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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied settled law to the particular facts of this case in finding:

(a) that respondents had standing to pursue their challenge to the promulgation by the Bureau of Land Management (BLM) of amendments to its grazing regulations, based on their uncontested showing that named members, who engage in recreational and scientific activities on specifically identified parcels of public lands managed by BLM, and currently subject to livestock grazing, were adversely affected by the amended regulations;

(b) that respondents' challenges to the lawfulness of BLM's rulemaking procedures under the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) were ripe for review because review would not interfere with ongoing agency proceedings, the claims did not turn on the facts of any specific application of the regulations, and respondents would suffer hardship if review were deferred;

(c) that BLM acted arbitrarily and capriciously, and contrary to law, by failing to take the "hard look" at the environmental consequences of its actions required by NEPA and failing to respond meaningfully to the views of its own and outside experts that the regulatory changes would have substantial environmental impact; and

(d) that BLM acted arbitrarily and capriciously, and contrary to law, in failing to consult with the U.S. Fish and Wildlife Service about the impact of its actions on species listed under the ESA, as that statute requires where, as here, an agency's action is likely to affect a listed species or its critical habitat.

RULE 29.6 STATEMENT

Respondents Western Watersheds Project, Idaho Wildlife Federation, Idaho Conservation League, Natural Resources Defense Council, and National Wildlife Federation have no parent corporations, and no publicly held company has any ownership interest in them.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Constitutional Provisions, Statutes, and Rules:

INTRODUCTION

This case is a challenge to an action of the Bureau of Land Management (BLM) promulgating regulations that eliminated long-established rights of the public to participate in agency decisionmaking concerning grazing allotments on public lands and that substantially limited the agency's ability to enforce standards protecting those lands from the significant damage that grazing can cause. The court of appeals, applying well-established legal principles, found that respondents had standing to challenge the regulations because their declarations established that they would suffer immediate injuries to concrete interests, and held that their challenges to the rulemaking's compliance with the National Environmental Policy Act (NEPA) and Endangered Species Act (ESA) were ripe for review.

On the merits, the court of appeals affirmed the district court's findings that BLM's rulemaking violated NEPA because the agency's Environmental Impact Statement (EIS) did not provide a reasoned response to the views of its own experts, other federal agencies, and outside experts that the rulemaking would have substantial, adverse environmental effects. Likewise, the court of appeals affirmed the district court's ruling that the rulemaking violated the ESA's requirement that an agency consult with the U.S. Fish & Wildlife Service (FWS) about the impact of any action likely to affect species listed under the ESA. Again, the agency had not provided a rational basis for disregarding the views of its own experts and FWS that the changed rules would adversely affect many listed species on millions of acres of rangeland.

BLM no longer defends its flawed rulemaking. In 2008, under the prior administration, the agency decided not to pursue an appeal of the district court's ruling. Instead, private organizations that had intervened in the district court to defend the rulemaking appealed (and BLM filed an amicus curiae brief *opposing* their appeal). One of those intervenors, petitioner Public Lands Council, now seeks review in this Court.

Petitioner presents a grab-bag of challenges to the court of appeals' rulings on standing and ripeness (issues first raised in the court of appeals) and to the rulings of both lower courts that BLM violated NEPA and the ESA in promulgating the rules. Petitioner does not allege any conflict among the circuits or other disagreement among the lower courts over any legal issues decided by the court of appeals, but instead accuses the court of appeals of "disregarding" this Court's ripeness and standing precedents and the limits that the Administrative Procedure Act (APA) imposes on judicial review of agency action. In fact, however, the court of appeals applied this Court's justiciability precedents *and* the deferential APA standard of review petitioner advocates.

Petitioner's real argument is that the court of appeals *misapplied* settled legal principles to the particular facts of this case. Even if that were correct, petitioner's request for error-correction in a factbound case raises no issue requiring review by this Court, particularly given the government's lack of interest in maintaining the rules at issue. And in any event, petitioner's claims that the court of appeals erred are unpersuasive. The petition should be denied.

STATEMENT

Petitioner's sketchy statement of the case describes little of the case's factual background or the record on which the court of appeals determined that respondents had standing to challenge BLM's rulemaking and on which both lower courts found that BLM violated NEPA and the ESA. More complete descriptions of those factual circumstances are found in the opinions of the two lower courts. However, certain misstatements and omissions in petitioner's statement of the case require correction here.

First, petitioner's description of BLM's changes to its regulations concerning public participation omits the most important of those changes and a principal focus of respondents' challenge to BLM's rulemaking. According to petitioner, the only relevant change made to BLM's public participation rules in the 2006 rulemaking was the revision of the definition of "interested public," which, according to petitioner, merely limited who receives notice of BLM decisions. *See* Pet. 2.

Although that change was important (and harmed respondents), an even more fundamental change was that the new regulations deleted completely the requirement that BLM "consult, cooperate, and coordinate" with members of the interested public in making the most critical range-management decisions, including issuance, renewal and modification of permits. *See* Pet. App. 13-14. Thus, the new regulations eliminated important procedural rights of members of the public. That change was a key element both in respondents' showing of standing and in their demonstration that the agency's action was unlawful.

Equally inaccurate is petitioner's repeated characterization of the regulatory changes as merely "administrative" and not "substantive." *See, e.g.,* Pet. 14. Although the curtailment of public participation rights may be described as procedural, most of the other changes were substantive.

For example, since 1995, two sets of environmental requirements have applied to BLM rangelands: the national Fundamentals of Rangeland Health and the state-specific Standards and Guidelines for Grazing Administration. Pet. App. 14-15, 35. According to BLM, the Fundamentals "were identified as the basic components of rangeland health and were intended to serve as overarching principles to be *supplemented* by the standards and guidelines." Pet. App. 36. Failure of a grazing allotment to meet either set of requirements triggered prompt remedial action. Pet. App. 14-15, 35. BLM's new rules deleted the requirement for remedial action when an allotment violates the Fundamentals. *Id.* This effective repeal of the Fundamentals created substantial gaps in resource protection. BLM's final EIS contained no acknowledgment of those gaps, no specific response to comments identifying them, and, other than a conclusory denial, no information about their environmental impacts. *See id.* at 51–52, 37.

