Nos. 11-1384, 11-1378

In The
Supreme Court of the United States

COLORADO MINING ASSOCIATION,

Petitioner,

v.

UNITED STATES DEPARTMENT
OF AGRICULTURE; ET AL.,

Respondents.

STATE OF WYOMING,

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 OF *AMICI CURIAE* OF ASSOCIATIONS REPRESENTING THE INTERESTS OF THE MINING INDUSTRY, CATTLE INDUSTRY AND WESTERN BUSINESS IN SUPPORT OF THE COLORADO MINING ASSOCIATION AND THE STATE OF WYOMING'S PETITIONS FOR WRITS OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*	1
A. Identity Of The Associations And Their Members	2
B. The Roadless Rule's Impact On The Associations' Property And Economic Interests	9
C. The Roadless Rule's Impact On Employees	11
SUMMARY OF THE ARGUMENT	13
REASONS THE COURT SHOULD GRANT CMA AND THE STATE OF WYOMING'S PETITIONS	14
I. An Agency's Authority Is Limited To Only Those Powers Congress Grants It	14
II. The Wilderness Act Gives Congress The Exclusive Right To Designate Wilderness Areas	16
III. The Roadless Rule Creates *De Facto* Wilderness Areas	18
IV. The Associations' Property Interests Are Negatively Impacted By The Roadless Rule's Designation Of Land As Wilderness Areas	23
CONCLUSION	28

TABLE OF AUTHORITIES

Page

CASES

Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638 (1990) 14, 15

Andrus v. Utah, 446 U.S. 500 (1980) 24

Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984) 15

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 15, 20

Gonzales v. Oregon, 546 U.S. 243 (2006) 15

Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001) 14

Wyoming v. USDA, 414 F.3d 1207 (10th Cir. 2005) 19

Wyoming v. USDA, 570 F. Supp. 2d 1309 (D. Wyo. 2008) 20

Wyoming v. USDA, 661 F.3d 1209 (10th Cir. 2011) 20, 23

U.S. CONSTITUTION

U.S. Const. art. I, § 1 14

U.S. Const. art. IV, § 3, cl. 2 14

FEDERAL STATUTES

16 U.S.C. §§ 473-482, 551 ("Organic Act") 16

16 U.S.C. §§ 528-531 ("Multiple Use Act") 16

TABLE OF AUTHORITIES – Continued

Page

16 U.S.C. § 532 16

16 U.S.C. §§ 1131-1136 ("Wilderness Act") ....*passim*

30 U.S.C. § 1605 ("Materials and Mineral Policy Act") 16

FEDERAL REGULATIONS

36 C.F.R. § 294.11-13 ("Roadless Rule")............*passim*

SECONDARY MATERIALS

Alaska Miners Association, *The Economic Benefits of Alaska's Mining Industry* (Jan. 2012) 11, 12

George F. Leaming, *The Economic Impact of the Arizona Copper Industry 2010*, W. Econ. Analysis Ctr., May 2011 12

Jay Alan Sekulow & Erik M. Zimmerman, *Weeding Them Out By The Roots: The Unconstitutionality of Regulating Grassroots Advocacy*, 19 Stan. L. & Pol'y Rev. 164 (2008).......26

USDA Forest Service, *Inventoried Roadless Rule Acreage by State*, App. A, *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsm8_037652.htm 24

USDA Forest Service, *National Wilderness Area by State*, Table 7, *available at* http://www.fs.fed.us/land/staff/lar/LAR2011/LAR_Table_07.pdf 24

STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

The Alaska Miners Association, Arizona Mining Association, Arizona Cattle Growers' Association, Mining Minnesota, Montana Mining Association, National Mining Association, New Mexico Mining Association, Northwest Mining Association, Utah Mining Association and Western Business Roundtable (collectively, the "Associations") respectfully submit this *amici curiae* brief in support of the Colorado Mining Association ("CMA") and the State of Wyoming's Petitions for Writs of Certiorari.

