ORAL ARGUMENT NOT YET SCHEDULED
Nos. 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, et al.,
Defendants-Appellees,

STATE OF LOUISIANA AND AMERICAN PETROLEUM INSTITUTE,
Intervenors-Defendants-Appellants.

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

AMICUS BRIEF OF WASHINGTON, DELAWARE, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW YORK, RHODE ISLAND, AND VERMONT IN SUPPORT OF APPELLEES FRIENDS OF THE EARTH, ET AL. AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. **Parties and Amici**

The Brief for Intervenor-Appellant American Petroleum Institute (Institute) lists all parties, intervenors, and amici appearing in the district court. All parties, intervenors, and amici appearing in this Court are listed in the Briefs for the Institute and the State of Louisiana, the Brief for Federal Appellees, and Appellees Friends of the Earth et al.'s Brief, except for amici Bayou City Waterkeeper, San Antonio Bay Estuarine Waterkeeper, Society of Native Nationals, Surfrider Foundation, and Turtle Island Restoration Network, and the Institute for Policy Integrity and the amici joining this brief: the States of Washington, Delaware, Illinois, Maine, Maryland, Minnesota, New York, Rhode Island, and Vermont, and the Commonwealth of Massachusetts.

B. **Rulings Under Review**

References to the ruling at issue appear in the Institute's Brief.

C. **Related Cases**

There are no related cases within the meaning of Circuit Rule 28(a)(1)(c).

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GLOSSARY

IPCC	Intergovernmental Panel on Climate Change
NEPA	National Environmental Policy Act
Offshore Act	Outer Continental Shelf Lands Act
USGCRP	United States Global Change Research Program

I. STATE AMICI INTERESTS

Amici States file this amicus brief in support of Plaintiffs-Appellees Friends of the Earth to protect Amici States' residents and natural resources from climate harms and to ensure that federal agencies fully comply with our nation's bedrock environmental law, the National Environmental Policy Act (NEPA). Large-scale fossil fuel projects—like challenged Lease Sale 257 authorized by the Bureau of Ocean Energy Management (Bureau), the largest offshore oil and gas lease sale in United States history—threaten to exacerbate climate change and harm Amici States' public health, environment, and natural resources. Detailed and transparent environmental review under NEPA helps to reduce these harms by ensuring that federal agencies analyze, disclose, and potentially mitigate the climate impacts of their actions.[1]

A. Amici States Seek to Protect Their Residents' Public Health and Natural Resources from Harms Caused by Climate Change.

Federal actions authorizing large-scale fossil fuel projects that lead to greenhouse gas emissions, including Lease Sale 257, impact Amici States' interests in protecting their residents, environment, and natural resources from

[1] Amici States file this amicus brief pursuant to Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29(b). This amicus brief addresses only the merits issues before the Court. It does not address the pending jurisdictional questions, including the impact of the Inflation Reduction Act of 2022, Pub. Law No. 117-169, on this litigation.

climate change harms. *See Massachusetts v. Env't'l Prot. Agency*, 549 U.S. 497, 518-23 (2007). Carbon dioxide, largely produced by combustion of fossil fuels, is the largest driver of climate change.[2] Climate change has devastating and increasing impacts on Amici States and their residents, including larger and more intense wildfires, extreme flooding, unprecedented drought, more severe storms, deadly heat waves, and adverse public and mental health impacts.[3] These "[e]xtreme weather events and other climate-related effects have harmed the health, safety, and security of the American people and have increased the urgency for combatting climate change and accelerating the transition toward a clean energy economy." Executive Order 13990: Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037, 7041 (Jan. 25, 2021). Climate change causes disproportionate harms

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[2] *See* U.S. Global Change Research Program, 2017: *Climate Science Special Report: Fourth National Climate Assessment, Volume I* [D.J. Wuebbles *et al.* (eds.)], U.S. Global Change Research Program, Washington, DC, USA 80-84 (USGCRP 2017).

[3] *Id.* at 17-22; *See also* Intergovernmental Panel on Climate Change, 2021: *Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [V. Masson-Delmotte, *et al.* (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA 18-9 (IPCC 2021a); *See also* Nick Watts *et al.,* The 2020 report of the Lancet Countdown on health and climate change: responding to converging crises, 397 The Lancet 129; 134-42; 155-57 (2021).

to overburdened communities and disadvantaged populations, and those disparities in turn harm state interests. *See, e.g.*, Wash. Rev. Code 70A.02.005-010 (discussing Washington's interest in reducing disparate environmental health impacts, including from climate change). As the Environmental Protection Agency recently explained, people "who are already vulnerable due to a range of social, economic, historical and political factors have a lower capacity to prepare for, cope with, and recover from climate change impacts." Env'tl Prot. Agency, Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts, at 9 (Sept. 2021). Because reasonably foreseeable emissions from Lease Sale 257 will contribute to climate change, Amici States have an interest in this action.

B. Amici States Seek to Ensure that Federal Agencies Fully Disclose the Climate Impacts of Major Fossil Fuel Projects in NEPA Reviews.

