No. 03M10

In the Supreme Court of the United States

AMERICAN FOREST & PAPER ASSOCIATION, ET AL., MOVANTS

v.

LEAGUE OF WILDERNESS DEFENDERS/ BLUE MOUNTAINS BIODIVERSITY PROJECT, ET AL.

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO MOTION FOR LEAVE TO INTERVENE TO FILE A PETITION FOR WRIT OF CERTIORARI

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The movants, American Forest and Paper Association, American Forest Resource Council, CropLife America, and Oregonians for Food and Shelter, seek leave to intervene to file a petition for a writ of certiorari seeking review of the judgment of the court of appeals in *League of Wilderness Defenders/Blue Mountains Biodiversity Project* v. *Forsgren*, 309 F.3d 1181 (9th Cir. 2002). Movants participated in the proceedings below as amicus curiae, but did not seek to become named parties, and are not real parties in interest, in that suit. Nevertheless, more than two years after the issuance of the district court decision, six months after the issuance of the court of appeals' decision, and ten weeks after the court of appeals denied rehearing, movants sought an extension of time to file a motion for leave to intervene directly in this

Court, even though no party has invoked this Court's jurisdiction. The government, which was the defendant in *League of Wilderness Defenders*, opposes the motion.

STATEMENT

The plaintiffs in *League of Wilderness Defenders* brought suit against the United States Forest Service challenging the legality of a Forest Service project to protect nine national forests from a potential outbreak of the Douglas Fir Tussock Moth. The plaintiffs argued, among other things, that the Forest Service must obtain a National Pollution Discharge Elimination System (NPDES) permit under Section 402 of the Clean Water Act, 33 U.S.C. 1342, before conducting aerial application of biological pesticides over, among other areas, waters that are subject to the Clean Water Act's regulatory requirements.

On cross motions for summary judgment, the federal district court held that the Forest Service's planned application of the biological pesticides within the national forests is a nonpoint source silvicultural activity exempt from NPDES permitting requirements. *League of Wilderness Defenders/Blue Mountains Biodiversity Project* v. *Forsgren*, 163 F. Supp. 2d 1222 (D. Or. 2001). A panel of the Ninth Circuit reversed that decision and remanded the case for further proceedings. 309 F.3d 1181 (2002).

The court of appeals concluded that the Forest Service's aerial spraying of the pesticides into waters that are subject to the Clean Water Act's regulatory requirements is a point source discharge of pollutants that cannot be conducted without first obtaining an NPDES permit. 309 F.3d at 1183-1185. The court further concluded that regulations of the Environmental Protection Agency (EPA) defining silvicultural

point source activities do not provide a basis for exempting the Forest Service's proposed pesticide spraying from the NPDES permitting requirements. *Id.* at 1185-1188. The court of appeals instructed the district court "to enjoin further spraying until, among other things, the Forest Service "obtains an NPDES permit." *Id.* at 1193.

The government filed a petition for rehearing and suggestion for rehearing *en banc*, and movants filed a brief amicus curiae in support of the government's petition. On March 14, 2003, the court of appeals denied the petition. On June 2, 2003, movants filed an application for an extension of time to seek to intervene in the case for the purpose of filing a petition for a writ of certiorari. Justice O'Connor granted the request for an extension to and including July 28, 2003, and movants filed their motion to intervene on that date.[1]

ARGUMENT

THE MOTION TO INTERVENE SHOULD BE DENIED

Movants are not entitled to intervene in this Court to file a petition for a writ of certiorari. Congress has provided that only a "party" in the court of appeals may petition for a writ of certiorari. 28 U.S.C. 1254(1). None of the parties in *League of Wilderness Defenders* has filed a petition for a writ of certiorari to review the court of appeals' judgment in that case and there is, accordingly, no proceeding in this Court in which to intervene. Movants did not seek to intervene in the court of appeals, and they therefore have no right to file

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[1] Movants filed with their motion to intervene a petition for a writ of certiorari, which includes an appendix reproducing the opinion of the court of appeals (Pet. App. 1a-22a) and the decision of the district court (*id.* at 23a-100a).

a petition for a writ of certiorari in their own right. Contrary to movants' contentions, this Court's decisions do not allow an entity to intervene in this Court to file a petition for a writ of certiorari in a case in which the entity was not a party or real party in interest in the proceedings below and none of the parties has invoked the Court's jurisdiction.