The Roadless Area Conservation Rule ("Roadless Rule") raises important constitutional questions regarding separation of powers between Congress and an Executive agency. Pursuant to the Wilderness Act, Congress granted to itself the exclusive power to designate areas as "wilderness." The practical effect of Congress designating an area as wilderness is the prohibition of road construction. In adopting the Roadless Rule, the Forest Service[2] improperly usurped

[1] Pursuant to Supreme Court Rule 37.2(a), undersigned counsel notified counsel of record for all parties more than 10 days prior to the due date of the *amici curiae*'s intention to file this brief. All parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for the parties of record authored this brief in whole or in part. CMA made a monetary contribution intended to fund the preparation and submission of this brief.

[2] The "Forest Service" collectively refers to the United States Department of Agriculture, the United States Forest Service,

(Continued on following page)

Congress's exclusive power to determine which National Forest Service ("NFS") land should be designated as "wilderness." The Roadless Rule makes 58.5 million acres of NFS lands subject to a prohibition on road construction. By prohibiting road construction in these areas, the Forest Service has used the Roadless Rule to improperly declare these inventoried NFS areas as *de facto* Wilderness. The Wilderness Act provides that only Congress can make such a determination.

The Forest Service's designation of land as *de facto* wilderness directly impacts the interests of the Associations. Without road construction and reconstruction, industrial and mining development is effectively prohibited and limits the domestic production of materials critical to national defense and industrial development. The Associations agree with CMA and the State of Wyoming's arguments in their Petitions for Writs of Certiorari and offer the Court the following additional reasons why this Court should hear this case.

A. Identity Of The Associations And Their Members

The Associations consist of a national mining association, seven state mining associations, a regional

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Tom Vilsack, Secretary of the United States Department of Agriculture, in his official capacity, and Tom Tidwell, Chief Forester of the United States Forest Service, in his official capacity.

mining association, a cattle growers' association and a western business organization.

The Alaska Miners Association works to promote the mining industry in Alaska. It advocates the development and use of Alaska's mineral resources to provide an economic base for Alaska. The Alaska Miners Association's goals are to: (1) provide services to the membership that will assist them in their mining activities; (2) monitor the political processes to help keep lands available for mineral exploration and development; (3) insure that the restrictions on land and water use are economically realistic and provide a balance between environmental protection and resource utilization; (4) increase public awareness of the mineral industry and its economic implications to the State and nation; and (5) encourage and support responsible mineral production in Alaska.

The Arizona Mining Association strives to be the primary advocate of the Arizona mining industry through promoting sound public policy at all levels of government, educating the public about the benefits of mining and supporting the sustainability of a safe and responsible mining industry. The Arizona Mining Association is a diversified mining association that is the unified voice of responsible, sustainable and safe mining in Arizona. The Arizona Mining Association supports educational programs that demonstrate the importance and benefits of mining to the economy. The members benefit from productive relationships and alliances with government, business associations and natural resource industry groups. Through the

association's advocacy, Arizona is a premier location for mining investment in the U.S.

The Arizona Cattle Growers' Association is a non-profit organization formed in 1904 to provide a unified voice on regulatory and legal issues affecting the ranching industry in Arizona. The Arizona Cattle Growers' Association has members who graze livestock on National Forest lands in Arizona, including the Coconino, Coronado, Kaibab, and Prescott National Forests. The Arizona Cattle Growers' Association presently represents approximately 850 members. The Arizona Cattle Growers' Association provides assistance to its members, as well as the ranching industry in general, by disseminating information to its members and the public, meeting with legislators and agencies, drafting and commenting on legislation and agency rules, and, when necessary, participating in litigation in both state and federal courts. The Arizona Cattle Growers' Association has a substantial interest in protecting its members from disruption of livestock grazing on federal lands, disruption of predator management on federal lands and direct economic loss to members and their families as a result of loss of the ability to graze livestock.

Mining Minnesota is a membership organization committed to sustainable and environmentally responsible critical and strategic metals mining development. Driven by a diverse coalition of organizations, companies and individuals, Mining Minnesota's goal is to bring growth and job creation to the state through the responsible development of Minnesota's

natural resources. Mining Minnesota represents all active mining and exploration companies, owners and holders of mineral rights in Minnesota, as well as dozens of suppliers and contractor companies.

