CASE NO. 22-5036; 22-5037

United States Court of Appeals for the District of Columbia Circuit

FRIENDS OF THE EARTH, ET AL.,

Plaintiffs-Appellees,

V.

DEBRA A. HAALAND, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR OF THE UNITED STATES, ET. AL.,

Defendants-Appellants,

STATE OF LOUISIANA AND AMERICAN PETROLEUM INSTITUTE,

Intervenors for Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
NO. 1:21-CV-2317-RC

BRIEF FOR STATES OF MONTANA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, GEORGIA, KENTUCKY, MISSISSIPPI, MISSOURI, NEBRASKA, OKLAHOMA, TEXAS, UTAH, AND WEST VIRGINIA AMICI CURIAE IN SUPPORT OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. **Parties and Amici**: All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Defendants-Appellees.

B. **Rulings Under Review**: References to the ruling at issue appear in the Brief for Defendants-Appellees.

C. **Related Cases:** There are no related cases to amici's knowledge.

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INTEREST OF AMICI CURIAE

Amici Curiae States of Montana, Alabama, Alaska, Arizona, Arkansas, Georgia, Kentucky, Mississippi, Missouri, Nebraska, Oklahoma, Texas, Utah, and West Virginia, ("the States") seek to protect oil and gas production in the Gulf of Mexico and throughout the United States. The States seek to stop abuses of environmental statutes such as NEPA that have become antithetical to their original purpose and are now used to the detriment of the American people.

SUMMARY OF ARGUMENT

America is in the midst of an energy crisis. The district court's vacatur of the Bureau of Ocean Energy Management's ("BOEM" or "Agency") Lease Sale 257 as part of the 2017-2022 Program for the Outer Continental Shelf ("OCS") in the Gulf of Mexico will only exacerbate this crisis and inflict greater costs on the American people. *Friends of the Earth v. Haaland*, 2022 U.S. Dist. LEXIS 15172 (D.D.C. Jan. 27, 2022).

Plaintiffs Friends of the Earth, Healthy Gulf, Sierra Club, and Center for Biological Diversity sued the federal Defendants to stop oil and gas production in the United States. This action dovetails with the federal Defendants' own actions since January 20, 2021, to bottleneck the domestic supply of oil.

Under the Outer Continental Shelf Leasing Act ("OCSLA"), 43 U.S.C. § 1334, *et seq*., the Department of the Interior ("Interior") must lease areas of the OCS for oil and gas exploration and development. Congress enacted OCSLA, as amended, to promote the swift, orderly, and efficient exploitation of our virtually untapped domestic oil and gas resources in the OCS. *See* 43 U.S.C. § 1332(3). OCSLA sets forth a four-stage environmental review process that narrows in focus as potential oil and gas production grows more imminent.

Litigants—and courts, for that matter—have weaponized the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq*., ("NEPA"), to thwart oil and gas development under statutes like OCSLA; statutes intended to support that development of oil and gas—not thwart it completely. NEPA requires agencies to reasonably analyze potential environmental consequences before taking major federal action, but this analysis is necessarily limited by agencies' finite time and resources. NEPA "directs agencies only to look hard at the environmental effects of their decisions, and not to take one type of action or another." *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017). Courts "should not 'flyspeck' an agency's environmental analysis, looking for any deficiency

no matter how minor.'" *Id.* at 1368 (quoting *Nevada v. DOE*, 457 F.3d 78, 93 (D.C. Cir. 2006)). Still, NEPA has grown very lengthy, complex, and costly thanks to litigation and judicial innovations. Agencies now focus exclusively on inevitable litigation rather than effectuating NEPA's original goals.

The district court held BOEM's calculation of total greenhouse gas emissions from Lease 257 was arbitrary and capricious. *Friends of the Earth*, 2022 U.S. Dist. LEXIS 15172, at *36–46. BOEM's NEPA analysis analyzed upstream and downstream emissions—relying on a report that quantified the difference between the greenhouse gas emissions that would occur under the full five-year program and the emissions that would occur if no leasing took place during that period (known as the "no-action alternative"). *Id.* at *29–30. BOEM utilized a model for the calculations that determined the total greenhouse gas emissions would be slightly higher under the no-action alternative—but the model did not take into account the decrease in foreign oil consumption. *Id.* at *29–32. BOEM did not take the decrease into account at that stage because it was too speculative. *Id.* at *36.

The district court relied on flawed Ninth Circuit NEPA precedent to conclude that BOEM—at the lease stage—was required to calculate and consider the downstream effects of greenhouse gas emissions in its no-action alternative. But those decisions are poorly reasoned and of little persuasive value. This Court's precedent, moreover, makes clear that—at the leasing stage—NEPA does not require consideration of far-reaching downstream consequences.

BOEM's decision was not arbitrary and capricious. This Court should reverse the district court.

