Nos. 11-1378, 11-1384

In The
Supreme Court of the United States

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES DEPARTMENT
OF AGRICULTURE, et al.,

Respondents.

COLORADO MINING ASSOCIATION,

Petitioner,

v.

UNITED STATES DEPARTMENT
OF AGRICULTURE, et al.,

Respondents.

**On Petitions For Writs Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

BRIEF AMICI CURIAE OF BLUE RIBBON COALITION, CALIFORNIA ASSOCIATION OF 4WD CLUBS, AND AMERICAN FOREST RESOURCE COUNCIL IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

Amici Curiae represent companies and families that depend, in part, on the national forests for their livelihoods, recreation, and timber supply.

The BlueRibbon Coalition is an Idaho nonprofit corporation representing over 10,000 individuals, businesses and organizations with approximately 600,000 members nationwide. BlueRibbon members use motorized and nonmotorized means, including off-highway vehicles, horses, mountain bikes, and hiking, to access United States Forest Service (USFS) lands throughout the United States, including inventoried and uninventoried "roadless areas" in Wyoming and elsewhere affected by the 2001 Roadless Rule at issue herein.

The California Association of 4 Wheel Drive Clubs (Cal4) is a nonprofit, California mutual benefit corporation which consists of over 8,000 members and 160 member clubs. Cal4 members regularly engage in four-wheel-drive oriented recreation throughout the

[1] The parties were given at least ten days notice of amici's intention to file a brief. The Conservation Respondents have filed a letter of blanket consent to filing amicus briefs. Both Petitioners and remaining Respondents have provided amici with a letter of consent to file a brief. Pursuant to this Court's Rule 37.6, the amici submitting this brief and their counsel hereby represent that no party to this case nor their counsel authored this brief in whole or in part, and that no person other than amici paid for or made a monetary contribution toward the preparation and submission of this brief.

country and intend to continue doing so. These interests in off-road access involve public lands throughout the National Forest System, including inventoried and uninventoried "roadless areas" throughout the nation, including Wyoming.

The American Forest Resource Council (AFRC) is an Oregon nonprofit corporation that represents the forest products industry throughout Oregon, Washington, Idaho, Montana, and California. AFRC represents over 50 forest product businesses and forest landowners. In states where AFRC members are located, they purchase the majority of timber from federal lands managed by the U.S. Department of Agriculture, Forest Service. AFRC's mission is to create a favorable operating climate for the forest products industry, ensure a reliable timber supply from public and private lands, and promote sustainable management of forests by improving federal laws, regulations, policies and decisions regarding access to, and management of, forest lands. AFRC and its members have been actively involved in national forest planning and roadless area management issues during the last several decades. Many of the AFRC members own land which is adjacent to or intermingled with national forest land and are concerned about access to, and protection of, their private forest land. The concern is particularly great for national forest lands which are currently unroaded and pose a high fire hazard or a heightened risk to the private forest land because of insect and disease problems.

Amici have an interest in this Court's review of the Tenth Circuit's decision which upheld the U.S. Department of Agriculture's rulemaking that effectively eliminated 58.5 out of the 190 million acres of National Forests from the integrated planning requirements of the National Forest Management Act, 16 U.S.C. § 1600, et seq. (NFMA). By their collective and separate presence, including through their member organizations and affiliates, amici have formally participated in diverse roles initiating and defending against nearly all Forest Service roadless area litigation resulting in published decisions, including those in the District of Wyoming and Tenth Circuit giving rise to the subject petitions. *See also*, *California ex rel. Lockyer v. U.S. Dept. of Agric.*, 459 F.Supp.2d 874 (N.D. Cal. 2006), *aff'd*, 575 F.3d 999 (9th Cir. 2009); *Kootenai Tribe v. Veneman*, 142 F.Supp.2d 1231 (D. Idaho 2001), *rev'd*, 313 F.3d 1094 (9th Cir. 2002).

Eliminating the inventoried roadless areas from planning has been and will continue to be detrimental to amici interests in maintaining national forest land open to a broad spectrum of recreational users, including motorized, mechanized and trail-based recreation, in supplying timber from national forests to support businesses and jobs, and in managing inventoried roadless areas so they are not a source of insects, disease, and wildfire that spread to private lands.