The Montana Mining Association is a Montana trade association dedicated to helping mining companies, small miners and allied trade members succeed, understand, comply and function in a complex business and regulatory world. The primary purpose of the Montana Mining Association is to protect and promote the mining industry in the state. The Montana Mining Association monitors issues of concern and provides representation for its members at the state legislature in addition to various other state and federal regulatory agencies. The Montana Mining Association supports national mining initiatives. The Montana Mining Association provides information and education for its members and distributes information to the general public about mining and mineral contributions to Montana's economy and well-being. One of the Association's primary functions is to promote and enhance the image of the mining industry. The Montana Mining Association works in cooperation with other state and national mining associations, natural resource trade associations and groups with similar interests and needs. The Montana Mining Association serves the industry on a wide range of subjects through the expertise of its members.

The National Mining Association is a national trade association whose members produce most of America's coal, metals, industrial and agricultural

minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms and other businesses involved in the nation's mining industries. The National Mining Association works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources.

The New Mexico Mining Association is a trade association that has been organized since 1939. Its members include: (1) companies that explore, produce and refine metals, coal and industrial materials; (2) companies that manufacture and distribute mining and mineral processing equipment and supplies; and (3) individuals engaged in various phases of the mineral industry. The New Mexico Mining Association speaks for the mining industry in New Mexico. The association works in cooperation with other state mining associations and the National Mining Association to keep the industry informed on pending legislation. The association also promotes constructive programs and actions that will adequately recognize and serve mining's special problems and needs. The New Mexico Mining Association serves the industry on a wide range of subjects, such as taxation, environmental quality, public lands, health and safety and education through the expertise of its members and member companies. New Mexico plays a vital

role in national and international mining production as the largest producer of potash and the sixth largest producer of molybdenum in the United States.

The Northwest Mining Association is a 117-year-old, 2,300 member non-profit, non-partisan trade association based in Spokane, Washington. Its members reside in 46 states and are actively exploring for mineral deposits on National Forest lands, especially in the west. The Northwest Mining Association serves as the state mining association for Oregon and for Washington, and as a national voice for exploration and access to public lands. It works closely with the National Mining Association and state mining associations in the western United States to advance its members' interests. Its purpose is to support and advance the mineral resource and related industries; to represent and inform members on technical, legislative and regulatory issues; to provide for the dissemination of educational materials to federal and state agencies, the public and international business communities; and to foster and promote economic opportunity and environmentally responsible mining both in the U.S. and internationally.

The Utah Mining Association, established in 1915, helps to promote and protect the mining industry. The Utah Mining Association supports the very foundation of our economy. From the stone and gravel used to build roads and lay foundations for homes and buildings, to coal and uranium used to generate more than half of the nation's electricity, to the copper wire that connects billions of computers to a global

social and commercial network, our economy and way of life depend on the vital resources provided by mining in Utah. The Utah Mining Association provides its members with full-time professional industry representation before the State Legislature and various government regulatory agencies on the federal, state and local levels. The Utah Mining Association encourages education in mining and minerals to further the understanding of the role this critical industry and its products play in people's lives and to foster a spirit of community cooperation.

The Western Business Roundtable is a broad-based association of companies doing business in the Western United States with members in Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. Its members are engaged in a wide array of enterprises, including: manufacturing; retail energy sales; mining; electric power generation and transmission; energy infrastructure development; oil and gas exploration, development, transportation and distribution; and energy services. The Western Business Roundtable works to defend the interests of the West and support policies that encourage economic growth and opportunity, freedom of enterprise and a common-sense, balanced approach to conservation and environmental stewardship. Federal land designations have serious implications for Roundtable members, many of which are involved in energy and natural resource development activities on federal lands across the West.

B. The Roadless Rule's Impact On The Associations' Property And Economic Interests

The members of the Associations hold an array of protectable property, economic, social and organizational interests that are directly, and negatively, affected by the Roadless Rule. The members of the mining Associations are authorized to operate on NFS lands under a variety of statutes including, the Mineral Leasing Act, the Federal Coal Leasing Amendments Act, the Surface Mining Control and Reclamation Act of 1977 and the Mining Law of 1872. The mining Associations' primary mission is to promote and enhance the continued development of responsible coal and mineral resources extraction from NFS lands in their respective states and regions throughout the western United States. Responsible mining from the NFS lands is vital to supplying electricity and other fundamental needs to this nation.

