held, over a dissent by Judge Gras, that petitioners lack such a cause of action and therefore cannot sue to protect their vital interests. That decision leaves petitioners with a right of possession but no means of enforcing it, depriving petitioners of the judicial remedy this Court has held is “necessarily include[d]” in the “right of property.” *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 20 (1823) (emphasis omitted).

This Court should grant the petition and reverse.

At the outset, the Eighth Circuit’s decision cannot be reconciled with this Court’s cases. The panel majority acknowledged that this Court has recognized a federal common-law trespass cause of action for “Indians.” But it believed this Court’s cases did not control because (1) petitioners’ possessory rights derive from a federal

statute (rather than aboriginal title) and (2) petitioners are individual Indians (rather than tribes). But this Court's cases do not draw either purported distinction, and neither distinction supports denying petitioners a right to sue to protect their property rights.

On the first, the *Oneida* cases are not limited to possessory rights derived from aboriginal title; the Court expressly noted that the Oneidas' aboriginal right of possession was *also* confirmed by federal treaties and statutes, making the case directly applicable here. Moreover, privileging aboriginal title over trust title makes no sense. Both aboriginal title and trust title are conferred by federal law, and there is no reason for federal law to provide a right of action for one but not the other. Indeed, trust title is a *stronger* right than aboriginal title: aboriginal title does not qualify as "property" under the Fifth Amendment, while the trust title petitioners hold does. *E.g.*, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

On the second, this Court has never held that individual Indians lack power to enforce their possessory interests; to the contrary, the Court has noted that the "dual purpose of the allotment system would be frustrated unless both the Indian and the United States were empowered to seek judicial relief to protect the allotment." *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369 (1968); *see* App.44a (Grasz, J., dissenting) (calling majority's distinction "questionable").

By basing its decision on these artificial distinctions, the Eighth Circuit stripped petitioners of an enforceable right to exclude, in contravention of this Court's cases and centuries of settled property law.

The Eighth Circuit's decision also creates a split among the courts of appeals and openly departs from the considered position of the United States. Both the Tenth Circuit—in a decision joined by then-Judge Gorsuch—and the Ninth Circuit have recognized that, under this Court's precedents, individual Indian trust allottees possess a federal common-law trespass claim to protect their possessory interests. See *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1282 (10th Cir. 2010) (holding that allottees have a “federal common-law trespass claim”); *Agua Caliente Band of Mission Indians v. Cnty. of Riverside*, 442 F.2d 1184, 1186 & n.6 (9th Cir. 1971) (“An Indian, as the beneficial owner of lands held by the United States in trust[,] has a right acting independently of the United States to sue to protect his property interests.” (citing *Poafpybitty*)); see also *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009). The Eighth Circuit's contrary rule means that, while allottees in California and Oklahoma can maintain trespass claims, allottees in North Dakota cannot.

The United States rejected this untenable result in an amicus brief filed below. It explained that petitioners' statutorily conferred possessory interests are, “if anything, more deeply rooted in federal law” than the possessory interests conferred by aboriginal title, and that petitioners may sue to protect those interests under federal common law. Br. of the United States as Amicus Curiae in Supp. of Appellants and Reversal at 16, *Chase v. Andeavor Logistics, L.P.*, No. 23-3019 (8th Cir. Jan. 16, 2024), 2024 WL 248905 (“U.S. Br.”).

The question presented is important and this case presents an ideal vehicle for resolving it. There are

nearly 38,000 individual trust allotments, spanning nearly 2.7 million acres, in the Eighth Circuit alone. Under the decision below, the individual Indians who own those lands have no recourse of their own when a trespasser comes on their land or a right-of-way expires and the grantee simply stays put; they must wait, indefinitely, for an overburdened federal trustee to act—or not—on their behalf. The case presents a pure question of law that is outcome determinative and was fully briefed below (including by the United States). And the time to decide that question is now: the Eighth, Ninth, and Tenth Circuits—the three circuits split on the question presented—account for 99% of trust allotments held by individual Indians nationwide. There is no reason for further delay.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 165 F.4th 1102 (8th Cir. 2026) and reproduced at App.1a-46a. The order of the Eighth Circuit denying panel and en banc rehearing is unreported but is available at 2026 WL 981215 and reproduced at App.96a-97a. The opinion of the United States District Court for the District of North Dakota is reported at 686 F. Supp. 3d 854 (D.N.D. 2023) and reproduced at App.47a-95a. The prior opinion of the Eighth Circuit in this case, *Chase v. Andeavor Logistics, L.P.* (“*Chase I*”), is reported at 12 F.4th 864 (8th Cir. 2021) and reproduced at App.98a-123a.

JURISDICTION

The Eighth Circuit entered judgment on January 30, 2026. App.2a. Petitioners timely sought rehearing en banc, which the Eighth Circuit denied on April 13, 2026.

App.96a-97a. On June 29, 2026, this Court extended the time for filing this petition to September 10, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant portions of the Act of Mar. 3, 1891, ch. 543, § 23, arts. I-V, 26 Stat. 989, 1032-33, and of the U.S. Code, 25 U.S.C. §§ 323-325, 345, are reproduced in the appendix to this petition. *See* App.124a-30a.

STATEMENT OF THE CASE

A. Statutory and Historical Background

“[F]rom time immemorial,” Indian tribes were “the undisputed possessors of the soil” in the territory that would one day become the United States. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). With European arrival, “fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States.” *Oneida I*, 414 U.S. at 667. But the Indians’ possessory rights survived that transfer: “a right of occupancy in the Indian tribes was nevertheless recognized”—one “good against all but the sovereign” and “extinguishable only by the United States.” *Id.* After the Founding, moreover, that right was “the exclusive province of the federal law.” *Id.*

As the Nation expanded, the federal government acted to formally recognize Indians’ possessory interests to protect them from state incursion. It did so primarily via treaties establishing formal reservations, usually on lands within the tribes’ aboriginal territories. *See, e.g., Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 670 (1979)

("[P]art of land to which the Omahas had held aboriginal title ... was ... designated by the United States as a reservation and the Tribe's permanent home.").