SUMMARY OF ARGUMENT

This Court should grant the petitions for certiorari because of the exceptional importance of the Tenth Circuit's decision to the management of the vast acreage of federal forest which provide recreation and supply timber for thousands of families and businesses in rural communities. *Leo Sheep Co. v. United States*, 440 U.S. 668, 678 (1979) ("Because this holding affects property rights in 150 million acres of land in the Western United States, we granted certiorari"); *Andrus v. Utah*, 446 U.S. 500, 506 (1980). The decision also indirectly affects millions of acres held by private landowners adjacent to national forests that must contend with the mismanagement of the adjoining national forests.

The Court should grant the Writs of Certiorari to address the important issue of the extent, if any, to which Congress has delegated power to the Forest Service to address through administrative rule those topics definitively addressed through the Wilderness Act, 16 U.S.C. § 1131 et seq. Granting the Writs will also allow the Court to address the important issue of the limits of power of the executive branch to use rulemaking to dictate a subset of permitted uses on national forest lands when Congress explicitly directed in NFMA that these important decisions must be made instead through revisions of forest plans that require integrated consideration of uses for all lands in each national forest.

ARGUMENT

I. These Are Cases of National Importance Involving Resource Management Restrictions on a Vast Area of Federal Land.

The National Forest System covers 190 million acres of federal land throughout the United States. Nearly one-third of this area or approximately 58.5 million acres are what the USDA has classified as "inventoried roadless areas." President Clinton in announcing the 2001 Roadless Rule dictating the management prescriptions for the inventoried roadless areas, proclaimed "[t]oday we are launching one of the largest land-preservation efforts in America's history." http://clinton3.nara.gov/WH/Work/101399.html. The Supreme Court should review the Tenth Circuit's decision regarding this significant administrative land preservation strategy.

Fires routinely yet increasingly devastate millions of acres of national forest land. http://www.nifc.gov/fireInfo/fireInfo_statistics.html. The Forest Service has interpreted the 2001 Roadless Rule to preclude commercial salvage of fire-killed timber in inventoried roadless areas. 36 C.F.R. § 294.13 (2002). For example, in Grant County, Oregon, the Shake Table Fire Complex burned more than 14,000 acres and approximately 8,000 of those acres were within the Dry Cabin Inventoried Roadless Area. *Wyoming v. U.S. Dept. of Agriculture*, 2:07-cv-00017-CAB (D. Wyo.), Dkt. 85-4 ¶ 7. The Forest Service designed the Thorn Fire Salvage Recovery Project in response to the fire. *Id.* However, none of the alternatives

considered salvage of timber within the Dry Cabin Inventoried Roadless Area solely due to the 2001 Roadless Rule. The Roadless Rule also prevented salvage of irreparably deteriorating timber in the Chippy Creek Fire in Montana and the Egley Fire in Oregon, which each burned 100,000 or more acres. *Id.*, Dkt. 85-5 ¶ 6, Dkt. 85-7, ¶ 4. These vast areas of dead trees threaten the safety of recreationists, woodworkers and create a future wildfire threat. Burned timber in inventoried roadless areas will irreparably lose its economic value which will be unusable to supply timber to mills and provide employment in rural counties.

II. The Cases Raise Important Questions About Congressional Delegation.

The Court should grant review to address the tension inherent in a "roadless" scheme that is designed to be the functional equivalent of "wilderness."

The Wilderness Act uniquely constrains executive branch agency discretion. Congress is certainly capable of delegating broad authority to executive branch agencies in public lands statutes. *See*, NFMA, 16 U.S.C. § 1613 ("[t]he Secretary of Agriculture shall prescribe such regulations as he determines necessary and desirable to carry out the provisions of this subchapter"); Federal Lands Policy and Management Act, 43 U.S.C. § 1701 (declaration of Congressional policy that "in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive

rules and regulations. . . ."). The Wilderness Act reflects a conspicuous exception in which the authority to *designate* resides exclusively with Congress. 16 U.S.C. § 1132(a). Notably absent are broader[2] delegations of authority to promulgate agency rules or regulations. In marked contrast to the above-cited "management" statutes the agency duty in the Wilderness Act is carefully defined and limited to functions such as to "file map[s] and a legal description of each wilderness area" (*id.* at § 1133(a)(1)); "maintain . . . records pertaining to said wilderness areas" (*id.* at (2)); review and report findings to the President on "primitive" areas, who in turn may "advise" Congress of "his recommendations" on possible wilderness designations which "shall become effective *only* if so provided by an Act of Congress" (*id.* at (b) (emphasis added)). In short, the Wilderness Act reflects a clear and singular Congressional pronouncement on the subject of wilderness, which leaves no room for even overlapping agency constructs.

