No. 10-1290

In The
Supreme Court of the United States

PUBLIC LANDS COUNCIL,

Petitioner,

v.

WESTERN WATERSHEDS PROJECT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION, ARIZONA CATTLE GROWERS' ASSOCIATION, WYOMING STOCK GROWERS ASSOCIATION, WYOMING COUNTY COMMISSIONERS ASSOCIATION, THE MONTANA FARM BUREAU FEDERATION, AND THE IDAHO CATTLE ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Whether environmental groups have standing to bring procedural challenges against regulations that do not authorize any on-the-ground activities by merely showing that their members use public lands upon which the regulations may have some effect in the future because of some yet-to-be-issued agency decision.

Whether the National Environmental Policy Act or the Administrative Procedure Act allows a reviewing court to permanently enjoin agency regulations because of the court's view that the regulations are bad policy.

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BRIEF OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, amici curiae Mountain States Legal Foundation, the Arizona Cattle Growers' Association, the Wyoming Stock Growers Association, the Wyoming County Commissioners Association, the Montana Farm Bureau Federation, and the Idaho Cattle Association, respectfully submit this brief, on behalf of themselves and their members, in support of Petitioner.[1]

IDENTITY AND INTEREST OF AMICI CURIAE

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. Since its creation in 1977, MSLF has been actively involved in

[1] Pursuant to Supreme Court Rule 37.2, letters indicating the intent to file this amici curiae brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, MSLF affirms that no counsel for a party authored this brief in whole or in part and that no party, person, or entity other than amici curiae, their members, and counsel made a monetary contribution specifically for the preparation or submission of this brief.

the proper administration of the public lands. *E.g.*, *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000) (represented amicus curiae); *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) (respondent); *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986).

The Arizona Cattle Growers' Association ("ACGA") is a non-profit corporation organized under the laws of the State of Arizona. ACGA was formed in 1904 to provide a unified voice on regulatory and legal issues affecting the ranching industry in Arizona. ACGA presently represents approximately 850 member-ranches. In fact, most major ranching interests in Arizona are members of ACGA. ACGA 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 Wyoming Stock Growers Association ("WSGA") is a non-profit organization organized under the laws of Wyoming. WSGA was formed in 1872 and represents over 1,200 members. WSGA advocates issues affecting the cattle industry, Wyoming agriculture, and rural community living. It promotes the role of the Wyoming cattle industry in resource stewardship, animal care, and production of high-quality, safe, and nutritious beef. As part of its mission, WSGA informs and educates the public regarding the role of the

cattle industry in the State of Wyoming, emphasizing the commitment of ranchers to resource stewardship.

The Wyoming County Commissioners Association ("WCCA") is an organization consisting of the Boards of County Commissioners of all twenty-three Counties in Wyoming. The livestock industry is a substantial part of the economy, culture, and heritage of the residents and communities that are represented by the County Commissioners. The vitality of the livestock industry in Wyoming is largely dependent on the use of the public range.

The Montana Farm Bureau Federation ("MFBF") is a non-profit corporation organized under the laws of the State of Montana. MFBF was formed in 1919 to protect, promote, and assert the business, economic, social, and educational interest of its membership. MFBF is Montana's largest agricultural organization, and its membership consists of thousands of Montana ranchers who have interests directly impacted by the proper management of public range.

The Idaho Cattle Association ("ICA") is a non-profit trade association organized under the laws of the State of Idaho. ICA was officially formed in 1983, through a merger of the Idaho Cattlemen's Association (originally founded in 1915 as the Idaho Cattle & Horse Growers Association) and the Idaho Cattle Feeders Association (founded 1963). In 1998, ICA and the Idaho CattleWomen, Inc. merged. ICA is the official voice for all segments of the beef business in Idaho and is composed of nearly 1,500 beef producers.

