No. _____

In The
Supreme Court of the United States

LEE SIMMONS,

Petitioner,

v.

PAUL DANIEL SMITH, in his official capacity as Acting Director of the National Park Service; RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior; and the UNITED STATES OF AMERICA,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an agency can advance an interpretation of a statute for the first time in litigation and then demand deference for its view under *Chevron*.

2. Whether a court must judge a determination made by an administrative agency solely on the ground invoked and not by post hoc rationalization of the court, prompted by agency appellate counsel's arguments first made in litigation.

3. Whether the lower court erred in failing to hold the administrative agency to a burden of justification before restricting and devaluing the private property of a landowner, without compensation, under the Wild and Scenic River Act, 16 U.S.C. §§ 1271 *et seq*.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Lee Simmons ("Simmons") states he is an individual.

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PETITION FOR WRIT OF CERTIORARI

Simmons respectfully prays the Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the opinion decided April 30, 2018.

OPINIONS BELOW

The Eighth Circuit issued its opinion April 30, 2018, which may be found at *Simmons v. Smith*, 888 F.3d 994 (8th Cir. 2018) (App. 1–18). The United States District Court for the District of Nebraska issued its opinion September 12, 2016, which may be found at *Simmons v. Jarvis*, No. 8:13-cv-98, 2016 WL 4742256 (D. Neb. Sept. 12, 2016) (unpublished) (App. 19–57). The Eighth Circuit denied panel and *en banc* rehearing on July 17, 2018, with a dissenting vote (App. 58).

BASIS FOR JURISDICTION

The Eighth Circuit issued its opinion on April 30, 2018 (App. 1). On July 17, 2018, the Eighth Circuit denied panel and *en banc* rehearing with one dissenting vote (App. 58). Simmons files this petition within 90 days of the order denying rehearing as required by Supreme Court Rule 13.1 and 13.3. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 706

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > (B) contrary to constitutional right, power, privilege, or immunity;
> >
> > (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> >
> > (D) without observance of procedure required by law;
> >
> > (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

16 U.S.C. § 1271

> It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. The Congress declares that the established national policy of dam and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes.

16 U.S.C. § 1274(a)(117)

(a) Designation

The following rivers and the land adjacent thereto are hereby designated as components of the national wild and scenic rivers system:

* * *

(117) Niobrara, Nebraska

(A) The 40-mile segment from Borman Bridge southeast of Valentine downstream to its confluence with Chimney Creek and the 30-mile segment from the river's confluence with Rock Creek downstream to the State Highway 137 bridge, both segments to be classified as scenic and administered by the Secretary of the Interior. That portion of the 40-mile segment designated by this subparagraph located within the Fort Niobrara National Wildlife Refuge shall continue to be managed by the Secretary through the Director of the United States Fish and Wildlife Service.

(B) The 25-mile segment from the western boundary of Knox County to its confluence with the Missouri River, including that segment of the Verdigre Creek from the north municipal boundary of Verdigre, Nebraska, to its confluence with the Niobrara, to

> be administered by the Secretary of the Interior as a recreational river.
>
> After consultation with State and local governments and the interested public, the Secretary shall take such action as is required under subsection (b) of this section.

STATEMENT OF THE CASE

Simmons is a longtime "recreational outfitter" and owner of land adjacent to the Niobrara National Scenic River ("Niobrara"). Congress added the Niobrara as "a component[ ] river and adjacent lands" under the Wild and Scenic Rivers Act ("WSRA") in 1991. 16 U.S.C. § 1274(a)(117)(A)–(B); (App. 2–3). As an interim measure, Congress designated a "one-quarter mile" area on each side of the Niobrara as part of the WSRA until final boundaries could be established. 16 U.S.C. § 1275. The interim boundary for the Niobrara included "a substantial portion" of Simmons' property (App. 3).