Moreover, the new rules, besides rendering the Fundamentals unenforceable, added a requirement that, after the BLM finds non-compliance with the Standards and Guidelines, it must collect years of additional "monitoring data" before taking corrective action. *Id.* at 15, 36. Many experts, agencies, and organizations commented that monitoring data are often neither necessary nor helpful in determining the

need for corrective action and that the monitoring requirement would render the Standards and Guidelines unenforceable in many areas because the BLM lacks the resources to collect monitoring data. *Id*. at 37–39.

Other provisions of the new rules with substantive effect included their extended compliance timeframes for grazers whose allotments do not meet applicable standards; their five-year phase-in requirement for grazing reductions; and their authorization for grazers to acquire joint ownership of improvements and water rights on public lands. These provisions are not merely "administrative." *See* Pet. App. 58

Petitioner's statement of the case not only mischaracterizes the regulations, but also fails to provide any description of the administrative record that led both lower courts to agree that BLM violated both NEPA (by preparing an EIS that did not take a "hard look" at the regulations' environmental effects) and the ESA (by not consulting with FWS over anticipated effects on species listed under the ESA). Critically, that record included a lengthy document prepared by BLM experts tasked with examining the environmental effects of the proposed regulations, the "Administrative Review Copy—Draft Environmental Impact Statement" (ARC-DEIS). The ARC-DEIS contained extensive analysis of the environmental effects of each of the challenged regulations and concluded that the proposed changes should not be adopted because of their adverse effects. The lower courts based their holdings that BLM violated NEPA in significant part on the agency's deletion of its experts' analysis from the published EIS, as well as the EIS's failure to provide a meaningful discussion of the concerns raised by

the ARC-DEIS (as well as comments from FWS, the EPA, and outside experts). Pet. App. 30-50.

Similarly, the courts rested their findings that BLM violated the ESA on the administrative record's demonstration that both BLM's own experts and FWS had advised BLM of potential impacts on listed species, and that BLM nonetheless neither consulted with FWS nor provided a rational explanation of why the changes in the rules would not affect listed species. Pet. App. 54-56.

Finally, even while basing its argument on conclusory assertions that respondents failed to demonstrate standing under this Court's precedents, petitioner fails to engage in any discussion of what respondents' standing declarations actually said. As the court of appeals found, the declarations explained at length the declarants' use of specific named grazing allotments for recreational, aesthetic, and scientific purposes, and detailed how each of the challenged regulations would adversely affect the declarants' interests in specific locations where they would be applied. *See* Pet. App. 25.

The declarations cited by the court of appeals, as well as others submitted by the respondents, demonstrate (among other things) that livestock grazing already occurring on specific BLM grazing allotments is *currently* harming respondents' interests. As also shown in their declarations, respondents and their members are currently using BLM's administrative processes to attempt to change existing grazing practices on those allotments to alleviate the ongoing

harm. *See, e.g.,* Jon Marvel Dec., SER 1,[1] 12-20 (demonstrating harm to his use, and detailing his involvement in the management of, the Mountain Springs/San Felipe, Burnt Creek, and Pleasantview Allotments in Idaho and the Salmon River Allotment in Nevada); Linn Kincannon Dec., SER 675-81 (demonstrating harm to her use, and detailing her involvement in the management of, the Mountain Springs and Pleasantview Allotments in Idaho); Joseph M. Feller Dec., 9th Cir. DE 37-2 (demonstrating harm to his use, and detailing his involvement in the management of, the Santa Maria Ranch, Soap Creek, and House Rock Allotments in Arizona).[2] *See also, e.g.,* SER 89–159 (additional, similar declarations). The new rules, if permitted to go into effect, would (a) largely eliminate these members' rights to continue participating in the process, and (b) eliminate much of the substantive regulatory basis for their efforts, resulting in continuing injury to their interests.

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[1] "SER" refers to Plaintiffs'-Appellees' Joint Supplemental Excerpts of Record in the court of appeals

[2] The Feller Declaration and the Ralph Maughan Declarations (9th Cir. DE 37-3) were filed in the court of appeals because the standing issue was first raised there. *Summers v. Earth Island Institute* held that declarations filed after judgment should not be considered when standing has been litigated in the district court, s*ee* 129 S. Ct. 1142, 1150, n.*, 1153 (2009), but *Summers* was not a case where the factual and legal basis for standing was uncontested in the district court. The Court's reasoning that "[i]f respondents had not met the challenge to their standing at the time of judgment, they could not remedy the defect retroactively," *id.*, has no application where, at the time of judgment, there had been no challenge to standing. Indeed, petitioner also relied on declarations submitted on appeal to demonstrate standing to defend the regulations, which likewise was not an issue until the appeal. *See* Pet. App. 21-22, n.6.

This Court's rules provide that "[t]he failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." S. Ct. R. 14.4. Petitioner's significant omissions constitute such a failure, but, as will become apparent, that is only the first of the many reasons the petition should be denied.

REASONS FOR DENYING THE WRIT

I. Petitioner's Challenge to Respondents' Standing Does Not Merit Review.

A. The Court of Appeals Did Not "Ignore" *Summers*.

The centerpiece of petitioner's argument for review is its assertion that, in finding that respondents had standing to challenge BLM regulations at issue, the Ninth Circuit "simply ignored" (Pet. 16) the Court's recent decision in *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009), and that the court of appeals' "utter disregard" (Pet. 7) for *Summers* merits review in this Court.