In the late nineteenth century, during what is now called the Allotment Era, Congress reversed course, passing statutes that "carved reservations into allotments and assigned the land parcels to tribal members," *Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1104 (10th Cir. 2017), to encourage individual land ownership and hasten assimilation, see *Solem v. Bartlett*, 465 U.S. 463, 466 (1984).

Initially, allotment involved conveying parcels of reservation land in fee simple directly to individual Indians. See *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 253-54 (1992). That approach proved disastrous: since allotted lands were freely alienable, many allottees "quickly lost their land through transactions that were unwise or even procured by fraud." *Id.* at 254; see *Hodel v. Irving*, 481 U.S. 704, 706-07 (1987). Congress responded in 1887 with the General Allotment Act (or Dawes Act), ch. 119, 24 Stat. 388, which replaced fee ownership with a trust model: the United States would hold allotted land in trust for a specified period during which the allottee could not alienate or encumber his parcel without federal approval; only after that period elapsed would the allottee receive fee title, see *Yakima*, 502 U.S. at 254. Lands allotted in trust remained subject to federal law; state law would apply only "at the expiration of the trust period." *Id.* at 255 (citation omitted); see also *United States v. Mitchell*, 445 U.S. 535, 540-41 (1980).

Under this trust arrangement, the United States retained legal title to allotted parcels, while Indian allottees received—in Senator Dawes’s own words—the right to “occup[y] ... the land and enjoy all its use.” 13 Cong. Rec. 3211 (1882). The allottees’ possessory rights were central to this arrangement: “Congress intended that,” during the trust period, “the allottee would occupy the land as a homestead for his personal use in agriculture or grazing.” *Mitchell*, 445 U.S. at 543. Thus, “the allottee, and not the United States, was to manage the land” and “control [its] use.” *Id.* at 543-44.

Congress brought the Allotment Era to an end in 1934 with the Indian Reorganization Act (“IRA”), which halted all further allotments nationwide, indefinitely extended the trust periods for lands already allotted but not yet fee-patented, and provided that lands not yet allotted would be held in trust for the tribes. *See Yakima*, 502 U.S. at 255. As a result, lands allotted prior to 1934 which had not yet been fee patented never became subject to state property law. *Wilson*, 442 U.S. at 670-71 (“[W]here the Government has never parted with title and its interest in the property continues, the Indians’ right to the property depends on federal law, ‘wholly apart from the application of state law principles which normally and separately protect a valid right of possession.’” (quoting *Oneida I*, 414 U.S. at 677)). By contrast, the IRA did not affect allotted lands for which the trust period *already* elapsed; those lands *are* subject to state law. *See Yakima*, 502 U.S. at 254-55. The resulting “checkerboard of tribal, individual Indian, and individual non-Indian land interests,” *Barboan*, 857 F.3d at 1105, complicated the siting of railroads, telegraph

lines, pipelines, and other rights-of-way accompanying land expansion, *e.g.*, *Nebraska Pub. Power Dist. v. 100.95 Acres of Land in Thurston Cnty., Hiram Grant*, 719 F.2d 956, 958-59 (8th Cir. 1983).

Congress responded with a series of statutes empowering the Secretary of the Interior to grant rights-of-way across Indian trust land, including the Indian Right-of-Way Act of 1948 ("IRWA"), 25 U.S.C. §§ 323-328, which authorizes the Secretary to grant rights-of-way "for all purposes" across land held in trust for tribes or individual Indians, *id.* § 323. Crucially, consent of the Indian owner—whether tribe or individual—is needed. Where land is held in trust for a tribe, the Secretary must obtain "the consent of the proper tribal officials." *Id.* § 324. And when the Secretary wishes to grant a right of way "over and across lands of individual Indians," he must, except in specified circumstances not relevant here, obtain "the consent of the individual Indian owners" or, if "the land is owned by more than one person," the consent of owners holding a majority of the equitable interest in the tract, *id.*¹ In all cases, Congress provided that "[n]o

¹ IRWA's implementing regulations provide that, when "a grantee remains in possession after the expiration ... of a right-of-way," the Bureau of Indian Affairs ("BIA") "may treat the unauthorized possession as a trespass under applicable law," and may, if renewal cannot be renegotiated, "take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law." 25 C.F.R. § 169.410. A similar provision states that where an entity uses Indian land without an authorized right-of-way, the agency may act to recover possession and "[t]he Indian landowners may pursue any available remedies under applicable law, including applicable tribal law." *Id.* § 169.413.

grant of a right-of-way shall be made without the payment of [just] compensation" to the Indian owners. *Id.* § 325.

B. Factual Background

This case concerns allotted trust lands on the Fort Berthold Reservation (the "Reservation") in North Dakota. The Reservation was first formally recognized as the permanent home of the Mandan, Hidatsa, and Arikara Tribes (together, the "Tribes") via executive order in 1870, *see* Exec. Order of April 12, 1870; App.2a n.1, nearly two decades before North Dakota's admission to the Union in 1889, *see Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g*, 476 U.S. 877, 879 (1986). Then, by an 1891 statute approving an 1886 agreement, the Tribes agreed to cede part of the Reservation to the federal government. *See* Act of Mar. 3, 1891, ch. 543, § 23 ("1891 Act"), arts. I-II, 26 Stat. 989, 1032-33; *see* App.2a n.1. The same statute directed the Secretary of the Interior to allot the remaining Reservation lands to individual Indians on terms mirroring those in the Dawes Act: the United States would hold title in trust for 25 years before transferring fee ownership to the allottee. *See* 1891 Act, arts. III-IV, 26 Stat. at 1033. Allotted lands would become subject to state jurisdiction only once they were "patent[ed] ... to said allottees" at the trust's expiration. *Id.*, art. V, 26 Stat. at 1033.