Amici States also have a substantial interest in ensuring that federal agencies fully comply with their NEPA obligations by analyzing and disclosing the climate impacts of major fossil fuel projects. Such transparency provides Amici States and the public in their jurisdictions with valuable information about the environmental and public health costs of fossil fuel projects. The district court's decision advanced these interests by holding that the Bureau violated

NEPA when it ignored reasonably foreseeable foreign emissions in its analysis of climate change impacts from Lease Sale 257.

The district court's holding is particularly significant to Amici States because federal agencies have applied the same inadequate and unlawful analysis of climate impacts used by the Bureau in Lease Sale 257 to environmental reviews for other oil and gas leasing decisions. Several Amici States have challenged one of those reviews, the Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program in the Arctic National Wildlife Refuge, as unlawful under NEPA. *See* Compl. for Declaratory and Injunctive Relief, *Washington v. Haaland*, No. 3:20-cv-00224 (D. Alaska, Sept. 9, 2020), ECF No. 1.[4] Amici States have a strong interest in ensuring that federal agencies, including the Bureau,[5] do not continue to apply that same unlawful analysis in their NEPA reviews.

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[4] The States' lawsuit has been stayed while the Bureau of Land Management prepares a supplemental environmental impact statement. Order re Defs. Unopposed Mot. to Stay Proceedings, *Washington v. Haaland*, No. 3:20-cv-00224 (D. Alaska, Sept. 13, 2021), ECF No. 106.

[5] Lease Sale 257's authorization relied on the 2017-2022 Leasing Program programmatic environmental impact statement, the multisale environmental impact statement, and the 2018 supplemental environmental impact statement, each of which applied the same flawed climate impacts analysis. *See* Joint Appendix (JA) JA286-87, JA303 [Memorandum Opinion (Mem. Op.) 6-7, 23, ECF No. 78]. The Bureau has indicated that it may apply these unlawful environmental reviews to authorize future actions in the 2017-2022 Leasing

II. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici States respectfully ask the Court to affirm the district court's decision that the Bureau violated NEPA by excluding critical information about changes in foreign demand for oil and the associated impacts on greenhouse gas emissions from its environmental analysis.

The Bureau's failure to conduct a rational analysis of climate impacts violated NEPA's requirement that agencies make informed decisions and frustrated NEPA's goal of environmental protection. NEPA requires all federal agencies to conduct thorough environmental reviews that analyze reasonably foreseeable environmental consequences before authorizing actions. *See* 42 U.S.C. § 4332; *see also* former 40 C.F.R. §§ 1508.7, 1508.8 (2019).[6] Through this process, NEPA advances environmental protection by ensuring agencies make informed decisions and, where appropriate, amend their actions to better protect public health, avoid long-term, irreversible, and costly environmental

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Program as part of a "tiered" environmental review process that incorporates prior environmental reviews at other stages of the Program. *Id*. at JA286-87.

[6] The Council on Environmental Quality substantially revised its NEPA regulations in 2020, 85 Fed. Reg. 43,304, 43,357-76 (July 16, 2020) (codified at 40 C.F.R. pt. 1500–1508 (2021)), and made additional revisions in April 2022, *see* 87 Fed. Reg. 23,453, 23,469-70 (Apr. 20, 2022) (codified at 40 C.F.R. pts. 1502.13, 1507.3, 1508.1 (2022)). However, because the NEPA review at issue in this action began before these regulatory changes, the 2019 regulations govern the challenged action and are cited in this brief.

harms, and preserve irreplaceable natural resources for current and future generations. Understanding a project's environmental impacts under NEPA requires agencies to thoroughly examine the project's climate impacts, including reasonably foreseeable indirect impacts on foreign greenhouse gas emissions. The Bureau's failure to conduct that analysis here was unlawful.

Intervenors-Appellants American Petroleum Institute (Institute) and Louisiana wrongly contend that the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (Offshore Act), limits NEPA's mandate to consider reasonably foreseeable indirect effects, and instead allows the Bureau to ignore effects on foreign greenhouse gas emissions despite their importance to understanding the climate impacts of the Bureau's leasing decision. The Court should reject these efforts to constrain NEPA, which lack support in the Offshore Act and this Court's precedent and conflict with NEPA's plain language.

III. ARGUMENT

A. This Court Should Affirm the District Court's Holding that NEPA Requires Detailed Consideration of an Action's Climate Impacts, Including Foreign Greenhouse Gas Emissions.

The district court correctly held that the Bureau violated NEPA by ignoring information critical to its analysis of Lease Sale 257's climate impacts. Climate change is altering our environment in profound ways. It is now clear that the increase in atmospheric greenhouse gases caused by human activities is

the main driver of harmful changes to our climate.[7] Lease Sale 257, and the 2017-2022 Leasing Program as a whole, could significantly affect foreign oil consumption and the resulting greenhouse gas emissions. The Bureau's failure to consider the impacts of lease sales on foreign emissions rendered its NEPA analysis inadequate. This Court should affirm the district court's determination that NEPA requires federal agencies to fully consider the reasonably foreseeable climate impacts of a proposed action, including reasonably foreseeable effects on foreign greenhouse gas emissions.

1. NEPA's policy of environmental protection through informed decision-making mandates detailed consideration of world-wide and long-range problems like climate change and related greenhouse gas emissions.