As petitioner elsewhere grudgingly acknowledges (Pet. 17), the Ninth Circuit did not "ignore" *Summers*, but *cited* it. *See* Pet. App. 26. More importantly, the court of appeals framed its standing discussion by invoking the standing analysis of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), of which *Summers*, by its own account (*see* 129 S. Ct. at 1148-51), was merely an application. *See* Pet. App. 24; *see also* Pet. App. 20 (citing *Lujan*'s requirements of injury in fact, causation, and redressability). As the court of appeals recognized, *Summers*, like *Lujan*, acknowl-

edged that when environmental harm "in fact affects the recreational or even the mere aesthetic interests of the plaintiff, that will suffice" to confer standing. 129 S. Ct. at 1149.

Petitioner asserts that the Ninth Circuit ignored "relevant" aspects of *Summers* by requiring only that respondents show an "interest" in public lands affected by BLM's rules, without also requiring them to demonstrate "concrete *harm* to that interest." Pet. 17. But while the court of appeals emphasized the necessity of establishing a recreational or aesthetic interest in an area affected by an administrative action as the first step in showing standing (*see* Pet. App. 24-25), the court did not suggest that such an interest sufficed without an actual imminent injury. On the contrary, the court based its finding that respondents had standing on its determination that respondents' declarations "identify both a concrete interest in *and an imminent harm to* specific allotments of BLM land to which the 2006 Regulations apply." Pet. App. 25 (emphasis added). Petitioner's claim that the court ignored the requirement of imminent injury to the asserted interest (a requirement long predating *Summers*) is quite wrong.

Equally false is petitioner's assertion that the Ninth Circuit disregarded *Summers* by finding standing based on mere "procedural injury" divorced from an imminent threat to respondents' concrete interests in particular lands affected by the rules. *See* Pet. 21. The decision below is fully consistent with *Summers*' holding that "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." 129 S. Ct. at 1151. The

court of appeals said exactly the same thing: "To satisfy the injury in fact requirement, and thereby meet the first prong of Article III standing, 'a plaintiff asserting a procedural injury must show that the procedures in question are designed to protect some threatened concrete injury of his that is the ultimate basis of his standing.'" Pet. App. 26 (citation omitted).

That requirement of "threatened concrete injury ... that is the ultimate basis of … standing" in a procedural rights case comes from *Lujan v. Defenders*, 504 U.S. at 573, n.8—the very precedent *Summers* relied on for the point. Consistent with *Summers* and *Lujan*, the Ninth Circuit afforded standing to assert procedural rights only upon demonstration of a threatened concrete interest, which it found by requiring not just a geographic nexus between the plaintiffs and areas subject to the challenged regulations, but a geographic nexus to "*location[s] suffering an environmental impact*." Pet. App. 26 (emphasis added, citation omitted). Here, the impact that harms respondents is the ongoing damage to specifically identified grazing allotments, and the procedural rights that the new rules attempted to take away existed to protect against that concrete injury.

The suggestion that the Ninth Circuit has disregarded *Summers* and afforded standing willy-nilly in procedural rights cases without threatened concrete injury is particularly unfounded because that court has repeatedly held that, under *Summers*, procedural injury claims are *not* enough for standing where (unlike in this case) deprivations of procedural rights are not tied to threats of concrete, particularized injury. *Wilderness Soc'y v. Rey*, 622 F.3d 1251 (2010); *Ashley Creek Properties v. Larson*, 403 Fed. Appx. 273, 274

(2010); *Glassert v. Nat'l Marine Fisheries Serv.*, 360 Fed. Appx. 805 (2009); *Clatskanie Peoples Util. Dist. v. Bonneville Power Admin.*, 330 Fed. Appx. 637 (2009).

Wilderness Society is particularly pertinent because, in addressing a procedural rights claim in an environmental case, the Ninth Circuit repeatedly recognized that *Summers* does not permit standing on the basis of a procedural violation without a showing of an underlying threat of concrete injury to the plaintiff's aesthetic or recreational interests in particular locations subject to the challenged action. 622 F.3d at 1255-58. Read together with the decision below, *Wilderness Society* demonstrates that the Ninth Circuit is not in need of discipline for disregarding the requirement of threatened concrete injury in procedural rights cases. The court regularly enforces that requirement. It simply found the requirement satisfied on the facts here, but not in *Wilderness Society*.[3]

Petitioner not only does not demonstrate that the Ninth Circuit has disregarded this Court's precedents, but also fails to point to any conflict or confusion among the lower courts over application of those precedents. Petitioner's real argument is just that the Ninth Circuit has *misapplied* those decisions to the specific circumstances here. And petitioner does not even assert that the Ninth Circuit has *generally* failed to implement *Summers* properly (nor could it, given

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[3] *See also Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171-72 (9th Cir. 2011) (recognizing that *Summers* requires plaintiffs asserting violation of a procedural right to show a likelihood that the challenged action will affect their concrete interests, and finding that plaintiffs had made such a showing).

such recent precedents as *Wilderness Society*).[4] Petitioner's argument boils down to the assertion that the Court should grant certiorari because, in this one case, the Ninth Circuit (in petitioner's view) got the standing issue wrong.

Such an argument falls far short of meeting this Court's standards for granting certiorari. As the Court's rules emphasize, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law." S. Ct. R. 10. Parsing standing affidavits to determine whether they adequately demonstrate a sufficiently imminent threat of injury to respondents' members based on their recreational, scientific and aesthetic interests in specific areas subject to BLM regulations is not a worthwhile use of this Court's limited time and resources, particularly given the guidance the Court so recently provided in *Summers*.