Many of amici's members own grazing permits and leases that allow them to graze livestock on lands managed by the Bureau of Land Management ("BLM"). These members' economic livelihood is largely dependent on the use of the public range. In addition, amici, WSGA, MFBF, and ICA, helped identify changes that needed to be made to regulations that govern the administration of livestock grazing on lands managed by the BLM. These amici also commented extensively during the public comment period for the challenged regulations.

In the instant case, the Ninth Circuit, in disregard of this Court's standing analysis in *Summers v. Earth Island Institute*, 555 U.S. 488, 129 S.Ct. 1142 (2009), held that environmental groups have standing to bring facial, procedural claims against BLM regulations that govern the administration of livestock grazing on public lands. The Ninth Circuit made this ruling even though the regulations authorize no on-the-ground activities and even though any effects from the regulations could arise only through subsequent BLM decisions. If the Ninth Circuit's decision is allowed to stand, it will further open the federal courthouse doors to groups who wish that the public lands be managed solely for their individual agendas – not for the multiple uses mandated by Congress. "The constitutional role of the courts, however, is to decide concrete cases – not to serve as a convenient forum for policy debates." *Massachusetts v. EPA*, 549 U.S. 497, 547 (2007) (Roberts, C.J., dissenting); *Valley Forge Christian College v. Americans United*

for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) ("[Standing] tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action"). Therefore, amici curiae submit this brief in support of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The BLM is the federal agency charged with overseeing livestock grazing on over 160 million acres of public land in the western United States. Petitioner's Appendix ("Pet. App.") at 5. Prior to 1934, ranchers had an "implied license" to use the public lands for livestock grazing. *See Buford v. Houtz*, 133 U.S. 320, 326 (1890). In 1934, however, the Nation was recovering from one of the most severe droughts in history, which had left the public lands barren of forage. P. Gates, *History of Public Land Law Development* 607-13 (1968). Cattle prices had also fallen dramatically, which meant that more cattle remained on the depleted range. *See id.* at 607. Because of these conditions, the livestock industry was on the brink of disaster. *Id.* at 610 ("[t]he combination of drought with poor forage and the low prices . . . demoralized the livestock industry"). Accordingly, Congress passed the Taylor Grazing Act, 43 U.S.C. § 315 *et seq.*, to, *inter alia*, "stabilize the livestock industry dependent

upon the public range." 78 Cong. Rec. 5371 (1934) (remarks of Representative Taylor).

In 1976, Congress passed the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq*. Pursuant to FLPMA, the BLM is to manage the public lands for "multiple use." 43 U.S.C. §§ 1701(a)(7), 1732(a). As this Court explained: "'Multiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put, 'including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.'" *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004) ("*SUWA*") (quoting 43 U.S.C. § 1702(c) (alteration in original)). To fulfill this mandate, FLPMA requires the BLM to develop and maintain land use plans. 43 U.S.C. § 1712(a). These land use plans are designed to provide guidance for future management actions. 43 U.S.C. § 1712(e); *SUWA*, 542 U.S. at 69 ("The implementing regulations make clear that land use plans are a preliminary step in the overall process of managing public lands.").

With respect to livestock grazing, land use plans identify lands that are available for livestock grazing. The BLM then issues grazing permits or leases for lands available for grazing. *See* 43 U.S.C. § 1752(a). Grazing permits and leases specify the lands upon which grazing may occur (*i.e.*, one or more grazing allotments) and establish the terms and conditions of

grazing use. *See* 43 U.S.C. §§ 1752(d), (e). These terms and conditions include the number of livestock, when and where they are allowed to graze, and for how long. *See* 43 U.S.C. § 1752(e). In 1978, the BLM amended its grazing regulations to bring them into compliance with FLPMA. *See* 43 Fed. Reg. 29,058-29,076 (July 5, 1978).

In 1995, the BLM issued new grazing regulations that substantially altered the administration of livestock grazing on public lands that had existed since passage of the TGA. Petitioner in this case, Public Lands Council ("PLC"), which represents cattle and sheep ranchers in the western states, and other livestock organizations, were unsuccessful in their facial challenge to the new regulations. *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000).