In passing NEPA, Congress declared a federal policy of environmental protection through detailed environmental review and informed decision-making. 42 U.S.C. §§ 4331, 4332. To advance this policy, NEPA directs agencies to analyze "any adverse environmental effects which cannot be avoided," 42 U.S.C. § 4332(2)(C)(ii); to evaluate "alternatives to the proposed action," including a no-action alternative, *id*. § 4332(2)(C)(iii); to consider "the

[7] *See* Intergovernmental Panel on Climate Change, 2021: *Technical Summary. In Climate Change 2021: The Physical Science Basis, Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [P. Arias *et al.*, (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA 41 (IPCC 2021b).

relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity," *id*. § 4332(2)(C)(iv); and to "recognize the worldwide and long-range character of environmental problems," *id*. § 4332(2)(F). NEPA's "action-forcing" provisions advance environmental protection by requiring agencies to examine and disclose the environmental and public health impacts of their actions and, where appropriate, to adjust those actions to avoid or minimize environmental and public health harms. *See Andrus v. Sierra Club*, 442 U.S. 347, 350-51 (1979) ("If environmental concerns are not interwoven into the fabric of agency planning, the 'action-forcing' characteristics of § 102(2)(C) would be lost …"); *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1113 (D.C. Cir. 1971) ("In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not.").

Reasonably foreseeable climate impacts, including an action's impacts on greenhouse gas emissions, fall squarely within NEPA's purview. Such impacts are not only the type of "worldwide and long-range" environmental problems that NEPA directs agencies to consider, 42 U.S.C. § 4332(2)(F), but they are also essential to realizing NEPA's core mandate of informed decision-making, *id*. § 4332(2)(C). As the Council on Environmental Quality, the federal agency

tasked with promulgating regulations under NEPA, recently explained: "An agency decision maker can make a more informed decision about how a proposed action aligns with the agency's statutory authorities and policies when she has information on the comparative potential air pollution effects and greenhouse gas emissions of the proposed alternatives, including the no action alternative." Council on Env'tl Quality, NEPA Implementing Regulations Revisions, 87 Fed. Reg. 23,453, 23,467 (Apr. 20, 2022). Similarly, this Court has observed that it is "difficult to see" how informed decision-making is possible under NEPA without an adequate quantification of reasonably foreseeable emissions. *See Sierra Club v. Federal Energy Regul. Comm'n*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (*Southeast Market*). Among other things, such "[q]uantification would permit the agency to compare the emissions from this project to emissions from other projects, to total emissions from the state or the region, or to regional or national emissions-control goals." *Id*.

Applied here, NEPA's informed decision-making mandate compels a detailed and accurate analysis of Lease Sale 257's climate and emission impacts as compared to the no-action alternative. As the district court noted, the Bureau acknowledged as much in the challenged environmental review by repeatedly "emphasiz[ing] the importance of climate change to the agency's decision and

the relevance of lifecycle greenhouse gas emissions to U.S. efforts to combat it." JA309 [Mem. Op. 29]. Disclosing such information through the environmental review process also ensures that Amici States and the public fully understand Lease Sale 257's impacts on state and federal efforts to reduce greenhouse gas emissions and mitigate climate harms. Indeed, as the district court observed, "there is little doubt that a more complete consideration of total greenhouse gas emissions would have significantly informed [the Bureau's] decision." *Id*.

2. The district court properly concluded that NEPA required the Bureau to consider impacts on total greenhouse gas emissions as reasonably foreseeable indirect effects of its leasing decisions.

The district court's decision aligns with NEPA's requirement that agencies must consider reasonably foreseeable indirect impacts of their decisions in an environmental impact statement. *Southeast Market*, 867 F.3d at 1371, 1374. Indirect effects of an action are those that occur "later in time or farther removed in distance, but are still reasonably foreseeable." Former 40 C.F.R. § 1508.8 (2019). "Effects are reasonably foreseeable if they are sufficiently likely to occur that a person of ordinary prudence would take them into account in reaching a decision." *Southeast Market*, 867 F.3d at 1371 (cleaned up). If the nature of greenhouse gas emissions are reasonably foreseeable and it is feasible to quantify them, then an agency must do so or

explain why it cannot. *Id.* at 1374. As the Council on Environmental Quality recently explained, "air pollution, including greenhouse gas emissions, released by fossil fuel combustion is often a reasonably foreseeable indirect effect of proposed fossil fuel extraction that agencies should evaluate in the NEPA process, even if the pollution is remote in time or geographically remote from a proposed action." Council on Env'tl Quality, NEPA Implementing Regulations Revisions, 87 Fed. Reg. at 23,466-67.