B. The Ninth Circuit Correctly Held That Respondents Had Standing.

Petitioner's claim that the Ninth Circuit misapplied standing doctrine in this case is not only unworthy of a grant of certiorari, but also unconvincing on its merits. The declarations in this case do not share the shortcomings that this Court found in the plaintiffs' standing declarations in *Summers*. *Summers* turned on the failure of the relevant declarations to show a likelihood that the declarants would suffer injury through an imminent application of the chal-

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[4] *See also Ecology Ctr. v. Tidwell*, 328 Fed. Appx. 395 (9th Cir. 2009). According to WestLaw, the Ninth Circuit has cited *Summers* in 14 cases (including this one) as of the filing of this brief, finding standing in 8 and denying standing in 6.

lenged regulations to any area in which they asserted a valid recreational or aesthetic interest. The one specific location in which one of the declarants had demonstrated an interest was no longer threatened with injury. *See* 129 S. Ct. at 1149. The other declaration the Court considered was held inadequate because it addressed the declarant's general use of the national forests without demonstrating an interest in any particular location that was concretely threatened by any imminent application of the challenged regulations. *See id.* at 1150. The only particular locations where any application of the regulations was expected were areas that the declarant had no "firm intention" of visiting, and thus those anticipated applications of the regulations were "insufficient to satisfy the requirement of imminent injury" to the declarant. *Id*. at 1150-51.

The declarations in this case suffer from no such flaws. As the court of appeals explained, the Marvel and Fite declarations submitted by respondent Western Watersheds Project identified many specific grazing allotments (including among many others the Pleasantview and Burnt Creek allotments in Idaho) that the declarants regularly visit, and explained how the application of the challenged regulations—including the regulations deleting most public consultation rights with respect to upcoming agency decisions affecting the allotments, rendering BLM's Fundamentals of Rangeland Health unenforceable, providing for private ownership of "improvements" and water rights, preventing enforcement actions in the absence of monitoring, and delaying agency actions to enforce standards or reduce grazing—would adversely affect their interests in those allotments. *See* Pet. App. 25. Similarly, other respondents submit-

ted declarations of members who identified specific grazing allotments in Idaho (Pleasantview) and Arizona (Santa Maria Ranch, Soap Creek, and House Rock) that they regularly visited and had concrete plans to visit again, and explained how those allotments (and their enjoyment of them) would be damaged by the provisions in the regulations eliminating public consultation rights, making the Fundamentals of Rangeland Health unenforceable, and requiring monitoring data as prerequisites for enforcement.[5] Indeed, the declarations submitted by the respondents showed that the public lands in which their members are interested are *already* suffering ill effects from grazing—effects that the challenged regulations would reduce BLM's ability to rectify.

Beyond its conclusory assertion that "this case is similar to *Summers*, and the plaintiffs here are similarly situated to the *Summers* plaintiffs," Pet. 14, petitioner attempts no specific demonstration that the court of appeals was wrong in concluding that the respondents' declarations were sufficient to establish the key fact this Court found missing in *Summers*—namely, that it was likely the challenged regulations would affect specific areas in which the respondents had a continuing interest, in a way harmful to that interest. Instead, petitioner offers only a series of non sequiturs.

Petitioner contends that the key fact in *Summers* was that the regulations "had not been applied to any specific projects or activities on the regulated lands," Pet. 8, and that the same is true here. But the critical

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[5] Kincannon Dec., SER 675-81; Feller Dec., 9th Cir. DE 37-2; Maughan Dec., 9th Cir. DE 37-3.

fact in *Summers* was not that the regulations "had not" been applied—indeed, the Court made clear that a *past* application would not support standing to seek prospective relief. *See* 129 S. Ct. at 1150. Rather, the problem in *Summers* was the failure to demonstrate that the regulations would *soon* be applied, *and* that they would be applied to areas where the plaintiffs had a cognizable interest that would be harmed. *See id.* at 1150, 1152-53. As the court of appeals found here, respondents' declarations established that BLM's regulations (and the ongoing harms from grazing that they perpetuate) pose just such a threat of imminent injury.[6]

Petitioner also asserts that BLM's regulations "establish administrative requirements only and do not establish any substantive grazing standards or otherwise authorize any projects or activities on the public range that might conceivably cause concrete harm to the plaintiffs." Pet. 14. That assertion is quite untrue. The regulations would have the substantive effect of rendering BLM's Fundamentals of Rangeland Health unenforceable, and thus effectively authorize grazing that would violate the Fundamentals but not the Standards and Guidelines that would remain enforceable. And, by preventing enforcement activities absent monitoring data, delaying the effectiveness of remedies for violations, and delaying implementation of grazing reductions, the regulations would permit the continuation of harmful grazing activities that violate

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[6] Contrary to petitioner's suggestion (Pet. 19-20), these same injuries establish standing for the violation of both NEPA and ESA procedures in the rulemaking, as the harms inflicted on respondents by both overlap.

the standards remaining in place. Respondents' declarations explained in detail how these changes would harm their interest in particular rangeland areas to which they would be applied if not enjoined. *See* SER 4-25 (Marvel Dec.); SER 100-24 (Fite Dec.); SER 675-81 (Kincannon Dec.); Feller Dec. ¶¶ 22-26; Maughan Dec. ¶¶ 2-12.

Moreover, the regulations' "administrative" aspects also impose harm on respondents by increasing the likelihood of adverse effects on rangelands as a result of the denial of consultation rights to members of the public, as respondents' declarations also explain. Petitioner's assertion that respondents nonetheless "have a lesser basis for standing than the *Summers* plaintiffs" because the regulations in Summers "categorically *precluded* public participation, while the BLM regulations here conditionally *authorize* public participation," Pet. 15, overlooks that the standing issue in *Summers* did not turn on the degree of public participation permitted, but on the failure to show the likely application of the regulations to any areas in which the plaintiffs had demonstrated an interest. Respondents here made such a showing, and further explained how the new rules' *elimination* of consultation obligations (which petitioner ignores)—would adversely affect them. *Summers* requires no more.

