No. _____

In The
Supreme Court of the United States

K. JOHN AND M. MARTHA CORRIGAN, husband and wife; HANLEY RANCH PARTNERSHIP; and MICHAEL F. HANLEY, IV. AND LINDA LEE HANLEY, husband and wife,

Petitioners,

v.

DEB HAALAND, in her official capacity as Secretary of the U.S. Department of the Interior; TRACY STONE-MANNING, in her official capacity as Director of the U.S. Bureau of Land Management; PETER J. DITTON, in his official capacity as Acting Idaho State Director of the U.S. Bureau of Land Management; TANYA THRIFT, in her official capacity as Acting Boise District Manager of the U.S. Bureau of Land Management; and DONN CHRISTIANSEN, in his official capacity as Owyhee Field Office Manager for the U.S. Bureau of Land Management,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The *Chevron* doctrine requires a federal court under certain circumstances to defer to an agency's interpretation of a statute "if the statute is silent or ambiguous with respect to the specific issue" before the court. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). In this case, the U.S. Court of Appeals for the Ninth Circuit conceded that the statutes bearing on this case – the *Taylor Grazing Act* and the *Federal Land Policy and Management Act* – are silent on the issue of statutory interpretation that was presented to it, namely, whether the Bureau of Land Management ("Bureau") can treat a longstanding Grazing preference as cancelled without following the regulations specifically governing cancellation of a Grazing preference. The Ninth Circuit resolved this issue of statutory interpretation, despite the conceded statutory *silence*, on the ground that the statutes are *unambiguous*. The question presented is:

> Whether the Ninth Circuit correctly held that statutory *silence* on the issue before the court can be *unambiguous* for purposes of the *Chevron* doctrine and accordingly justify the court's disregarding the statutory interpretation embodied in the agency's regulations.

PARTIES TO THE PROCEEDING

Petitioners are K. John Corrigan, M. Martha Corrigan, Hanley Ranch Partnership, Michael F. Hanley IV., and Linda Lee Hanley. Petitioners were the Appellants in the court of appeals.

Respondents are Deb Haaland, in her official capacity as Secretary of the U.S. Department of the Interior; Tracy Stone-Manning, in her official capacity as Director of the U.S. Bureau of Land Management; Peter J. Ditton, in his official capacity as Acting Idaho State Director of the U.S. Bureau of Land Management; Tanya Thrift, in her official capacity as Acting Boise District Manager of the U.S. Bureau of Land Management; and Donn Christiansen, in his official capacity as Owyhee Field Office Manager for the U.S. Bureau of Land Management. Respondents' official positions were the Appellees in the court of appeals.

RULE 29.6 DISCLOSURE STATEMENT

No corporate disclosure statement is required under Supreme Court Rule 29.6. Petitioners K. John Corrigan and M. Martha Corrigan, husband & wife, are individual U.S. citizens and residents of the State of Oregon. Petitioner Hanley Ranch Partnership is an assumed business name registered in the State of Idaho to Michael F. Hanley, IV. and Linda Lee Hanley. Petitioner Hanley Ranch Partnership is not incorporated

RULE 29.6 DISCLOSURE STATEMENT – Continued

under the laws of the State of Idaho and is not otherwise owned by a parent corporation or publicly held corporation that owns ten percent or more of its stock. Petitioners Michael F. Hanley, IV. and Linda Lee Hanley, husband & wife, are individual U.S. citizens and residents of the State of Idaho.

RELATED PROCEEDINGS

The underlying proceedings and decisions directly related to this Petition are:

- *K. John Corrigan, et al. v. Haaland, et al.*, No. 20-35393, U.S. Court of Appeals for the Ninth Circuit. Judgment and Opinion filed September 2, 2021. App. 1-27.
- *K. John Corrigan, et al. v. David L. Bernhardt, et al.*, No. 1:18-CV-512-BLW. U.S. District Court for the District of Idaho. Memorandum Decision and Order filed February 26, 2020. App. 28-36.
- *K. John Corrigan, et al. v. Bureau of Land Management*, 190 IBLA 371 (2017). U.S. Department of the Interior, Office of Hearings and Appeals, Interior Board of Land Appeals ("IBLA"). Decision issued August 10, 2017. App. 37-74.
- *K. John Corrigan, et al. v. Bureau of Land Management*, ID-BD-3000-2014-002, 003, 004,

RELATED PROCEEDINGS – Continued

006, 007 (2016). U.S. Department of the Interior, Office of Hearings and Appeals, Hearings Division (Salt Lake City, Utah). Decision issued January 25, 2016. App. 75-115.

- *Notice of Field Manager's Final Decision* dated November 22, 2013, issued to *K. John & M. Martha Corrigan*, U.S. Department of the Interior, Bureau of Land Management, Idaho, Boise District, Owyhee Field Office. Decision issued November 22, 2013. App. 116-28.
- *Notice of Field Manager's Final Decision* dated November 22, 2013, issued to *Hanley Ranch Partnership*, U.S. Department of the Interior, Bureau of Land Management, Idaho, Boise District, Owyhee Field Office. Decision issued November 22, 2013. App. 129-45.
- *Notice of Field Manager's Final Decision* dated November 13, 2013, issued to *Payne Family Grazing Association, LLC*, U.S. Department of the Interior, Bureau of Land Management, Idaho, Boise District, Owyhee Field Office. Decision issued November 13, 2013. App. 146-200.

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PETITION FOR A WRIT OF CERTIORARI

K. John Corrigan, M. Martha Corrigan, Hanley Ranch Partnership, Michael F. Hanley IV., and Linda Lee Hanley petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is available at 12 F.4th 901 and 2021 WL 3923391, and reproduced at App. 1-27. The opinion of the District Court for the U.S. District of Idaho is available at 2020 WL 930490, and reproduced at App. 28-36. The opinion of the Interior Board of Land Appeals ("IBLA"), Office of Hearings and Appeals, U.S. Department of the Interior, is available at 190 IBLA 371 and 2017 WL 5653738, and reproduced at App. 37-74. The opinion of the Administrative Law Judge, Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, is reproduced at App. 75-115. The decisions of the Bureau of Land Management are reproduced at App. 116-28 (Corrigan Decision), at App. 129-45 (Hanley Decision), and App. 146-200 (Payne Decision).