A. Congress Has Provided That Only A "Party" In The Court Of Appeals May Petition for A Writ of Certiorari To Review The Court Of Appeals' Decision

Section 1254(1) of Title 28 sets out this Court's jurisdiction over petitions for a writ of certiorari to the courts of appeals. It provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition *of any party to any civil or criminal case*, before or after rendition of judgment or decree.

28 U.S.C. 1254(1) (emphasis added). Section 1254(1) reflects the "well settled" rule that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). See, *e.g.*, *Karcher* v. *May*, 484 U.S. 72, 77 (1987) ("we have consistently applied the general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom"); *International Union, UAW, Local 283* v. *Scofield*, 382 U.S. 205, 208-209 (1965) ("only a 'party' to a case in the Court of Appeals may seek review [in the Supreme Court]"); *Ex parte Leaf Tobacco Bd. of Trade*, 222 U.S. 578, 581 (1911) ("One who is not a party to a record and judgment is not entitled to appeal therefrom."); *Ex parte Cutting*,

94 U.S. 14, 22 (1876) ("Only parties, or those who represent them, can appeal.").

Congress alone has the power to determine the scope of this Court's appellate jurisdiction, U.S. Const. Art. III, § 2, Cl. 2, and it has specifically provided that only a "party" in the court of appeals proceeding may petition for a writ of certiorari, 28 U.S.C. 1254(1). The "party" requirement ensures that the entity seeking review has already demonstrated, in the proceedings below, that it satisfies the constitutional, statutory, and prudential requirements for participating in the lawsuit. Congress has reasonably concluded that this Court should not be obligated to make those determinations in the first instance.

As this Court has repeatedly observed, jurisdictional statutes "must be construed with strict fidelity to their terms." *Stone* v. *INS*, 514 U.S. 386, 405 (1995); see, *e.g.*, *Bread Political Action Comm.* v. *FEC*, 455 U.S. 577, 580-581 (1982); *Palmore* v. *United States*, 411 U.S. 389, 396 (1973). If this Court were to allow entities that were not parties below to intervene in this Court in order to petition for a writ of certiorari, it would not only take on a burden that properly rests with the lower courts and encourage entities with insubstantial interests to seek this Court's review, but it would create a mechanism for circumventing a congressionally prescribed limit on this Court's jurisdiction.

B. Movants Were Not Parties In The Lower Court Proceedings

As this Court has explained, parties in a case normally include the named plaintiffs and defendants and those entities that become a party by intervention, substitution, or third-party practice. *Karcher*, 484 U.S. at 77. Cf. Restatement (Second) of Judgments § 34(1)

(1982) ("A person who is named as a party to an action and subjected to the jurisdiction of the court is a party to the action."). Movants concede that they were not, at any time during the course of the proceedings below, parties in the *League of Wilderness Defenders* litigation. See Mot. 3 (acknowledging that movants "were not parties to the case below").

This Court has also sometimes applied the term "party" to entities that are the real parties in interest in the litigation. For example, the Court has ruled that "nonnamed class members * * * who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening." *Devlin* v. *Scardelletti*, 536 U.S. 1, 14 (2002). Accord *Hinckley* v. *Gilman*, 94 U.S. 467, 469 (1876) (holding that an entity that has been subjected to the jurisdiction of the court and made liable to its orders and decrees occupies the position of a party); *Blossom* v. *Milwaukee & Chicago R.R.*, 68 U.S. (1 Wall.) 655, 656 (1863) (holding that an entity that in the course of litigation becomes subject to the jurisdiction of the court and liable to its orders is a "quasi-party" entitled to appeal a district court decision).

Movants are not parties in that sense. They were neither real parties in interest in the litigation below nor were they subject to the jurisdiction of the court of appeals and liable to its orders and decrees. The court of appeals' judgment and the resulting remedy apply only to the Forest Service. See *League of Wilderness Defenders*, 309 F.3d at 1193. Movants were merely amicus curiae in the proceedings below. See *UAW*, 382 U.S. at 209 ("an *amicus* is not a 'party' to the case"). Movants' reliance (Mot. 4 n.3) on cases involving "quasi-parties" or real parties in interest is accordingly misplaced. In each of those instances, the entity that

sought to intervene in this Court had a direct stake in the outcome of the case under the judgment below and, unlike movants, was the real party to the litigation.