Argument

I. Federal Defendants and Plaintiffs inflicted an energy crisis on the American people.

The district court recognized that one consequence of vacatur in this case is that "because the 2017-2022 Five-Year Program is drawing to a close, there may not be another Gulf of Mexico Lease Sale under that Program if Lease Sale 257 does not go forward" due the current Program expiring in June 2022. *Friends of the Earth*, 2022 U.S. Dist. LEXIS 15172, at *85. This outcome would obviously delight not only the Plaintiffs, but also the federal Defendants given that the current Administration (unsuccessfully) attempted to suspend Lease 257 as part of its oil

and gas leasing moratorium. *See Louisiana v. Biden*, 543 F. Supp. 3d 388, 402 (W.D. La. 2021). On that point, the Biden Administration and Plaintiffs agree. They want to prevent oil and gas activity in the United States. To the Nation's detriment, they have largely succeeded.

Gas prices in the United States continue to set record highs.[1] They have doubled since President Biden took office.[2] Economy-wide inflation—the highest in 40 years—strains families' budgets.[3] Make no mistake; the Nation faces this crisis because of this Administration's anti-energy policies.

After President Biden's revoked the Keystone XL Pipeline ("KXLP") permit on his first day in office, Amici repeatedly asked the Administration to reconsider its misguided and unlawful decision. Amici warned the Administration then that if its decision stood, Americans would "suffer

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[1] Matt Egan, *US gas prices jump to record high $4.67 a gallon*, CNN.COM (June 1, 2022), https://www.cnn.com/2022/06/01/energy/gas-prices-inflation/index.html.

[2] Timothy Nerozzi, *National gas prices have doubled since Biden took office*, FoxNews.com (June 4, 2022), https://www.foxbusiness.com/economy/national-gas-prices-double-since-biden-took-office.

[3] The Associated Press, *Europe agrees to ban Russian coal, but struggles on oil, gas*, AP NEWS (Apr. 7, 2022), https://tinyurl.com/2x9zxpv4; Emily Peck, *Pressure mounts on Europe for total Russian Energy embargo*, AXIOS: ECON. AND BUS. (Apr. 8, 2022), https://tinyurl.com/yc7veva3.

serious detrimental consequences," consumers would pay higher prices, and our allies would become further dependent on Russian and Middle Eastern oil.[4] Those predictions have unfortunately proven accurate.

Days after revoking the KXLP Permit, President Biden issued Executive Order 14008, which "pause[d] new oil and natural gas leases on public lands or in offshore waters pending completion of a comprehensive review and reconsideration." Exec. Ord. 14008, Tackling the Climate Crisis at Home and Abroad § 208, 86 Fed. Reg. 7619, 7624-25 (Jan. 27, 2021). A coalition of States—including several Amici and Defendant-Intervenors—sued to challenge that recission, and a district court preliminarily enjoined Interior officials from implementing the pause of new oil and natural gas leases on public lands or in offshore waters. *See Louisiana v. Biden*, 543 F. Supp. 3d 388. This injunction included Lease 257. Beyond KXLP and the leasing moratorium, the Administration has taken

[4] Sebastien Malo, *Decision to cancel Keystone XL 'rushed' and 'unilateral' - AGs' letter*, REUTERS (Feb. 9, 2021, 5:20 PM), https://tinyurl.com/32dystw3.

numerous actual, proposed, and pledged actions to hamstring American energy production.[5]

The results have been predictable: an energy crisis. The Administration has turned everywhere for answers but its own policies. It begged OPEC+ (Organization of the Petroleum Exporting Countries and others) to increase oil output. Low Saudi oil output, according to President Biden, was to blame for rising gas prices.[6] The Administration reportedly approached Venezuela about increasing production.[7] It also apparently hopes to obtain more oil from Iran in future.[8]

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[5] *See generally* Republican Study Committee Memorandum, A Promise Kept: Biden's War on American Energy, Mar. 9, 2022, *available at* https://barr.house.gov/_cache/files/1/7/17ec008b-f7ea-49e6-b614-ea9b4dd12d6f/16871653E745FF6D04D065F4E6DE8623.a-promise-kept-biden-s-war-on-energy-final-002-.pdf.

[6] Stephen Kalin, et al., *How U.S.-Saudi Relations Reached the Breaking Point*, WALL ST. J. (Apr. 19 2022) https://www.wsj.com/articles/how-u-s-saudi-relations-reached-the-breaking-point-11650383578?st=ojdpok2w4b9kdn5.

[7] Liptak, et al., *Biden turns to countries he once sought to avoid to find help shutting off Russia's oil money*, CNN.COM (Mar. 8, 2022), https://www.cnn.com/2022/03/08/politics/joe-biden-saudi-arabia-venezuela-iran-russia-oil/index.html.

[8] *Id.*

In April 2022, the Administration sought additional oil imports from Canada.[9] As that report notes, however, limited capacity in existing pipelines leave few (if any) viable options.[10] Ironically, that Canadian oil would have flowed through the KXLP, which would have transported nearly a million barrels per day—not only from Canada but from the Bakken oilfields in Montana and North Dakota—to American refineries. Also in April 2022, the Administration—unsuccessfully—asked Saudi Arabia to increase oil production.[11] It appears the Administration is searching for oil everywhere but in the United States.

Next, in a feeble attempt to lower gas prices, the Administration announced that it would release one million barrels per day for six months (totaling 180 million barrels) from the strategic petroleum reserve (SPR).[12] In May, the Administration announced it would release

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[9] Timothy Puko & Vipal Monga, *U.S. Wants More Oil from Canada but Not a New Pipeline to Bring It*, WALL ST. J. (Apr. 5, 2022), https://tinyurl.com/53hzs4pz.

