No. 12-935

IN THE
Supreme Court of the United States

AMERICAN INDEPENDENCE MINES AND MINERALS CO., ET AL.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL MINING ASSOCIATION, THE AMERICAN FARM BUREAU FEDERATION, THE AMERICAN PETROLEUM INSTITUTE, THE NATIONAL ASSOCIATION OF HOME BUILDERS, AND THE AMERICAN FOREST RESOURCE COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the nation's largest business federation. It directly represents 300,000 members and indirectly represents the interests of over 3 million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases implicating issues of national concern to American business. Many of the Chamber's members are directly affected by the National Environmental Policy Act ("NEPA") and the costs it imposes on industry.

The National Mining Association ("NMA") has a membership of more than 300 corporations and organizations involved in various aspects of mining. NMA's mission is to build support for public policies that will help Americans fully and responsibly benefit from domestic coal and mineral resources. NMA seeks to engage in and influence the public process on the most significant and timely issues that impact mining's ability to safely and sustainably locate, permit, mine, transport, and utilize the

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[1] Counsel of record for all parties received timely notice of *amici curiae*'s intent to file this brief. A letter from Petitioners consenting to the filing of this brief is on file with the Clerk. A letter from Respondent consenting to the filing of this brief accompanies this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

nation's vast resources. NMA and its members who mine on or near federal land are often directly impacted by regulation under NEPA.

The American Farm Bureau Federation ("AFBF") was formed in 1919 and is the largest nonprofit general farm organization the United States, representing more than 6.1 million members in all 50 states and Puerto Rico, including members in all states in the Ninth Circuit. AFBF's membership produces every type of agricultural crop and commodity that is produced in the United States. AFBF's mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF members conduct their farming and grazing operations on both private and federal lands, and are subject to innumerable rules, policies and permitting requirements that require review under NEPA.

The American Petroleum Institute ("API") is the only national trade association that represents all aspects of America's oil and natural gas industry. API's more than 500 corporate members, from the largest major oil company to the smallest of independents, come from all segments of the industry. They are producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry. API's members are directly affected by regulation under NEPA.

The National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate

for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 140,000 members are home builders and/or remodelers, and its builder members construct about 80 percent of the new homes built each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services. NAHB members are often directly and indirectly impacted by regulation under NEPA.

The American Forest Resource Council ("AFRC") represents the forest products industry throughout Oregon, Washington, Idaho, Montana, and California. AFRC members in these states purchase the majority of timber from federal lands managed by the U.S. Forest Service and the Bureau of Land Management. These agencies prepare more NEPA documents combined than any other federal agency. AFRC and its members have been actively involved in the process for preparation and administrative appeal of hundreds of NEPA documents for programmatic forest management plans and individual timber sales. Like the environmental groups, AFRC can submit comments on a NEPA document and can administratively appeal the decision. However, in the Ninth Circuit, only the environmental groups can raise their NEPA claims in court. AFRC has a strong interest in this case to level the playing field.

SUMMARY OF ARGUMENT

This case presents issues of major importance to *amici* and their members. In the decision below, the Ninth Circuit continued to depart from the rule in other Circuits and held that the federal courts are closed to plaintiffs acting to protect their economic interests by challenging agency action under NEPA. Indeed, the Ninth Circuit held that a plaintiff may not challenge NEPA action even where the plaintiff's economic interests are intertwined with environmental ones, so long as the plaintiff's primary motive is economic. That crabbed conception of judicial review forecloses *amici* and their members from being heard on issues that profoundly affect them – despite their active participation in the NEPA process – in a Circuit in which a significant number of NEPA cases arise. It also creates an arbitrary regime in which *amici*'s members can bring suit to protect their economic interests in some parts of the country, but not others.

Congress did not intend NEPA to be completely one-sided – a statute to be invoked solely by "environmentally-friendly" organizations, while shutting out those with economic concerns about environmental regulation. Rather, Congress specifically directed that under NEPA, it is the policy of the federal government to "foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, *economic*, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a) (emphasis added). The legislative history of NEPA and its

implementing regulations further underscore Congressional concern about the economic impact of environmental regulation.