JURISDICTION

The Ninth Circuit Court of Appeals entered judgment on September 2, 2021. App. 1-27. This Petition for Certiorari is timely filed within ninety days after entry

of the Ninth Circuit Court of Appeals' judgment in compliance with Supreme Court Rule 13. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory provisions are the *Taylor Grazing Act*, 43 U.S.C. §§ 315, 315a, 315b (which is reproduced in the appendix to the Petition at App. 201-06), and the *Federal Land Policy and Management Act*, 43 U.S.C. § 1752(c) (which is reproduced in the appendix at App. 208), but the relevant statutory provision within the *Federal Land Policy and Management Act*, was amended on December 19, 2014, during the mix of the adjudicative process subject to this Petition (which is reproduced in the appendix at App. 214-15). The relevant regulatory provisions are 43 C.F.R. Part 4100 (which is reproduced in the appendix at App. 222-309).[1]

[1] Petitioners cite and rely upon the grazing regulations set forth in 43 C.F.R. Part 4100 (10-1-2005), i.e. the 1996 grazing rules, because the 2006 grazing rules were enjoined from implementation in all respects. *See Western Watersheds Project v. Kraayenbrink, et al.*, 538 F. Supp. 2d 1302 (D. Idaho 2008), *aff'd in relevant part*, 632 F.3d 472 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 366 (2011); *see also* App. 7, Footnote 2.

INTRODUCTION

This case centers on *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and, like *Chevron*, it involves the deference to an agency's interpretation of statutes. However, unlike *Chevron*, it involves an agency's interpretation of statutes that are actually silent with respect to a specific issue, as found by the Ninth Circuit (App. 19, *see also* App. 17), yet simultaneously "unambiguous" with respect to the *same* issue, as also found by the Ninth Circuit (App. 3, 13 (Footnote 3), 14, 15, 24, 27). A court cannot have it both ways under *Chevron*, *id.* at 842, though that is what precisely occurred here, resulting in the lower courts assuming a legislative role which this Court explicitly prohibited in *Chevron*, *id.* at 865.

This Court in *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019), recently clarified when to apply *Auer* deference to an agency's interpretation of regulations. The Court explained, "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Kisor*, 139 S.Ct. at 2415. The Court stated the "same approach" is used for interpreting ambiguous statutes under *Chevron*. *Id*. In *Kisor*, the lower court found the regulation at issue ambiguous merely because neither party argued the agency's interpretation of the rule was unreasonable. *Id*. at 2423. This Court found that analysis in error and held, "the court must make a conscientious effort to determine, based on indicia like text, structure, history, and

purpose, whether the regulation really has more than one reasonable meaning." *Id*. at 2423-24.

This Petition involves a case where the lower courts' analysis swings too far in the other direction – where the courts worked so hard to review the text, structure, and purpose of the statutes at issue that it imposed a tortured interpretation in the face of actual statutory silence, resulting in the courts usurping the legislative authority of Congress. *Chevron* prescribed a two-part test for a lower court to follow when faced with reviewing an agency's construction of a statute which it administers. *Chevron*, 467 U.S. at 842-43. Step one is "whether Congress has directly spoken to the precise question at issue." *Id*. at 842. Step two is "**if the statute is silent** or ambiguous **with respect to the specific issue**," whether the agency's interpretation of the statute "is based on a permissible construction of the statute." *Id*. (emphasis added). Here, the statutory silence was declared by the Ninth Circuit to be "unambiguous" under step one. App. 3, 14, 24, 27; *see also* App. 13 (Footnote 3), 15. Thus, this Petition asks this Court to decide whether silence can, in fact, be "unambiguous" under *Chevron* step one. This case provides an appropriate vehicle for providing that clarification.

STATEMENT OF THE CASE

I. Applicable Statutes and Regulations.

Before the enactment of the *Taylor Grazing Act* ("TGA") of 1934, public lands were openly grazed. *Public Lands Council v. Babbitt*, 529 U.S. 728, 731-33, 120 S.Ct. 1815, 146 L.Ed.2d 753 (2000). However, with the enactment of the TGA, Congress delegated authority to the Secretary of the U.S. Department of the Interior to divide the public lands and establish Grazing Districts. 43 U.S.C. § 315 (App. 201-03). The self-stated purposes of the TGA are "to promote the highest use of the public lands pending its final disposal," 43 U.S.C. § 315 (App. 201), and "to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range." 43 U.S.C. § 315a (App. 203).

Under the TGA, the Secretary of the Interior is authorized to establish Grazing districts upon the public lands, *id*. at § 315 (App. 201), and to give "[p]reference" for "the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them," *id*. at § 315b (App. 204). Grazing permits are issued for periods of not more than ten years, and are subject to a "preference right" (aka first priority) of renewal in the discretion of the Secretary of the Interior. *See id*. (App. 205).

Congress enacted the *Federal Land Policy and Management Act* ("FLPMA") in 1976. 43 U.S.C. §§ 1701 *et seq*. FLPMA did not change the TGA, but rather "reinforced" the TGA's provisions. App. 12. FLPMA provides that Grazing permits issued under the TGA are for a term of ten years, though permits for lesser durations may also be issued. *Id*. at § 1752(a) and (b) (App. 207-08, pre-2014 version; App. 213-14, post-2014 version). Such permits are subject to terms and conditions, and the "authority of the Secretary concerned to cancel, suspend, or modify a grazing permit or lease, in whole or in part, pursuant to the terms and conditions thereof, or to cancel or suspend a grazing permit or lease for any violation of a grazing regulation or any term or condition of such grazing permit or lease." *Id*. at § 1752(a) (App. 207, pre-2014 version; App. 213, post-2014 version). *Id*. at § 1752(a). Moreover, FLPMA provides for the renewal of such permits. The pre-2014 version of FLPMA stated:

> So long as (1) the [public] lands for which the permit . . . is issued remain available for domestic livestock . . . , (2) the permittee . . . is in compliance with the rules and regulations issued and the terms and conditions in the permit . . . specified by the Secretary concerned, and (3) the permittee . . . accepts the terms and conditions to be included by the Secretary concerned in the new permit . . . , the holder of the expiring permit . . . shall be given first priority for receipt of the new permit. . . .