In this case, changes in foreign emissions resulting from oil consumption constitute a reasonably foreseeable indirect impact of the action. Climate change is a worldwide problem. Once emitted, greenhouse gases remain in the atmosphere and become well mixed, or relatively evenly distributed across the globe. For example, carbon dioxide, the major greenhouse gas produced by combustion of fossil fuels, can persist in the atmosphere for "many decades to millennia."[8] Because of this global mixing, increased greenhouse gas emissions anywhere contribute to climate change effects worldwide. Env'tl Prot. Agency, Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,514 (Dec. 15, 2009). And climate change effects are cumulative because each incremental ton

[8] USGCRP 2017, *supra* n.2, at 81.

of greenhouse gases emitted adds to the effect of those already in the atmosphere.[9]

Just as climate change leads to global harms, fossil fuels are produced, sold, and consumed as part of a global market.[10] Oil, in particular, is widely traded among countries.[11] As a result, constraining oil supply anywhere impacts overall oil consumption by increasing prices in the global market, thereby reducing demand and consumption.[12] The Stockholm Environmental Institute studied how a halt to fossil fuel leasing on federal lands would affect global oil consumption and greenhouse gas emissions, and concluded that net global oil consumption would be reduced by 0.44 units for every unit of oil not produced from U.S. federal lands.[13] Even after accounting for substitution of some forgone oil production by other energy sources, a large reduction in global carbon dioxide emissions would result.[14] In other words, forgoing major new oil development in the United States can reduce oil consumption and thus emissions globally,

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[9] IPCC 2021a, *supra* n.3, at 28.

[10] JA647 [AR26935] (Erickson, P. and M. Lazarus (2016), *How would phasing out U.S. federal leases for fossil fuel extraction affect CO2 emissions and 2 °C goals?*, Stockholm Environmental Institute, Seattle, WA, USA at 23).

[11] *Id*.

[12] JA647-48 [AR26935-36] (*Id.* at 23-24).

[13] JA648-49 [AR26936-37] (*Id.* at 24-25).

[14] *Id*.

making such changes in global emissions a reasonably foreseeable effect of leasing. *See Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 736 (9th Cir. 2020) (*Liberty*) ("If oil is produced from [the project], the total supply of oil in the world will rise. Increasing global supply will reduce prices. Once prices drop, foreign consumers will buy and consume more oil."). Because these are reasonably foreseeable effects, NEPA required their consideration.

3. The district court properly concluded that the Bureau violated NEPA because it did not consider the reasonably foreseeable impacts of its leasing decision on foreign greenhouse gas emissions.

The district court correctly concluded that the Bureau arbitrarily and capriciously ignored reasonably foreseeable impacts on foreign emissions under the no-action alternative. JA318-19 [Mem. Op. 38-39].

a. The Bureau's own analysis demonstrates that a reasoned decision requires consideration of impacts on foreign emissions.

The Bureau arbitrarily excluded consideration of changes to foreign emissions from its analysis despite acknowledging that the no-action alternative would reduce foreign oil consumption. Specifically, the Bureau's analysis of the 2017-2022 Leasing Program found that the no-action alternative (i.e., no lease sales) would reduce foreign oil consumption over the duration of the Program by up to six billion barrels, depending on the price scenario used. *See* JA304

[Mem. Op. 24] (noting that the Bureau's model calculated a "substantial decrease" in foreign oil consumption for the no-action alternative). Given the reasonable foreseeability that reducing foreign oil consumption would also reduce foreign greenhouse gas emissions under the no-action alternative, NEPA required the Bureau to evaluate those reasonably foreseeable impacts on foreign emissions in comparing alternatives. *See Liberty*, 982 F.3d at 738 ("Emissions resulting from the foreign consumption of oil are surely a 'reasonably foreseeable' indirect effect of drilling at *Liberty* …."). As the district court observed, consideration of the Leasing Program's reasonably foreseeable effects on total emissions "would have significantly informed [the Bureau's] decision." *See* JA309 [Mem. Op. 29]. But the Bureau did not perform that analysis.

Instead, despite acknowledging that the no-action alternative could decrease foreign oil consumption relative to the preferred alternative, the Bureau arbitrarily chose to ignore the resulting effects on greenhouse gas emissions when analyzing the 2017-2022 Leasing Program's reasonably foreseeable climate impacts. The Bureau thus gave the erroneous impression that the no-action alternative would actually result in greater climate impacts than the preferred alternative. *See* JA318-19 [Mem. Op. 38-39] ("The problem is that considering foreign consumption likely does change the bottom line of a key

conclusion in the prior [environmental impact statements]: That greenhouse gas emissions if the Lease Sale Programs were held 'would be similar to but slightly lower than the No Action Alternative ….'"). As a result, the Bureau engaged in an irrational analysis that ignored key variables and violated NEPA's requirement that agencies and the public be fully informed of the indirect effects of federal actions. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); 42 U.S.C. § 4332(2)(C); former 40 C.F.R. § 1508.8 (2019).

b. The district court's decision aligns with case law.

Other courts have held that the Bureau violated NEPA when it did not analyze a project's reasonably foreseeable indirect effects on foreign greenhouse emissions. On a similar record that employed the same flawed analysis, the Ninth Circuit and the District of Alaska both held that federal agencies violated NEPA by arbitrarily failing to consider reasonably foreseeable impacts on foreign greenhouse gas emissions. *Liberty*, 982 F.3d at 740 (holding that the Bureau violated NEPA by failing to consider reasonably foreseeable foreign emissions); *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, 555 F.Supp.3d 739, 765 (D. Alaska 2021) (*Willow*) (applying *Liberty* and holding that agency

violated NEPA by failing to estimate foreign greenhouse gas emissions or to explain why it could not do so).