[10] *Id.*

[11] Kalin, *supra*.

[12] Thomas Franck, *U.S. to release 1 million barrels of oil per day from reserves to help cut gas prices*, CNBC.COM (Mar. 31, 2022), https://www.cnbc.com/2022/03/31/us-to-release-1-million-barrels-of-oil-per-day-from-reserves-to-help-cut-gas-prices.html.

an additional 40 million barrels from the SPR.[13] Resultantly, the SPR now rests at its lowest level since 1987.[14] Gas prices, meanwhile, continue to rise.

To be sure, energy policy is complex. Many economic, market, and regulatory forces converge to traceably affect rising energy prices. But the co-conspirators responsible for higher gas prices aren't Vladimir Putin,[15] the oil industry,[16] or OPEC+.

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[13] U.S. Dep. Of Energy, DOE Announces Additional Notice of Sale of Crude Oil From The Strategic Petroleum Reserve, May 24, 2022, https://www.energy.gov/articles/doe-announces-additional-notice-sale-crude-oil-strategic-petroleum-reserve.

[14] *U.S. Strategic Petroleum Reserve drops to lowest level since 1987*, REUTERS (May 16, 2022), https://www.reuters.com/markets/commodities/us-strategic-petroleum-reserve-drops-lowest-level-since-1987-2022-05-16/.

[15] White House, FACT SHEET: President Biden's Plan to Respond to Putin's Price Hike at the Pump, Mar. 31, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/31/fact-sheet-president-bidens-plan-to-respond-to-putins-price-hike-at-the-pump/.

[16] *Biden Takes Aim at Big Oil Amid Accusations of Price Gouging*, BLOOMBERG LAW (Mar. 16, 2022), https://news.bloomberglaw.com/environment-and-energy/deja-vu-for-oil-markets-as-biden-calls-out-surge-in-pump-prices; Ben Lefebvre & Matthew Choi, *Democrats accuse oil industry of 'ripping off' Americans, while GOP blames Biden policies*, POLITICO (Apr. 6, 2022), https://www.politico.com/news/2022/04/06/democrats-republicans-oil-industry-gas-prices-00023381.

Environmental groups in the United States have made it their mission to frustrate the purpose of Congress and halt American energy production. Gas prices affect everyone,[17] but they disproportionately afflict low-income Americans.[18] That means communities of color and rural

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[17] Ariel Zilber, *Stephen Colbert roasted for saying he'd pay $15 for gas because he drives a Tesla*, N.Y. POST (Mar. 8, 2022), https://nypost.com/2022/03/08/stephen-colbert-blasted-for-saying-hes-willing-to-pay-more-for-gas/.

[18] *See, e.g.*, *Greg Iacurci, Why high gas prices fall harder on lower earners,* CNBC.COM (Mar. 18, 2022), https://www.cnbc.com/2022/03/18/why-high-gas-prices-fall-harder-on-lower-earners.html.

households suffer the most.[19] Ironically, these environmental groups are funded by some of our society's wealthiest and most privileged.[20]

This case is merely one example in a long line of destructive attacks by environmental groups against American energy. After a decade of opposition, Plaintiff Friends of the Earth now celebrates "Killing the

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[19] *See* Op-ed, Annika Olson, *As gas prices hit record high, communities of color and rural households suffer the most*, USA TODAY (Mar. 9, 2022), https://www.usatoday.com/story/opinion/columnists/2022/03/09/record-gas-prices-hit-low-income-families-hardest/9418761002/

[20] *See, e.g.,* Annie Palmer, *Jeff Bezos names first recipients of his $10 billion Earth Fund for combating climate change*, CNBC.com (Nov. 16, 2020), https://www.cnbc.com/2020/11/16/jeff-bezos-names-first-recipients-of-his-10-billion-earth-fund.html; https://eelegal.org/wp-content/uploads/2015/07/Big-Donors-Big-Conflicts-Final1.pdf; John Shwartz, Meet the millionaires helping to pay for climate protests, N.Y. Times (Sept. 27, 2019), https://www.nytimes.com/2019/09/27/climate/climate-change-protests-funding.html; Energy & Env. Legal Inst., Big Donors…Big Conflicts: How Wealthy Donors Use the Sierra Club to Push Their Agenda (July 2015), https://eelegal.org/wp-content/uploads/2015/07/Big-Donors-Big-Conflicts-Final1.pdf; United States Senate Committee on Environment and Public Works, Minority Staff, How a Club of Billionaires and Their Foundations Control the Environmental Movement and Obama's EPA (July 2014), https://www.naro-us.org/

Resources/NARO%20CA/NARO-CA,%20US%20Senate%20Minority%20Report,%20Billionaires%20Club%20(1).pdf.

Keystone XL Pipeline."[21] Plaintiffs Sierra Club[22] and Center for Biological Diversity[23] likewise claim credit for defeating the KXLP.

Plaintiffs Friends of the Earth, Sierra Club, and Healthy Gulf joined with other groups and activist companies like Patagonia to welcome the Administration's war on fossil fuels, including its decision to infuse government-wide decision-making with arbitrary "social costs of carbon."[24]

The tragic sum of these interrelated parts is that the American people have been victimized by radical, out-of-touch elites. American energy production benefits American families and communities. For example, in its first year of operation in Montana, the KXLP would have generated:

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[21] Friends of the Earth, Killing the Keystone XL Pipeline, July 29, 2021, https://foe.org/impact-stories/killing-the-keystone-xl-pipeline/.