II. Petitioner's Novel Reading of This Court's Ripeness Holdings Presents No Issue Meriting Review.

Petitioner's request that this Court review the Ninth Circuit's holding that respondents' NEPA and ESA claims were ripe presents no issue requiring resolution by this Court. The Ninth Circuit's ripeness

holding applied this Court's seminal decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), under which ripeness involves a pragmatic consideration of the fitness of an issue for review and the relative hardships that would be involved in deferred versus immediate review. The court of appeals stated that the issues were fit for review because the administrative actions at issue (promulgation of the regulation and preparation of the EIS) were final, and resolving the question whether the agency complied with its procedural obligations under NEPA and the ESA in the rulemaking did not depend on any specific application of the rules. *See* Pet. App. 29. The court also invoked this Court's observation in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998), that "a person with standing who is injured by a failure to comply with the NEPA procedures may complain of that failure at the time the failure takes place, for the claim can never get riper." And the court of appeals indicated that respondents would suffer hardship if they were prevented from challenging the promulgation of the regulations on a nationwide basis and forced to challenge them only in the context of a specific application in which their threatened injuries came to fruition. *See* Pet. App. 29 (citing *Cal. v. U.S. Dep't of Agric.*, 575 F.3d 999, 1011 (9th Cir. 2009)).

Nothing about this conventional application of ripeness analysis warrants review. Petitioner does not contend that the Ninth Circuit's decision conflicts with the holding of any other court of appeals. Indeed, petitioner cites *no* federal court decision on any level that has held that a plaintiff whose threatened injuries are sufficient to support standing may bring claims that a rulemaking violated procedural re-

quirements of NEPA or the ESA only in an as-applied challenge.

Instead, petitioner contends that this Court's statement in *Ohio Forestry* about the ripeness of NEPA claims conflicts with this Court's earlier statement in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990), that "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him."

The supposed conflict does not exist. The statement in *Lujan v. NWF* is itself dicta, made in the course of explaining why the broad administrative "program" challenged in the case, which consisted of a host of discrete actions, was not "final agency action" subject to review under the APA. *See id.* at 891-93. And the statement did not purport to set forth any categorical rule, but only offered a generalization subject to exceptions (one of which was immediately discussed by the Court after it made the statement).

Moreover, the Court's generalization in *Lujan* by its own terms does not apply to the sort of challenges at issue here, where the "factual components" of the controversy are not dependent on particular applications of the rule, but instead relate to the procedural circumstances of the rule's promulgation, which will in no way be "fleshed out" by particular applications of the rule. That is why, as the Court's statement in *Ohio Forestry* suggests, claims such as the NEPA and ESA claims at issue here are fit for review. (Indeed,

because the NEPA and ESA procedural requirements depend upon the cumulative effects of *all* applications of the rules, a narrow focus on the concrete facts of a particular controversy over their application would actually tend to *obscure* the facts relevant to the legal challenges.)

Thus, where deferring review would also impose hardship upon the plaintiffs, a finding of ripeness is perfectly appropriate. Here, deferring review would cause such hardship. Respondents are already exposed to ongoing injuries resulting from grazing on allotments in which they have valid interests. The challenged rules, by curtailing public participation rights and precluding BLM from enforcing environmental protections, not only perpetuate that ongoing injury, but also prevent BLM from taking future actions that might individually be the subject of judicial review. Thus, unlike the actions that the Court held unripe for review in *Ohio Forestry*, the actions here *do* effectively confer on grazers a "legal right" to commit environmental harms and "abolish [respondents'] legal authority to object," 523 U.S. at 733, and there will *not* be "ample opportunity later to bring [respondents'] legal challenge at a time when harm is more imminent and more certain." *Id.* at 734.

Not only is the conflict petitioner perceives between this Court's own decisions nonexistent, but the solution petitioner proposes to the so-called conflict is incoherent. Petitioner suggests that NEPA and other procedural challenges to a regulation's promulgation be considered ripe for review outside of a specific application of the rule only "if the regulation authorizes a specific project or activity that may cause harm to the plaintiffs." Pet. 21. Petitioner cites no decision

adopting such a rule, and understandably so. Whether a challenged regulation authorizes a "specific project or activity" or more broadly authorizes actions that create threats of imminent harm to a plaintiff is irrelevant to the concerns underlying the ripeness doctrine: fitness for review and hardship to the parties. A procedural NEPA challenge to the issuance of a regulation is fit for review whether the regulation is broad or narrow, because in neither instance does the resolution of the NEPA challenge turn on the specific facts of cases in which the regulation may be applied. And when a plaintiff challenging a broad set of regulations (like the ones here) has surmounted the standing threshold of showing an imminent risk of injury resulting from the regulations, the hardship of deferring review is just as great (indeed greater) as in the case of a regulation that only authorizes a "specific project." If the type of procedural challenge that petitioner concedes is proper satisfies the ripeness standard, then so do the claims at issue here.

This Court should deny petitioner's invitation to resolve a nonexistent conflict between dicta in two of its opinions. If there were such a conflict, one would expect that petitioner might be able to cite divergent results in the lower courts over the ripeness of challenges to agency regulations based on NEPA and ESA consultation violations. Petitioner has not even attempted to do so, and has demonstrated no other compelling reason for the Court to consider adoption of the novel rule it proposes.[7]

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[7] The petitioners in *Summers* also argued that a facial challenge to a regulation was not ripe for review. In that case, however, the challenge was to the substantive validity of the rule

(*Footnote continued*)

III. Petitioner's NEPA Arguments Are Meritless.

A. The Ninth Circuit Applied the Proper Standard of Review.

Petitioner's contention that the Ninth Circuit failed to apply the proper APA standard of review in determining whether the agency's EIS reflected the required "hard look" at the environmental consequences of its actions, and that the court's decision was part of a "trend" of invalidating agency actions under NEPA, is false. The Ninth Circuit did not ignore the APA standard of review, but properly applied it. And the recent "trend" in the Ninth Circuit, far from running in the direction of overly intrusive review of agency actions under NEPA, has been in favor of conscientious adherence to the APA's limits on review of agency compliance with NEPA, at least since the court's en banc ruling in *Lands Council v. McNair*, 537 F.3d 981 (2008). Even under the APA's deferential standards, however, agency action sometimes fails to pass muster. This is such a case, and petitioner's disagreement with the Ninth Circuit's application of the long-established APA standard of review to the particular facts of this case presents no issue worthy of this Court's consideration.