For example, in *Banks* v. *Chicago Grain Trimmers Ass'n*, 389 U.S. 813 (1967), this Court allowed the widow of a deceased longshoreman to seek review of a court of appeals' decision reversing the Department of Labor's award of benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, after the government elected not to petition for a writ of certiorari. The claimant was the real party in interest because the court of appeals' decision reversed the Department's award to her and terminated her right to receive the statutory benefits.[2]

In *Hunter* v. *Ohio ex rel. Miller*, 396 U.S. 879 (1969), this Court allowed a state judge to intervene to seek review of a decision of the Ohio Supreme Court's decision that the judge, who was a sitting judge over the age of 70, was barred from seeking re-election under the Ohio Constitution. The judge was not a named party below, but he was a real party in interest because

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[2] The Court's decision on the merits in *Banks* does not discuss the status of the claimant. See *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968). The Solicitor General, however, described the claimant as the "real party in interest." The Solicitor General stated, in responding to an order inviting the government's views, that "the claimant is the real party in interest in the judicial proceedings even if not formally named, and it would not appear unreasonable to deem petitioner a party below for purposes of entitlement to file a petition for a writ of certiorari." Memorandum for the Deputy Commissioner (Department of Labor), No. 59 (1967 Term), at 3. The Solicitor General also noted that the claimant had attempted unsuccessfully to intervene in the proceedings below and that, "if the Court agreed that intervention was wrongly denied * * *, it would be free also to consider the merits of the judgment below." *Id.* at 2-3 & n.1.

the Ohio Supreme Court had issued a writ of prohibition that prevented the Stark County Board of Elections from placing that judge's name on the election ballot. *State ex rel. Graves* v. *Brown*, 247 N.E.2d 463 (Ohio 1969). The judge had sought unsuccessfully to intervene in the Ohio Supreme Court before seeking review in this Court under 28 U.S.C. 1257, which, unlike 28 U.S.C. 1254(1), does not expressly require that the petitioner be a "party" below. See Petition to Intervene, No. 240 (1969 Term), at 9. This Court denied the petition for a writ of certiorari. 396 U.S. 879 (1969).

In *Commonwealth Title Insurance Co.* v. *Corman Construction Co.*, 508 U.S. 958 (1993), this Court allowed an insurance company to intervene to seek review of the Virginia Supreme Court's decision that the Commonwealth's mechanics lien statute was constitutional. The insurance company claimed to be the real party in interest because, as the insurer of a failed bank that was in receivership, the movant had funded and directed the defense of the failed bank against various mechanics lien claims and potentially faced a policy claim for any amounts necessary to discharge the liens. See Motion to Intervene, No. 92-1871, at 2. As in *Hunter*, this Court's jurisdiction was invoked under 28 U.S.C. 1257, and the Court denied the petition for a writ of certiorari.[3]

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[3] The insurance company moved to intervene following the filing of a separate petition for a writ of certiorari in the case that was filed in the name of the Federal Deposit Insurance Corporation (FDIC), but without proper authorization. See *FDIC* v. *Corman Constr., Inc.*, 508 U.S. 958 (1993). The FDIC served as receiver for the failed bank and had retained private counsel for the receivership proceedings. The private counsel filed a petition for a writ of certiorari without seeking the Solicitor General's authorization, and the Court dismissed the petition for lack of jurisdiction.

Movants in this case have no stake in the *League of Wilderness Defenders* litigation that is comparable to the interests of the movants in *Banks*, *Hunter*, and *Commonwealth Title*. Movants are not real parties in interest and are not entitled to intervene.

C. Movants Did Not Pursue The Available Avenues To Become Parties In The Proceedings Below

The Federal Rules of Civil Procedure specify the mechanism for entities claiming an interest in litigation to intervene in district court proceedings. See Fed. R. Civ. P. 24. In addition, the courts of appeals may allow intervention in appellate proceedings in appropriate circumstances. See, *e.g.*, *UAW*, 382 U.S. at 209-210 & n.2; see also Fed. R. App. P. 15(d) (setting out the procedure for intervention in proceedings for review of administrative orders). This Court and the courts of appeals have expressly affirmed the practice in certain circumstances of seeking post-judgment intervention for purposes of appeal. See, *e.g.*, *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395-396 (1977) (holding that post-judgment intervention for the purposes of appeal is permissible and that the critical inquiry is whether the intervenor acted promptly after entry of final judgment); see also Robert L. Stern et al., *Supreme Court Practice* 78 (8th ed. 2002).