Id. at § 1752(c) (App. 208). The post-2014 version of FLPMA followed the previous version but distinguish

the "first priority" standard between a permit that *was expiring* and a permit that *had expired*, stating:

> (1) Renewal of expiring or transferred permit or lease
>
> During any period in which (A) the [public] lands for which the permit . . . is issued remain available for domestic livestock grazing . . . , (B) the permittee . . . is in compliance with the rules and regulations issued and the terms and conditions in the permit . . . specified by the Secretary concerned, and (C) the permittee . . . accepts the terms and conditions to be included by the Secretary concerned in the new permit . . . , the holder of the expiring permit . . . shall be given first priority for receipt of the new permit. . . .
>
> (2) Continuation of terms under new permit or lease
>
> The terms and conditions in a grazing permit . . . that has expired, or was terminated due to a grazing preference transfer, shall be continued under a new permit . . . until the date on which the Secretary concerned completes any environmental analysis and documentation for the permit . . . required under the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321 *et seq.*) and other applicable laws.

Id. at § 1752(c) (App. 214-15).

The Department of the Interior enacted regulations to carry out the mandates of the TGA and

FLPMA. *See* 43 C.F.R. Part 4100 (App. 222-309). Under the regulatory definitions, a Grazing "District" means "the specific area of public lands administered by a District Manager." 43 C.F.R. § 4100.0-5 (App. 230). A "Grazing permit" means "a document authorizing use of the public lands within an established grazing district." *Id*. (App. 230-31); *see also* "Grazing lease," *id*. (App. 230). A "Grazing preference" means "a superior or priority position against others for the purpose of receiving a grazing permit or lease. This priority is attached to base property owned or controlled by a permittee or lessee." *Id*. (App. 231). A "Base property" means "(1) Land that has the capability to produce crops or forage that can be used to support authorized livestock for a specified period of the year, or (2) water that is suitable for consumption by livestock and is available and accessible, to the authorized livestock when the public lands are used for livestock grazing." *Id*. (App. 229).

Under the grazing regulations, there are mandatory qualifications for being issued a Grazing permit. The first relates to applicant status. 43 C.F.R. § 4110.1(a) (App. 237). The second relates to Base property status. *Id*.; *see also* 43 C.F.R. § 4110.2-1(a) (App. 239-41). The third relates to performance status wherein a *renewed* Grazing permit is subject to a record of "substantial compliance," 43 C.F.R. § 4110.1(b)(1)(ii) (App. 238), and wherein a *new* Grazing permit is subject to a similar, but different, record of performance, 43 C.F.R. § 4110.1(b)(2) (App. 238).

Neither the TGA nor FLPMA includes a single provision regarding the cancellation of a Grazing preference. The Ninth Circuit's opinion acknowledges such point, stating, "[n]either the TGA nor the FLPMA mention a process for cancelling a grazing preference." App. 19; *see also* App. 17. The only portion of the grazing regulations that establish a procedure for cancellation of a Grazing preference is at 43 C.F.R. §§ 4160.1-4160.4 (App. 294-98), which includes notice and opportunity for appeal and hearing, i.e. due process, prior to any cancellation. 43 C.F.R. § 4170.1-1(a) provides:

> The authorized officer may withhold issuance of a grazing permit or lease, or suspend the grazing use authorized under a grazing permit or lease, in whole or in part, or cancel a grazing permit or and grazing preference, or a free use grazing permit or other grazing authorization, in whole or in part, under Subpart 4160 of this title, for violation of a permittee or lessee of any of the provisions of this part.

App. 298. Thus, Section 4170.1-1(a) requires that if a permittee violates certain provisions, the agency may withhold, suspend, or cancel "a grazing permit . . . and grazing preference . . . in whole or in part" under the due process procedures provided in Subpart 4160.

II. Statement of Facts.

Petitioner Hanley Ranch Partnership ("Hanley") is a partnership between Michael F. Hanley, IV. and Linda Lee Hanley, who are husband & wife. Since

1949, other than the years Mr. Hanley was away at college and in the military, he lived at his ranch headquartered in Jordan Valley, Oregon. The ranch owned and maintained Base property in the form of private land upon which the Grazing preferences within the Trout Springs and Hanley FFR Allotments ("Allotments") were attached to sustain a yearlong livestock operation dependent by use upon the public lands within the Allotments. *See* App. 6; *see also* App. 79.

The Bureau administrates the public lands within the applicable Grazing district, and specifically within the Allotments. It was under this authority the Bureau recognized the Grazing preferences attached to the Base property owned by Hanley, and, based thereon, issued Grazing permits to Hanley over time to authorize their grazing use within the Allotments. *Id*.

Things changed in 2009. While the change is not the issue before this Court, the events are. The Bureau decided not to renew Hanley's Grazing permit in 2009 due to Hanley's lack of "substantial compliance" with the terms of their permit under 43 C.F.R. § 4110.1(b)(1) (App. 237-38). *See* App. 6 (Ninth Circuit); App. 29 (District Court); App. 40-43 (IBLA); App. 81-82 (ALJ); App. 131-32 (BLM). While Hanley administratively challenged the Bureau's decision between 2009 and 2013, the agency sustained it based upon a decision issued in March 2013. App. 6, 29, 42, 81-82, 132.

The present case arose at this time, though a critical note is necessary. It was undisputed both by the agency and the lower courts that the permit

nonrenewal process between 2009 and 2013 neither included nor involved any cancellation of Hanley's Grazing preferences under any statute or regulation. *See* App. 26 (Ninth Circuit); App. 33-35 (District Court); App. 47, 65-69 (IBLA); App. 101-02 (ALJ). The agency never (and has never) cancelled the Grazing preferences as provided for in 43 C.F.R. § 4170.1-1(a) (App. 298).

After the agency sustained the permit nonrenewal in March 2013, Petitioners Martha and John Corrigan leased Hanley's Base property in August 2013, and simultaneously filed with the Bureau a Grazing Preference Transfer Application and a Grazing Permit Application. App. 6-7 (Ninth Circuit); App. 30 (District Court); App. 42 (IBLA); App. 83 (ALJ); App. 116 (Corrigan Decision). Corrigan sought approval of their Transfer Application upon the theory that the Hanley FFR and Trout Springs Grazing preferences were *not* cancelled by the Bureau during its previous permit nonrenewal process under any statute or regulation, and the preferences remained attached to the Base property to which Corrigan now controlled via the Base property Lease. *Id*.