The Associations have a great interest in this case because the Roadless Rule prohibits road-building on 58.5 million acres of federal forests. The Roadless Rule results in a 167% increase in road prohibitions for federal lands across the United States. [*See infra* § III(D)]. There is a 178% increase in road prohibitions in the states whose interests the state and regional Associations represent. *Id.* The increase in road prohibition in Utah is an astounding 500% and the increase in road prohibition in Alaska and Montana is 255% and 188%, respectively.

The NFS lands play an important role in our nation's current mineral production supplying about 100 million tons of coal annually, as well as being significant sources of silver, gold, molybdenum, copper, lead and zinc. With its world-class deposits of such minerals, NFS lands are a critical source of supplying our nation's future energy and mineral needs.

The members of the Associations have many mining claims staked in areas included in the inventoried roadless areas described in the final Environmental Impact Statement ("FEIS") to the Roadless Rule. The Roadless Rule unduly burdens these members' ability to exercise their statutory rights to access, occupy and use those mining claims for prospecting, exploration, mining, processing and uses reasonably incident thereto.

The Roadless Rule has and will continue to make access more difficult, more expensive and in many cases, impossible. The increased regulatory uncertainty has resulted and will continue to result in a decrease in exploration investment on NFS lands. This decrease in exploration investment will translate to fewer new mineral discoveries, fewer new mines and a loss of high-paying jobs in rural areas.

Further, the global and U.S. demand for products made from critical and strategic metals continues to grow. The Roadless Rule, and the accompanying decrease in exploration, has caused an increase in the nation's reliance on foreign sources of minerals needed for national defense and economic security. Currently,

the U.S. imports significant amounts of these metals from nations that have less stringent environmental standards and whose mining practices not only may harm their local environments, but also that of other countries, including the U.S.

C. The Roadless Rule's Impact On Employees

The Associations also represent the individuals employed by the member companies. These citizens and their families live, work and use the lands that are adversely impacted.

The Roadless Rule will result and has resulted in a loss of mining and energy related jobs in rural communities causing significant socio-economic harm to these communities. The Roadless Rule does not just prohibit the mining companies from operating, but it keeps the companies from employing miners and other support personnel. Rural communities rely on the high paying jobs associated with mineral development. Mining on NFS administered lands provides some of the Nation's highest paid non-supervisory jobs. According to the Northwest Mining Association, 130,000 hard-working men and women are employed by the U.S. coal mining industry alone and each one of these jobs creates an additional 3.5 jobs in other sectors of the U.S. economy. For example, the mining industry in Alaska employed 9,000 individuals in 2011 for a total of $620 million in payroll to those citizens. Alaska Miners Association, *The Economic Benefits of Alaska's Mining Industry*

(Jan. 2012). These individuals were employed in more than 120 different communities across Alaska including rural areas where employment is sparse. *Id.* In Arizona, the mining industry alone accounted for 10,900 jobs resulting in $1,171,000,000 in personal income for Arizona citizens in 2010. George F. Leaming, *The Economic Impact of the Arizona Copper Industry 2010*, W. Econ. Analysis Ctr., May 2011, at 39-40.

Likewise, the Roadless Rule has and will result in the loss of jobs in the livestock industry. Ranchers and cattlemen have and will be put out of work because the Roadless Rule eliminates their ability to utilize NFS lands.

It is the citizens and the members of their respective communities who will truly feel the impact of the Roadless Rule. States and local governments rely substantially on the taxes and royalties that are generated by mineral operations and the other jobs that it creates. Especially in times of great economic turmoil for many state governments, the prospect of losing tax dollars and royalties from mining activities imposes a significant hardship.

Many of the Associations' members, especially exploration geologists, drillers, ranchers and cattlemen, entered their professions for the opportunity to work and live close to nature. The Roadless Rule threatens the viability of these professions and has caused and is continuing to cause those affected people deep philosophical and cultural loss because

they are prevented from using NFS lands for work and recreation as they have done for many generations.