Simmons has resided in the Niobrara River Valley during his entire life and is "sensitive to the resources and the values" of the Niobrara (App. 17 n.8). Simmons did not object to inclusion of his land within the one-quarter mile interim boundary of the Niobrara, even though he knew it would result in land restrictions and devaluation for which the Federal Government would not provide compensation (NPS CA8 En Banc Petition at 1). This litigation arose because the Federal

Government wanted more of Simmons' land, beyond one-quarter mile, on an uncompensated basis.

The National Park Service ("NPS") was instructed by Congress to designate a final boundary for the Niobrara ("Niobrara Boundary"), but adjacent land had to have "outstandingly remarkable values" ("ORVs") to be included within the Niobrara Boundary. 16 U.S.C. § 1271.

On January 9, 2003, NPS determined it planned to include more adjacent land for the Niobrara Boundary than the "one-quarter mile" interim boundary in the WSRA (App. 7). NPS initially identified a preliminary boundary that included 23,074 acres of land (App. 48). During the designation process, NPS made adjustments to the preliminary boundary by adding or removing certain land, for example, requested by landowners favored by NPS (App. 51–52). Simmons was not included in that group (*Id.*).

After removing land owned by others that previously was included within the preliminary boundary, NPS captured an additional approximately 75 acres of valuable property held by Simmons' family ("Family Property") located a considerable distance from, and not contiguous with, the Niobrara shoreline (App. 3, 7) (NPS CA8 Brief at 25–26). NPS admits it arbitrarily added the Family Property to be within the Niobrara Boundary solely to keep the acreage number of 23,074 "constant" (NPS CA8 Brief at 51).

Simmons filed objections with NPS, but NPS refused to alter its decision of including the Family

Property within the Niobrara Boundary, despite the fact it was ***solely*** based on its desire to arbitrarily maintain a "constant" acreage number used in an earlier, preliminary boundary determination (NPS CA8 Brief at 51).

Simmons filed this lawsuit against NPS for, among other things, its arbitrary inclusion of the Family Property within the Niobrara Boundary (App. 7). On all but one claim, which NPS did not appeal, "the district court granted summary judgment to NPS" (App. 7–8).

On appeal to the Eighth Circuit, NPS' appellate counsel argued, in ***addition*** to NPS' desire to maintain a pre-determined number of acres, NPS "added" the Family Property to be within the Niobrara Boundary for the ***further*** reason NPS sought "to protect and enhance" ORVs (NPS CA8 Brief at 51). NPS through appellate counsel also argued NPS articulated a "connection" between its decision to keep the acreage numbers constant ***and*** its choice to protect as many ORVs as possible (NPS CA8 Brief at 53). NPS also argued its decision to include the Family Property within the boundary was reasonable ***because*** it protected additional ORVs (NPA CA8 Brief at 53).

Relying on *Chevron*, NPS' appellate counsel argued to the Eighth Circuit that "[c]ourts have long granted considerable deference to agency interpretations of statutes" and urged the Eighth Circuit to "afford appropriate deference" to NPS decisions, among

others, to include the Family Property within the Niobrara Boundary (NPS CA8 Brief at 39, 46).

The Eighth Circuit adopted the ***additional*** arguments presented by NPS' appellate counsel, concluding NPS "drew a boundary line that sought to protect" ORVs (App. 17). The Eighth Circuit affirmed the district court's grant of summary judgment to NPS (App. 17–18).

REASONS FOR GRANTING THE WRIT

A. Summary of the Argument

This petition presents an opportunity for resolving several related issues, all of which demonstrate a clear conflict in the lower courts of appeals, including an especially challenging and growing conflict regarding when deference may be afforded under *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Closely related to the *Chevron* dispute is a question of the power of a federal court to uphold an agency decision through post hoc rationalization based on arguments first presented by the agency's appellate counsel in litigation. Finally, this petition presents an opportunity to resolve a split in the courts of appeals regarding whether a federal agency must meet a "burden of justification" before it may restrict, and thus devalue, the land of a private citizen, without compensation, under the The Wild and Scenic Rivers Act ("WSRA"), 16 U.S.C. §§ 1271 *et seq*.