The district court's decision aligns with a growing body of cases holding that NEPA requires agencies to analyze the reasonably foreseeable emissions of proposed actions. This Circuit and numerous other courts, including the Eighth, Ninth, and Tenth Circuits, have invalidated NEPA analyses that failed to rationally evaluate a proposed action's effects on reasonably foreseeable emissions. *See Liberty*, 982 F.3d at 740; *WildEarth Guardians v. Bureau of Land Mgmt.*, 870 F.3d 1222, 1228-30, 1235-38 (10th Cir. 2017) (holding that agency violated NEPA when it concluded that coal leasing would not impact consumption or emissions based on an irrational economic assumption); *Southeast Market*, 867 F.3d at 1374 (holding that agency violated NEPA by failing to consider reasonably foreseeable greenhouse gas emissions produced by burning gas transported by pipeline); *Mid States Coal. For Progress v. Surface Trans. Bd.*, 345 F.3d 520, 549-50 (8th Cir. 2003) (holding that agency's air quality and emissions analysis violated NEPA when it relied on illogical economic assumption); *Willow,* 555 F. Supp. 3d at 765.

c. The Institute and Louisiana misread case law in arguing that the Bureau did not need to consider changes in foreign emissions.

To avoid the requirements of these settled decisions applying NEPA, the Institute and Louisiana advance inapposite case law and flawed readings of *Liberty* and *Willow*. First, the Institute and Louisiana unsuccessfully attempt to distinguish *Liberty* and *Willow* as involving later stages in oil and gas development than the leasing at issue here, and therefore argue that analysis of reasonably foreseeable changes in foreign emissions is unnecessary at this stage. Institute Br. 29-30; Louisiana Br. 17-18. But, as shown above, changes in foreign emissions are reasonably foreseeable at the leasing stage. If the Court were to adopt the Institute and Louisiana's limited view of these cases and NEPA's requirements, it would incorrectly restrict NEPA's scope to only impacts that directly result from the project stage at issue, conflicting with NEPA's requirements to consider indirect and cumulative effects and allowing agencies to ignore critical information about the reasonably foreseeable climate impacts of their actions. *See* former 40 C.F.R. §§ 1508.7; 1508.8 (2019).

The Institute and Louisiana's heavy reliance on *North Slope Borough v. Andrus*, 642 F.2d 589, 606 (D.C. Cir. 1980), is also misplaced. Institute Br. 27-30; Louisiana Br. 10-16. That case does not suggest that the Bureau can ignore

reasonably foreseeable changes in foreign emissions in its environmental analysis of Lease Sale 257 and the 2017-2022 Leasing Program. *North Slope Borough* held only that the worst-case analysis performed by the Bureau in the challenged environmental impact statement did not violate NEPA given uncertainty about certain impacts. 642 F.2d at 605-06. *North Slope Borough* does not allow the Bureau to "shirk its responsibility to consider all foreseeable direct and indirect impacts of the proposed action" at the earliest possible time in the leasing process. *See Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 493-94, 504-05 (9th Cir. 2014) (cleaned up) (rejecting the Bureau's contention that it could correct deficiencies in the lease sale environmental impact statement later in the leasing process). To the contrary, this Court recently held that consideration of broad environmental impacts like climate impacts is important at the Offshore Act's leasing stage because only then can the Bureau "look ahead and assimilate broad issues relevant to the program overall." *Gulf Restoration Network v. Haaland*, 47 F.4th 795, 804 (D.C. Cir. 2022).

d. The Bureau can analyze impacts on foreign emissions on this record.

The Bureau has the tools to perform that analysis here. Contrary to the arguments raised by the Institute, Institute Br. 34-35, the record in this case demonstrates the feasibility of a reasoned analysis of foreign greenhouse gas

emissions. *See* JA311-12 [Mem. Op. 31-32]. And the Bureau has since accounted for foreign greenhouse emissions in its subsequent analysis of the next lease sale—Lease Sale 258. *See* JA316 [Mem. Op. 36] ("Undercutting [the Bureau's] argument that it could not have calculated the emissions resulting from changes to foreign consumption is the fact that it did exactly that just a few weeks later …. in the [d]raft [environmental impact statement] for the next proposed lease sale (258)."). The fact that the Bureau had the information it needed to estimate effects on foreign emissions distinguishes this case from *Sierra Club v. U.S. Department of Energy*, where the agency lacked adequate information to estimate how gas exports would impact energy consumption and use of other energy sources, such as nuclear power and renewables, in foreign countries. 867 F.3d 189, 202 (D.C. Cir. 2017).

B. Neither the Offshore Act Nor National Energy Concerns Provide a Basis to Restrict Analysis of Foreign Greenhouse Gas Emissions Under NEPA.

The other arguments advanced by Louisiana, the Institute, and amici in support of them to limit NEPA's application should be rejected because they conflict with the Offshore Act, this Court's precedent, and NEPA's plain language.