Petitioners are 48 individual Indians who possess and hold beneficial title to trust parcels of Reservation land under the 1891 Act. D. Ct. Dkt. 28 ("Am. Compl.") ¶¶7-54. Due to the IRA's indefinite extension of the trust, petitioners' allotments are not—and never have been—subject to state law. *See* App.46a (Grasz, J., dissenting).

Respondent Andeavor owns the High Plains Pipeline System, a roughly 500-mile pipeline for transporting crude oil across the Reservation—including across 35 trust allotments belonging to petitioners and similarly situated allottees. App.2a-3a; Am. Compl. ¶6. In 1953, pursuant to IRWA, the Secretary granted Andeavor's predecessor a 20-year pipeline right-of-way across the Reservation. App.3a. The right-of-way was renewed for two further 20-year terms, before finally expiring in 2013. *Id.* For years thereafter, Andeavor continued operating the pipeline across petitioners' allotments without a valid right-of-way. *E.g.*, Am. Compl. ¶96.

Although Andeavor reached a renewal agreement with the Tribes in 2017—paying roughly \$2 million per acre in back trespass damages for lands possessed by the Tribes—it never obtained a renewed right-of-way over petitioners' individual tracts. *See id.* ¶¶92, 97. Yet the pipeline remains in place. *Id.* ¶98.

C. Proceedings Below

1. In October 2018, petitioners filed this putative class action against Andeavor for continuing trespass under federal common law, breach of the expired easement agreement, and unjust enrichment; they seek compensatory and punitive damages, an accounting of profits, disgorgement, and injunctive relief. App.3a-4a; *see generally* Am. Compl.

2. The district court dismissed the suit for failure to exhaust administrative remedies. App.4a. In September 2021, the Eighth Circuit reversed, holding that because IRWA does not authorize the BIA to award the remedies petitioners sought, exhaustion was not

required. *See* App.102a-06a. The *Chase I* panel deferred consideration of whether petitioners had a valid cause of action. *See* App.108a-16a, 116a n.6. It instead remanded, directing the district court to stay the case to allow the BIA to weigh in, because its “views ... on these legal issues would obviously be important.” App.119a-22a.

While *Chase I* was pending, the BIA took a series of shifting positions regarding Andeavor’s trespass. In a July 2020 Notification of Trespass Determination, it found that Andeavor continuously trespassed on individual trust allotments for seven years, ordered it to cease operations, and awarded treble damages of \$187.2 million. App.7a. The Assistant Secretary for Indian Affairs subsequently vacated that decision and remanded for a new decision. App.7a-8a. On remand, the BIA issued a decision reducing the trespass damages to around \$4 million, and the Assistant Secretary later affirmed. App.8a. Andeavor paid that amount and ceased operations, but left the pipeline in place. *Id.*

In March 2021, the Acting Secretary of the Interior vacated all prior BIA actions in this matter. App.118a. Then, one of Andeavor’s subsidiaries—Tesoro High Plains Pipeline Co.—sued the United States under the Administrative Procedure Act (“APA”) to vacate that 2021 decision. *See id.*; *Tesoro High Plains Pipeline Co. v. United States*, No. 21-cv-90 (D.N.D. filed Apr. 23, 2021). In its answer in *Tesoro*, the United States, in its capacity as trustee, asserted counterclaims against Andeavor for federal common-law trespass and ejectment on behalf of individual allottees. App.8a-9a. The district court denied Andeavor’s motion to dismiss the counterclaims but severed and stayed those claims

pending resolution of Tesoro's APA claims, which remain pending. App.10a.

3. After the Acting Secretary's March 2021 vacatur, the district court, on remand from *Chase I*, granted Andeavor's renewed motion to dismiss, holding, as relevant here, that petitioners lacked a federal common-law cause of action for trespass. App.11a.²

4. A divided Eighth Circuit panel affirmed. App.1a-46a. The two-judge majority recognized that this Court authorized a federal common-law trespass cause of action in *Oneida I* and *II*. *E.g.*, App.22a. But it believed that "this case is distinguishable from *Oneida* in two significant respects": (1) "the alleged source of [petitioners'] ownership interests was federal statutory allotments, not necessarily Indian title"; and (2) petitioners are individual Indians, "not a tribe." App.20a. Because the majority stated it was "unaware of any Supreme Court or circuit court decision that affords allottees with equitable possessory interest to tribal lands held in trust an individual cause of action for trespass *under federal common law*," it concluded that petitioners lacked "standing to bring this federal common law trespass cause of action." App.22a-23a.³

The majority acknowledged that the United States, as amicus, agreed with petitioners that individual trust allottees can sue for trespass under federal common law.

² Separately, the district court denied petitioners' request to intervene in *Tesoro*. App.11a-12a.

³ Despite the panel's repeated references to "standing," *e.g.*, App.20a, 23a, 43a, the panel majority held only that petitioners lack a cause of action, not that they lack Article III standing.

App.9a-10a. But it gave the government's submission "no deference or separate consideration," reasoning that the brief added "nothing of substance" beyond the parties' briefs and reflected only "the flip-flopping that has permeated the Secretary of Interior's actions in this complex dispute for more than a decade." App.10a-11a.⁴

Judge Grasz dissented on the trespass issue. He would have held that *Oneida II*'s reasoning indicates that individual allottees like petitioners—not just tribes asserting aboriginal title—can sue under federal common law to protect their possessory interests in land. See App.43a-46a. In Judge Grasz's view, when "*Oneida II* said 'Indians' had a federal common law right to sue to enforce their aboriginal land rights, it meant both tribes *and individual tribe members*." App.44a. That is so, Judge Grasz explained, because this Court's precedents do not distinguish based on tribal versus individual ownership or aboriginal versus statutory title; they turn instead on whether the plaintiff's possessory interest arises solely under federal (rather than state) law. See App.44a-46a (citing *Wilson*, 442 U.S. at 670-71). Because the lands here "ha[ve] never left the ownership of the United States and [are] not subject to state law," Judge Grasz would have held that petitioners "have standing to bring a trespass claim under federal common

⁴ Separately, the court dismissed petitioners' unjust-enrichment claim as derivative of their trespass claim, App.25a, and dismissed petitioners' breach-of-easement claim after finding that the United States was a required party that could not be joined, App.26a-34a. The court affirmed the denial of petitioners' motion to intervene in *Tesoro* but remanded for the district court to consider whether it should consolidate this case with *Tesoro*. App.34a-43a.

law.” App.46a.