SUMMARY OF THE ARGUMENT

The Tenth Circuit's decision that the Roadless Rule does not violate the Wilderness Act raises important Constitutional questions regarding the separation of powers between Congress and an Executive agency, the Forest Service. Under the Wilderness Act, only Congress can designate areas as wilderness areas. The Forest Service infringed on the exclusive rights of Congress when it enacted the Roadless Rule because the Roadless Rule creates *de facto* wilderness areas. That is, in enacting the Roadless Rule, the Forest Service accomplished a result that only Congress could accomplish: banning permanent and temporary roads on NFS lands.

REASONS THE COURT SHOULD GRANT CMA AND THE STATE OF WYOMING'S PETITIONS[3]

I. An Agency's Authority Is Limited To Only Those Powers Congress Grants It

The power to legislate is vested with Congress under Article I, § 1 of the Constitution. Further, Congress has plenary power to enact all necessary rules and regulations respecting the federal government's property under Article IV, § 3, cl. 2. While the Constitution does not explicitly authorize the congressional delegation of power, it is an inherent power of Congress to "confer decisionmaking authority upon agencies. . . ." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) (internal citations and quotations omitted). Any delegation of power is something "Congress must lay down by legislative act [with] an intelligible principle to which the person or body authorized to act is directed to conform." *Id.* (emphasis in original). Once Congress has delegated its own decisionmaking power to an agency, anything done by the agency must be within the scope of that delegation. *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990). "Although agency determinations within the scope of delegated authority are entitled

[3] The Associations reference and incorporate CMA's Statement of The Case, including the Statutory and Regulatory Background and Procedural Background sections. Further, the Associations reference and incorporate the State of Wyoming's arguments regarding why the Forest Service violated NEPA when it enacted the Roadless Rule.

to deference, it is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction." *Id.* (internal quotations omitted). All rulemaking "must be promulgated pursuant to authority Congress has delegated to the [agency]." *Gonzales v. Oregon*, 546 U.S. 243, 245 (2006).

When evaluating an agency action, the court should first determine whether Congress specifically authorized the action in a statute. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). In the event there are multiple statutes governing the same issue, courts have developed tools for determining whether the agency is acting within its delegated power. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (holding the FDA rulemaking as improper in light of the 35 years of subsequent legislation and history). In *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court explained "[a]t the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings." *Id.* It is the Court's task to reconcile the various laws to determine the scope of an agency's authority. *Id.* "This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." *Id.* "[A] specific policy embodied in a later federal statute should control [the] construction of the earlier statute, even though it has not been expressly amended." *Id.*

II. The Wilderness Act Gives Congress The Exclusive Right To Designate Wilderness Areas

In the Organic Act, enacted in 1897, and later the Multiple Use Act, enacted in 1960, Congress set forth the Forest Service's powers to establish rules governing management of the NFS lands. *See* 16 U.S.C. §§ 473-482, 551; 16 U.S.C. §§ 528-531. Prior to the Wilderness Act, the Forest Service relied on these acts to designate lands as wilderness.[4]

When Congress enacted the Wilderness Act in 1964 it narrowed the Forest Service's authority and vested itself with the exclusive power to designate lands as wilderness areas. 16 U.S.C. §§ 1131-1136.

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[4] It is worth noting, that even the Multiple Use Act does not contemplate the Forest Service taking any action that would ban mining. To the contrary, it provides the Forest Service may not, in the course of its management of national forests, "affect the use or administration of the mineral resources of the national forests." 16 U.S.C. § 528. Congress has subsequently made it clear that it is its policy to support mining. In the Materials and Minerals Policy Act, 30 U.S.C. § 1605, Congress requires "the various departments and agencies" of the federal government to "act immediately to promote the goals" of "foster[ing] and encourage[ing] private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries." Likewise, Congress has also made clear that it supports having an adequate system of roads and trails in NFS lands to support multiple uses of those lands. *See* 16 U.S.C. § 532 ("the construction and maintenance of an adequate system of roads and trails within and near the national forests . . . is essential if increasing demands for timber, recreation and other uses of such lands are to be met).