1. The Offshore Act does not limit the Bureau's obligation to consider impacts on global emissions under NEPA.

Contrary to the Institute's contention, Institute Br. 30-33, the Offshore Act does not forbid the Bureau from considering global greenhouse gas emissions as required by NEPA. In the absence of a "clear conflict of statutory authority," an agency must fully comply with NEPA's requirements. *Calvert Cliffs*, 449 F.2d at 1114, 1125 (italics omitted). The text of the Offshore Act presents no such "clear conflict." *Id*. Rather, it specifically contemplates NEPA's application to management of the Outer Continental Shelf.

Several provisions of the Offshore Act demonstrate Congress's intent to complement, not override, NEPA. Most explicitly, the Offshore Act provides that "[e]xcept as otherwise expressly provided in this chapter, nothing in this chapter shall be construed to amend, modify, or repeal any provision of … the National Environmental Policy Act of 1969." 43 U.S.C. § 1866(a). The Offshore Act also contains several direct references to the NEPA process in the management of the Outer Continental Shelf. *See* 43 U.S.C. § 1344(b)(3) (leasing program to include cost estimate for any environmental impact statements required by NEPA); *id.* § 1344(g) (Secretary may obtain information to assist in preparing an environmental impact statement); *id.* § 1351(f) (directing Secretary to transmit draft environmental impact statement for development and

production plan to governors of affected states); *id.* § 1351(h)(1) (Secretary's review of environmental impact statement prepared under NEPA); *id.* § 1351(k) (Secretary and Federal Energy Regulatory Commission to determine which agency shall prepare environmental impact statement for natural gas production and development plan). And the Offshore Act directly instructs the Secretary of the Interior to manage the Outer Continental Shelf in a manner "which considers economic, social, and environmental values [of Outer Continental Shelf resources] and the potential impact of oil and gas exploration on other resource values of the Outer Continental Shelf and the marine, coastal, and human environments." 43 U.S.C. § 1344(a)(1); *see also id.* § 1346 (discussing Secretary's obligations to conduct environmental studies). Together, these repeated references to NEPA show harmony, not conflict between NEPA and the Offshore Act. This Court's precedents, which recognize NEPA's application to and environmental considerations in the Offshore Act, bolster that conclusion. *See Gulf Restoration Network*, 47 F.4th at 799-804 (reviewing the Bureau's NEPA compliance at lease-sale stage); *Ctr. for Sustainable Economy v. Jewell (Jewell)*, 779 F.3d 588, 593 (D.C. Cir. 2015) (explaining that Congress amended the Offshore Act in part to respond to "intensifying awareness of the need for environmental safeguards") (citing 43 U.S.C. § 1802); *North Slope Borough*,

642 F.2d at 598-604 (reviewing the Bureau's NEPA compliance at lease-sale stage).

The Institute nevertheless contends that this Court's narrow decision in *Center for Biological Diversity v. U.S. Dep't of the Interior* bars the Bureau from considering global greenhouse gas emissions. Institute Br. 31-33. But the Institute reads *Center for Biological Diversity* too broadly. *Center for Biological Diversity* held only that the Offshore Act itself does not require the Bureau to consider global effects before approving a leasing program, not that the Bureau is prohibited from doing so. C*tr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 484-85 (D.C. Cir. 2009). *Center for Biological Diversity* also does not address what NEPA requires in this context because that issue was not before the Court. *Id.* at 480-82.

The Institute's position also conflicts with this Court's more recent decision in *Jewell* describing the narrow scope of *Center for Biological Diversity's* holding. In *Jewell*, this Court explained that *Center for Biological Diversity* "concluded that [the Offshore Act] was sufficiently ambiguous to permit Interior to forgo consideration of climate-related effects of burning [Outer Continental Shelf]-derived fossil fuels, and to allow Interior to limit its consideration of the environmental impact of Outer Continental Shelf leasing."

Jewell, 779 F.3d at 608 n.11. *Jewell* went on to hold that Interior's consideration, on a national scale, of environmental impacts and costs of a Leasing Program was "neither expressly proscribed by [the Offshore Act] nor unreasonable." *Id.* at 604-07 (rejecting argument "that environmental effects that do not occur in any [Outer Continental Shelf] area should be treated as irrelevant to Interior's environmental calculus under [the Offshore Act]."). Nothing in *Jewell* suggests that either *Center for Biological Diversity* or the Offshore Act *restricts* the Bureau's authority to consider global greenhouse gas emissions in evaluating lease sales. By misreading *Center for Biological Diversity*, the Institute argues for a prohibition that lacks support in statute or precedent.

The Institute also misreads *Southeast Market*. Rather than excusing the Bureau's failure to properly consider foreign emissions, *Southeast Market* explained that where agencies have "legal authority" to "mitigate" adverse environmental effects, they must consider those effects in their NEPA reviews. *Southeast Market*, 867 F.3d at 1374. Because the Bureau has authority to mitigate the Leasing Program's impacts on foreign emissions and the obligation to consider environmental impacts generally, it was obligated to consider those emissions here. *See Liberty*, 982 F.3d at 740 ("[The Bureau] has the statutory authority to act on the emissions resulting from foreign oil consumption.");

supra pp. 20-22 (discussing the Offshore Act provisions requiring consideration of environmental factors); 43 U.S.C. § 1337 (describing the Bureau's authority over offshore leases).