Congress had good reason to be concerned. The environmental impact statement process that is mandated under NEPA can impose staggering costs and devastating economic losses on private parties. Yet under the Ninth Circuit's rule, those litigants who are concerned about the economic impact of NEPA regulation lack standing to hold federal agencies accountable for unlawful conduct, even when these litigants were actively involved in the NEPA process that led to the agency decision. That turns prudential standing doctrine on its head. This Court's intervention is necessary to vindicate Congress's intent in enacting NEPA and to clarify the proper scope of prudential standing to challenge agency action pursuant to that statute.

ARGUMENT

I. Compliance With NEPA Imposes Significant Costs On Industry.

NEPA profoundly affects industry. A federal government proposal to construct any major project – a new building, highway, airport, or transportation system – triggers NEPA's requirements. Similarly, whenever a major change in federal policy is contemplated – for example, the management of federal lands for agricultural purposes, approval of new biotechnologies, or a change in drilling, mining, or energy policies – federal agencies must comply with NEPA. NEPA's primary requirement is the preparation of environmental impact statements

(EISs) for any new major agency project, permit, or change in policy. *See* 42 U.S.C. § 4332(2)(C) (requiring that before an agency undertakes any "major Federal action[ ] significantly affecting the quality of the human environment," the federal government must produce and make publicly available a "detailed statement" on the environmental impacts of the proposed action, its alternatives, and any mitigation measures that might be available).

The NEPA review process can significantly delay federal projects, policies, permits, and authorizations. A 2008 study found that preparation of the average EIS across all federal agencies takes 3.4 years. Piet deWitt & Carole A. deWitt, *How Long Does It Take to Prepare an Environmental Impact Statement?*, 10 Envtl. Prac. 164, 167 (2008). The Federal Highway Administration reported that some EISs took up to twelve years. And the average completion time actually increased over the 30-year period of the Highway Administration survey, from 2.2 years in the 1970s to 5 years in the 1990s. *See* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 Colum. L. Rev. 903, 919 & nn.66-67 (2002) (citing Federal Highway Administration study).

EISs can also be extremely expensive, ranging in cost from hundreds of thousands of dollars to millions of dollars. *See* deWitt & deWitt, 10 Envtl. Prac. at 164. According to one study at the Department of Energy, prior to July 1994, the mean cost of an EIS was $6.3 million and the median cost

was $1.2 million. After aggressive attempts at streamlining, the mean cost of an EIS produced after 1994 was reduced to $5.1 million, but the median cost increased to $2.7 million. *See* Karkkainen, 102 Colum. L. Rev. at 918 & n.65 (citing Department of Energy study).

Not surprisingly, the entities that are most affected by the delay and costs associated with NEPA's EIS process are the industry partners involved with the proposed agency projects, permits, and policies – those who design and build new highways, develop new energy projects, and mine, drill, farm, or graze on federal lands.[2] In the area of biotechnology, NEPA reviews can keep new biotechnology seeds off the commercial market for years. Because so many federal actions must comply with NEPA, the range of economic activities that are delayed, or simply halted because of NEPA is staggering. And the costs imposed on industry partners are profound. A recent study commissioned by the Western Energy Alliance found that in the western United States alone (in an area primarily covered by the Ninth Circuit), NEPA-related delays with respect to proposed energy projects prevented the creation of 67,321 jobs and $4.5 billion in wages, resulting in $15.4 billion in economic impact *every year*. *See* Western Energy Alliance, *Economic*

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[2] Even private residential developers can be affected, if, for example, the development requires crossing over federally owned waters. *See, e.g., Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (2004) (environmental organization challenged issuance of permit for private developer to commence construction over federally owned lands).

Impacts of Oil & Gas Development on Federal Lands in the West, Executive Summary (Apr. 2012), *available at* http://westernenergyalliance.org/wp-content/uploads/ 2012/10/Final-Combined-ES-Econ-Impacts-of-OG-Dev-on-Fed-Lands-in-the-West-Oct-Update.pdf.