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rather than the lawfulness of the procedures followed in promulgating it. Such a claim might be thought more likely to be better "fleshed out" in an as-applied challenge than a claim based on procedural violations in the rulemaking proceeding. Even so, the majority of the Court declined to consider the ripeness argument, *see* 129 S. Ct. at 1153, and four Justices summarily pronounced it "without merit." *Id*. at 1158 (Breyer, J., dissenting). There is no more (indeed, less) reason to address the ripeness argument here than there was in *Summers*.

Petitioner's argument rests on its inexplicable assertion that "[t]he Ninth Circuit failed to apply the APA's narrow and deferential standard of review in its 'hard look' analysis, and did not even mention the APA review standard—just as it did not mention *Summers* in its standing analysis." Pet. 26. Petitioner's claim that the Ninth Circuit "did not mention the APA review standard" is false. In fact, at the very outset of the opinion's legal analysis—in a section prominently headed "Standard of Review"—the Ninth Circuit said this:

> Alleged procedural violations of NEPA … are reviewed under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2). …. In reviewing claims brought under the APA, we will only set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Pet. App. 17 (citation omitted).

The Ninth Circuit's express application of the very standard of review petitioner advocates was consistent with a long string of Ninth Circuit precedent applying the APA's arbitrary-and-capricious standard to claims that an agency violated NEPA. In its recent en banc decision in *Lands Council v. McNair* (cited by the opinion below for its statement of the arbitrary and capricious standard, *see* Pet. App. 46), the court stressed the limits the APA imposes on review of agency decisions under NEPA:

> Review under the arbitrary and capricious standard "is narrow, and [we do] not substitute [our] judgment for that of the agency." … Rather, we will reverse a decision as arbitrary and capricious only if the agency relied on factors

> Congress did not intend it to consider, "entirely failed to consider an important aspect of the problem," or offered an explanation "that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

537 F.3d at 987 (citations omitted). Disapproving prior decisions that were insufficiently deferential in applying the APA standard, *McNair* expressly held that an agency's NEPA analysis should not be faulted merely because it does not affirmatively present and address every uncertainty concerning the environmental effects of the agency's action (*see id.* at 1001), because experts disagree on some matters addressed by an EIS (*see id.*), or because the agency does not use what the court regards as the best available scientific methodology (*see id.* at 1003).

Since the Ninth Circuit's decision in *McNair*, that court has repeatedly cited the decision, and its statement of the narrow scope of review of NEPA claims under the APA, in rejecting claims that an agency's NEPA analysis failed to provide the requisite "hard look" at environmental consequences of agency action. *See, e.g., Sierra Forest Legacy v. Sherman*, _ F.3d _, 2011 WL 2041149 (May 26, 2011); *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166 (2011); *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143 (2010); *Earth Island Inst. v. Carlton*, 626 F.3d 462 (2010); *Hapner v. Tidwell*, 621 F.3d 1239 (2010); *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701 (2009); *Ecology Ctr. v. Castaneda*, 574 F.3d 652 (2009); *WildWest Inst. v. Bull*, 547 F.3d 1162 (2008); *N. Ida. Cmty. Action*

Network v. U.S. Dep't of Transp., 545 F.3d 1147 (2008).

In the face of this clear evidence that the Ninth Circuit applies the correct standard of review and takes very seriously the deference that it requires towards agencies' NEPA analysis, petitioner's citation of a handful of recent cases in which the court has rejected an agency's NEPA analysis fails to establish that there is a "trend" in the court of ignoring the standard of review. The cases petitioner cites only demonstrate that even under a deferential standard of review, an agency's egregious failure to comply with NEPA's "hard look" requirement may still be set aside as arbitrary and capricious, and that the outcome in any NEPA challenge depends on specific facts including the nature of the agency action at issue and its environmental consequences, and whether the agency's analysis adequately addressed them.

Once its inaccurate claim that the Ninth Circuit ignored the standard of review (and regularly ignores it in other cases) is set aside, petitioner's NEPA argument boils down to a factbound contention that the court misapplied the standard of review—a classic example of a question that does not merit certiorari. Petitioner would like this Court to engage in the "thorough, fact-specific analysis of the EIS to determine whether it adequately analyzed environmental effects" that it claims the Ninth Circuit failed to provide. Pet. 27. Like petitioner's claim that the court of appeals misapplied this Court's standing precedents, that claim of error in applying a settled legal standard to specific facts fails to satisfy the Court's standards for the exercise of its discretionary jurisdiction. The absence of any need for further review is underscored

by the fact that both the district court and the Ninth Circuit reached the same conclusion based on their review of the record. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

B. The Court of Appeals' NEPA Ruling Was Correct.

Petitioner's argument that the Ninth Circuit erred in holding that BLM violated NEPA is not only fact-bound, but also meritless. Petitioner claims that because the court of appeals made some general comments about the "discordan[ce]" between the agency's actions and "the history of rangeland management in the west," it must follow that the court based its holding on mere disagreement with BLM's action rather than deferential review. Pet. 26 (quoting Pet. App. 48).

But the Ninth Circuit's analysis of the EIS consisted of much more than generalities. Rather, the Ninth Circuit analyzed the EIS's treatment of each of the regulatory changes (including the curtailment of public consultation rights, which petitioner fails to mention). The court concluded that in each case the EIS failed to provide a meaningful analysis of the likely environmental effects of changing the regulations (and of the concerns raised about those effects by BLM's own experts, experts from other agencies, and outside experts). *See* Pet. App. 32.