Petitioners sought rehearing en banc, which the Eighth Circuit denied. App.96a-97a.

REASONS FOR GRANTING THE PETITION

This Court’s cases are clear: The right to bring a federal common-law cause of action for trespass runs to *all* Indians with possessory interests in land derived solely from federal law. In holding otherwise, a divided panel of the Eighth Circuit departed from this Court’s precedents on Indian property rights and property principles more generally, split with the Ninth and Tenth Circuits, and wholly disregarded the position of the United States. The question presented is important and this case is an ideal vehicle. This Court should grant certiorari to clarify the scope of the federal common-law trespass cause of action, as only this Court can.

I. The Eighth Circuit’s decision conflicts with this Court’s precedents.

A. Under this Court’s precedents, where Indians’ possessory interests in land derive solely from federal law, a federal common-law trespass cause of action exists to protect those rights.

Where the United States holds land in trust for the benefit of individual Indians and has never parted with title, the Indians’ possessory interests arise exclusively under federal law. As a result, under this Court’s cases, a federal common-law cause of action for trespass exists to protect those federal possessory rights.

1. In *Oneida I*, this Court found federal question jurisdiction over the Oneida Nation’s possessory claim

to millions of acres of land in New York because the possessory right asserted was exclusively “conferred by federal law, wholly independent of state law.” 414 U.S. at 666-67. As the Court explained, the Oneidas “owned and occupied” the disputed lands “from time immemorial.” *Id.* at 664. Then, after the Founding, the United States signed “various treaties” with the Oneidas “confirming [their] right to possession of their lands,” which were later “implemented by [a] federal statute,” the Nonintercourse Act. *Id.* These possessory rights—whether derived from aboriginal title or recognized title (that is, title formally granted by statute)—were “the exclusive province of the federal law.” *Id.* at 667. And federal law recognized these possessory rights as protectable interests even though the Indians no longer had “fee title to the [disputed] lands,” such title having “vested in the sovereign” by operation of law after “the colonists arrived.” *Id.* *Oneida I* held that, because the Oneidas “assert[ed] a present right to possession under federal law,” that claim presented a federal question over which the federal courts had jurisdiction under 28 U.S.C. §§ 1331 and 1362. 414 U.S. at 667, 675.

Although *Oneida I* held that the Oneidas’ possessory claims presented federal-law questions creating federal-court jurisdiction, it did not decide what standard governed those claims. The Oneidas’ claims could not be governed by state law, since “state law does not apply to the Indians except so far as the United States has given its consent,” which it had not done. *Id.* at 674 (citation omitted). Nor was there any “federal statutory guidance” on the subject. *Id.* But the Court did not see

the absence of a statute recognizing a cause of action as negating the existence of one. Instead, the Court held, “the governing rule of decision” should “be fashioned by the federal court in the mode of the common law.” *Id.*

On remand, the lower courts took up that mantle, holding that “the Oneidas may assert a federal common law action to recover damages for the [] wrongful possession of their land.” *Oneida Indian Nation of New York v. Cnty. of Oneida*, 719 F.2d 525, 530 (2d Cir. 1983); *see id.* at 531 (also recognizing common-law ejectment claim).

This Court affirmed that conclusion in *Oneida II*, holding that federal common law recognizes a cause of action for “Indians” to sue to enforce their federal “possessory rights.” 470 U.S. at 230, 236. To reach that conclusion, the Court applied the “well-established” principle, traceable through over a century of this Court’s cases, that when an Indian’s possessory right derives exclusively from federal law, a federal common-law cause of action exists to protect it. *Id.* at 235-36 & nn.5-6 (citing, *inter alia*, *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232 (1850)).

Together, *Oneida I* and *II* resolve this case. Here, it is undisputed that petitioners have a right to possess the lands over which Andeavor’s pipeline runs. *See* App.19a (recognizing petitioners’ “possessory interest in lands held in trust by the United States”). It is undisputed, too, that this possessory interest derives exclusively from federal law. *See* App.20a (noting that petitioners’ possessory rights “are based on federal statutes,” not state law); App.46a (Grasz, J., dissenting) (noting that petitioners’ lands are “not subject to state law”). Thus,

because petitioners “assert[] a present right to possession under federal law,” *Oneida I*, 414 U.S. at 675, they “can maintain [an] action for violation of th[ose] possessory rights based on federal common law,” *Oneida II*, 470 U.S. at 236; *accord Marsh*, 49 U.S. at 232 (recognizing, as to lands to which the United States held title subject to a right of use and occupancy reserved by treaty to individual Indians, that it was “not open to question” that “an action of ejectment could be maintained on an Indian right to occupancy and use”).

2. The panel majority resisted this conclusion because it believed this Court’s prior decisions did not involve the precise facts here—claims asserting possessory rights derived from federal statutes (rather than aboriginal title) brought by individual Indians (rather than tribes). *See, e.g.*, App.20a (“[T]he Allottees are not a tribe, ... and the alleged source of their ownership interests was federal statutory allotments, not necessarily Indian title.”).