On July 12, 2006, based, in part, on the "lessons learned" from implementing the 1995 regulations, the BLM amended its regulations that govern the administration of livestock grazing on the public range. 71 Fed. Reg. 39,402-39,509 (July 12, 2006) ("2006 Regulations"). These regulations changed some of the regulations adopted in 1995, and restored earlier regulations that had been rescinded by the 1995 regulations. The BLM explained that the "[c]hanges ensure that BLM documents its consideration of the social, cultural, environmental, and economic consequences of grazing changes[,]" and that the changes should "contribute to improving working relationships with permittees and lessees, protecting the health of the rangelands and increasing administrative efficiency

and effectiveness." 71 Fed. Reg. 39,402. Importantly, the 2006 Regulations are simply administrative and do not authorize any on-the-ground activities.

Before the regulations took effect, Respondents, Western Watersheds Project, *et al.* (collectively "WWP"), filed suit facially challenging the regulations on, *inter alia*, procedural grounds.[2] WWP alleged that, in issuing the 2006 Regulations, the BLM violated both the National Environmental Policy Act ("NEPA") 42 U.S.C. §§ 4331-4335, by failing to take the required "hard look" at the environmental effects, and Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536, by failing to consult with the U.S. Fish & Wildlife Service ("FWS"). Petitioner, PLC, intervened on the side of the BLM to defend the 2006 Regulations. The district court ultimately ruled that the BLM violated NEPA and the ESA in promulgating the 2006 Regulations and permanently enjoined the implementation thereof. Pet. App. at 63-112.

On appeal, PLC argued, *inter alia*, that WWP lacked standing to facially challenge the non-applied regulations based upon, *inter alia*, this Court's decision in *Summers*. PLC also argued that the BLM took a "hard look" at the environmental effects in accordance with NEPA and fully complied with the ESA.

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[2] WWP also brought a substantive FLPMA claim, which is not at issue here. Pet. App. at 59-61 (Ninth Circuit vacating the district court's judgment regarding the FLPMA claim).

The Ninth Circuit, however, rejected PLC's arguments and affirmed the district court. Pet. App. at 1-62. In so doing, the Ninth Circuit ruled that WWP had standing to facially challenge the non-applied regulations that authorize no on-the-ground activities because WWP members have visited BLM grazing allotments and plan to visit allotments in the future. *Id.* at 24-28. The Ninth Circuit based its ruling on declarations by two WWP members. *Id.* at 25. One member stated that he "has personally visited and continues to visit, study, enjoy" certain BLM grazing allotments and wishes to "pursue[ ] recreational activities" thereon. *Id.* The other member stated she "visits, studies, [and] works to protect" certain BLM grazing allotments, and would be "exclude[d] from participating in various management decisions" under the 2006 Regulations. *Id.* Astonishingly, the Ninth Circuit found that these declarations – which described no actual on-the-ground effects from the 2006 Regulations – prove "the 2006 Regulations pose *an imminent harm* to [WWP's] members' aesthetic enjoyment of the rangeland and to their involvement in public land grazing management." *Id.* at 26-27 (emphasis added). In short, the Ninth Circuit ruled that WWP had standing to bring procedural claims under NEPA and the ESA simply because there was a connection between WWP's members and grazing allotments on which the 2006 Regulations *may* have some effect at some unknown time in the future because of some yet-to-be-issued decision by the BLM.

As to the merits, the Ninth Circuit expressed its belief that the BLM's 2006 Regulations were bad policy:

> These changes are inconsistent with the 1995 Regulations and discordant with the lessons learned from the history of rangeland management in the west, which has been moving towards multiple use management and increased public participation.

Pet. App. at 48. Not surprisingly, the Ninth Circuit ruled that the BLM violated NEPA and the ESA. Pet. App. at 41-58.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE NINTH CIRCUIT'S DECISION IGNORES THIS COURT'S STANDING JURISPRUDENCE.