The court's holding was amply justified by the huge gaps in the agency's NEPA analysis, which said virtually nothing about the environmental consequences of eliminating enforceability of the Fundamentals of Rangeland Health, the requirement of monitoring data before enforcement action may be taken, the joint ownership provisions, and the provi-

sions delaying compliance measures. *See* Pet. App. 25-46. As the court observed, in many instances the EIS addressed not the environmental consequences of the regulations, but only such factors as "efficiency" and "improved cooperative relations" between the agency and grazing interests. *See* Pet. App. 43.

The court also found that the agency had "entirely failed to consider an important aspect of the problem" (Pet. App. 46 (quoting *McNair*, 537 F.3d at 987)) in stating that its adoption of limits on enforcement of grazing standards and guidelines would have minimal environmental impact because "only" 16% of grazing allotments were not in compliance with standards and guidelines—which even on the dubious assumption that the data supported the 16% figure would mean that over 25 million acres of public rangeland would be adversely affected. The EIS did not address those effects. Further, the court concluded that BLM had failed to consider the synergistic effects of the changes, which, through a combination of reduced public participation, laxer substantive standards, and impairment of the enforcement of those standards that remained, would result in "greater environmental impact," as the agency's own experts predicted. Pet. App. 47.

Petitioner contends that in making these findings, the court improperly deferred to environmental concerns raised by experts within BLM (and experts at FWS and EPA) rather than to the agency's own judgment as expressed in the EIS. But the court did not "defer" to dissident experts; indeed, the Ninth Circuit has made clear that it would be improper to set aside an agency's EIS merely because of expert disagreement with its conclusions. As that court most

recently put it, "The mere presence of expert disagreement does not violate NEPA because 'experts in every scientific field routinely disagree.'" *Sierra Forest Legacy*, 2011 WL 2041149, at *14. Rather, the court based its holding on the agency's failure to provide a "meaningful response" based on "reasoned analysis" to the detailed explanations by its own experts, those of sister agencies, and outside experts of the significant environmental effects that the proposed regulatory changes would have. Pet. App. 44, 42. Petitioner's citation of the agency's purely conclusory criticisms of those expert views (Pet. 32) fails to suggest, let alone demonstrate, that the Ninth Circuit was wrong in finding that the agency's unreasoned rejection of the expert critiques of the proposed rules was arbitrary and capricious.

C. The Court of Appeals Did Not Err in Citing *State Farm*.

Petitioner also faults the Ninth Circuit for finding that BLM failed to provide a reasoned explanation for the dramatic changes effected by its rules, in violation of *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 42 (1983). According to petitioner, this Court's decision in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), by holding that the APA does not impose a "heightened standard" of review for changes in agency policy, *id.* at 1810, relieved BLM of any obligation to explain its reasons for its 180-degree reversal of policy on public participation in the permitting process and other matters addressed by the new rules.

But *Fox* did not overrule *State Farm*. It merely held that not *every* change in policy "must be justified by reasons more substantial than those required to

adopt a policy in the first place." *Id*. It also recognized that "of course the agency must show that there are good reasons for the new policy," and that while "the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate," "[s]ometimes it must." *Id*. at 1811. In particular, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* That is all the Ninth Circuit required here: an explanation of why the agency no longer thought policies it previously adopted had the benefits it formerly ascribed to them. For example, as the court of appeals observed, the agency previously had stated that experience showed that public participation improved the quality of agency decisionmaking, yet in its 2006 rulemaking it asserted without explanation that experience showed the public participation was *sometimes* inefficient or redundant without addressing the benefits it previously touted. Pet. App. 49.

Petitioner offers no reason why this Court should review the factbound question whether this is one of those cases that, under *Fox* and *State Farm*, requires explanation. Petitioner points to no conflict among the circuits over the proper application of *Fox*. Nor could petitioner credibly claim that the Ninth Circuit is ignoring *Fox*. Indeed, the Ninth Circuit has endorsed and followed *Fox* in recognizing the "flexibility" and "latitude" that it affords agencies in changing policies and providing explanations for the change. *Modesto Irr. Dist. v. Gutierrez*, 619 F.3d 1024, 1034 (2010).

IV. The Ninth Circuit's ESA Ruling Correctly Applied the Proper Standard of Review.

Petitioner's effort to identify an issue meriting this Court's review in the Ninth Circuit's holding that BLM violated its consultation obligations under the ESA is unavailing. The ESA requires consultation whenever there is "reason to believe" an action "will likely affect" a listed species. 16 U.S.C. § 1536(a)(3). BLM implausibly asserted that its actions would have *no* effect on any listed species, even though the regulatory changes would increase the environmental impacts of grazing, encourage grazers to appropriate water supplies and engage in construction on their allotments, weaken standards governing grazing on public lands, and impair enforcement efforts over millions of acres of federal lands that are the home to over 300 listed species. These circumstances understandably led FWS to comment that the regulations could adversely affect listed species, and BLM's own staff to conclude that the obligation to consult was a "no brainer." Pet. App. 55.

Petitioner, once again, incorrectly contends that the court ignored the applicable standard of review and gave the agency's conclusion "no deference whatever." Pet. 37. But the court expressly acknowledged that a deferential standard of review applies to claims that an agency violated the ESA's consultation requirement: "[T]he normal 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' standard applies." Pet App. 52 (citation omitted). The court held that the agency violated this "deferential" standard because it "failed to consider relevant expert analysis or articulate a rational con-

nection between the facts found and the choice made." Pet. App. 58.

Petitioner's argument thus reduces to a claim that the court of appeals did not "properly apply" the standard of review to the particular facts of this case. Pet. 38, 40. Again, petitioner offers no reason why that factbound issue should be of interest to this Court. Petitioner provides an assortment of reasons why it thinks the Ninth Circuit was wrong but does not contend that any of them implicates any issue of law over which the courts are in disagreement or otherwise identify any reason why they merit this Court's attention. The absence of any reason for review is underscored by the fact that the Ninth Circuit has expressly extended the deferential approach to NEPA claims commanded by its en banc opinion in *McNair* to claims under the ESA as well. *See Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (2010); *Trout Unlimited v. Lohn*, 559 F.3d 946 (2009).