[22] Jamie Henn, *Here's How We Defeated the Keystone XL Pipeline*, SIERRA: THE MAGAZINE OF THE SIERRA CLUB (Jan. 31, 2021), https://www.sierraclub.org/sierra/here-s-how-we-defeated-keystone-xl-pipeline.

[23] Center for Bio Diversity, Victory: You Helped Defeat Keystone XL, https://www.biologicaldiversity.org/campaigns/no_keystone_xl/in_harms_way.html (last visited June 8 ,2022).

[24] *See* Coalition Comment Letter on Department of the Interior's review and reform of the federal fossil fuel programs pursuant to Executive Order 14008, April 14, 2021, https://www.biologicaldiversity.org/programs/public_lands/energy/dirty_energy_development/pdfs/Federal-Fossil-Fuel-Programs-Review-PEIS-Sign-On-Letter-13-April-2021.pdf.

$30,202,721 in revenue paid directly to county governments; $5,070,018 in revenue for county schools; $27,784,235 in revenue for local schools; $2,234,333 in revenue for miscellaneous entities and fire districts; $5,499,483 for cities; and $8,899,769 in additional taxes and fees.[25] These revenues would have provided sorely needed resources to low income and rural areas. Several poor Montana counties would have seen their property tax revenues increase from 27% to 117%.

America has been weakened and her foreign adversaries emboldened by the work of these "environmental justice" groups.[26] The abuse and distortion of NEPA constitutes their most withering assault on everyday Americans. As this case demonstrates, it's no longer about balancing natural resource development with environmental responsibility in a transparent manner that welcomes public participation. NEPA now dooms the very developments Congress intended it to bless.

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[25] Plaintiffs' Brief in Opposition to Motion to Dismiss KXLP, ECF 107 at 34, *Texas & Montana, et al. v. Biden*, No. 21-cv-00065 (S.D. Tex. 2021).

[26] Op-ed, Marc Thiessen, *Biden's war on fossil fuels has strengthened Putin and weakened America*, WASH. POST (Feb. 24, 2022), https://www.washingtonpost.com/opinions/2022/02/24/biden-climate-gas-prices-russia-sanctions/.

II. NEPA has been undermined and weaponized to cripple responsible energy development.

NEPA functions as an umbrella procedural statute, integrating a variety of environmental and natural resource laws[27]—including OCSLA—into NEPA reviews and discussing them in NEPA documents. This is because complex actions require compliance with dozens of other federal, state, tribal, and local laws. The NEPA process is intended to form the overarching framework "to coordinate and demonstrate compliance with these requirements."[28]

NEPA doesn't mandate particular results or substantive outcomes. *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991) (Thomas, J.) ("Just as NEPA is not a green Magna Carta, federal

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[27] *See, e,g.*, the Clean Air Act, 42 U.S.C. §§ 7401– 7671q; Clean Water Act, 33 U.S.C. §§ 1251–1388; Coastal Zone Management Act, 16 U.S.C. §§ 1451– 1466; Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1787; Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. §§ 1600– 1614; Magnuson-Stevens Fishery Conservation and Management Act, 16 USC §§ 1801–1884; Endangered Species Act, 16 U.S.C. §§ 1531–1544; Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2762; Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201, 1202, and 1211; and Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601–9675.

[28] Linda Luther, The National Environmental Policy Act: Background and Implementation, CRS Report No RL3315, at 28 (2005), http://nationalaglawcenter.org/wpcontent/uploads/assets/crs/RL33152.pdf.

judges are not the barons at Runnymede. Because the statute directs agencies only to look hard at the environmental effects of their decisions, and not to take one type of action or another, federal judges correspondingly enforce the statute by ensuring that agencies comply with [NEPA]'s procedures, and not by trying to coax agency decisionmakers to reach certain results."). NEPA serves the twin aims of ensuring that agencies consider the significant environmental consequences of their proposed actions and inform the public about their decision making. *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983). Practically, NEPA requires agencies to prepare a detailed document, referred to as an Environmental Impact Statement (EIS), for every federal action that significantly impacts the quality of the environment. *See* 40 C.F.R. § 1502; 42 U.S.C. § 4332(C); *Busey*, 938 F.2d at 194. It also requires agencies to prepare a supplemental EIS if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). NEPA also established the Council on Environmental Quality ("CEQ") as an agency within the

Executive Office of the President to administer federal agency implementation of NEPA. 42 U.S.C. §§ 4342, 4344.[29]

"Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations." *Balt. Gas & Elec. Co.,* 462 U.S. at 97. NEPA simply requires agencies to analyze the environmental consequences before taking a major federal action. *Id.* (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)); *see also Sierra Club*, 867 F.3d at 1367 ("The role of the courts in reviewing agency compliance with NEPA is accordingly limited.").