In November 2013, the Bureau issued decisions[2] that denied the Grazing Preference Transfer Application, stating in one such denial, "Hanley Ranch Partnership no longer possesses grazing preference." App.

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[2] App. 116-28 (Corrigan Decision dated November 22, 2013); App. 129-45 (Hanley Decision dated November 22, 2013); App. 146-200 (Payne Decision dated November 13, 2013).

117 (Corrigan Decision). The Agency used *other* word choices to rationalize the denial of the Application, stating:

- "when a grazing permit expires, the associated grazing preference and permitted use automatically and simultaneously **extinguished**," App. 73-74 (emphasis added); *see also* App. 39, 40, 51;
- "[b]ecause HRP could not realize the basic (and only) benefit of receiving 'priority position against others for the purpose of receiving a grazing permit,' their preference **disappeared** when they could no longer take advantage of that priority," App. 169 (emphasis added), *see also* App. 124, 140, 144, 167; and,
- "HRP grazing preference '**terminated**' upon the expiration of the HRP grazing permit because HRP was found to have an unsatisfactory record of performance," App. 123, 143, 166, 168 (emphasis added); *see also* App. 132, 139.

See also App. 32 (wherein the District Court's word choice was "forfeit[ure]").

The Petitioners administratively challenged the Bureau's decisions, though the agency[3] and the lower courts sustained those decisions.[4] The Ninth Circuit

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[3] App. 37-74 (IBLA Decision dated August 10, 2017); App. 75-115 (ALJ Decision dated January 25, 2016).

[4] App. 1-27 (Ninth Circuit Decision filed September 2, 2021); App. 28-36 (District Court Decision filed February 26, 2020).

ultimately sustained the decision made by the agency based upon "*Chevron* step one" (App. 3, 14, 24, 27), holding the applicable statutes are "unambiguous" in authorizing cancellation of Hanley's Grazing preferences upon the nonrenewal of their Grazing permit under 43 C.F.R. § 4110.1(b)(1) (App. 237-38), but yet simultaneously finding that "[n]either the TGA nor the FLPMA mention a process for cancelling a grazing preference." (App. 19; *see also* App. 17).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision "decided an important federal question in a way that conflicts with relevant decisions of this Court," or alternatively, "decided an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c). Specifically, the decision's found *silence* in the relevant statutes yet simultaneously held the *same* statutes "unambiguous" under *Chevron* step one analysis. This holding was either in conflict with *Chevron*, or in need of clarification. Lower courts are required or should be required to go to *Chevron* step two analysis when the relevant statutes are actually silent with respect to a specific issue.

This Court prescribed in *Chevron* a two-part test for a lower court to follow when faced with reviewing an agency's construction of a statute which it administers, stating:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is ***silent*** or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (emphasis added).

Here, the Ninth Circuit found that the TGA and FLPMA are silent on the question of how a Grazing preference may be cancelled. App. 19 ("Neither the TGA nor the FLPMA mention a process for cancelling a grazing preference."). Despite that statutory silence, the Ninth Circuit held that "our analysis begins and ends with *Chevron* step one. The TGA and the FLPMA are unambiguous and are consistent with the IBLA's conclusions." App. 14; *see also* App. 3, 24, 27.

The Ninth Circuit's holding raises a significant contradiction in the manner lower courts can and should review an agency's construction of a statute. It

widens, as opposed to narrowing, the door as to how the courts should interpret an applicable statute when the statute is found to actually be silent on the specific point at issue.

I. The Ninth Circuit erred in holding the TGA and FLPMA are "unambiguous" as to the cancellation of a Grazing preference upon the nonrenewal of a Grazing permit under *Chevron* step one, when the court simultaneously found such statutes are silent as to the process to cancel a Grazing preference.

The issue of whether a Grazing preference can extinguish, disappear, terminate, or even be forfeited *without* actually being cancelled by the Bureau, and *without* any statutory or regulatory authority for cancellation, is before this Court. It is of material significance to Hanley, Corrigan, and similarly situated other applicants upon the vast public lands in the West when the Bureau finds reasons to not renew a Grazing permit as provided for in 43 C.F.R. § 4110.1(b)(1) (App. 237-38), yet simultaneously finds no reasons to cancel the Grazing permit and Grazing preference, in whole or in part, as provided for in 43 C.F.R. § 4170.1-1(a) (App. 298) – as was the factual situation the present case.

The Ninth Circuit found:

> Ranchers make much of the fact that the statutes do not explicitly state that a preference

> expires upon non-renewal of a permit. **Yet the statutes also do not require the agency to formally cancel a preference, separate and apart from its non-renewal decision.** This latter omission is more significant because the other statutory language discussed above supports the conclusion that a preference cannot be exercised after a permit expires.

App. 17-18 (emphasis added); *see also* App. 19 ("Neither the TGA nor the FLPMA mention a process for cancelling a grazing preference."). Thus, the Court found that the *silence* in the statutes authorized cancellation of the Grazing preference because such cancellation was not expressly prohibited (and the omission of a requirement to cancel was somehow "more significant" than the omission of authority for automatic cancellation).

For the reasons stated below, the plain text, structure, and purpose of the applicable statutes do not support the Ninth Circuit's conclusion that the *silence* in the statutes was "unambiguous" in authorizing a cancellation of Hanley's Grazing preferences upon the nonrenewal of Hanley's Grazing permit in 2009. In determining that the silence unambiguously authorized cancellation, the Ninth Circuit took on the role of Congress by creating new law.

A. A plain reading of the TGA and FLPMA cannot result in an "unambiguous" interpretation because the statutes are *silent* on the specific issue as to the process to cancel a Grazing preference.

In considering the "plain text" of the statutes, the Ninth Circuit considered the following from the TGA:

> Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business . . . [and] such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior.

App. 11, quoting 43 U.S.C. § 315b. The court found, "[t]his language neither states nor implies that a preference may exist as a stand-alone interest or be held by a former permittee." App. 15. Of course, the same is true of the opposite conclusion since the text is *silent* on that issue.