Even if it were true that none of this Court’s cases were directly on point, that would *begin* the analysis, not end it. Yet the Eighth Circuit saw that observation as dispositive. Regardless, neither of the two distinctions with this Court’s prior cases that the panel majority saw as “critical,” *id.*, justifies the result below.

a. It is irrelevant under this Court’s cases that petitioners’ “claimed possessory right is based on ... a federal statutory grant” rather than “on aboriginal title.” *Id.*

To begin, the line the panel drew between aboriginal and recognized title does not describe even the *Oneida*

cases themselves. The trespass claim recognized in *Oneida II* was *not* based on possessory rights rooted solely in “aboriginal or Indian title.” App.20a. Rather, the Oneidas claimed “a present right to possession based *in part* on their aboriginal right of occupancy” and *in part* on “treaties guaranteeing their possessory right” and on “the Nonintercourse Acts.” *Oneida I*, 414 U.S. at 677-78 (emphasis added); *see id.* at 684 (Rehnquist, J., concurring) (noting that the Oneidas’ possession was “based not solely on the original grant of rights in the land but also upon the Federal Government’s subsequent guarantee” of those rights by treaty and statute). The Eighth Circuit was thus doubly wrong to assert that “[t]he distinction that mattered [in *Oneida II*] was whether the claimed possessory right is based on aboriginal title or a federal statutory grant.” App.20a. *Oneida II* concerned possessory rights derived from *both* sources. And the Court did not see those subsequent federal actions recognizing the tribe’s possessory rights as negating the availability of a federal cause of action. Instead, *Oneida I and II* together make clear that what matters is whether *federal* (rather than state) law—be it aboriginal title, treaties, statutes, or a combination thereof—grants the Indians the right “to the exclusive *possession* of their lands.” *Oneida II*, 470 U.S. at 235 (emphasis added). Federal law grants petitioners here the very same right.

Oneida I and II aside, the panel’s distinction—privileging aboriginal title over recognized trust title—flouts this Court’s jurisprudence. As a general rule, “[t]he rights attaching to tribal title are unaffected” by whether it is “aboriginal title” or “derived from treaties,

statutes, [or] executive orders.” *Am. Indian Law Deskbook* § 3.1, Westlaw (updated May 2024). So, if aboriginal title includes a federal-law right to sue in trespass, as *Oneida II* holds, so must trust title.

That is particularly obvious because, in the sole respect in which these two forms of Indian title differ, trust title is the *stronger* of the two. Aboriginal title, however venerable, is not compensable property within the meaning of the Fifth Amendment’s Takings Clause; thus, Congress may extinguish it without paying just compensation. *Tee-Hit-Ton*, 348 U.S. at 282-91. Trust title of the kind petitioners hold, by contrast, *is* a fully compensable property interest. *See Hodel*, 481 U.S. at 713-18; *see also* 25 U.S.C. § 325.

The upshot is that the panel majority got the hierarchy of Indian title exactly backwards. It held that a possessory interest that the Constitution protects from uncompensated appropriation (i.e., petitioners’ beneficial title to their trust allotments) enjoys *less* protection against private trespass than a possessory interest that the sovereign may extinguish for nothing (i.e., aboriginal title). That cannot be right. If Congress’s decision to place lands in trust reflects anything, it is a considered choice to provide allottees with *greater* protection than aboriginal title alone would supply. But in the majority’s view, the creation of a federal trust has precisely the opposite effect, stripping allottees of one of the ordinary incidents of possession.

There is no reason to suppose Congress intended this backwards result. The general rule is that an “extinguishment” of “the rights which the [Indians] had in their ancestral home[s].... cannot be lightly implied”

from “doubtful expressions.” *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353-54 (1941) (citation and internal quotation marks omitted). As a result, because under *Oneida II* aboriginal title included the “right[]” to sue for trespass under federal common law, the executive order and statute that created and then allotted the Reservation here should not be deemed to have “extinguish[ed]” that right absent some “clear and plain indication” that Congress intended that result. *Id.* No such indication appears in relevant statutes.

To the contrary, Congress’s statutes are uniformly solicitous of allottees’ possessory rights. For example, in IRWA, Congress specified that, before granting a right-of-way over individual trust allotments, the Secretary generally must obtain “the consent of the individual Indian owners” or “a majority” thereof. 25 U.S.C. § 324; see 25 C.F.R. § 169.107(b)(1). That requirement presupposes that the owners’ decision to withhold consent achieves something. Under the rule announced below, it does not. A party denied consent might simply carry on with its plans, knowing that the owner has no means of enforcing his denial of consent via trespass or ejectment; instead, the owner would need to persuade his overburdened trustee to act on his behalf. A consent requirement enforceable only at the option of a third party is not much of a consent requirement. This case proves the point: petitioners withheld their consent, yet Andeavor has remained on their land for thirteen years.

The Eighth Circuit’s ill-conceived distinction could also yield unintended consequences. If, as the panel majority suggested, federal trespass claims are available only to protect possessory interests based on aboriginal

title, *e.g.*, App.23a n.7, that rule would seem also to bar claims brought by *tribes* holding trust title. That rule would leave nearly 55,000 tribal trust parcels in the Eighth Circuit open to private trespasses.⁵ And it would be directly at odds with a substantial body of circuit precedent adjudicating tribes' federal common-law claims for trespass on trust lands.⁶

b. To the extent the decision below can be read to suggest that it is separately significant that petitioners are individual allottees and “not a tribe,” App.20a, that distinction, too, is irrelevant under this Court’s cases. True, the plaintiff in the *Oneida* cases was a tribe. *See Oneida I*, 414 U.S. at 663. But the Court never deemed this fact significant. Just the opposite: as Judge Graszk noted, *Oneida II* cited a litany of this Court’s prior cases

⁵ *See* Native Land Info. Sys., *BIA Land Area Totals for US Native Lands: 2019 Data from the United States Bureau of Indian Affairs*, <https://nativeland.info/dashboard/land-area-totals-for-us-native-lands/> (last visited Sept. 9, 2026) (“NILS Dataset”).