These available avenues for intervention provide entities in movants' posture with ample opportunity to become a party for purposes of petitioning for certiorari in this Court, provided that they otherwise satisfy the

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See *ibid.*; see also Memorandum for the United States in Opposition, No. 92-1771. The insurance company filed its motion to intervene in response to the United States' memorandum urging dismissal of the unauthorized petition. See Motion to Intervene, No. 92-1871, at 2.

criteria for intervention. "One occupying the status of intervenor in the Court of Appeals proceeding may seek certiorari from the decision there." *UAW*, 382 U.S. at 214. Furthermore, "[o]ne who has been denied the right to intervene in a case in a court of appeals may petition for certiorari to review that ruling." *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 30 (1993) (per curiam); accord *Marino*, 484 at 304. Thus, if an entity properly seeks to intervene in the lower court proceedings, it preserves its right ultimately to seek review in this Court.[4]

Despite the available mechanisms for doing so, movants did not, at any time, attempt to intervene in either the district court or court of appeals proceedings. Movants accordingly have no basis for urging this Court to overlook the plain language of Section 1254(1) and to allow them to intervene at this juncture for purposes of filing a petition for writ of certiorari. To the contrary, the course they urge is inconsistent with the Court's practices in managing its heavy workload. The Court relies on the lower courts to resolve matters of first impression, and the lower courts can perform an important screening function in determining whether intervention is appropriate. In the course of resolving cases, those courts become familiar with the facts, issues, and parties. They are in a far better posture than this Court to determine, in the first instance, whether an entity satisfies the prerequisites for intervention

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[4] Some nineteenth and early twentieth century cases suggesting that there may be exceptions to the rule against non-party appeal appear to rest on the presumption that orders denying leave to intervene are unappealable. See, *e.g.*, *United States of America ex rel. La.* v. *Jack*, 244 U.S. 397, 402 (1917); *Ex parte Cutting*, 94 U.S. at 22. That presumption plainly is no longer warranted.

and to evaluate any opposition to the entity's participation in the case.

This case illustrates the role that lower courts usefully perform. The district court and the court of appeals consumed more than two years resolving this case. They evaluated the parties' briefs, heard oral argument, and issued decisions addressing the matters at issue. During that period, movants could have moved for intervention, and those courts could have resolved the motion—including any questions of its timeliness—in light of their intimate familiarity with the case. Instead, movants ask this Court, which has no familiarity with the matter, to resolve an issue that should have been resolved in the proceedings below. That approach is not only contrary to the plain language of Section 1254(1), but is also inconsistent with the goal of judicial economy.

D. Movants Have Not Established An Entitlement To Intervene

Movants contend that they should be permitted to intervene in this matter because they would meet the requirements for intervention under Rule 24 of the Federal Rules of Civil Procedure. Mot. 13-19. The Federal Rules of Civil Procedure do not apply, however, to proceedings in this Court. See Fed. R. Civ. P. 1 ("These rules govern the procedure in the United States *district courts* in all suits of a civil nature.") (emphasis added); *UAW*, 382 U.S. at 217 n.10; *Hines* v. *Royal Indem. Co.*, 253 F.2d 111 (6th Cir. 1958). To the extent that the Court obtains guidance from the criteria that the lower courts employ in deciding intervention motions, those criteria do not support movants' request to intervene. To the contrary, four considerations weigh heavily against granting the motion.

First, movants have not shown exceptional circumstances warranting intervention at this juncture. Cf. *McKenna* v. *Pan American Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962) ("A Court of Appeals may, but only in an exceptional case for imperative reasons, permit intervention where none was sought in the district court."). Accord *Hutchinson* v. *Pfeil*, 211 F.3d 515, 519 (10th Cir. 2000); *Hall* v. *Holder*, 117 F.3d 1222, 1231 (11th Cir. 1997). Movants do not contend that they are bound by the judgment of the court of appeals under principles of claim preclusion or issue preclusion since they were neither parties nor in privity with parties to the proceedings in which that judgment was rendered. Movants claim an interest in this case primarily on the basis that the decision below would result in an adverse precedent. That consequence is by no means extraordinary. To the contrary, it is commonplace that litigation resolving the claims of one litigant might serve as a precedent in litigation affecting the interests of another. Countless other entities could make a similar claim of interest in numerous cases in which the United States has elected not to seek this Court's review. Indeed, the theory of intervention advanced by movants would apply equally to a person who seeks to intervene in this Court because that person is disappointed that the losing party in wholly private litigation declined to file a petition for writ of certiorari.