The Wilderness Act set up the exclusive method to designate land as a wilderness area under a specific process in which: the Secretary of Agriculture makes a recommendation to the President as to which NFS lands should be "wilderness"; the President then requests these lands be recognized as "wilderness" by Congress; and the final determination of "wilderness" is only established if Congress enacts legislation to that effect. *Id.* The Wilderness Act specifically provides there is to be no other method for wilderness designation. *Id.* § 1131(a) ("no federal lands shall be designated as 'wilderness areas' except as provided for in [the Wilderness Act] or by subsequent Act.").

By setting up a process requiring congressional vote to designate additional wilderness areas, Congress was ensuring that the states and their citizens would be involved in this process. This process allows interested citizens, such as the Associations and their members, the opportunity to share their political views regarding the proposed designation with their congressional representatives prior to any vote. Congress can then consider public opinion, resource demands, energy policies and revenue requirements in making its final determination of which areas should be designated as wilderness. Further, this process allows the voters to hold their representatives accountable if they are not properly representing the interests of the people. Looking from a different perspective, this process prevents an agency of the Executive branch from declaring lands as wilderness area without a public debate in Congress.

Congressional debate by elected representatives over the designation of wilderness areas in NFS lands is vital to the sound development and implementation of energy policy. This is especially true in the current economic climate where there is an outcry from citizens for the United States to enact policies that promote the domestic exploration and production of metal and mineral resources. There is also a strong environmental component to this issue as well because of foreign mining practices that could harm the environment. As a result, domestic energy policy decisions need to be debated by the country's elected representatives. The policies regarding exploration and production of domestic resources also have a direct impact on energy prices. During a time when too many families are living paycheck to paycheck or suffering through unemployment, energy costs are at the forefront of the political spectrum.

III. The Roadless Rule Creates *De Facto* Wilderness Areas

The Roadless Rule created *de facto* wilderness areas in violation of the Wilderness Act because the "wilderness areas" governed by the Wilderness Act are essentially the same as the inventoried roadless areas designated by the Roadless Rule.

A side-by-side comparison of the Wilderness Act and Roadless Rule demonstrate that the Forest Service is acting in an area over which Congress enjoys exclusive jurisdiction:

Wilderness Act	Roadless Rule
Defines "wilderness," in relevant part as an "area of undeveloped Federal Land" that "has at least five thousand acres of land." 16 U.S.C. § 1131(c).	Defines "inventoried roadless area" as "undeveloped areas typically exceeding 5,000 acres that met the minimum criteria for wilderness conservation under the Wilderness Act. . . ." *Wyoming v. USDA*, 414 F.3d 1207, 1210, n.3 (10th Cir. 2005).
In order to preserve the wilderness character of wilderness areas, such areas "shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use." 16 U.S.C. § 1133(b).	The purpose of the Roadless Rule is to conserve and protect desirable characteristics of inventoried roadless areas, including primitive forms of dispersed recreation, scenic quality, cultural properties, and conservation of soil, water, air, wildlife habitat and wildlife diversity. 36 C.F.R. § 294.11
Prohibits permanent and temporary roads within wilderness areas. 16 U.S.C. § 1133(c).	Prohibits permanent and temporary road construction on inventoried roadless areas. 36 C.F.R. § 294.12(a).
Prohibits commercial logging. 16 U.S.C. § 1133(c)	Prohibits commercial timber harvesting. 36 C.F.R. § 294.12-.13.

Identified land in the 1967 Roadless Area Review Evaluation ("RARE I") and the 1977 Roadless Area Review Evaluation ("RARE II") for evaluation by the Forest Service for recommendations to Congress for wilderness designations. *Wyoming v. USDA*, 570 F. Supp. 2d 1309, 1321, 1350 (D. Wyo. 2008).	Most, if not all, of the lands the Forest Service included in the Roadless Rule are RARE II lands. *Wyoming*, 570 F. Supp. 2d at 1350 (the fact that the inventoried roadless areas were based on RARE II "evidences that the Forest Service usurped congressional authority").