The Court has recognized that this analysis is not open-ended because agencies have limited time and resources. Thus, "[t]he scope of the agency's inquiries must remain manageable if NEPA's goal of '[insuring] a fully informed and well-considered decision,' … is to be accomplished." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978)); *see also Theodore Roosevelt Conservation*

[29] CEQ regulations set NEPA's procedural requirements. Those include requiring agencies to conduct a scoping process, requiring draft and final EISs, determining the criteria of what constitutes a "federal action," defining the roles of "lead agencies" and "cooperating agencies," and defining the public's role and public comment process. 40 C.F.R. § 1502.25.

P'ship v. Salazar, 616 F.3d 497, 503 (D.C. Cir. 2010) (NEPA is "meant to ensure 'a fully informed and well-considered decision, not necessarily' the best decision.") (quoting *Vt. Yankee*, 435 U.S. at 558). But in practice, NEPA has proven unduly cumbersome and often unproductive.

As one scholar at Columbia University's Climate School notes, "for years presidents of both parties recognized the need for [NEPA] reform."[30] This is because "over the years compliance with NEPA has morphed into an expensive, time-consuming process and has become the weapon of choice for opponents seeking to slow down or stop major projects that need federal permits or approvals."[31] It has "spawned an entire cottage industry of consultants, lawyers and litigation" to become "the most litigated environmental law in the country."[32]

In 1997, CEQ issued a report concluding that, notwithstanding NEPA's successes, NEPA had created real problems in agency decision-

[30] David R. Hill, *Biden Should Keep Trump's Reforms to the National Environmental Policy Act*, COLUMBIA UNIV. CLIMATE SCH. (Mar. 2, 2021), https://news.climate.columbia.edu/2021/03/02/biden-trump-nepa-reforms/.

[31] *Id.*

[32] *Id.*

making.[33] Agencies created overly lengthy documents and sought to "litigation-proof documents, increasing costs and time but not necessarily quality."[34] The report also said that "[o]ther matters of concern to participants in the Study were the length of NEPA processes, the extensive detail of NEPA analyses, and the sometimes confusing overlay of other laws and regulations."[35] For the past two decades—across multiple administrations—Congress has sought more efficient environmental reviews by federal agencies. *See, e.g.*, Public Law 114–94, § 41001–41014, 129 Stat. 1312, 1741 (42 U.S.C. § 4370m—4370m–12) (providing for a more efficient environmental review and permitting process for "covered projects."); 23 U.S.C. § 139, Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109– 59, section 6002(a), 119 Stat. 1144, 1857 ("Efficient environmental reviews for project decisionmaking," a streamlined environmental review process for highway, transit, and multimodal transportation projects).

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[33] Council on Env. Quality, The National Environmental Policy Act: A Study of Its Effectiveness After Twenty five Years (January 1997), *available at* https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf.

[34] *Id.* at iii.

[35] *Id.*

Congress even amended OCSLA after NEPA was adopted to overcome "a variety of technological, economic, environmental, administrative, and legal problems which tend to retard the development of the oil and natural gas reserves." 43 U.S.C. § 1801(8). To that end, Congress put in place "policies and procedures … intended to result in expedited exploration and development of the Outer Continental Shelf." OCSLA Amendments of 1978, Pub. L. No. 95-372, § 109, 92 Stat. 629, 631 (1978) (codified at 43 U.S.C. § 1802(1)); *see also* H.R. Rep. No. 95–590, at 53 (1977) ("The basic purpose of [the amendments is] to promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf.").

Under NEPA, nevertheless, federal agencies continue to conduct hundreds of EISs and hundreds of thousands of other environmental assessments.[36] In 2020, CEQ concluded that "[d]espite CEQ guidance and regulations providing for concise, timely documents, the documentation and timelines for completing environmental reviews can be very lengthy, and the process can be complex and costly." 85 Fed. Reg. 1684, 1687 (Jan.

[36] *See* Government Accountability Office, Report 14-370 (2014), http://www.gao.gov/assets/670/662546.pdf.

10, 2020). CEQ found that the process for preparing EISs was "taking much longer than CEQ advised, and that the documents are far longer than the CEQ regulations and guidance recommended." *Id.*

One reason for the excessive nature of NEPA review is the exacting judicial review imposed on federal agencies by the courts. Federal courts issue approximately 100 to 140 decisions each year interpreting NEPA.[37] This extensive body of caselaw interpreting NEPA and CEQ regulations drives much of agencies' modern-day decisionmaking. 85 Fed. Reg. at 1688.

For example, in 2018 CEQ found that, across the federal government, the average EIS completion time and issuance of a Record of Decision ("ROD") was over 4.5 years and the median was 3.6 years. *Id.* (citing Council on Environmental Quality, Environmental Impact Statement Timelines (2010–2017), (Dec. 14, 2018), https://ceq.doe.gov/nepapractice/eis-timelines.html). On average, Interior takes five years and the Department of Transportation 6.5 years to complete an EIS—and that's not including the usual years of resulting litigation. *Id.* CEQ found that

[37] *See* GAO, National Environmental Policy Act: Little Information Exists on NEPA Analyses at 14, http://www.gao.gov/assets/670/662546.pdf.

"across all Federal agencies, draft EISs averaged 586 pages in total, with a median document length of 403 pages." *Id.* at 1688 (citing Council on Environmental Quality, Length of Environmental Impact Statements (2013–2017), (July 22, 2019), https://ceq.doe.gov/nepa-practice/ eis-length.html).