A. Article III Standing Is Essential To The Separation Of Powers And Individual Liberty.

Separation of powers is an essential feature of the American constitutional system and is necessary for the preservation of liberty. *Clinton v. New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty."); *Metropolitan Washington Airports Auth. v. Citizens for*

the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991) ("The ultimate purpose of . . . separation of powers is to protect the liberty and security of the governed."); *Morrison v. Olson*, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting) ("While the separation of powers may prevent [the Judiciary] from righting every wrong, it does so in order to ensure that we do not lose liberty.").

"[T]he law of Article III standing is built on a single basic idea – the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984). "To permit a complainant who has no concrete injury to require a court to rule" on important questions of national importance "would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974); *see also United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring) ("[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens.").

B. The Immutable Requirements Of Standing.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) ("*Defenders*") this Court reaffirmed that Article III standing contains three immutable requirements: injury in fact, causation, and redressability. Importantly, these immutable requirements may not be modified or abrogated by any branch of government.[3] *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); *Valley Forge*, 454 U.S. at 487 n.24 ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III.").

This Court has recognized that two of these requirements may be slightly relaxed under very narrow circumstances, *i.e.*, where a plaintiff is "seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest . . . (*e.g.*, the procedural requirement of a hearing prior to the denial of [a] license application, or the procedural

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[3] In addition to the immutable requirements of Article III, this Court "also adhere[s] to a set of prudential principles that bear on the question of standing." *Valley Forge*, 454 U.S. at 471-72. One important prudential principle is the "rule barring adjudication of generalized grievances more appropriately addressed in the representative branches. . . ." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen*, 468 U.S. at 751).

requirement for an environmental impact statement before a federal facility is constructed next door to [the plaintiff]).” *Defenders*, 504 U.S. at 572. Under such circumstances, this Court suggested that a plaintiff could establish standing “without meeting all the demanding normal standards for redressability and immediacy.” *Defenders*, 504 U.S. at 572 n.7. The basis for the slight relaxing of the redressability and immediacy requirements is to ensure the federal government's compliance with the procedural requirements established to protect an individual's concrete interest from impairment.[4] *Id.* at 572. Without impairment to a concrete interest, however, an individual plaintiff could usurp the President's most important constitutional duty, *i.e.*, to “take care that the Laws be faithfully executed, Art. II, § 3.” *Id.* at 577; *see Allen*, 468 U.S. at 761.

Importantly, this Court has never relaxed the causation requirement. To the contrary, a plaintiff still must show that the impairment of the concrete interest is fairly traceable to the procedural violation. *Defenders*, 504 U.S. at 572 n.8; *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-65 (D.C. Cir. 1996) (en banc) (“To demonstrate standing . . . a procedural-rights

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[4] Importantly, WWP is not seeking to have an environmental impact statement (“EIS”) prepared. Instead, WWP is simply challenging the sufficiency of the EIS that was prepared. Pet. App. at 5-6. Amici submit that this distinguishes this case from the example in *Defenders* and that the redressability and immediacy requirements should not be relaxed when only the sufficiency of an EIS is at issue.

plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is *substantially probable* that the procedural breach will *cause* the essential injury to the plaintiff's own interest.") (emphasis added).

Finally, the party invoking federal jurisdiction bears the burden of establishing standing. *Defenders*, 504 U.S. at 561. Thus, at the summary judgment stage, a plaintiff "must set forth by affidavit or other evidence specific facts" that establish the plaintiff's right to invoke the jurisdiction of the federal court. *Id.* (quotation omitted). This burden of proof is "'substantially more difficult'" to meet when, like in the instant case, "the plaintiff is not himself the object of the government action or inaction he challenges. . . ." *Id.* at 562 (quoting *Allen*, 468 U.S. at 758). In such cases the immutable requirements are almost impossible to prove because they generally hinge on subsequent decisions or actions that the court "cannot presume either to control or to predict[.]" *Defenders*, 504 U.S. at 562 (quotation omitted).