Industry partners such as *amici* and their members spend significant amounts of time and resources participating in the NEPA review process – submitting comments, providing data, and sharing expert reports with agencies. Yet even after the lengthy and expensive environmental review process mandated by NEPA, these industry partners are often left with an EIS that they believe fails to adequately consider other alternatives, arbitrarily and capriciously chooses one alternative over another, or refuses to allow the project to move forward at all. If these industry partners happen to be subject to NEPA regulation in the Ninth Circuit – and many of them are[3] – they are barred from the courthouse, even if they have fully participated in the NEPA process and filed an administrative appeal. According to the Ninth Circuit, these industry partners have no standing to raise their concerns in a court of law if their concerns are in any way motivated by economic interests. As Petitioner describes, under the decision below in *American Mines and Minerals Co. v. United States*

[3] NEPA regulation in the Ninth Circuit is especially prevalent because "an astounding seventy percent of the federal public lands in the entire United States are within the Ninth Circuit's purview." Carl Tobias, *Natural Resources and the Ninth Circuit Split*, 28 Envtl. L. 411, 412 (1998)

Department of Agriculture (Pet. App. 85-86), which follows the Ninth Circuit's precedent in *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934 (9th Cir. 2005), the only persons with prudential standing to challenge an inadequate, arbitrary, or capricious EIS in the Ninth Circuit are those who are purportedly solely motivated by their interest in protecting the environment.

II. The Ninth Circuit's Position Denies Standing To Plaintiffs Who Should be Heard Under NEPA.

The Ninth Circuit's view that an economic interest is insufficient to create prudential standing under NEPA closes the courthouse doors of the Circuit to plaintiffs with legitimate interests in the statute's proper enforcement. These plaintiffs – ranging from large corporations to small businesses to trade associations – are denied standing simply because their interest in NEPA's proper enforcement derives from economic rather than environmental motives. Yet, as Petitioner describes, given the split in the Circuits, these very same plaintiffs would be permitted to proceed with their NEPA claims in either the Eighth or the D.C. Circuit. For farming, ranching, mining, energy, timber, or other regulated companies, access to the courthouse to challenge NEPA action should not depend on whether the project at issue is located on federal lands in Montana – governed by the Ninth Circuit – or in neighboring North Dakota – governed by the Eighth Circuit. As described below, the Ninth Circuit is routinely turning away NEPA claims from plaintiffs who otherwise would have had their day in court had they been able to bring suit in another Circuit.

Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. United States Department of Agriculture, 415 F.3d 1078 (9th Cir. 2005), provides a typical example. There, the Ninth Circuit considered a Department of Agriculture regulation ending a ban on importation of Canadian cattle. The Department had adopted this ban in response to an outbreak of "mad-cow disease" in Canadian cattle. When officials subsequently moved to lift this embargo, plaintiff R-CALF, "a non-profit cattle association representing cattle producers on issues concerning international trade and marketing," brought suit, arguing, *inter alia*, that the Department's rulemaking contravened NEPA. *Id.* at 1104 (quotation marks omitted). The district court agreed, concluding that the Department had repeatedly violated NEPA "[b]y failing to prepare an EIS, basing its FEA on inaccurate or unsupported assumptions and on an outdated and superseded risk analysis, taking final action before its revised environmental assessment was made available to the public for review and comment, failing to assess all the impacts of the rule (including the impacts due to increased truck traffic), and bringing an additional 2 million head of cattle into a limited number of feedlots and slaughter facilities." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 359 F. Supp. 2d 1058, 1071 (D. Mont. 2005), *rev'd*, 415 F.3d 1078 (9th Cir. 2005).

Without denying that any of these violations occurred, the Ninth Circuit rejected plaintiff's claims, concluding that its "economic interest" in the

statute's enforcement placed it outside NEPA's zone of interests. *Ranchers Cattlemen*, 415 F.3d at 1103. In the eyes of the court, plaintiff's interest in the safety and viability of its members' businesses represented an immaterial financial concern. R-CALF's failure to allege a sufficient "environmental" injury or an interest in protecting the physical environment terminated the NEPA inquiry. As a result, the Department's actions went unchallenged. *See also, e.g., Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 715, 716 (9th Cir. 1993) (denying standing to challenge the Forest Service's failure to comply with NEPA to an organization representing ranchers on the basis that the organization's claim that the proposed environmental change would "result in a drastic decrease in grazing levels" and thus threaten its members' livelihood was a "purely economic injur[y]" that did not confer "standing to challenge an agency action under NEPA").