As a result, "[t]he entire original purpose of doing NEPA analysis has been lost along the way to creating mountains of data and information in the hopes of successfully defending against inevitable litigation."[38]

As this case shows, NEPA challenges have produced a system in which courts consistently tell agencies their analyses fall short. As the decisions in *Liberty*, *Willow*, and *Friends of the Earth* demonstrate, NEPA's goalposts move further back a little more each time. It's time this Court says enough is enough.

III. The district court erroneously concluded that Lease Sale 257's record of decision was arbitrary and capricious.

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[38] Hill, *supra*.

When it approved Lease Sale 257, BOEM relied on—among other things—its Program EIS of the five-year Outer Continental Shelf Oil and Gas Leasing Program. *Friends of the Earth*, 2022 U.S. Dist. LEXIS 15172, at *29–30. That EIS compared the market and environmental effects that would likely result from the proposed lease sales versus those of taking no action at all (disallowing the sales and foreclosing any resultant oil and gas production). BOEM's EIS concluded the leases would increase oil supply, lower prices, and reduce emissions. *See id.* at *30–31. By contrast, BOEM determined that scuttling the leases (the no action alternative) would result in slightly *higher* global emissions. *Id.* at *30–31. But it reached that conclusion by running a market simulation model called "MarketSim" and holding the variable of foreign consumption more-or-less constant. *Id.* at *31–32. To be sure, although BOEM acknowledged that lower supply could lead to higher prices and—therefore—lower demand and consumption, *id.* at *30, it disavowed that it could accurately estimate those changes in any principled manner. *Id.* at *36. And so, it assumed that global oil demand would remain constant—not decrease; that the relatively less-carbon intensive domestic oil production would not displace foreign and more carbon-intensive production;

and that therefore, failure to conduct the lease sales would likely increase total emissions. *Id.* at *31.

Plaintiffs attacked BOEM's decision to forego any emissions estimates based on future changes in foreign oil consumption, and the district court concluded it was arbitrary and capricious. *Id.* at *36. The district court erroneously concluded that BOEM had the ability to calculate the emissions results of change in foreign consumption and that it bore the affirmative obligation to do so at *this* stage in the OCSLA process. *Id.* at *31–32.

A. The district court wrongly followed and misapplied out-of-circuit cases.

1. The *Liberty* & *Willow* Decisions

The district court relied heavily on two out-of-circuit decisions evaluating the MarketSim model. *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020) ("Liberty"); *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt.*, 555 F. Supp. 3d 739 (D. Alaska 2021) ("*Willow*"). *See Friends of the Earth*, 2022 U.S. Dist. LEXIS 15172, at *32–46.

In *Liberty*, BOEM used the "MarketSim" model to calculate the downstream indirect emissions from foreign oil consumption in its no-

action alternative for a proposed Alaskan offshore drilling project and assumed that foreign oil consumption would remain static, whether or not oil was produced at the project. *Liberty*, 982 F.3d at 736. BOEM also estimated the no-action alternative would lower foreign oil consumption. But it failed to estimate how that reduction would affect emissions because BOEM determined it lacked "sufficiently 'reliable' information on foreign emissions factors and consumption patterns." *Id.* at 737.

The Ninth Circuit deemed that emissions determination arbitrary and capricious. *Id.* at 740 (BOEM "should have either given a quantitative estimate of the downstream greenhouse gas emissions that will result from consuming oil abroad, or explained more specifically why it could not have done so, and provided a more thorough discussion of how foreign oil consumption might change the carbon dioxide equivalents analysis.") (internal quotation marks omitted). The court specifically decried "[t]he EIS's two-page explanation of BOEM's decision to omit foreign oil emissions …." *Id.* at 740. It reasoned that "even if BOEM is unable to quantitatively evaluate the emissions generated by foreign countries in the absence of the Liberty project, it still must thoroughly explain why such an estimate is impossible." *Id.* at 739.

Ultimately, BOEM's conclusion that not drilling would result in more carbon emissions than drilling was "counterintuitive" and—absent a more thorough explanation—arbitrary and capricious because it reached a decision that was "'so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id.* at 739 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The *Liberty* court notably determined that BOEM's "decision to exclude a discussion of foreign oil consumption" merited no "significant deference" because "deference applies only when the agency is making predictions 'within its area of special expertise.'" *Id.* at 740 (quoting *Balt. Gas & Elec. Co.*, 462 U.S. at 103). It reasoned that BOEM's expertise stopped short of "the economic analysis of greenhouse gas emissions." *Id.*

Shortly after *Liberty*, a district court in Alaska evaluated the Bureau of Land Management's ("BLM") use of the MarketSim model for a proposed oil and gas development project. *Willow*, 555 F. Supp. 3d at 763. BLM once again analyzed the effects of the project's downstream emissions in its alternatives analysis. *Id.* In this instance—following *Liberty*'s holding—BLM comprehensively evaluated emissions for the

project and explained in detail why the lack of reliable data about country-by-country energy substitutions prevented quantification of foreign consumption of oil in its indirect effects analysis. *Id.* at 763. That should have satisfied the *Liberty* standard. *See Liberty*, 982 F.3d at 739.