⁶ *E.g.*, *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Rsrv. v. Enbridge Energy Co.*, 184 F.4th 874, 886-87 (7th Cir. 2026) (affirming summary judgment for tribe on federal common-law trespass claim against pipeline that overstayed rights-of-way on trust parcels); *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1146, 1153 (9th Cir. 2020) (adjudicating common-law trespass claim arising from expired right-of-way on reservation land “held in trust for the Tribe by the United States,” and stating that “[t]ribes have a federal common law right to sue to protect their possessory interests” (citing *Oneida II*, 470 U.S. at 235-36)); *see also, e.g.*, *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 & n.8 (9th Cir. 1994) (recognizing, in a suit brought by the United States on behalf of a tribe and individual allottees, “a variety of federal common law causes of action to protect Indian lands from trespass”).

for the proposition “that *Indians* have a federal common-law right to sue” to vindicate their possessory interests. App.43a-44a (quoting *Oneida II*, 470 U.S. at 235 (emphasis in App.43a)). Indeed, among the decisions *Oneida II* cited were *Fellows v. Blacksmith*, a trespass action brought by an individual Indian’s estate, see 60 U.S. (19 How.) 366, 367 (1857), and *Marsh v. Brooks*, which concerned the availability of an ejectment action to individual Indians, see 49 U.S. at 232-33.

Nor did the Eighth Circuit ever explain *why* a cause of action available to a tribe should be unavailable to individual tribal members. In general, individuals have the same right to protect their possessory interests as collective entities, so if a tribe can sue to protect its trust land, an individual allottee can too. That is particularly so given the Indian Land Consolidation Act, which creates a statutory mechanism “to ‘help tribes buy back lost land’ after the fractionalization wrought by allotment.” *Bad River*, 184 F.4th at 885 (citation omitted). On the Eighth Circuit’s view, it would seem that the same trust land that could not be protected by a federal trespass claim in the hands of an individual allottee *could* be so protected once the tribe reacquires it, despite the fact that, in both cases, “the nature and source of the possessory rights” is the same: federal law. App.20a (quoting *Oneida I*, 414 U.S. at 667). That result makes no sense.

The panel majority’s reliance on *Taylor v. Anderson*, 234 U.S. 74 (1914), for the proposition that “cases by allottees ... are different from cases in which a *tribe* brings an ejectment claim,” App.18a (emphasis added), is misplaced. The crucial distinction between *Oneida II*

and *Taylor* was not that the Oneidas were a tribe while the *Taylor* plaintiffs were individuals; rather, it was that in *Taylor*, the individual allottees held *fee-patented* lands whose “incidents of ownership” were no longer “matters of” federal law, but rather of “local property law to be vindicated in local courts.” *Oneida I*, 414 U.S. at 676-77 (describing *Taylor*); see App.44a-46a (Grasz, J., dissenting); *Taylor v. Anderson*, 197 F. 383, 385 (C.C.E.D. Okla. 1911). Because state law supplied the cause of action for “ejectment” in *Taylor*, the case presented no federal question. *Oneida I*, 414 U.S. at 665-66. By contrast, because the Oneidas’ “right to possession ... ar[ose] under federal law in the first instance,” *id.* at 676, it followed that *federal law* had to supply a cause of action to protect that right, see *Oneida II*, 470 U.S. at 235. In reaching that conclusion, the Court nowhere indicated that the fact that the Oneidas were suing as a tribe rather than as individual Indians was relevant at all.

Here, as in *Oneida II* and unlike in *Taylor*, petitioners’ possessory interests derive exclusively from federal law. See *Wilson*, 442 U.S. at 670-71. Thus, because petitioners “assert[] a present right to possession under federal law,” *Oneida I*, 414 U.S. at 675, federal law supplies a cause of action to protect that right, *Oneida II*, 470 U.S. at 236.

The panel majority also misunderstood this Court’s decision in *Poafpybitty*. There, the Court addressed whether individual Indian allottees holding restricted trust allotments could sue, independent of the United States, to enforce an oil-and-gas lease on their allotted land. 390 U.S. at 366. The Court answered that question

yes, reasoning from the structure and purpose of the allotment system: “[T]he allotment system,” the Court explained, “created interests in both the Indian and the United States,” and that “dual purpose ... would be frustrated unless both the Indian and the United States were empowered to seek judicial relief to protect the allotment.” *Id.* at 369 (discussing *Heckman v. United States*, 224 U.S. 413 (1912)). The Court explained that “the general power of the United States to safeguard an allotment” does not “affect[] the capacity of the Indian to protect that allotment.” *Id.* at 374. And it emphasized that “the Indian’s right to sue should not depend on the good judgment or zeal of a government attorney.” *Id.*

Those principles further confirm that petitioners’ status as individual allottees cannot negate their ability to invoke the cause of action recognized in *Oneida II*. The panel ignored *Poafpybitty*’s structural reasoning, instead reading it to stand only for the tautology that, where “both the United States and the individual Indian landowners [independently] ha[ve] standing to assert a claim [,] either may bring a lawsuit.” App.21a-22a. But *Poafpybitty* did not treat the individual allottees’ capacity to sue as dependent on some pre-existing entitlement to bring the claim; rather, it held that “the allotment system” *itself* “created interests in *both* the Indian and the United States,” 390 U.S. at 369 (emphasis added), that were independently enforceable. Here, the Eighth Circuit acknowledged that the United States has a cause of action to sue in trespass. *See, e.g.*, App.23a. Yet it denied petitioners the parallel “capacity ... to protect th[eir] allotment[s]” that *Poafpybitty* deemed inherent in the allotment system. 390 U.S. at 374.

B. The decision below also conflicts with the settled understanding that an enforceable right to exclude is a defining feature of property irrespective of the source of title.

The decision below is also irreconcilable with this Court's broader property jurisprudence.