The first conflict presented by this petition has already been identified by members of the Court in an earlier petition, *E.I. Du Pont De Nemours & Co. v. Smiley*, 138 S. Ct. 2563 (Mem.), 2564 (2018) (statement of Gorsuch, J., respecting the denial of certiorari, joined by Roberts, C.J., and Thomas, J.). Three members described the question under consideration in this way: "Can an agency advance an interpretation of a statute for the first time in litigation and then demand deference for its view? There is a well-defined circuit split on the question. The Court of Appeals in this case said yes, joining several other circuits who share that view." *Id.* at 2564 (citing *Smiley v. E.I. Dupont De Nemours & Co.*, 839 F.3d 325, 333–34 (3d Cir. 2016); *Sec. & Exch. Comm'n v. Rosenthal*, 650 F.3d 156, 160 (2d Cir. 2011); *TVA v. Whitman*, 336 F.3d 1236, 1250 (11th Cir. 2003); *Dania Beach v. FAA*, 628 F.3d 581, 586–87 (D.C. Cir. 2010)). But "[t]wo circuits, the Sixth and Ninth, expressly deny *Skidmore* deference to agency litigation interpretations, and the Seventh does so implicitly." *Smiley*, 138 S. Ct. at 2564 (citing Hubbard, Comment, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The* Chevron *Two–Step and the* Skidmore *Shuffle*, 80 U. Chi. L. Rev. 447, 462 (2013); *Smith v. Aegon Companies Pension Plan*, 769 F.3d 922, 929 (6th Cir. 2014); *Alaska v. Federal Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008); *In re UAL Corp. (Pilots' Pension Plan Termination)*, 468 F.3d 444, 449–50 (7th Cir. 2006)).

As will be discussed below, the *Chevron* question left open in *Smiley* presents itself again in this appeal,

now with an additional court of appeals, the Eighth Circuit, joining seven other courts of appeals in the highly divided dispute over *Chevron* deference.

A second, closely-related issue to the circuit split identified in *Smiley* is whether a court must review a determination made by an administrative agency solely on the ground invoked by the agency itself, and not by post hoc rationalization of the court, prompted by an agency appellate counsel's arguments first made in litigation.

This Court has made clear: "We may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947)); *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974) ("A federal court may not supply a reasoned basis for the agency's action that the agency itself has not given.").

This court rule has been consistently applied and followed throughout the circuits for decades—until this case. *See, e.g.*, *Ultratec, Inc. v. CaptionCall, LLC*, 872 F.3d 1267, 1274 (Fed. Cir. 2017); *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1151 (10th Cir. 2016); *Epsilon Elecs., Inc. v. U.S. Dep't of Treasury*, 857 F.3d 913, 928 (D.C. Cir. 2017); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 833 F.3d 1274, 1285 (11th Cir. 2016); *Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 668 (7th Cir. 2016);

Ruiz-Del-Cid v. Holder, 765 F.3d 635, 639 (6th Cir. 2014); *Nw. Res. Info. Ctr., Inc. v. Nw. Power & Conservation Council*, 730 F.3d 1008, 1021 (9th Cir. 2013); *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 767 (4th Cir. 2012); *Nat. Res. Def. Council v. U.S. E.P.A.*, 658 F.3d 200, 215 (2d Cir. 2011).

The Eighth Circuit did not uphold NPS' action on the ground NPS ***invoked*** when it took the action. NPS added the Family Property merely to arbitrarily keep the acreage within the Niobrara Boundary constant at a pre-selected number of acres, not because it sought to protect ORVs. As further discussed below, the Eighth Circuit upheld NPS' action by post hoc rationalization, prompted by NPS appellate counsel's arguments first made in litigation.