Petitioner's arguments that the Court erred are not only unworthy of review, but unconvincing even as merits arguments. Petitioner contends that BLM was correct in concluding that its rules would have no effect on any listed species because it could always address any possible effect by consulting about some particular action taken under the rules. But many of the rules have the effect of *preventing* the agency from taking an action (consulting with the public; initiating enforcement actions without monitoring; immediately enforcing requirements against violators; or reducing grazing over a period of less than five years), so they will potentially harm listed species without ever leading to some specific action that could be the subject of consultation with FWS. Moreover, the cumulative ef-

fects of the rule changes over the millions of acres to which they apply are, as the court explained, likely to affect many listed species in ways that a particular application to an individual grazing allotment would not. Pet. App. 54.

Petitioner criticizes the court of appeals for treating the FWS's comments as official comments, despite the court's convincing explanation for doing so. *Compare* Pet. 38, n.11 *with* Pet. App. 34, n.8. Petitioner further asserts that the FWS's comments should be disregarded because they ascribe substantive effects to BLM's rules even though, petitioner claims, the regulations "do not establish substantive grazing standards" and "do not affect the 'presence and distribution of livestock' on the public range." Pet. 38-39, n.11. These assertions are doubly false: The regulations *did* alter substantive grazing standards by making the agency's Fundamentals of Rangeland Health unenforceable, and they also directly affected the presence of livestock by reducing the agency's power to enforce the substantive standards that remained and substantially delaying any reductions in grazing.

Petitioner also faults the court for considering evidence on the ESA claim from outside the administrative record, which it contends is barred by the APA. Pet. 39, n.11. But outside evidence was not essential to the court's holding, as the administrative record itself showed that the decision not to consult was arbitrary and capricious. Pet. App. 53-56. 57-58.[8]

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[8] In addition, as the court of appeals explained, the APA prohibition on extra-record evidence does not apply to ESA citizen suits. Pet. App. 56. Petitioner cites no contrary authority, and

(*Footnote continued*)

Finally, petitioner asserts that it is not enough for the court of appeals to have concluded that the agency had reason to believe that its action would affect hundreds of listed species over millions of acres of federal lands. According to petitioner, consultation is only required if the agency (or the court) can identify the specific location in which a specific species would be affected. Pet. 39-40. Petitioner cites no case authority in support of this novel argument (which the Ninth Circuit did not address) and identifies no reason why this Court should address the question in the first instance.

In short, petitioner's sniping at the particulars of the Ninth Circuit's ESA analysis is unconvincing even as a claim of mere error, and it falls far short of establishing that review of the court of appeals' ESA holding is a matter of national importance.

V. Other Considerations Counsel Against Review of This Case.

Beyond the lack of merit of the issues raised by petitioner, a number of other factors weigh against granting review of this case. To begin, reviewing the propriety of BLM's issuance of regulations that the agency no longer defends (and chose not to continue defending even before the change in administrations) is not a matter of national importance. The agency's decision that neither the district court's findings that it violated NEPA and the ESA in issuing the regulations nor the justiciability of respondents' challenges

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indeed does not even acknowledge the Ninth Circuit's rationale for examining extra-record material in connection with the ESA claim.

were matters worth litigating is entitled to considerable weight as the Court considers whether to exercise its discretionary review. The agency's satisfaction with continuing to operate under its old rules provides a strong practical reason not to disturb the Ninth Circuit's judgment, which would likely only require further agency action to correct the excesses of the challenged rules. In addition, because of the Ninth Circuit's remand of respondents' Federal Land Policy and Management Act claims, a reversal on the merits of the Ninth Circuit's NEPA and ESA rulings would result in continued litigation over rules the agency no longer seeks to maintain.

Moreover, although Article III standing is not a matter that any party can waive, the prudential ripeness doctrine is another matter. That doctrine exists largely to protect agencies against adverse effects of premature adjudication. *Abbott Labs.,* 387 U.S. at 148-49. The government's failure to invoke that doctrine is a powerful indication that review of the issues was not premature.

The absence of any important reason for review is underscored by the fact that the rules that the Ninth Circuit's ruling effectively revives (by holding their amendment unlawful) had been in place for more than a decade before the agency undertook its rulemaking to replace them. The rules restored by the court's decision impose, at best, modest burdens on affected members of the grazing community. They provide only for the public's right to be heard when the agency decides matters relating to grazing allotments, for the enforceability of fundamental principles affecting the environmental health of rangelands, for prompt enforcement when the agency finds viola-

tions by grazers, for timely reductions in grazing when the agency finds such reductions needed, and for the maintenance of public ownership over public resources. Those modest conditions on grazers' use of public lands, representing the status quo for over a decade, hardly impose such harm on the industry that this Court need feel compelled to review issues that otherwise would not merit its attention.

Indeed, the absence of perceptible harm to the industry flowing from the restoration of the prior rules raises a serious question whether the petitioner itself had standing to appeal the district court's decision striking down the new rules—serious enough to lead the Department of Justice, on behalf of BLM and the federal officials named as defendants in the district court, to file an amicus brief in the Ninth Circuit arguing that the appeal should be dismissed because petitioner and the other intervenor lacked standing to appeal. The brief argued that the two appellants had not shown that their members would suffer an imminent injury in fact from the application of the prior rules rather than the rules whose enforcement the district court had enjoined. Amicus Brief of the United States in Support of Appellees Regarding Appellate Jurisdiction, 9th Cir. DE 45.

Petitioner's standing to appeal is an antecedent question to whether the district court's judgment should be overturned based on either justiciability grounds or the merits, because, even if the district court had violated Article III limits by issuing a judgment in a case in which the plaintiffs lacked standing, an appellate court would have no power to overturn that judgment absent a proper appellant. Thus, if this Court were to grant certiorari to consider the ques-

tions presented by the petitioner, it would first have to address the additional question of petitioner's own standing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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