C. The Ninth Circuit's Ruling That WWP Had Established Standing Violates This Court's Decision In *Summers*.

Summers involved the Forest Service Decisionmaking and Appeals Reform Act ("Appeals Reform Act"), 16 U.S.C. § 1612, note, which requires the Forest Service to establish a public participation process – consisting of notice, comment and appeal – for its

approval of "projects and activities" implementing land use plans. 129 S.Ct. at 1147. Pursuant to that authority, the Forest Service promulgated regulations that exempted certain projects and activities from the public participation process in NEPA. *Id.* The issue before this Court was whether the environmental groups could facially challenge the regulations on the ground that the regulations could preclude public participation with respect to unknown, future Forest Service's management decisions. *Id.* at 1148.

In reversing the Ninth Circuit, this Court recited the immutable requirements of standing, injury causation, and redressability. *Id.* at 1149. This Court then emphasized that the challenged regulations "neither require nor forbid any action on the part" of the environmental groups or their members because the regulations were administrative in nature. *Id.* at 1149. This Court then concluded that the environmental groups had not satisfied their heavy burden of proof because they had not identified any application of the regulations "that threatens imminent and concrete harm to the interests of their members." *Id.* at 1150. In so doing, this Court rejected an affidavit supplied by a member of an environmental group that alleged past injury from activities on National Forest lands and plans to visit National Forests in the future:

> Here we are asked to assume not only that [the affiant] will stumble across a project tract unlawfully subject to the regulations, but also that the tract is about to be developed by the Forest Service in a way that

> harms his recreational interests, and that he would have commented on the project but for the regulation. Accepting an intention to visit the National Forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact.

Id.

This case is on all fours with *Summers*. Like the plaintiffs in *Summers*, WWP challenged agency regulations that have not been applied. Like the regulations in *Summers*, the 2006 Regulations do not authorize any on-the-ground activities that might cause any concrete harm. In other words, the 2006 regulations, like the regulations in *Summers*, do not authorize any "project" that will "impede" any "specific or concrete plan" that WWP has with respect to any grazing allotment. *Summers*, 129 S.Ct. at 1150. Instead, the BLM regulations establish administrative requirements applicable to BLM's management of the public range by, *inter alia*, setting forth public participation rights and authorizing ranchers to jointly own new rangeland improvements and water rights. 71 Fed. Reg. at 39,404, 39,410, 39,413-14, 39,462-64. Because the 2006 BLM regulations have not been applied and do not authorize any activities they do not – and cannot – cause any concrete injury to WWP, or any non-livestock interest for that matter. Because *Summers* held that the plaintiffs

lack standing to challenge non-applied regulations under similar circumstances, the same conclusion must apply to WWP's challenge to the 2006 regulations.

In the instant case, the Ninth Circuit did not follow *Summers* in the context of Article III standing with respect to non-applied regulations. Instead, the Ninth Circuit simply ruled that WWP had an interest in the public range, and that interest was sufficient to establish standing. Pet. App. at 24-27. By focusing solely on WWP's *interest* – its members' "use[ ] and enjoy[ment]" of grazing allotments – the Ninth Circuit lost sight that Article III standing requires more than just an "interest." It requires that WWP prove that its members would be injured in addition to their "'special interest' in th[e] subject."[5] *Defenders*, 504 U.S. at 563 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)); *see Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000) ("The relevant showing for purposes of

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[5] The Ninth Circuit also improperly relaxed the causation requirement. Pet. App. at 27 ("Once a plaintiff has established an injury in fact under NEPA the causation and redressability requirements are relaxed." (quoting *Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001)). The causation requirement, however, has never been relaxed. *Defenders*, 504 U.S. at 572 n.7; *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1159 (D.C. Cir. 2005) ("In other words, while we relax the imminence and redressability requirements, the procedural-rights plaintiff must still satisfy the general requirements of the constitutional standards of particularized injury and causation."). This Court should grant the Petition to clear up the Ninth Circuit's confusion regarding the causation requirement.