Next, the Ninth Circuit reviewed the following text from FLPMA, which

> sets forth three requirements for the exercise of a preference or "first priority": (1) the lands for which a permit a permit was previously issued "remain available for domestic livestock grazing"; (2) "the permittee or lessee is in compliance with the rules and regulations issued and the terms and conditions in the permit or lease"; and (3) "the permittee or lessee accepts

> the terms and conditions to be included by the Secretary concerned in the new permit or lease." 43 U.S.C § 1752(c).

App. 16; *see also* App. 208. From this text, the court concluded from the pre-2014 version of FLPMA, "[t]he second and third requirements of Section 1752(c) of the FLPMA make explicit that **only an *existing* permittee** may exercise a preference right as part of the permit renewal process." App. 17 (emphasis added). While this may be true,[5] the text does *not* answer the question at issue in this case, which is the procedure for cancellation of a Grazing preference.

As acknowledged by the Ninth Circuit, "the statutes do not explicitly state that a preference expires upon non-renewal of a permit. Yet the statutes also do not require the agency to formally cancel a preference, separate and apart from its non-renewal decision."

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[5] The words "may be" are used because a reading of the post-2014 version of FLPMA is not limited to *an existing permittee* that could indicate Congress did not, actually, limit the renewal process to *an existing permittee*. Specifically, the post-2014 version of FLPMA added two (2) separate subsections to 43 U.S.C. § 1752(c): one covering *an expiring permit, implicating an existing permittee*, i.e. § 1752(c)(1) (App. 214-15), and another covering *an expired permit, implicating either an existing permittee or a new applicant for a permit*, i.e. § 1752(c)(2) (App. 215). *See* App. 13, Footnote 3 (wherein the Ninth Circuit recognized this distinction, but attempted to rationalize around it, stating: (1) " '[a] reviewing court must review the administrative record before the agency at the time the agency made its decision' "; (2) "[t]he 2014 amendments to the FLPMA include no indication that they were intended to apply retroactively to the BLM's 2013 decision"; and (3) even assuming the post-2014 version of FLPMA applied, it "would not alter the outcome."

App. 17; *see also* App. 19. As such, a "plain reading" of the statutes only highlights the silence of the statutes. The statutes neither provide nor disavow that a Grazing preference is cancelled upon the nonrenewal of a Grazing permit.

The Ninth Circuit employed a canon of construction to support its "plain text" reading of the statutes, stating Congressional silence should not create "statutory requirements" or "a controlling rule of law." App. 18 (*citing United States v. Wells*, 519 U.S. 482, 496 (1997) and *Chemehuevi Indian Tribe v. Newsom*, 919 F.3d 1148, 1153 (9th Cir. 2019)). However, that is precisely what the court did here. Although the statutes are silent, the court determined the silence plainly means a Grazing preference is extinguished, disappears, terminates, or is forfeited. Furthermore, the court's analysis conflicts with another canon of construction, namely if Congress intended a certain result, like cancellation of a Grazing preference, it would have made that intent explicit in the statute. *Chisom v. Roemer*, 501 U.S. 380, 396, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991). "Congress' silence in this regard can be likened to the dog that did not bark." *Id*. at Footnote 23. "In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Harrison v. PPG Industries, Inc*., 446 U.S. 578, 592, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980). Here, Congress did not "bark" by legislating that a Grazing preference attached to the Base property cancels upon the

nonrenewal of a Grazing permit. Nor did Congress make this intent known in the legislative history.

B. The structure and purpose of the TGA and FLPMA cannot make the silence in the statutes "unambiguous."

The Ninth Circuit examined the structure and purpose of the statutes. "In making the threshold determination under *Chevron* step one, 'a reviewing court should not confine itself to examining a particular statutory provision in isolation. Rather the meaning – or ambiguity – of certain words or phrases may only become evident when placed in context.' *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007)." App. 18. "In interpreting a statute, a court must also account for that statute's history and purpose. *See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90-93 (2007)." App. 22.

First, the Ninth Circuit determined that the inclusion of a Grazing preference under the same section as a Grazing permit in the TGA "reinforces the view that a preference is not a stand-alone entitlement." App. 19. Regardless of whether such a sweeping generalization can be made from inclusion within a section of a statute, this still does not answer the issue in this case about the correct procedure for cancellation of a Grazing preference.

Second, the Ninth Circuit discussed, "[t]he explicit provision for cancellation of a permit, and the omission of any corresponding provision for cancellation of a

preference, is 'imbued with legal significance' . . . 'for it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.'" App. 19 (*quoting Pit River Tribe v. Bureau of Land Mgmt.*, 939 F.3d 962, 971 (9th Cir. 2019) and *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)). From that canon of construction, the Ninth Circuit concluded:

> If Congress intended grazing preferences to exist indefinitely until cancelled, as Ranchers urge, we would expect the statutes to at least mention cancellation of preferences.

App. 19-20. But at the same time, if Congress intended a Grazing preference to be cancelled upon nonrenewal of a Grazing permit, instead of being capable of transfer as otherwise provided in the grazing regulations, Petitioners would expect Congress to state such intention too. Thus, Petitioners agree it is "legal[ly] significan[t]" that Congress did not expressly state how a Grazing preference is cancelled. App. 19; *see also* App. 17. However, this silence cannot be determined to mean a Grazing preference is cancelled rather than remain intact. Neither the text nor the statutory scheme can create such a meaning when Congress remains silent on that issue.

Third, the Ninth Circuit considered the "defining characteristic of the statutory scheme: to preserve the agency's discretion over grazing privileges and avoid establishing any indefinite entitlements for private parties." App. 20; *see also* App. 20-22. However, in so

considering, the Ninth Circuit never considered whether the Bureau's cancellation of such a Grazing preference as provided under Subparts 4160 and 4170 of the grazing regulations would also satisfy the purpose of the statutory scheme. Instead, the court stated that "Section 4170.1-1(a) is not even at play in this case." App. 25. Thus, the Ninth Circuit simply embraced the fallacy that a Grazing preference either cancels or exists in eternity. The Ninth Circuit never considered the very straightforward procedure for cancellation of a Grazing preference already included and required by the grazing regulations. *See* Section II. below.