These petitions and the underlying, recurrent questions about "roadless" policy raise important questions about the nature and limits of Congressional delegation. In the end, the Tenth Circuit essentially concludes the agency rule was within the "broad authority" granted by statutes other than the

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[2] Even the broader delegation of authority in these statutes is not without limit. Congress presumably envisioned regulations to effectuate the stated goals and procedures of the statute, and certainly did not authorize agency regulations inconsistent with or in contradiction to the statutory framework.

Wilderness Act. Wyo. App. at 37. The Tenth Circuit avoids discussion of statutory delegation and their surrounding vibrant body of law, such as expressed in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).[3] This Court's review would facilitate proper placement within this important analytical framework. Indeed, agency counsel on appeal framed any Wilderness Act questions under *Chevron* as a reasonable exercise of agency expression. *See*, Respondent USDA Reply Br. (Tenth Cir. No. 09-8075) at 7 (filed Feb. 3, 2010) (contending the Wilderness Act is silent where USDA applies multiple-use management authorities "for conservation purposes that stop short of wilderness designation" and that "Congress clearly empowered USDA to regulate within that statutory gap").

The Tenth Circuit's analysis of this issue is incomplete, confusing, and/or circular. The Tenth Circuit notes the USDA "first argues" an inherent, "broad authority to regulate NFS lands for conservation purposes, including 'wilderness'. . . ." Wyo. App. at 26. However the Tenth Circuit never reached this argument because it concluded the "alternative"

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[3] Proper invocation and application of *Chevron* and related lines of authority has presented a focal point for debate and development in administrative law. *See*, *generally*, Michael C. Pollack, *Chevron's Regrets: The Persistent Vitality of the Nondelegation Doctrine*, 86 N.Y.U. L. Rev. 316 (2011); Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006); David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201 (2002).

position advanced by the agency "and the Environmental Groups" resolved the question – that "roadless" areas "are not de facto wilderness areas" and the Rule was a legitimate mechanism "'to manage NFS lands for an array of uses or combinations of use, including conservation uses that *fall short* of statutory 'wilderness designation.'" *Id.* (quoting USDA Opening Br. at 32) (emphasis in Tenth Circuit opinion). The Tenth Circuit thus proceeded through a list of ostensible distinctions between roadless and wilderness areas. Wyo. App. at 28-35. The Tenth Circuit thus "conclude[d] that the Roadless Rule did not designate de facto administrative wilderness area in contravention of the procedures set out in the Wilderness Act." *Id.* at 36-37.

There are fundamental problems with the Tenth Circuit analysis. The arguments relied upon by the Tenth Circuit creatively fill gaps,[4] but the statute in question does not specify a "conservation" purpose,

[4] For all of its detail, the Tenth Circuit's pivotal checklist occurs entirely in the realm of the abstract and theoretical. The checklist is premised on the notion that textual difference(s) between the 2001 Roadless Rule and wilderness prescription would be fatal to the Wilderness Act claims. Assuming this abstract exercise to be valid, the court was apparently untroubled by the converse proposition – that for a hypothetical roadless area lacking any roads, motorized trails, helicopter logging projects, or other "exceptions" there would be no distinction whatsoever between USDA-bestowed Inventoried Roadless Area and Congressionally-designated Wilderness status.

rather the "related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish. . . ." NFMA, 16 U.S.C. § 1604(g)(3)(A). In other words, when pushed for an affirmative grant of authority to underpin the Roadless Rule, the agency understandably pointed to the explicit mention of "wilderness" in NFMA. Thus, the second and ultimately successful argument advanced by the agency before the Tenth Circuit necessarily devolved into, and should have been betrayed by, the first. The Tenth Circuit's final iteration of its holding exposes its consideration of the question as one resolved within the procedural framework of the Wilderness Act, instead of the proper consideration, under *Chevron*, whether Congress even left a "statutory gap" for the agency to "fill" on the subject of wilderness. While NFMA may have left unanswered questions about the confines of broad authority on some subjects, the Wilderness Act makes clear that only Congress may create wilderness.

Congress did not delegate creation of wilderness or wilderness-like lands to administrative agencies like the Forest Service. This Court should grant review to properly refocus analysis within the foundations of *Chevron* and the relevant statutes.