Article III standing . . . is not injury to the environment but injury to the plaintiff"); *see also*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.")

Moreover, in *Summers*, this Court recognized that the environmental groups had interests (*i.e.*, "recreational" and "aesthetic" interests), but held that they had not demonstrated that the Forest Service's non-applied regulations caused any harm to those interests. 129 S.Ct. at 1149. In other words, this Court ruled that the plaintiffs did not have standing simply because they "visited" and had "plans to visit" national forests, or because the regulations denied their right to participate in unidentified Forest Service management decisions. *Id.* at 1150-51. Therefore, the Ninth Circuit's ruling that WWP had standing simply because of its members' interests is clearly erroneous because it flies in the face of *Summers*.

The Ninth Circuit also ignored *Summers* with respect to standing to bring procedural claims. The Ninth Circuit held that WWP had standing to assert a procedural claim under NEPA because WWP's declarations establish a geographical nexus between WWP's members and locations that may be subject to the 2006 Regulations sometime in the future:

> We have described the concrete interest test as requiring a geographic nexus between the

> individual asserting the claim and the location suffering an environmental impact. The . . . declarations establish a geographic nexus between Western Watersheds Project's members and the locations subject to the 2006 Regulations, and, therefore, Western Watersheds Project has established a concrete interest sufficient to pursue their NEPA claim.

Pet. App. at 26 (internal quotation and citation omitted).

Granted, a geographical nexus is a prerequisite to challenge a final agency action affecting the public lands. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990) ("[A]verments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which [regulated] . . . activity has occurred or probably will occur by virtue of the governmental action, are insufficient to show that the member's rights have been adversely affected or aggrieved by Government action."); *Defenders*, 504 U.S. at 565 (rejecting the idea that any person who uses any part of a "contiguous ecosystem" adversely affected by an agency action has standing even if the challenged activity is located a great distance away from the area used). A geographical nexus, in and of itself, however, is not sufficient to establish standing to bring procedural claim. Instead, a plaintiff must establish a geographical nexus and that the alleged procedural violation has caused some "concrete harm." *Summers*, 129 S.Ct. at 1151. Because the 2006 regulations have

not been applied and do not authorize any activities, WWP cannot show any harm as a result of an alleged NEPA violation to a particular grazing allotment that its members use. Thus, WWP's NEPA claim is simply a generalized grievance. As this Court explained in *Summers*, however, "'it would exceed [Article III's] limitations if . . . we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws.'" 129 S.Ct. at 1151 (quoting *Defenders*, 504 U.S. at 580-81 (Kennedy, J., concurring)).

Accordingly, the Ninth Circuit erred in ruling the WWP had established standing to bring procedural challenges against the 2006 Regulations.[6] Therefore, this Court should grant the Petition to remedy this error.

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[6] The Ninth Circuit also ruled that WWP had standing to bring a procedural ESA claim because WWP members visit grazing allotments inhabited by listed species. Pet. App. at 25. Again, by considering only WWP's geographical nexus to grazing allotments, the Ninth Circuit ignored that standing requires a concrete injury. Because the 2006 Regulations have not been applied and do not authorize any activities, they cannot affect any listed species that may inhabit a grazing allotment used by WWP's members. Therefore, the Ninth Circuit also erred in ruling that WWP had established standing to bring a procedural ESA claim.

II. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE NINTH CIRCUIT'S DECISION VIOLATES THIS COURT'S NEPA AND APA JURISPRUDENCE.