Second, movants' contention (Mot. 9) that their intervention is necessary to protect the "public interest" is without merit. The politically accountable branches of government, rather than individual private entities, are properly charged with the duty to represent the "public interest," particularly insofar as the interests of the government in litigation are concerned. See, *e.g.*, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966); *New*

Jersey v. *New York*, 345 U.S. 369, 372-373 (1953); see also *Sierra Club* v. *Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994) ("The government must represent the broad public interest, not just the economic concerns of the timber industry."). As movants ultimately acknowledge (Mot. 19), they seek to protect their "private economic interests." Movants are dissatisfied, based on their assessment of those interests, with the government's determination, based on its broader perspective, that a petition for a writ of certiorari is not warranted in this case.

Third, in a related vein, to allow intervention in this Court in these circumstances—*viz.*, so that non-parties below may ask this Court to review a judgment when the parties themselves have elected not to do so—would impermissibly interfere with the autonomy of the actual litigants in this case. That autonomy is especially important in government litigation, which Congress has entrusted to the Attorney General and the Solicitor General. See 28 U.S.C. 517-519. This Court relies on the Solicitor General to screen cases and determine when the filing of a petition for a writ of certiorari is warranted. See *Federal Election Comm'n* v. *NRA Political Victory Fund*, 513 U.S. 88, 93, 96 (1994); *United States* v. *Providence Journal Co.*, 485 U.S. 693, 702 & n.7. (1988). There are a number of reasons why the Solicitor General may choose not to file a petition in a given instance. He may conclude that the precedential effect of the decision is uncertain or not as broadly adverse as others might assert; the particular case may not present typical facts or may have other features that would make it an unsuitable vehicle for this Court's review of the legal issue; or it might be appropriate for the federal agency or agencies to address the problem in the first instance to resolve, clarify, or

narrow the legal issues in the future. To allow private parties who are not bound by the judgment below to intervene for purposes of seeking this Court's review when the Solicitor General has chosen not to do so would undermine the Solicitor General's performance of that important screening function and intrude upon the autonomy of the Executive Branch in litigation.

Finally, movants' request to intervene is untimely. Movants contend that their motion is timely because it was filed within the 45-day extension of time granted by Justice O'Connor. But the due date imposed by the extension of time is not the proper criterion for determining the timeliness of intervention. Rather, the Court has focused on "all the circumstances," including the point to which the suit has progressed and the lapse of time between the date that the potential intervenor became aware of the proceedings and the date of filing. See *NAACP* v. *New York*, 413 U.S. 345, 365-367 (1973). Those considerations weigh heavily against intervention. Movants sought an extension of time in which to intervene in this Court more than two years after the district court rendered its decision, six months after the court of appeals issued its decision, and ten weeks after the court of appeals denied rehearing. That delay far exceeds the delay in *NAACP*, where this Court affirmed a three-judge district court's determination that a motion to intervene, filed four months after commencement of the suit in district court, 17 days after the movants learned of the suit, and four days after the United States' consent to entry of a motion for summary judgment, was untimely. See *id.* at 360, 362, 366-367.

Movants justify their delay on the basis that they sought an extension of time from this Court immediately after they learned that the government would not

petition for a writ of certiorari in *League of Wilderness Defenders*. But the government seeks certiorari in only a small number of cases, and movants had no reasonable basis for assuming that the government would do so in that instance. Movants failed to attend to their interests by seeking to intervene at the appropriate time in the lower court proceedings. See *NAACP*, 413 U.S. at 367. Movants' failure to do so does not provide a basis for this Court to depart from the plain language of Section 1254(1) and to take the extraordinary step of allowing intervention in this Court to file a petition for a writ of certiorari.

CONCLUSION

The motion for leave to intervene should be denied.

Respectfully submitted.

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