As this Court has held, "[t]he Founders recognized that the protection of private property is indispensable to the promotion of individual freedom." *Cedar Point*, 594 U.S. at 147. One "fundamental element" of property meriting such protection is "the right to exclude." *Id.* at 149-50 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)). Indeed, that right inheres in "the very idea of property." *Id.*

Equally fundamental is a means of *enforcing* that right. The rule in England was that "every [unauthorized] entry upon another's lands[] ... [w]as an injury or wrong, *for satisfaction of which an action of trespass will lie.*" 3 W. Blackstone, *Commentaries on the Laws of England* 209 (1768) (emphasis added). That rule carried over to the United States. *See, e.g., Green*, 21 U.S. at 20 (noting that "[a] right of property necessarily includes the right to recover the possession, ... and to continue to possess undisturbed by others" (second emphasis added)). And the rule applied equally to lands held by Indians. *See Marsh*, 49 U.S. at 232 ("That an action of ejectment could be maintained on an Indian right to occupancy and use, is not open to question.").

Crucially, the inherent right to sue for trespass arises not from *title* in the underlying land, but from *possession* of it. *See Restatement (Second) of Torts*

§§ 157-158 (1965); *accord* 75 Am. Jur. 2d *Trespass* § 2, Westlaw (database updated Aug. 2026) (“The essence of the action [of trespass] is a violation of possession, not a challenge to title.”). Thus, it is settled that lessees and tenants—who have possessory interests but no title—can bring trespass claims for interference with that right of possession. *See, e.g.*, 1 Dan B. Dobbs et al., *The Law of Torts* § 52 (2d ed. 2011) (“The plaintiff need not be an owner in fee; any legal, possessory interest will suffice. For instance, a tenant in possession has a claim for a trespassory entry.”). As Oliver Wendell Holmes explained, both the owner and possessor of land have enforceable rights to exclude:

The owner is allowed to exclude all, and is accountable to no one. The possessor is allowed to exclude all but one [i.e., the owner], and is accountable to no one but him.

Oliver Wendell Holmes, Jr., *The Common Law* 246 (1881) (Lecture VI (“Possession”)).

The cause of action recognized in *Oneida II* aligns with these principles. That case holds that, because a possessory interest in property “necessarily includes” the right to protect that interest by a suit for trespass, *see Green*, 21 U.S. at 20, when federal law creates the possessory right, federal law also creates a concomitant cause of action for trespass, *see Oneida II*, 470 U.S. at 234-36, regardless of what *type* of federal law created the Indian’s possessory interest or what type of title the Indian holds. By concluding that individual Indians with beneficial title in trust lands lack the means to enforce the right to exclude, the divided Eighth Circuit departed from centuries of established trespass law, creating a

new, second-class type of property that lacks one of property's "fundamental element[s]." *Kaiser Aetna*, 444 U.S. at 179-80. This Court's review is warranted to clarify that federal law does not countenance that result.

II. The decision below creates a conflict among the courts of appeals.

The Eighth Circuit's holding not only misreads this Court's precedents, it also directly conflicts with the Ninth and Tenth Circuits on the question presented.

The Tenth Circuit. In *Nahno-Lopez v. Houser*, a decision joined by then-Judge Gorsuch, the Tenth Circuit held that individual Indian allottees stated a federal common-law claim for trespass on allotted land. 625 F.3d 1279 (10th Cir. 2010). The plaintiffs there, like petitioners here, held beneficial title to federal trust lands under a federal statute and sued to remedy an alleged trespass. *Id.* at 1280-81. Three holdings followed. First, the court explained that "Indian rights to a Congressional allotment are governed by federal—not state—law," so a claim resting on state law "cannot provide relief." *Id.* at 1282. Second, it held that 25 U.S.C. § 345 "does not create [a] cause of action or a standard for liability"; it supplies jurisdiction only. *Id.* Third, the court concluded that the allottees had "a *federal* common-law trespass claim, for which § 345 provides jurisdiction." *Id.* Nor did the court stop at recognizing the claim: it adjudicated it, borrowing Oklahoma trespass law as the federal rule of decision and affirming on the ground that the plaintiffs consented to the defendants' presence. *See id.* at 1282-84.

Likewise, in *Davilla v. Enable Midstream Partners*

L.P., the Tenth Circuit resolved a federal common-law trespass claim in the allottees' favor on facts materially identical to those here: individual Indians suing a pipeline operator that continued to occupy their trust allotments after its right-of-way expired. 913 F.3d 959, 962 (10th Cir. 2019). The Tenth Circuit reaffirmed that, "[w]hen a dispute arises over possessory rights in Indian allotted land, federal law governs." *Id.* at 965 (citing *Nahno-Lopez*, 625 F.3d at 1282). It then proceeded to define, as a matter of federal common law, the elements of the allottees' federal trespass claim, *id.* at 965-66, the availability of consent as a defense, *id.* at 966-68, and the standard governing injunctive relief, *id.* at 971-72.

The panel below sought to minimize the conflict with the Tenth Circuit by asserting that that court merely assumed without deciding that the cause of action existed. App.23a n.7. But *Nahno-Lopez* could not have been clearer. In finding jurisdiction proper, it stated: "We construe the complaint as stating a *federal* common-law trespass claim, for which [25 U.S.C.] § 345 provides jurisdiction." 625 F.3d at 1282 & n.1. *Nahno-Lopez* thus saw the cause of action's existence as necessary to its jurisdictional holding. And while the parties' agreement led the *Davilla* court to believe it was unnecessary to formally recognize that cause of action, *Davilla*'s detailed articulation of the federal trespass claim's "essential element[s]" and defenses, 913 F.3d at 965-71, betrays little skepticism about its existence.

The Ninth Circuit. The Ninth Circuit has likewise recognized that individual Indians, independent of the United States, may sue to protect their possessory

interests in trust land. In *Agua Caliente Band of Mission Indians v. County of Riverside*, the Ninth Circuit held that “[a]n Indian, as the beneficial owner of lands held by the United States in trust[,] has a right acting independently of the United States to sue to protect his property interests.” 442 F.2d 1184, 1186 & n.6 (9th Cir. 1971) (citing *Poafpybitty*).