The Wilderness Act's specific scope includes the prohibition of road building on NFS lands to preserve their characteristics. *See Wyoming*, 570 F. Supp. 2d at 1309 (there can be no debate that "a roadless forest is synonymous with the Wilderness Act's definition of 'wilderness'"; the reason they are synonymous "is that roads facilitate human disturbance and activity in degradation of wilderness characteristics"; noting that the Forest Service itself seems to acknowledge this fact). Thus, under this Court's rules of statutory construction the Wilderness Act granted Congress the exclusive right to make these designations and the Forest Service has no authority to do so. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 143.

The Tenth Circuit's attempt to distinguish the two by stating that the Wilderness Act is broader in scope and more restrictive and prohibitive than the Roadless Rule fails. *See Wyoming v. USDA*, 661 F.3d 1209, 1230-1234 (10th Cir. 2011); *contra Wyoming*,

570 F. Supp. 2d at 1349-1350 ("In fact, uses in inventoried roadless areas are even more restricted than those permitted in congressionally designated wilderness areas."). The Tenth Circuit states that the Wilderness Act, unlike the Roadless Rule, prohibits the construction of permanent and temporary structures or installations and prohibits the use of motorized vehicles or equipment, boats or aircraft, or other forms of mechanical transport. The Tenth Circuit's analysis ignores the practical realities. Without the ability to construct permanent and temporary roads, the construction of all structures or installations is impossible because there is no way to transfer the materials necessary for the construction to the site. Likewise, the use of motorized vehicles, whether it is a car, motorcycle, snowmobiles or ATV, requires roads. Or, if the use of these motorized vehicles goes forward without roads, the use of these motorized vehicles will naturally create roads which will violate the Roadless Rule's prohibitions. Boats also require roads to transport the vessels to the water and aircraft require roads for runways.

Similarly, the Tenth Circuit's claim that the Roadless Rule allows for mining is not grounded in reality. There can be no mining without the ability to construct roads. Mining requires power and numerous large pieces of equipment to construct and maintain the mine and the associated processing, milling and rail loading facilities. This equipment includes an array of excavating, extracting, blasting, loading, hauling, material handling and crushing machinery.

Further, some of the equipment, such as crushers, are mobile and any use would naturally create roads. Practically, the only way to transport all of these materials is through the use of roads. It would not be possible to transport all of this equipment with a helicopter or some other means that does not require a road. Even if that could happen – which it cannot – the mine would still need roads so that its workers could get from where they to live to the mine.

The Tenth Circuit's statement that grazing activities can occur under the Roadless Rule is also wrong. Grazing requires infrastructure such as fencing and water. Without roads it is impossible to construct, maintain or repair this infrastructure. The practical effect of the Roadless Rule is that all commercial activities, including mining or grazing, are prohibited. While Congress certainly could make this same decision, no Congressional action was taken. Rather, the Forest Service made this determination and, in the process, precluded the Associations from participating in this great country's representative democratic process.

The Tenth Circuit further fails in its attempt to distinguish the Roadless Rule and the Wilderness Act when it states that the Wilderness Act is more restrictive in terms of road maintenance, road construction and use of existing roads. While under certain narrow circumstances some existing classified roads could potentially be maintained under the Roadless Rule, that maintenance may only occur *if* the Forest Service determines it is permissible. It is the Forest Service – not Congress – making that determination whether

an area would be allowed to revert back to wilderness. *See Wyoming*, 661 F.3d at 1231 ("the Roadless Rule allows all existing classified roads – defined as roads 'wholly or partially within or adjacent to [NFS] lands *that [are] determined to be needed for long-term motor vehicle access* . . . – to be maintained" (emphasis added)). Under the Wilderness Act, this is not allowed because only Congress can make such a determination.

The Tenth Circuit's holding that the Roadless Rule has broader exceptions for new road construction and reconstruction fails for the same reason. If the Forest Service decides that it will not allow road construction or reconstruction, it is stepping into a realm that should be occupied exclusively by Congress. Any time the Forest Service determines that a road should not be built or reconstructed, the Forest Service is designating an area as wilderness and its determination will have the exact same effect as if Congress had declared the land wilderness. Again, the Forest Service cannot do this because it is Congress alone that can make the decision whether to designate an area as wilderness.