Under NEPA, whenever a federal agency proposes a "major Federal action[ ] significantly affecting the quality of the human environment," it must prepare an environmental impact statement ("EIS"). 42 U.S.C. § 4332(2)(C). An EIS must "provide [a] full and fair discussion of significant environmental impacts" so as to "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. NEPA, however, does not impose substantive requirements on federal agencies. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) ("NEPA imposes only procedural requirements"). Instead, NEPA exists to ensure a "process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("*Methow Valley*") ("NEPA itself does not mandate particular results, but simply prescribes the necessary process"). Granted, NEPA requires agencies take a "hard look" at the environmental effects of their actions. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374 (1989); *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776-77 (1983) (an agency need not consider psychological effects resulting from fears, dislikes, or anxieties about a proposed action). NEPA, however, does not require an agency to "affirmatively present every uncertainty" in an EIS. *Lands Council v. McNair*, 537 F.3d 981, 1001

(9th Cir. 2008) (en banc). Nor does NEPA require that an agency discuss every potential impact in great detail; it simply requires a reasoned evaluation of the facts. *Marsh*, 490 U.S. at 373-74. Most importantly, NEPA does not require that an agency "elevate environmental concerns over other appropriate considerations." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). In sum, "NEPA merely prohibits uninformed – rather than unwise – agency action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

Judicial review of an agency's compliance with NEPA is governed by the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *Baltimore Gas & Elec. Co.*, 462 U.S. at 90. This standard is exceedingly deferential. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007). In making the factual inquiry concerning whether an agency decision was "arbitrary and capricious," the reviewing court must determine whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action. . . ." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"). This inquiry must "be searching and careful," but "the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). And, in no event, shall a court "substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43.

In *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976), this Court explained this deferential standard of review in the context of NEPA:

> Neither [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. The only role of the court is to insure that the agency has taken a "hard look" at environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken.

(Citations and quotation omitted); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, (1980) ("NEPA was designed 'to insure a fully informed and well-considered decision,' but not necessarily 'a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency.'" (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978))).

In the instant case, the panel failed to follow the teachings of this Court and apply a deferential standard review in determining whether the BLM took a "hard look." Instead, the panel substituted its judgment for that of the BLM by concluding that the 2006 Regulations were bad policy:

> Here, the BLM decreased its regulatory authority over rangeland management, decreased the role of the public in overseeing that management, and granted permittees

> and lessees increased ownership rights. *These changes are inconsistent with the 1995 Regulations and discordant with the lessons learned from the history of rangeland management in the west*, which has been moving towards multiple use management and increased public participation.

Pet. App. 48 (emphasis added). By expressing its preference for the 1995 regulations and suggesting that the 2006 Regulations are "discordant with the lessons learned" from the past, the Ninth Circuit improperly "stray[ed] beyond judicial province . . . to impose upon the [BLM] its own notion" of what is "most likely to further some vague, undefined public good."[7] *Vermont Yankee*, 435 U.S. at 549.

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[7] The Ninth Circuit also improperly held the BLM's explanation for the changes to a heightened standard of review. Pet. App. at 48 ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." (quoting *State Farm*, 463 U.S. at 42)). In *F.C.C. v. Fox Television Stations, Inc.*, ___ U.S. ___, 129 S.Ct. 1800, 1810 (2009) this Court explained that holding an agency's explanation for its regulatory changes to a heightened standard of review violates the APA. This Court also explained that an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.* at 1811 (emphasis is original). Here, the BLM sufficiently explained that the changes were necessary based, in part, on the "lessons learned" from implementing the 1995 regulations. 71 Fed. Reg. at 39,403.

Unfortunately, the Ninth Circuit has a propensity for substituting its judgment. *E.g.*, *Ctr. for Biological Diversity v. U.S. Dept. of Interior*, 623 F.3d 633, 651 (9th Cir. 2010) (Tallman, J., dissenting) ("Congressional intent to benefit the country and insure its economic prosperity are completely ignored by the majority in its attempt to inject its views on how these lands should be administered."); *see Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 537 (9th Cir. 2010) (Fisher, J., concurring in part and dissenting in part) (The agency "provided a rational basis for its" conclusion. "To conclude otherwise requires . . . distrusting [the] agency['s] experts' analysis. . . ."); *cf. Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam) (ruling that the Ninth Circuit improperly "substituted its own judgment for that of the state court"). Therefore, this Court should grant the Petition.

CONCLUSION

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

Respectfully submitted:

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