Finally, this petition involves a further circuit split based on the Eighth Circuit's determination that "NPS was ***not required*** to identify a specific ORV on any specific piece of property" (App. 15) (emphasis added). This position is directly in conflict with the Ninth Circuit decision in *Friends of Yosemite Valley v. Norton*, 348 F.3d 789 (9th Cir. 2003), holding "there is one ***burden of justification*** that generally applies to an administering agency's determination of river boundaries: Boundaries . . . must be drawn so as to protect and enhance the ORVs causing that area to be included within the WSR[A]." *Id.* at 799.

B. This Court Should Resolve the Widespread Conflict in the Courts of Appeals Whether a Federal Agency is Entitled to *Chevron* Deference for Interpretation of a Statute Advanced for the First Time in Litigation.

"There is a well-defined circuit split on the question" of whether an agency may "advance an interpretation of a statute for the first time in litigation and then demand deference for its view." *Smiley*, 138 S. Ct. at 2564 (statement of Gorsuch, J., respecting the denial of certiorari, joined by Roberts, C.J., and Thomas, J.). The decision below increases the circuit split with the addition of the Eighth Circuit.

The Eighth Circuit joins four other circuit courts, and is directly contrary to three other courts of appeals, in finding a federal agency may demand and be entitled to deference in interpretating a statute where the argument was advanced by the agency through appellate counsel for the first time in litigation.

On this point of law, Simmons requests this Court adopt the views expressed by the Second Circuit and Ninth Circuit, and implicitly adopted by the Seventh Circuit, that *Chevron* deference is not appropriate when the agency's interpretation is presented for the first time by appellate counsel in the course of litigation and has not been previously articulated in a new "rule or regulation." *Rosenthal*, 650 F.3d at 160; *Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008) ("'We do not afford *Chevron* or *Skidmore* deference to litigation positions unmoored from any official

agency interpretation because 'Congress has delegated to the administrative official and ***not to appellate counsel*** the responsibility for elaborating and enforcing statutory commands.' ") (emphasis added); *see also Rosenthal*, 650 F.3d at 160 ("Although in some circumstances an agency's interpretation of a statute that it administers is entitled to substantial deference under *Chevron*, the *Chevron* framework is inapplicable where, as here, the agency's interpretation is presented in the course of litigation and has ***not been articulated before in a rule or regulation***.") (emphasis added).[1]

The lead NPS administrative official in this appeal admits the Family Property, located far from the Niobrara shoreline and restricted and devalued by NPS without compensation to Simmons, was added for inclusion within the Niobrara Boundary ***solely*** on the basis of NPS' desire to maintain a "constant" ***number*** of acres arbitrarily pre-selected by NPS earlier in the designation process (NPS CA8 Brief at 51) ("NPS made an affirmative decision . . . to keep the acreage within the boundary . . . constant, specifically . . . 23,074 acres."). NPS does not deny it added the Family Property ***specifically*** for the purpose of ensuring the number of acres stayed the same (Simmons CA8 App. 243:8–20; 244:2–10; 212:11–213:1; 243:8–20; 244:2–10; 249:10–250:2).

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[1] NPS admits its interpretation of the WSRA is not found in an NPS rule or regulation approved by Congress (*see* NPS CA8 Brief at 46) (referring to "Congress' silence in the WSRA" as meaning the sole decision for determining ORVs is on NPS).

Because NPS could not avoid during the litigation the reality and truth that its decision to include the Family Property was ***based only*** on an earlier, arbitrary and improper decision during the administrative process to keep the number of acres constant, NPS' ***appellate counsel*** skillfully argued on appeal NPS' decision to add the Family Property ***must have also*** been based on a desire to protect and enhance ORVs in the Niobrara River Valley (NPS CA8 Brief at 51).[2]

NPS' appellate counsel, citing *Chevron*, urged the Eighth Circuit to "afford appropriate deference" to NPS for adding the Family Property on the allegedly ***additional*** basis of seeking to protect and enhance ORVs (*see* NPS CA8 Brief at 51) ("NPS added this land to protect and enhance the [ORV's]").