III. The Cases Raise Important Questions of Whether the Executive Branch Through Its General Statutory Grant to Adopt Rules Can Ignore the Comprehensive National Forest Planning Directives Established by Congress in the National Forest Management Act.

Petitioners challenge the rulemaking in which USDA permanently established the land-use prescriptions for these lands. The Tenth Circuit held that the 2001 Roadless Rule was validly promulgated using USDA's general rule making authority under the Organic Act. 16 U.S.C. § 551 Wyo. App. at 122-23. Amici urge the Court to review the Tenth Circuit's decision because its raises important questions about the priority of statutes related to USDA's rulemaking authority and forest planning obligations. The Tenth Circuit decision allows USDA to use its statutory grant of rulemaking authority to circumvent the process established by Congress through the more specific and later enacted statute, NFMA, that requires land-use prescriptions for National Forests to be established through integrated planning that considers multiple-use alternatives. The USDA action also precludes the land use decision for inventoried roadless areas from ever being reconsidered when forest plans are revised contrary to the plain language of NFMA.

The NFMA requires that the Secretary of Agriculture prepare "*one integrated* plan for *each* unit of the National Forest System, incorporating in one

document or one set of documents, available to the public at convenient locations, all of the features required by [the NFMA planning requirements]" 16 U.S.C. § 1604(f)(1) (emphasis added). *See generally, Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998). This explicit statutory command for the Secretary to determine land uses for the national forests through the forest planning process proscribes a rule that extracts one-third of the national forests from the planning process to determine the uses and management prescriptions for those lands. *See*, *Board of Governors of Federal Reserve System v. Dimension Financial Corp.,* 474 U.S. 361, 374 (1986) (holding that "[agency] rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute."); *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129 (1936).

The NFMA requirement to determine uses of the inventoried roadless areas through the forest planning process applies with particular force to the inventoried roadless areas in western states with statewide wilderness bills. For example, the Wyoming Wilderness Act affirmed that multiple use management for the national forest inventoried roadless lands was to be determined through NFMA forest plan revisions. Pub. L. No. 98-550 § 401(b)(2)-(3), 98 Stat. 2807, 2811-12 (1984). The state's inventoried roadless areas that were not designated wilderness by the Act and evaluated in the Secretary's Roadless Area Review and Evaluation final environmental

impact statement were released for multiple-use management as determined by forest plans:

> Areas in the State of Wyoming reviewed in such final environmental statement or referred to in subsection (d) and not designated wilderness or wilderness study upon enactment of this Act *shall be managed* for multiple use *in accordance with the land management plans* pursuant to section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 as amended by the National Forest Management Act of 1976.

Pub. L. No. 98-550 § 401(b)(3), 98 Stat. at 2812 (emphasis added).

While it is true that the Organic Act provides the Secretary a general grant of rulemaking authority, the grant is not unlimited and must yield to NFMA and the Wyoming Wilderness Act which are more specific statutes that govern how land use planning decisions must be made for roadless areas. *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961).

The NFMA also requires that the management of these lands must be reconsidered every 15 years. 16 U.S.C. § 1604(f)(5). The 2001 Roadless Rule forever imposes its land-use restrictions on the inventoried roadless areas precluding evaluation of resource management options in forest plans. 36 C.F.R. § 294.14(e) (2002) ("the prohibitions and restrictions established in this subpart are not subject to reconsideration, revision, rescission in subsequent project

decisions or land and resource management plan amendments or revisions undertaken pursuant to 36 C.F.R. part 219"). Thousands of acres of inventoried roadless areas are allocated in current forest plans to productive uses that allow motorized recreation and timber harvest such as general forest and big game management. However, continuing with these existing uses or considering alternative uses through the forest plan revision process is foreclosed by the 2001 Roadless Rule which nullifies the plain language of NFMA to reevaluate the provisions of forest plans every 15 years.

CONCLUSION

Because the Tenth Circuit's holding will extend to 58.5 million acres of federal forestlands and presents an important question about the authority of the executive branch to determine land management for one-third the national forests through rulemaking in conflict with the Wilderness Act and the statutory process established in the NFMA, amici respectfully urge the Court to grant the Petition(s) for Writ(s) of Certiorari to review and reverse the decision to

ensure that the Executive Branch does not act outside its authority in determining permissible management of the National Forest.

Respectfully submitted,

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