Finally, the Ninth Circuit discussed the need for the Bureau to maintain control over public lands to carry out the purposes of the TGA. App. 22-24. The court opined that unless a Grazing preference cancels upon nonrenewal of a Grazing permit, "a rancher whose record of performance disqualifies it from holding a grazing permit nevertheless could hold a transferable, non-expiring privilege to stand first in line for a new permit." App. 23 (quoting a party's brief). However, in so opining, the court failed to consider that when the Grazing preference is transferred to a person qualified to be issued a Grazing permit – as what occurred here with the Grazing Preference Transfer Application from Hanley to Corrigan and with the Grazing Permit Application by Corrigan – there was no harm. More importantly, the court failed to consider that the Bureau could have cancelled the Grazing permit and Grazing preference, in whole – as even the agency itself acknowledged. *See* App. 47 (wherein the

IBLA stated that the Bureau "could have taken action to immediately cancel Hanley Ranch's grazing permit and preference during the term of the prior permit"); *see also* App. 65, 101. The agency, at all times, held the keys to the public lands relating to the Grazing preferences attached to the Base property owned by Hanley through 2013, and controlled by Corrigan thereafter.

Because the statutes are silent regarding cancellation of a Grazing preference, the structure and purposes of the statutes cannot answer the question at issue in this case. The most this analysis can yield is recognition that regulatory authority was delegated to the agency, and the agency enacted regulations requiring notice and hearing prior to cancellation of a Grazing preference as provided for in 43 C.F.R. § 4170.1-1(a) (App. 298). *See* Section II. below.

II. The Ninth Circuit erred in failing to recognize and apply the Grazing regulations to fill in the "gap" left by Congress in the TGA and FLPMA that provide a particular procedure for cancellation of a Grazing preference in 43 C.F.R. § 4170.1-1(a).

In an apparent effort to backfill, the Ninth Circuit overlooked and failed to apply the applicable and unambiguous grazing regulations already filling the "gap" for the statutory *silence* left by the TGA and FLPMA.

Federal agencies are creatures of statute. Each agency is delegated authority by acts of Congress. The

Nondelegation doctrine of the U.S. Constitution limits Congress's power to delegate legislative power to agencies. U.S. Const. Art. I, § 8. The Nondelegation doctrine is "rooted in principles of separation of powers" and requires that Congress provide an "intelligible principle" to the agency to guide the agency's exercise of discretion. *Mistretta v. United States*, 488 U.S. 361, 371-72, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Thus, "[i]f Congress has expressly left a gap for the agency to fill in, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843-44; *see also United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 488, 132 S.Ct. 1836 (2012) ("[A] statute's silence or ambiguity as to a particular issue means that Congress has . . . likely delegat[ed] gap-filling power to the agency.").

Here, the statutes are silent on the procedure to cancel a Grazing preference upon the nonrenewal of a Grazing permit, as even found by the Ninth Circuit itself. *See* App. 17, 19; *see also* 43 C.F.R. § 4110.1(b)(1) (App. 237-38) (wherein the renewal of a Grazing permit rule similarly is silent upon the point). The only regulation adopted by the agency through formal rulemaking to fill any such "gap" requires the agency to provide notice and an opportunity for hearing before cancelling a Grazing preference. 43 C.F.R. § 4170.1-1(a) (App. 298); *see also* 43 C.F.R. §§ 4160.1-4160.4 (App. 294-98). If the Bureau had adopted a regulation stating a Grazing preference would cancel upon nonrenewal of a Grazing permit, Petitioners would not be

before the Court today. However, the Bureau has *not* adopted such a rule.

Notwithstanding, the Ninth Circuit determined that the Grazing preference cancellation procedures in the grazing regulations at 43 C.F.R. § 4170.1-1(a) (App. 298) are not applicable to the current dispute because that section is only for cancellation of a Grazing permit "before its scheduled expiration." App. 24. The court states that since the Bureau relied on 43 C.F.R. § 4110.1(b)(1)(i) (App. 237) in declining to renew Hanley's Grazing permit in 2009, Section 4170.1-1(a) "is not even at play in this case." App. 25. Moreover, the Ninth Circuit determined "it would not have been possible for the BLM to cancel HRP's grazing preference pursuant to that provision, which provides for cancellation of a 'grazing permit or lease *and* grazing preference.' . . . Because of the conjunction 'and,' Section 4170.1-1(a) is most naturally read to mean that BLM cancels a preference when it simultaneously also cancels a permit or lease." App. 27.

First, the Ninth Circuit failed to examine the complete regulatory text in 43 C.F.R. § 4170.1-1(a). The regulation states:

> The authorized officer may withhold issuance of a grazing permit or lease, or suspend the grazing use authorized under a grazing permit or lease, in whole or in part, or cancel a grazing permit or lease and grazing preference, or a free use grazing permit or other grazing authorization, in whole or in part, under Subpart 4160 of this title, for violation of

> a permittee or lessee of any of the provisions of this part.

43 C.F.R. § 4170.1-1(a) (App. 298). As is plainly and expressly stated in the text of the regulation, the Bureau may "withhold issuance of a grazing permit," "suspend . . . a grazing permit," or "cancel a grazing permit . . . and grazing preference . . . in whole or in part, under Subpart 4160." In other words, the regulation is not only applicable to early suspension or cancellation of an existing Grazing permit. In addition, the Bureau may "cancel a grazing permit or lease and grazing preference . . . *in whole or in part*." *Id*. (emphasis added). Thus, the regulatory text does not restrict the agency to cancel a Grazing permit and Grazing preference simultaneously. Rather, a Grazing permit and Grazing preference may be cancelled under Section 4170.1-1(a) "in whole or in part" without any such limitation. The regulatory language "in whole or in part" includes no restrictions on which parts may be cancelled independently.