Demonstrating that NEPA is an endless game of Calvinball, the district court again identified a violation. *Willow* determined that BLM "should have either given a quantitative estimate of the downstream greenhouse gas emissions that will result from consuming oil abroad, or '*explained more specifically why it could not have done so*,' and provided a more thorough discussion of how foreign oil consumption might change the carbon dioxide equivalents analysis." *Id.* at 740 (emphasis added) (quoting *Liberty*, 982 F.3d at 740). So, although BLM in *Willow* provided a much more fulsome explanation of its analysis than BOEM did in *Liberty*, it still didn't do enough. *Id.* at 764–65 (quoting *Liberty*, 982 F.3d at 739).

2. The district court misapplied *Liberty* and *Willow*.

The district court thought it most important that BOEM "actually did quantify the effect of the proposed lease sales on foreign consumption," yet excluded that quantified reduction from its total emissions

calculation. *Friends of the Earth*, 2022 U.S. Dist. LEXIS 15172, at *41. This exclusion, the district court ribbed, quintessentially failed to consider an important aspect of the problem. *Id.* (citing *State Farm*, 463 U.S. at 43). According to the court, BOEM could have summarized or estimated foreign emissions with accurate or credible scientific evidence. *Id.* at *42 (citing *Liberty*, 982 F.3d at 738). The district court pointed out that the record contained a methodology from a foreign think tank (the "Stockholm model") that purported to measure how emissions are affected by reduced foreign consumption. *Id.*

By contrast, the report relied upon by BOEM reasoned that "[o]il consumption in each country is different and BOEM does not have information related to which countries would consume less oil. This is important information since consumption patterns vary by country." *Id.* at *44. This straightforward rationale struck the court as "nearly verbatim language" to that deemed insufficient in *Liberty*. *See id.*

The district court recognized that under this Court's precedent, BOEM wasn't compelled to use the newer Stockholm methodology (even if the Agency was using it elsewhere) so long as the older methodology was still valid. *Friends of the Earth*, 2022 U.S. Dist. LEXIS 15172, at

*48–50 (citing *Theodore Roosevelt*, 616 F.3d at 392). But it considered BOEM's method here *invalid*, because—according to the court—Lease Sale 257's ROD employed the same methodological assumption in its market simulation that *Liberty* and *Willow* rejected. *See id.* at *50 ("In contrast, excluding the reduction in foreign consumption emissions was not a reasonable methodology at the time of the preparation of the original … Report, and BOEM provided no reasons even in the Addendum to think that it was. And by the time the second Record of Decision was released, BOEM had been informed of that problem by not one but two different courts."). The district court based its decision solely on *Liberty* and *Willow*. It shouldn't have.

First, *Willow*'s internal incoherence undermines whatever persuasive value it might otherwise possess. It purported to follow *Liberty* while rejecting the "more thorough explanation" presented by the agency in response to *Liberty*. Perhaps, too, *Willow* typifies the arbitrary, standardless judicial decisionmaking generated by *Liberty*'s "not good enough" NEPA approach. The district court seemed to glean from those cases that the assumption used in BOEM's MarketSim model is *per se* invalid. But neither *Liberty* nor *Willow* say that.

Second, as discussed more, *infra*, those cases were evaluating NEPA reviews for more imminent oil extraction projections. Lease Sale 257 is just that—a sale. At this stage in the OSCLA process, NEPA doesn't require BOEM to reasonably forecast at such a granular level.[39]

Finally, even under *Liberty*'s malleable standard, BOEM's decision here wasn't arbitrary and capricious. It sufficiently explained its conclusions: (1) emissions increases would follow from the need to substitute foreign-produced oil for the American oil that wouldn't be produced under the leases—meaning more carbon-intensive extraction and transportation; and (2) coal—more carbon-intensive than oil—would substitute for some of this lost American oil production. *See Friends of the Earth*, 2022 U.S. Dist. LEXIS, at *30. Conversely, BLM in *Willow* only discussed its decision not to estimate foreign greenhouse gases emissions in response to public comments. *Sovereign Iñupiat for a Living Arctic*. 555 F. Supp.3d at 764 n.126.

B. BOEM at this stage was not required to assess downstream climate effects.

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[39] Even *Willow*, warts and all, recognized the critical distinction between the "leasing" stage (at issue here) and subsequent stages that implicate actual operations and development. *Willow*, 555 F. Supp.3d at 757 n.73.

OSCLA's text and purpose and this Court's precedents demonstrate that BOEM's NEPA analysis passes muster. Under NEPA, BOEM need not gather the elaborate scientific data mandated by the district court. To be sure, NEPA requires that agencies take a "hard look" at potential environmental impacts. *Sierra Club*, 867 F.3d at 1367. But that examination remains just a look—not a dissertation. The Agency's analysis must only be "reasonable and adequately explained." *Id.* at 1368. Particularly at the leasing stage, BOEM cleared that hurdle.

When Congress amended OCSLA in 1978, it declared the policy of the United States to be that "the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. § 1332(3). "In order to ensure the expeditious but orderly development of OCS resources, OCSLA provides that Interior undertake a four-stage process in order to develop an offshore oil well." *Ctr. for Biological Diversity v. United States DOI*, 563 F.3d 466, 472–73 (D.C. Cir. 2009) (cleaned up). Since OCSLA's leasing program involves a multi-

stage process, BOEM, likewise, utilizes a tiered NEPA process. *See Friends of the Earth v. Haaland*, 2022 U.S. Dist. LEXIS 15172, at *9.