NPS' appellate counsel for the first time during litigation also crafted a new related argument about an alleged relationship ("connection") and claimed proximity ("because") ***between*** NPS maintaining an arbitrary number of acres for the Niobrara Boundary and an alleged desire to protect additional ORVs. NPS' appellate counsel argued: "NPS ***articulated*** a rational ***connection*** between its decision to keep the acreage numbers . . . constant ***and*** its choice to protect as many of the ORVs as possible," concluding "NPS

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[2] NPS appellate counsel's argument is built upon a sweeping and illogical—and itself unlawful—declaration by NPS that ***all*** property within the entire Niobrara River Valley ("rim-to-rim") contained ORVs (NPS CA8 Brief at 40). NPS' claim that every foot space in the 150,000 acres of the Niobrara corridor contains ORVs is the legal equivalent of finding no ORVs at all.

decision . . . to include the Family Property within the boundary was reasonable ***because*** it protected additional ORVs of the River (NPS CA8 Brief at 53) (emphasis added).

NPS appellate counsel's argument is not supported by the record. NPS officials did ***not*** articulate ***any*** connection between a decision to include the Family Property within the Niobrara Boundary and protecting ORVs when they moved the Niobrara Boundary to include more of Simmons' property. Nor did NPS even contend during the agency administrative process that it made the decision to add the Family Property ***because*** it sought to protect additional ORVs. The decision, instead, was made ***solely*** to keep the amount of acres within the Niobrara Boundary constant with an earlier, arbitrarily pre-determined number identified by NPS (App. 14, 46).

NPS appellate counsel recognized the actual decisional basis used by NPS in adding the Family Property to the Niobrara Boundary (i.e., to keep the number of acres constant), but nevertheless argued the Eighth Circuit should give deference to NPS on account of the ***additional*** argument NPS appellate counsel advanced ***in litigation***, namely, an alleged connection and proximity between the number of acres and other claimed NPS interests (NPS CA8 Brief at 51). The Eighth Circuit agreed, and adopted NPS' appellate counsel's view, even though connectivity and proximity arguments were only ***first*** made during this litigation

and not during the administrative process (NPS CA8 Brief at 38–39).

Simmons respectfully submits NPS is not entitled to *Chevron* deference in this circumstance and requests the Court grant his petition to resolve the significant conflict in the courts of appeals on this important issue.

C. The Eighth Circuit Affirmed NPS' Action Based on *Post Hoc* Rationalization Contrary To This Court's Controlling Precedent.

This Court has long recognized "the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. Envt'l Prot. Agency*, 135 S. Ct. 2699, 2710 (2015). "[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are . . . improper, the court is powerless to affirm the administrative action by substituting what it considers to be a . . . proper basis." *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962) (same).

NPS added a large swath of Simmons' land far from the shoreline of the Niobrara to be included within the Niobrara Boundary *solely* to reach a predesignated maximum number of acres (Simmons' CA8

App. 857) (NPS CA8 Brief at 51) ("NPS made an affirmative decision . . . to keep the acreage within the boundary . . . constant, specifically . . . 23,074 acres.").

The Eighth Circuit did not uphold NPS' action on the grounds ***NPS invoked*** when it took the action. The Eighth Circuit adopted the ***additional*** arguments expressed by NPS' appellate counsel and concluded "the record amply demonstrates that multiple ORVs were identified within the boundary line in question" (App. 15). The Eighth Circuit did not mention, and otherwise ignored, the undisputed admission by NPS it took "affirmative" action to add the Family Property to the Niobrara Boundary in order to keep the acreage "constant" (NPS CA8 Brief at 51).