Second, the Bureau could not point to a single other situation in which a Grazing preference automatically cancelled upon nonrenewal of a Grazing permit. This record disclosed two examples that confirmed no precedent for this interpretation. The first was in Bureau's *Payne Decision* issued as part of the present matter wherein BLM considered and assessed a range of alternatives in authorizing grazing use on the Trout Springs Allotment. *See* App. 151-54. One of the alternatives considered and assessed was

the "No-Grazing Alternative" wherein the Bureau stated in a decision-document that:

> The BLM would not authorize livestock use on public lands within the Trout Springs Allotment for the next 10 years. **The BLM would deny your application for permit renewal (i.e., not reissue the permit) and for the next 10 years not approve any applications to graze public lands in this allotment.** After 10 years, the BLM would reevaluate whether to again authorize grazing on the public lands within the allotment, considering such factors as meeting or making significant progress towards meeting Idaho S&G, conformance with the ORMP, and other applicable resource needs not known at this time. **We would not cancel the existing preference for grazing use of this allotment's public lands as part of this action but would continue to administer it under applicable law and regulation. After 10 years, the BLM would grant first priority for receipt of a future authorization, if any, to graze public lands within the allotment to the qualified applicant who holds this preference.**

App. 152-53 (emphasis added). The Bureau itself admitted in its own *Payne Decision* that it could simultaneously deny the renewal of a Grazing permit and still recognize the Grazing preference, as much as 10-years after the nonrenewal of the permit.

The second example was similar to the first discussed above but involved a situation the Bureau followed the Section 4170.1-1(a) procedure to cancel the Grazing preference, as much as 12-years after the nonissuance of the permit. *See* App. 26, Footnote 6. As such, the undisputed evidence in the record showed that the Bureau has already recognized that a Grazing preference still exists until it is cancelled even after the nonrenewal of a Grazing permit.

The Ninth Circuit discounted this later, i.e. second example, only because there was "no evidence that this decision was ever appealed to or affirmed by the IBLA, whose decisions represent the agency's official position." App 26, Footnote 6. However, an unrelated former permittee's lack of appeal to cancel its Grazing preference has no bearing on the evidence of the Bureau's use of this procedure previously, in contradiction to its current arguments. Moreover, it is hornbook law before the agency that, while the IBLA is the *last word* for the agency, 43 C.F.R. § 4.403(a) (10-1-2020 Edition), it is not necessarily the *final word* for the agency when the Bureau issues a grazing decision and the adverse party does not elect to appeal it. *See* 43 C.F.R. § 4.470(d) (10-1-2020 Edition); 43 C.F.R. § 4.478(e) (10-1-2020 Edition).

As such, the Department of the Interior already filled the "gap" left by Congress since the TGA and FLPMA do not state how a Grazing preference is cancelled. The grazing regulations address this issue and require certain procedures under Subparts 4160 and 4170. The Bureau has even followed such procedures

in highly analogous situations. The Bureau cannot point to a *single* other case in which the Bureau asserted that a Grazing preference was cancelled upon nonrenewal of a Grazing permit. The Bureau's new arguments, in this case, are contrary to the statutes, regulations, and the Bureau's own past practice – and are illustrative of the Bureau taking on the role of Congress by creating new law.

III. The question presented has exceptional importance.

A. Certiorari is warranted to negate disorder to those who have a Grazing preference attached to their Base property.

A purpose of the *Taylor Grazing Act* was "to regulate their occupancy and use" of the public lands and "to provide for the orderly use, improvement, and development of the range." 43 U.S.C. § 315a (App. 203). However, here, the Ninth Circuit's decision creates disorder. Very notably, while seemingly satisfied with its decision, the court materially qualified it in Footnote 5, stating:

> [w]e leave open the possibility that if a permit terminates and the base property is sold in an arm's length transaction, the new owner of the base property might be entitled to a preference in applying for a new grazing permit.

App. 22, Footnote 5. The court thereby admitted that its interpretation of the statutes is tainted by prejudice

based upon how the control of the Base property was transferred in this particular case.

Here, in December 2009, the Bureau exercised its discretion to decide not to renew Hanley's Grazing permit as per 43 C.F.R. § 4110.1(b)(1) (App. 237-38). App. 131. After such decision was affirmed by the agency in March 2013, Hanley transferred their Grazing preferences in August 2013 via a Base property Lease to Martha Corrigan, along with her husband, John Corrigan. *See* App. 6-7 (Ninth Circuit); App. 30 (District Court); App. 42 (IBLA); App. 83 (ALJ); App. 116 (Corrigan Decision). Martha Corrigan is the daughter of Michael Hanley. App. 6, Footnote 1; *see also* App. 30. It was only then that the Bureau decided, *for the first time*, in November 2013, that Hanley's Grazing preferences extinguished, disappeared, or terminated upon the nonrenewal of Hanley's Grazing permit in December 2009,[6] citing FLPMA, 43 U.S.C. § 1752(c) (App. 133-34). Thus, the court admits that its statutory analysis may not apply if someone unrelated to the owners of Hanley leased the Base property. App. 22, Footnote 5.

The Ninth Circuit's conclusion about cancellation of a Grazing preference upon nonrenewal of a Grazing permit is situational and not actually derived from statutory interpretation of the TGA and FLPMA,

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[6] See the word "extinguished" used by the agency. App. 73-74; *see also* App. 39, 40, 51. See the word "disappeared" used by the agency. App. 169, *see also* App. 124, 140, 144, 167. See the word "terminated" used by the agency. App. 123, 143, 166, 168; *see also* App. 132, 139.

which are silent on that point. The court worked extremely hard, as did the District Court and the agency before it, to glean an "unambiguous" interpretation from the ***silence*** in both statutes. This effort was clearly the result of disfavor to the facts underlying the applications, rather than a truly impartial examination of the statutes using the tools of interpretation as required by *Chevron* and *Kisor*.

If the tools of statutory construction are impartially applied to the TGA, FLPMA, and the grazing regulations, several conclusions are clear. As admitted by the Ninth Circuit, neither the TGA nor FLPMA state how a Grazing preference is cancelled – the statutes are silent. App. 19; *see also* App. 17. No "unambiguous" interpretation of the silence found in the TGA and FLPMA can be made. The grazing regulations fill the "gap" left by Congress, and provide that the Bureau may cancel a Grazing permit and Grazing preference "in whole or in part." 43 C.F.R. § 4170.1-1(a) (App. 298). If the Bureau decides to cancel a Grazing preference, the procedure is set forth in Subpart 4160, and requires notice and hearing. *Id*.; *see also* 43 C.F.R. §§ 4160.1–4160.4 (App. 294-98). This analysis is clear and simple, as compared to the Ninth Circuit's extremely complicated rationalization for its determination that silence can be "unambiguous." Such efforts by courts go beyond simply interpreting statutes as directed under *Chevron* and *Kisor* and instead lead to courts adding and supplementing statutes due to subjective biases, resulting in predetermined outcomes. Thus, the Ninth Circuit's "interpretation" at issue in

this Petition was an exercise of legislative power and cannot be permitted to stand.