2. Constraining NEPA's application based on the Offshore Act or general national energy concerns conflicts with NEPA's text.

The Court should also reject efforts by Louisiana, the Institute, and amici in support of them to constrain NEPA's application either based on an erroneous reading of the Offshore Act or based on general energy concerns because those arguments conflict with NEPA's plain language. Congress directed that NEPA's key provisions requiring detailed environmental review and informed decision-making apply "to the fullest extent possible." 42 U.S.C. § 4332. This Court has long recognized that this statutory language mandates a broad application of NEPA and "establish[es] a strict standard of compliance" for federal agencies. *See Calvert Cliffs*, 449 F.2d at 1112, 1115. NEPA's plain language thus provides another basis for rejecting Louisiana and the Institute's arguments that the Offshore Act somehow constrains NEPA's broad mandate, when the Offshore Act says no such thing. *See supra* pp. 20-22.

NEPA's broad application also counters arguments made in the amicus brief filed by several States in support of Louisiana and the Institute, ECF No. 1950446, to constrain NEPA's application based on general concerns about what

those States deem a "national energy crisis." *See Calvert Cliffs*, 449 F.2d at 1122 ("Whether or not the spectre [sic] of a national power crisis is as real as the Commission apparently believes, it must not be used to create a blackout of environmental consideration in the agency review process."). NEPA applies even when agency actions implicate matters involving complex societal and political considerations. *See New York v. Nuclear Regul. Comm'n*, 681 F.3d 471, 483 (D.C. Cir. 2012) ("We recognize that the Commission is in a difficult position given the political problems concerning the storage of spent nuclear fuel. Nonetheless, the Commission's obligations under NEPA require a more thorough analysis …."). Here too, NEPA's broad mandate applies to the Bureau's environmental review of Lease Sale 257. This Court should "rigorously enforce[]" NEPA by holding that the Bureau must apply NEPA "to the fullest extent possible" in analyzing the reasonably foreseeable greenhouse gas emission and climate impacts of its leasing decisions. *See Calvert Cliffs*, 449 F.2d at 1114, 1115.

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IV. CONCLUSION

For these reasons, the Court should affirm the district court's decision.

RESPECTFULLY SUBMITTED this 14th day of December, 2022.

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This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because it contains 5,345 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: December 14, 2022

STATUTORY AND REGULATORY ADDENDUM

Except for the following, all applicable statutes and regulations are contained in the Brief for Intervenor-Appellant American Petroleum Institute, the Brief for Intervenor-Appellant the State of Louisiana, the Brief for Federal Appellees, the Brief for Appellees Friends of the Earth, and the Brief for Amici Bayou City Waterkeeper, et al.

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43 U.S.C. § 1802

Congressional declaration of purposes

The purposes of this chapter are to-

(1) establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade;

(2) preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition;

(3) encourage development of new and improved technology for energy resource production which will eliminate or minimize risk of damage to the human, marine, and coastal environments;

(4) provide States, and through States, local governments, which are impacted by Outer Continental Shelf oil and gas exploration, development, and production with comprehensive assistance in order to anticipate and plan for such impact, and thereby to assure adequate protection of the human environment;

(5) assure that States, and through States, local governments, have timely access to information regarding activities on the Outer Continental Shelf, and opportunity to review and comment on decisions relating to such activities, in order to anticipate, ameliorate, and plan for the impacts of such activities;

(6) assure that States, and through States, local governments, which are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the Outer Continental Shelf;

(7) minimize or eliminate conflicts between the exploration, development, and production of oil and natural gas, and the recovery of other resources such as fish and shellfish;

(8) establish an oil spill liability fund to pay for the prompt removal of any oil spilled or discharged as a result of activities on the Outer Continental Shelf

and for any damages to public or private interests caused by such spills or discharges;

(9) insure that the extent of oil and natural gas resources of the Outer Continental Shelf is assessed at the earliest practicable time; and

(10) establish a fishermen's contingency fund to pay for damages to commercial fishing vessels and gear due to Outer Continental Shelf activities.

(Pub. L. 95–372, title I, §102, Sept. 18, 1978, 92 Stat. 631.)

40 C.F.R. 1508.8

Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

RCW 70A.02.005

Purpose.(1) The purpose of this chapter is to reduce environmental and health disparities in Washington state and improve the health of all Washington state residents. This chapter implements the recommendations of the environmental justice task force established in section 221(48), chapter 415, Laws of 2019 entitled "Report to the Washington state governor and legislature, *Environmental Justice Task Force: Recommendations for Prioritizing EJ in Washington State Government* (October 2020)."

(2) As conveyed in the task force report, Washington state studies and national studies found that people of color and low-income people continue to be disproportionately exposed to environmental harms in their communities. As a result, there is a higher risk of adverse health outcomes for those communities. This risk is amplified when overlaid on communities with preexisting social and economic barriers and environmental risks, and creates cumulative environmental health impacts, which chapter 314, Laws of 2021 seeks to prevent and mitigate.