NPS alone is authorized to make a determination as to property to be added to the Niobrara Boundary and the Eighth Circuit was required to judge the propriety of such action solely by the grounds invoked by NPS. If those grounds are improper, as they are here, the Eighth Circuit was powerless to affirm NPS' action "by substituting what it considers to be a more . . . proper basis." *Chenery Corp.*, 332 U.S. at 196.

NPS admits it did not take the administrative action of adding the Family Property to the Niobrara River for the reason identified by the Eighth Circuit, namely, because "multiple ORVs were identified" at that location, but instead increased the Niobrara Boundary for an entirely different and arbitrary reason of keeping the acreage number constant. The Eighth Circuit was "powerless" under this Court's

precedent to affirm the administrative action of NPS by substituting what it considers to be a proper basis to affirm NPS' action.[3]

D. The Eighth Circuit Conflicts with the Ninth Circuit on "Burden of Justification" for River Boundaries

The Eighth Circuit found "NPS was ***not required*** to identify a specific ORV on any specific piece of property" (App. 15) (emphasis added). This position is in direct conflict with the Ninth Circuit decision in *Friends of Yosemite Valley v. Norton*, 348 F.3d 789 (9th Cir. 2003).

In *Friends of Yosemite Valley*, the Ninth Circuit reversed NPS' boundary determination for the Merced River under the WSRA because "the record does not reflect the precise location of the[] ORVs or how, in drawing the boundaries, the NPS sought to protect them." 348 F.3d at 798. The Ninth Circuit held "there is one ***burden of justification*** that generally applies to an administering agency's determination of river boundaries: Boundaries . . . must be drawn so as to

[3] In stating it did not "see any issue with an ultimate finding that an ORV might extend across the entire valley," the Eighth Circuit relied on a second post hoc rationalization, pointing to the Grand Canyon as an example of an area where "an outstandingly remarkable value might exist across an expansive area" (App. 14 n.5). This example is misplaced. The Grand Canyon is a national park judged under an entirely different standard than a scenic river. *See Sokol v. Kennedy*, 210 F.3d 876, 880 (8th Cir. 2000). NPS did not make any ORV determination for the Grand Canyon; Congress merely designated 1,217,262 acres. *See* 16 U.S.C. § 221.

protect and enhance the ORVs causing that area to be included within the WSR[A]." *Id.* at 799.

This petition presents an important question of the proper standard of review to be applied to a federal agency which seeks to restrict, and thus devalue, the property of a landowner without compensation.[4]

In the context of river boundaries designated under the WSRA, the Ninth Circuit imposes a "burden of justification" on NPS to ensure the record reflects the precise location of ORVs. The Eighth Circuit decision below is in direct conflict. It found NPS was ***not*** required to identify specific ORVs on any specific piece of property (App. 15).

Simmons respectfully requests the Court address the applicablility of the "burden of justification" upon NPS under the WSRA in light of the conflict in the courts of appeal and further due to the importance of determining the appropriate standard of review for federal agencies in this circumstance.

[4] NPS admits "[p]rivate landowners' use of their land after designation under . . . the WSRA is subject to federal restriction and oversight" (Simmons' CA8 App. 478, 789). It is well established governmental restrictions can reduce real property value. *See Steel Hill Dev., Inc. v. Town of Sanbornton*, 338 F. Supp. 301, 307 (D.N.H.), *aff'd*, 469 F.2d 956 (1st Cir. 1972) ("change in zoning depresses the immediate sale value of the property"); *see also* K. Kelley, *Restoring Property Rights in Washington: Regulatory Takings Compensation Inspired by Oregon's Measure 37*, 30 Seattle U. L. Rev. 287 (2006) ("[T]he government can impose regulations on private property that limit its use and result in a diminution in its fair market value.").

CONCLUSION

For these reasons, Simmons respectfully requests the Court grant his petition for a writ of certiorari.

Dated this 15th day of October, 2018.

Respectfully submitted,

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