BOEM's regulations require environmental reviews at each stage of the lease process—which makes sense given that it keeps the process manageable for agencies. *See Metro. Edison Co.*, 460 U.S. at 776. For example, at the development and production stage of the process, lessees must submit detailed plans and BOEM must review plans for compliance with federal law and specific environmental concerns. *See* 30 C.F.R. §§ 550.201-02. "This multi-tiered approach was designed to forestall premature litigation regarding adverse environmental effects that … will flow, if at all, only from the latter stages of OCS exploration and production." *Ctr. for Biological Diversity*, 563 F.3d at 473 (quotations omitted). That's why "the amount and specificity of information necessary to meet NEPA requirements varies at each of OCSLA's stages." *Tribal Vill. of Akutan v. Hodel*, 869 F.2d 1185, 1191-92 (9th Cir. 1988) (citing *Secretary of the Interior v. California*, 464 U.S. 312 (1984)); *see also Wilderness Soc'y. v. Salazar*, 603 F. Supp. 2d 52, 60 (D.D.C. 2009) ("[I]n the context of …[OCSLA] leasing, courts have acknowledged that the limited

information available at the leasing stage necessarily limits the scope of the environmental analysis.").

At the lease stage, NEPA doesn't require consideration of far-reaching downstream consequences. In *North Slope Borough v. Andrus*, 642 F.2d 589, (D.C. Cir. 1980), this Court declared that:

> The lease sale phase of the OCS project here under review presents a record of facts and doubts that have not yet fully matured. The awful prospect of a major oil spill--the worst case--is far removed from categorical relevance at this stage. Drilling for commercial quantities of oil is in all likelihood at least two years away, even under a turn of events most favorable to the government and the oil companies. Uncertainty over remote hazards can be rectified as more information is collected: where the oil is discovered and how much of it there is are crucial factors that will instruct the Secretary in his developing view of costs and benefits. It is more logical and efficient to ask certain questions when the truth of their premises is unveiled.

Id. at 605–06. The same reasoning applies with equal force here. *See Defs. of Wildlife v. Bureau of Ocean Energy Mgmt., Regulation & Enf't*, 871 F. Supp. 2d 1312, 1336 (S.D. Ala. 2012).

The district court disagreed, saying that "[a] site-specific environmental assessment may be preferable for certain environmental impacts, such as the risk of oil spills … but it is only at the lease sale stage that the agency can adequately consider cumulative effects of the lease sale

on the environment, including … the effects of the sale on climate change." *Friends of the Earth*, 2022 U.S. Dist. LEXIS 15172, at *25 (cleaned up). The court below didn't distinguish *North Slope*, it simply invoked, again, a Ninth Circuit case it found more agreeable—*Native Vill. of Point Hope v. Jewell*, 740 F.3d 489 (9th Cir. 2014).

But *Point Hope* isn't a silver bullet by any means. First, *Point Hope* concluded the agency underestimated the adverse environmental impact of the lease sale because it used an unrealistically low estimate of the number of barrels of economically recoverable oil. *Id.* at 495–96. But the amount of recoverable oil *in a specific lease* is directly relevant to the NEPA analysis at the project stage and not part of a "downstream" analysis. That's quite different from estimating the downstream emissions of other countries in the unknown future. Second, and importantly, *Point Hope* determined that information missing from the EIS wan't "essential" to informed decisionmaking at the lease sale stage. *Id.* at 498. Indeed, "further environmental analysis [would] be appropriate at a later stage." *Id.* That's completely consistent with BOEM's decision here. *North Slope* controls. *Point Hope* does not.

Finally, the district court recognized that BOEM's assumption in the MarketSim model deserved substantial deference but nevertheless ruled against BOEM. The court correctly acknowledged that BOEM possesses significant experience in economic forecasting even if that falls outside its traditional bailiwick. *Friends of the Earth*, 2022 U.S. Dist. LEXIS 15172, at *35 (citing *Delta Air Lines, Inc. v. Exp.-Imp. Bank of United States*, 85 F. Supp. 3d 436, 462 (D.D.C. 2015). That, however, made no difference in the outcome—BOEM was dinged for excluding foreign consumption in its emissions analysis. Perhaps most obviously, this last maneuver exemplifies how courts have reinvented NEPA's requirements and inserted themselves into the environmental policymaking process. If the district court is right, then courts can simply commandeer NEPA's intended process and dictated specific processes and outcomes.

CONCLUSION

It's time to stop moving the NEPA goalposts. The cottage industry of NEPA challengers—like Plaintiffs here—have upended national policy properly fixed by the Nation's policymaking body, Congress. Too many courts have facilitated this green coup. This Court can help reverse that trend by reversing the district court in this case. BOEM's analysis was

perfectly acceptable at the lease stage. Lease Sale 257 should move forward, without further delay.

Respectfully submitted this 13th day of June, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, Christian Corrigan, an employee in the Office of the Attorney General of the Montana, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,382 words, excluding the parts of the document exempted by Rule 32(f), and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and corresponding local rules.

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