This chapter also seeks to reduce exposure to environmental hazards within Indian country, as defined in 18 U.S.C. Sec. 1151, due to off-reservation activities within the state, and to improve state practices to reduce contamination of traditional foods wherever they occur. Exposure to such hazards can result in generational health and ecological problems, particularly on small reservations where it is impossible to move away from a hazard.

(3) Accordingly, the state has a compelling interest in preventing and addressing such environmental health disparities in the administration of ongoing and new environmental programs, including allocation of funds, and in administering these programs so as to remedy the effects of past disparate treatment of overburdened communities and vulnerable populations.

(4) The task force provided recommendations to state agencies for measurable goals and model policies to reduce environmental health inequities in Washington, equitable practices for meaningful community involvement, and how to use the environmental health disparities map to identify and promote the equitable distribution of environmental benefits to overburdened communities. In order for all communities in Washington state to be healthy and thriving, state government should aim to concentrate government actions to benefit communities that currently have the greatest environmental and health burdens.

[**2021 c 314 § 1**.]

Wash. Rev. Code § 70A.02.010

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Council" means the environmental justice council established in RCW **70A.02.110**.

(2) "Covered agency" means the departments of ecology, health, natural resources, commerce, agriculture, and transportation, the Puget Sound partnership, and any agency that opts to assume all of the obligations of chapter 314, Laws of 2021 pursuant to RCW **70A.02.030**.

(3) "Cumulative environmental health impact" means the combined, multiple environmental impacts and health impacts on a vulnerable population or overburdened community.

(4) "Environmental benefits" means activities that:

(a) Prevent or reduce existing environmental harms or associated risks that contribute significantly to cumulative environmental health impacts;

(b) Prevent or mitigate impacts to overburdened communities or vulnerable populations from, or support community response to, the impacts of environmental harm; or

(c) Meet a community need formally identified to a covered agency by an overburdened community or vulnerable population that is consistent with the intent of this chapter.

(5) "Environmental harm" means the individual or cumulative environmental health impacts and risks to communities caused by historic, current, or projected:

(a) Exposure to pollution, conventional or toxic pollutants, environmental hazards, or other contamination in the air, water, and land;

(b) Adverse environmental effects, including exposure to contamination, hazardous substances, or pollution that increase the risk of adverse environmental health outcomes or create vulnerabilities to the impacts of climate change;

(c) Loss or impairment of ecosystem functions or traditional food resources or loss of access to gather cultural resources or harvest traditional foods; or

(d) Health and economic impacts from climate change.

(6) "Environmental health disparities map" means the data and information developed pursuant to RCW **43.70.815**.

(7) "Environmental impacts" means environmental benefits or environmental harms, or the combination of environmental benefits and harms, resulting or expected to result from a proposed action.

(8) "Environmental justice" means the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, rules, and policies. Environmental justice includes addressing disproportionate environmental and health impacts in all laws, rules, and policies with environmental impacts by prioritizing vulnerable populations and overburdened communities, the equitable distribution of resources and benefits, and eliminating harm.

(9) "Equitable distribution" means a fair and just, but not necessarily equal, allocation intended to mitigate disparities in benefits and burdens that are based on current conditions, including existing legacy and cumulative impacts, that are informed by cumulative environmental health impact analysis.

(10) "Evidence-based" means a process that is conducted by a systematic review of available data based on a well-established and widely used hierarchy of data in current use by other state and national programs, selected by the departments of ecology and health. The environmental justice council may provide input on the development of the process.

(11) "Overburdened community" means a geographic area where vulnerable populations face combined, multiple environmental harms and health impacts, and includes, but is not limited to, highly impacted communities as defined in RCW **19.405.020**.

(12) "Significant agency action" means the following actions as identified at the beginning of a covered agency's consideration of the significant agency action or at the time when an environmental justice assessment would normally be initiated in conjunction with an agency action:

(a) The development and adoption of significant legislative rules as defined in RCW **34.05.328**;

(b) The development and adoption of any new grant or loan program that a covered agency is explicitly authorized or required by statute to carry out;

(c) A capital project, grant, or loan award by a covered agency of at least $12,000,000 or a transportation project, grant, or loan by a covered agency of at least $15,000,000;

(d) The submission of agency request legislation to the office of the governor or the office of financial management for approval; and

(e) Any other agency actions deemed significant by a covered agency consistent with RCW **70A.02.060**.

(13) "Tribal lands" has the same meaning as "Indian country" as provided in 18 U.S.C. Sec. 1151, and also includes sacred sites, traditional cultural properties, burial grounds, and other tribal sites protected by federal or state law.

(14)(a) "Vulnerable populations" means population groups that are more likely to be at higher risk for poor health outcomes in response to environmental harms, due to: (i) Adverse socioeconomic factors, such as unemployment, high housing and transportation costs relative to income, limited access to nutritious food and adequate health care, linguistic isolation, and other factors that negatively affect health outcomes and increase vulnerability to the effects of environmental harms; and (ii) sensitivity factors, such as low birth weight and higher rates of hospitalization.

(b) "Vulnerable populations" includes, but is not limited to:

(i) Racial or ethnic minorities;

(ii) Low-income populations;

(iii) Populations disproportionately impacted by environmental harms; and

(iv) Populations of workers experiencing environmental harms.

[**2021 c 314 § 2**.]