Similarly, in *United States v. Milner*, the Ninth Circuit confirmed that “[f]ederal common law governs an action for trespass on Indian lands,” without drawing a distinction based on the source of the plaintiff’s possessory interest. 583 F.3d 1174, 1182 (9th Cir. 2009) (citing *Oneida II*, 470 U.S. at 235-36). The tidelands at issue in *Milner* were reserved for the Lummi Nation by executive order in 1873, not held under unextinguished aboriginal title, yet the Ninth Circuit did not think that fact relevant to whether federal common law furnished a trespass cause of action. *See id.* at 1180-81.

III. The decision below disregards the considered position of the United States.

The Eighth Circuit’s decision is also at odds with the considered position of the United States—the trustee that holds legal title to petitioners’ allotments and administers IRWA—as articulated in an amicus brief filed in support of petitioners below.

The United States saw the case much as petitioners do. In its view, “*Oneida I* and *Oneida II* control,” and the rule they announce turns solely on the existence of a federally conferred possessory right to which state law does not apply: because petitioners undisputedly have “a valid present possessory interest in the[ir] ... allotments

based on federal trust title,” “federal common law provides a cause of action for trespass.” U.S. Br. 13-16, 21. The government rejected the precise distinction on which the panel majority’s holding rests, explaining that petitioners’ possessory “interests” based on statutory trust allotments “are, if anything, *more* deeply rooted in federal law than [the partially aboriginal-title-based interests] of the plaintiff Indian tribe in *Oneida*.” *Id.* at 16 (emphasis added). And it explained that, because Congress never made North Dakota law applicable to petitioners’ allotments, “the ‘controlling law’ remains ‘federal law,’ and federal courts *must* ‘fashion[]’ federal common law to govern the trespass.” *Id.* (quoting *Oneida I*, 414 U.S. at 674 (emphasis added)).

The panel majority did not address these arguments on the merits. Instead, it expressed frustration at what it saw as the government’s delay in weighing in and “[a]ccordingly” gave the United States’s brief “no deference or separate consideration.” App.10a-11a. The majority’s impatience with the government’s litigating conduct is no answer to its arguments. The Eighth Circuit’s casual disregard for the considered position of the United States on such an important issue of federal Indian law confirms the need for this Court’s review.

IV. The question presented is recurring and exceptionally important, and this case is an ideal vehicle for resolving it.

1. The question presented affects a vast body of Indian trust property. According to raw BIA data compiled by the Native Land Information System, in 2019 there were over 92,000 trust parcels, spanning nearly 10 million acres, in the Eighth Circuit alone—

approximately 38,000 tracts (2.7 million acres) held in trust for individual Indian allottees, with the other nearly 55,000 tracts (7.3 million acres) held in trust for tribes.⁷ Under the Eighth Circuit's rule, the individual Indian owners of those 38,000 allotments have no means to protect their right to exclusive possession of their allotted lands.

As this litigation itself illustrates, the government's help may never arrive. Overseeing trust obligations for thousands of allotments strains the BIA's capacity: enforcement positions may shift over the years as resources and priorities change; the agency may act on behalf of some affected allottees but not others; or it may not act at all. The Court described nearly 60 years ago the BIA's "almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments." *Poafpybitty*, 390 U.S. at 374 (citation omitted). It was precisely that concern that drove the Court to observe that "the Indian's right to sue should not depend on the good judgment or zeal of a government attorney." *Id.* Yet under the Eighth Circuit's rule, an allottee's right to sue depends on exactly that.

The end result will be this: individual Indian allottees in the Eighth Circuit have property in name only. The right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property," *Kaiser Aetna*, 444 U.S. at 176, but a right to exclude which the landowner cannot enforce is no right at all. Under the decision below, an intruder who wishes

⁷ See NILS Dataset, *supra* note 5.

to enter allotted trust lands without consent—to lay a pipeline, plant crops, fell timber, sink a well, extract oil, gas, or minerals, or even build a house—faces no obstacle that the allottee herself can place in his path. He need only enter and stay. If the BIA does not sue, and this case shows how easily years may pass without suit, then the trespasser may occupy the allottee's land, enjoy its use, utilize its resources, and reap its profits, while the allottee can neither stop the taking nor recover for it. Congress placed these lands in trust to *protect* Indian owners from dispossession. Yet under the decision below, that trust status is now the very mechanism of the dispossession it was meant to prevent.

2. This case squarely and cleanly presents the question whether individual trust allottees possess a federal common-law cause of action for trespass. The question was pressed and passed upon at every stage below, and it benefits from the well-considered position of the United States as amicus in the court of appeals. The question is also case-dispositive: the Eighth Circuit's holding will result in petitioners' claim being dismissed, whereas if petitioners possess the trespass cause of action they assert, their case can proceed.

Nor does the case present any disputed issue of fact that could complicate this Court's consideration of the question presented. It is undisputed that petitioners hold a current possessory interest in their allotments that derives exclusively from federal rather than state law and that Andeavor's pipeline remained on petitioners' allotments even after its right-of-way expired. The sole question is the purely legal one that the parties, the United States, the panel majority, and

Judge Grasz debated at length: whether petitioners can remedy that undisputed trespass via a federal common-law claim.

3. No further percolation is warranted, and none is likely regardless. The Ninth and Tenth Circuits have already rejected the Eighth Circuit's approach, instead recognizing that this Court's prior cases command the result that, where Indians enjoy possessory interests conferred by federal law and not governed by state law, federal law supplies a trespass cause of action to protect those interests. And these three circuits—the Eighth, Ninth, and Tenth—together account for 99% of trust allotments held by individual Indians nationwide.⁸ The time for this Court's intervention is now.

CONCLUSION

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

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⁸ See NILS Dataset, *supra* note 5.