Economic motives likewise blocked NEPA review in *Fitzgerald Reno, Inc. v. United States Department of Transportation*, 60 F. App'x. 53 (9th Cir. 2003) (unpublished opinion). There, a taxpayer organization brought suit under NEPA, challenging the construction of a rail project in Reno, Nevada. *Id.* Noting that "[p]laintiffs' concerns appear to be economic rather than environmental," the court dismissed their claims for lack of prudential standing. *Id.* Though plaintiffs complained about "noise, dust, vibrations and fumes" from the project, the court found that at bottom, "plaintiffs' expressed concerns were that their 'businesses' will be

affected." *Id.* at 54. As a result, the court concluded, they failed to "allege[] concern about such harms from a *non-business* standpoint." *Id.* (emphasis added). Thus, merely because plaintiffs viewed these prototypical environmental concerns through the lens of economic harm, the court found that they lacked prudential standing. An economic perspective doomed their NEPA claims.

Following the holdings of these cases and the Circuit precedent set in *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934 (9th Cir. 2005), district courts in the Ninth Circuit have similarly turned away business-minded plaintiffs seeking to ensure compliance with NEPA. *See, e.g., Duval Ranching Co. v. Glickman*, 965 F. Supp. 1427, 1441 (D. Nev. 1997); *Ariz. Cattle Growers' Ass'n v. Cartwright*, 29 F. Supp. 2d 1100, 1106-07 (D. Ariz. 1998). *Kanoa, Inc. v. Clinton*, 1 F. Supp. 2d 1088 (D. Haw. 1998), presents a particularly egregious example. There, the plaintiff challenged sonar testing by the United States Navy off the coast of the Island of Hawaii. Plaintiff, a company that led whale watching trips in the area, argued that the Navy's testing was driving humpback whales away from the coast, hurting its business. *Id.* at 1092. Indeed, this absence of whales had actually forced plaintiff to discontinue its tours. *Id.* Yet, while finding that this plaintiff met the requirements of Article III standing, the court nevertheless concluded that it lacked prudential standing. *Id.* at 1092-93. Plaintiff's claim that "its business was disrupted and it lost money as a result of fewer whale sightings," the court found, was no more than a "purely economic interest[]." *Id.* at

1093. Despite the fact that plaintiff's strong economic interest in NEPA's enforcement *coincided* with environmental concerns, the district court still found no prudential standing. Again, the presence of economic interests proved talismanic, closing off NEPA review for this plaintiff.[4]

As these examples vividly illustrate, the Ninth Circuit has taken an extreme position that means that the only organizations that will have standing to sue under NEPA are those motivated solely by their desire to protect the environment.[5] Petitioner noted that in the Ninth Circuit, a private party – such as one of *amici*'s members – could suffer millions of dollars of actual damages, lay off thousands of workers, and even be put out of business by NEPA action. Yet that private party would have no judicial redress. *See* Pet. 22. An energy company, for example, whose oil and gas exploration project is shut down by NEPA could not sue to protect its economic interests. In contrast, an

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[4] In *Winter v. Natural Resources Defense Council, Inc. ("NRDC")*, 555 U.S. 7 (2008), this Court overturned a preliminary injunction halting the Navy's sonar testing off the coast of California. Although the Court did not directly address the issue, presumably the Court found that the NRDC had the standing the *Kanoa* plaintiffs lacked to challenge the Navy's policy based on the NRDC's concern about "possible injury" to "an unknown number of … marine mammals." *Id.* at 26.

[5] As one commentator has noted: "Thus, the Ninth Circuit effectively denies access to courts for business interests regardless of their ability to show a substantial economic impact." Erik Figlio, *Stacking The Deck Against "Purely Economic Interests": Inequity and Intervention in Environmental Litigation*, 35 Ga. L. Rev. 1219, 1236 (2001).

environmental organization asserting that polar bears and walruses might be "'annoy[ed]'" or "'disturb[ed]'" by additional oil and gas exploration will have its NEPA claim litigated to conclusion in the Ninth Circuit. *Center for Biological Diversity v. Salazar*, 695 F.3d 893, 898 (9th Cir. 2012).