IV. The Associations' Property Interests Are Negatively Impacted By The Roadless Rule's Designation Of Land As Wilderness Areas

The amount of land the Roadless Rule impacts in these states is staggering. The 58.5 million acres of NFS land at issue alone demands that this Court

grant certiorari. *See, e.g.*, *Andrus v. Utah*, 446 U.S. 500, 506 (1980) (granting certiorari because the dispute involved "vast amounts of public lands").

The Associations and its members are directly and negatively impacted by the Roadless Rule's *de facto* designation of wilderness areas. As shown below, the Roadless Rule results in significant increases in the amount of wilderness areas in the states that the Associations represent:[5]

[5] *See* USDA Forest Service, *Inventoried Roadless Rule Acreage by State*, App. A, *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsm8_037652.htm; *see also* USDA Forest Service, *National Wilderness Area by State*, Table 7, *available at* http://www.fs.fed.us/land/staff/lar/LAR2011/LAR_Table_07.pdf.

Associations	State(s) Represented	Wilderness Area Before Roadless Rule (1 million acres)	Additional *De Facto* Wilderness Area Subject to Roadless Rule (1 million acres)	Percentage Increase
Alaska Miners Association	Alaska	5.8	14.8	255%
Arizona Mining Association/Arizona Cattle Growers' Association	Arizona	1.3	1.2	92%
Minnesota Mining	Minnesota	1.1	.1	9%
Montana Mining Association	Montana	3.4	6.4	188%
New Mexico Mining Association	New Mexico	1.4	1.6	114%
Utah Mining Association	Utah	.8	4	500%
Wyoming Mining Association	Wyoming	3.1	3.3	106%
Western Business Roundtable[6]	Colorado, Idaho, Nevada, North Dakota, South Dakota	8.0	17.3	216%
Northwest Mining Association	Oregon, Washington	4.7	4	85%
National Mining Association/ National Figures	All States (Including District of Columbia and Puerto Rico)	35	58.5	167%
TOTAL impact for all state and regional Associations		**29.6 (85%)**	**52.7 (90%)**	**178%**

[6] The Western Business Roundtable also represents Alaska, Arizona, Montana, New Mexico, Oregon, Utah, Washington and Wyoming. Because those states are accounted for individually, they are not included in this calculation.

Under the Wilderness Act, the Associations and their members would (and should) have had an opportunity to participate in the Congressional process in which democratically elected representatives consider and vote on whether these lands should be designated as wilderness areas. *See* Jay Alan Sekulow & Erik M. Zimmerman, *Weeding Them Out By The Roots: The Unconstitutionality of Regulating Grassroots Advocacy*, 19 Stan. L. & Pol'y Rev. 164, 197 (2008) (advocates informing public officials about their positions on government action is essential to the democratic system of government).

The Forest Service took the opportunity away from the Associations and its members to exercise their rights to ensure that the designation of wilderness areas is connected to public opinion. The removal of 58.5 million acres of land from potential commercial and recreational use is profoundly detrimental on local, state and the national economies. For instance, the removal of 58.5 million acres of land decreases the states' tax bases – taxes that are used for schools and other important government functions. The loss of such a significant tax base negatively impacts the quality of life for many citizens. Removing millions of acres from potential recreational uses will also have potentially crippling effects on local economies that survive on the recreational industry. Further, in a time when domestic energy considerations are paramount and the United States is seeking to form a cohesive energy policy to protect and enhance its economic and national security priorities, critical

policy decisions concerning the future use of 58.5 million acres of NFS lands should not be left to a mere rulemaking process. Rather, the question of whether it is in the nation's best interest to designate these lands as wilderness should, as set forth in the Wilderness Act, be made by Congress.

If the Tenth Circuit's judgment stands, the Forest Service could further remove millions of acres of NFS lands for only wilderness area uses. This is contrary to the statutory framework controlling the Forest Service and the Wilderness Act.

CONCLUSION

For all of these reasons, the Associations respectfully request that the Court grant CMA and the State of Wyoming's Petitions for Writs of Certiorari.

Respectfully submitted,

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