B. Certiorari is warranted to put bookends on the other side of the *Chevron* deference.

Before this Court on writ of certiorari is a case entitled *American Hospital Ass'n, et al. v. Norris Cochran*, No. 20-1114 (Petition for Writ of Certiorari granted on July 2, 2021, and Oral Arguments heard on November 30, 2021). That case involves the outer limits of deference to agency interpretations, and whether such deference is appropriate. This case is different than *American Hospital Ass'n* in that this case provides an important opportunity for the Court to put a bookend on the other side of *Chevron* deference. This case involves whether a court may interpret the silence in statutes and find that such statutes are unambiguous under *Chevron* step one, before even reaching the issues of ambiguity and agency deference (step two). Members of this Court have raised concerns about the wide-sweeping application of *Chevron*. Through this case, the Ninth Circuit now holds that under *Chevron* it may interpret the silence in statutes under *Chevron step one* analysis, in contradiction to this Court's prior decisions. The Court should grant this petition for writ of certiorari to prevent the lower courts in the Ninth Circuit from determining that silence may be "unambiguous," under *Chevron* step one analysis.

C. Certiorari is warranted to reinforce this Court's holding in *Christensen*, applying *Chevron* in the context of silence as to a specific point in a statute.

In *Christensen v. Harris County*, 529 U.S. 576, 578, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000), this Court interpreted provisions of the *Fair Labor Standards Act*, 29 U.S.C. §§ 201 *et seq.* Under that Act, overtime pay may be compensated by paid time off or monetary compensation. *Id*. at 578. Harris County adopted a policy requiring employees to use accrued paid time off to avoid large cash payouts, and certain employees brought suit to challenge that policy. *Id*. at 578. This Court rejected the claim, finding that nothing in the Act prohibited employers from compelling the use of accrued time off, and therefore the county's policy did not violate the Act. *Id*. The Act was silent on that issue. *Id*. at 585.

Further, this Court in *Christensen* considered the agency's implementing regulations under the Act. The regulations also did not prohibit employers from compelling the use of accrued paid time off. *Id*. at 584. However, the agency wrote an opinion letter stating that employers may only compel the use of accrued paid time off if the employee agreed in advance to that practice. *Id*. at 586. The petitioners and the United States (appearing as *amicus curiae*) argued that the Court should defer to the agency's opinion letter as an interpretation of its regulations. *Id*. at 586-88. The Court rejected that argument, stating "[o]f course, the framework of deference set forth in *Chevron* **does apply to**

an agency interpretation contained in a regulation." *Id.* at 587 (emphasis added).

The Ninth Circuit itself in *Oregon Restaurant & Lodging Ass'n v. Perez*, 816 F.3d 1080 (9th Cir. 2016), recognized the impact of *Christensen* on the interpretation of statutes that are silent regarding the particular issue in the case, stating:

> [A]s *Christensen* strongly suggests, there is a distinction between court decisions that interpret statutory commands and court decisions that interpret statutory silence. Moreover, *Chevron* itself distinguishes between statutes that directly address the precise question at issue and those for which the statute is 'silent.' *Chevron*, 467 U.S. at 843. As such, if a court holds that a statute unambiguously protects or prohibits certain conduct, the court 'leaves no room for agency discretion' under *Brand X*, 545 U.S. at 982. However, if a court holds that a statute does not prohibit conduct because it is silent, the court's ruling leaves room for agency discretion under *Christensen*.

Oregon Restaurant & Lodging Ass'n, 816 F.3d at 1088. This is consistent with other circuit courts as well. *See also Nat'l Envtl. Dev. Association's Clean Air Project v. EPA*, 891 F.3d 1041, 1050-51 (D.C. Cir. 2018) (wherein the D.C. Circuit applied the *Chevron step two* analysis after determining the applicable statute was silent).

Here, although the TGA and FLPMA are silent as to cancellation of a Grazing preference, the

implementing grazing regulations, adopted under formal rulemaking pursuant to congressional delegation of authority, filled the statutory "gap." The grazing regulations provide that a Grazing permit and Grazing Preferences may be cancelled "in whole or in part" under Subparts 4170 and 4160. Unlike *Christensen*, the Bureau has not issued a written policy interpreting these provisions of the grazing regulations. But similar to *Christensen*, the grazing regulations at issue are unambiguous. As explained above, the Bureau followed the process set forth in Subparts 4170 and 4160 to cancel a Grazing preference previously in an analogous situation when the Grazing permit was not renewed by the Bureau 10 to 12 years earlier. This is why Petitioners tried the case below under a theory that the lower courts should review the regulations under *Kisor v. Wilkie*. As such, the Ninth Circuit also erred in not reaching the issue of the grazing regulations. App. 24 ("Because a plain reading of the statutory language of the TGA and the FLPMA resolve this case, there is no reason for the Court to consider the Grazing Regulations."). The dicta in the Ninth Circuit's decision regarding the grazing regulations did not consider the full regulatory text, relying instead on its statutory interpretation of the silence in the statutes. *See* App. 3, 14, 24, 27.

The Bureau's interpretation of the statutes and regulations created *de facto* regulations where none existed, contrary to the regulatory process already adopted in the grazing regulations. Further, the Ninth Circuit's decision created *de facto* statutes where none

existed to the same effect. Instead of finding statutory silence to be "unambiguous," *Chevron* and *Christensen* required the Ninth Circuit to recognize that Congress's silence left a "gap for the agency to fill," and look to the unambiguous grazing regulations that so clearly set forth the procedure for cancellation of a Grazing preference.

IV. This case is an appropriate vehicle for review of the question presented.

There are no legal obstacles to prevent review of the question presented. The Petitioners have standing. The agency decisions are final. The Petitioners have exhausted their administrative remedies. The procedural posture of this case poses the question presented cleanly and in a manner that makes the issue dispositive. Specifically, should this Court reverse the decisions by the agency and the lower courts, the matter should be remanded by this Court to the Bureau to process Corrigan's Grazing Preference Transfer Application and Grazing Permit Application, or *in the alternative*, to the lower courts to apply *Chevron* step two analysis.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

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