This effectively turns NEPA into a one-way street, to be used only to impose more environmental regulation with no regard for its costs. Petitioner has compellingly demonstrated that the Ninth Circuit is out of step with the other Circuits to have considered this issue – primarily the Eighth Circuit and the D.C. Circuit. But as shown below, the Ninth Circuit has also taken a position that is completely at odds with what Congress intended in NEPA.[6]

III. Congress Did Not Intend That Environmental Organizations Alone Could Invoke NEPA.

Congress did not intend for NEPA to impose environmental regulations with no regard for their economic consequences. NEPA's very first statement of purpose declares that it is the national environmental policy to "foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, *economic*, and other

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[6] The Ninth Circuit's position that a litigant with economic interests cannot be a plaintiff in a NEPA case is also in significant tension with this Court's holding that NEPA is strictly a procedural statute and does not dictate any substantive environmental protection. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (overruling the Ninth Circuit's interpretation of NEPA as conferring substantive environmental protection).

requirements of present and future generations of Americans." 42 U.S.C. § 4331(a) (emphasis added). Congress further stated that regulation under NEPA should attempt to "achieve a *balance* between population and resource use which will permit high standards of living and a wide sharing of life's amenities." *Id.* § 4331(b)(5) (emphasis added). Finally, NEPA mandates that federal agencies "insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking *along with economic and technical considerations*." *Id.* § 4332(2)(B) (emphasis added). And NEPA's implementing regulations explicitly require consideration of economic impact during the EIS process. Thus, the Ninth Circuit's rule flouts the plain language of the statute and congressional intent.

A review of the legislative history clearly demonstrates that Congress was concerned about the economic impact of environmental regulation and wanted any NEPA action to account for and address this impact. The House Report accompanying NEPA explained that NEPA was meant to ensure that "the Federal Government, in cooperation with all other interested parties, shall use all practicable means and measures . . . to assure that man's capacity to change his environment is devoted to making that change one for the better, while remaining consistent with his future social, *economic*, and other needs." H.R. Rep. No. 91-378, at 9 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2751, 2759 (emphasis added). In stating that NEPA action was to be taken "in cooperation with all other interested parties," *id.*,

Congress did not intend to preclude industry partners from being a part of the NEPA process.

The inclusion of industry is particularly necessary during the EIS process. Most suits that are brought under NEPA – including the suit at issue in this case – challenge an agency's failure to properly comply with EIS requirements. And these requirements by their plain terms mandate consideration of more than just environmental impact. They require that an agency weigh "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity." 42 U.S.C. § 4332(2)(C). It would be difficult to adequately assess the trade-off between short-term uses and long-term productivity without considering economic factors.

Indeed, NEPA's implementing regulations expressly call for such consideration. The regulations set out by the Council for Environmental Quality require that: "When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment." 40 C.F.R. § 1508.14 (2000). Yet, despite the plain terms of the statute and its implementing regulations, the Ninth Circuit has read out of the EIS requirement any concern whatsoever with economic impacts on the "human environment."

As the foregoing shows, NEPA, when read in conjunction with its legislative history and

implementing regulations, clearly reflects Congress's explicit concern about the economic impact of environmental action. It would be absurd to suggest that in passing NEPA, Congress intended that only parties who are interested in the protection of environmental resources could invoke NEPA, and that NEPA has no concern for the economic impact of environmental protection. Indeed, NEPA expressly describes its purpose as working to "fulfill" the "economic requirements" of "present and future generations of Americans." 42 U.S.C. § 4331(a).

The Ninth Circuit's extreme position not only flouts Congress's intent, it also turns prudential standing doctrine on its head. The prudential standing test "is not meant to be especially demanding." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987). This Court applies the test in accordance with Congress's "evident intent" when enacting the Administrative Procedure Act "to make agency action presumptively reviewable." *Id.* Thus, "[t]he test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (quotation marks omitted). Here, there is every indication that Congress did not intend to close the courthouse doors to those asserting that they are adversely impacted by an unlawful NEPA action simply because that adverse impact is primarily economic. Indeed, all signs point to Congressional concern with the economic impact

of environmental regulation. It is difficult to imagine that Congress intended to pass a statute that can be enforced by just one set of interested entities to the exclusion of all others.

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Amici and their members are profoundly affected by NEPA action, yet the Ninth Circuit bars them from the courthouse. This Court's intervention is necessary to overturn the outlier position taken by the Ninth Circuit and to restore the proper scope of prudential standing doctrine under NEPA. As commentators have recognized, "[s]ome federal mandate from either Congress or the Supreme Court seems to be the only viable solution to th[e] continuing injustice" faced by plaintiffs like *amici*'s members. Erik Figlio, *Stacking The Deck Against "Purely Economic Interests": Inequity and Intervention in Environmental Litigation*, 35 Ga. L. Rev. 1219, 1249 (2001).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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