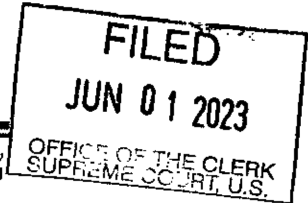
ORIGINAL

22-1251
No.



In the Supreme Court of the United States

SIMON V. KINSELLA,
Petitioner,
v.

U.S. BUREAU OF OCEAN ENERGY MANAGEMENT, ET AL.,

and

SOUTH FORK WIND, LLC,
Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Simon V. Kinsella
P.O. Box 792
Wainscott, NY 11975
Tel: (631) 903-9154
Si@oswSouthFork.Info

LEGAL PRINTERS LLC • Washington, DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED

The U.S. Bureau of Ocean Energy Management (BOEM) knowingly falsified its review of an offshore wind farm, concealing contamination harmful to human health, the project's cost ($2 billion), procurement manipulation, and other material facts. It approved the project based on *its own* deceit. BOEM has neither answered the complaint (7/20/2022) or the amended complaint (11/2/2022) nor responded to allegations of fraud. The court of appeals admitted the district court did *not* consider or allow argument on fraud claims (or parties named under those claims) before transferring the case. The transferee court did *not* recognize claims of fraud (or parties) before, without power, denying injunctive relief. Petitioner *pro se* first learned of that denial three weeks later.

1. Whether the Fifth Amendment requires that defendants answer allegations against them?

2. Whether fraud by a federal regulatory agency *sends the wrong message* to developers, regulators, and the public, and is the harm that flows from that message irreparable?

3. Whether construction, the plans for which the developer secured approval via fraudulent means, is a valid contributing economic injury when weighing the equities in contemplation of injunctive relief seeking to prevent that construction?

3. Whether 28 U.S.C. § 1404 requires consideration of the convenience of parties and witnesses before transferring a case three hundred miles from three federal agency defendants' offices, nine officials (defendants in fraud claims), potential witnesses, and seventeen causes of action to an *in*convenient forum prejudicial to claims filed in a permissible venue?

PARTIES TO PROCEEDINGS

Petitioner who was the plaintiff-petitioner is Simon V. Kinsella, *pro se.*

Respondents that were defendants-respondents are U.S. Bureau of Ocean Energy Management (BOEM); and in their official capacities working for BOEM: Director Elizabeth Klein; Chief Michelle Morin, Environment Branch for Renewable Energy; Program Manager James F. Bennett, Office of Renewable Energy Programs; Environmental Studies Chief Mary Boatman, Office of Renewable Energy Programs; Economist Emma Chaiken; Economist Mark Jensen; Biologist Brian Hooker; and Jennifer Draher; and Secretary of the Interior Deb Haaland, U.S. Department of the Interior (DOI); Principal Deputy Assistant Secretary Laura Daniels-Davis, Land and Mineral Management; and Administrator Michael S. Regan, U.S. Environmental Protection Agency (EPA).

Respondent that was intervenor-defendant-respondent is South Fork Wind LLC (SFW) (formerly Deepwater Wind South Fork LLC).

Note: BOEM Director was Amanda Lefton when filing the complaint on July 20, 2022, but Ms. Lefton resigned effective January 19, 2023.

RELATED CASES

The Supreme Court of the United States:

Simon Kinsella, Applicant v. Bureau of Ocean Energy Management, et al., (22A1097), Application for injunctive relief and a stay, submitted to The Chief Justice (dated June 12, 2023), Supplemental Brief (filed June 16, 2023).

United States Court of Appeals (D.C. Cir.):

In re: Simon V. Kinsella, No. 22-5317. Petition for a writ of mandamus seeking review of the district court's order granting defendants' motion to transfer the case to the Eastern District of New York (E.D.N.Y.). Judgment entered upon petition for writ of mandamus affecting the transfer *and* an emergency motion for a temporary restraining order and preliminary injunction entered May 17, 2023 (*denied*) (App 4a-5a). Judgment upon petitioner's motion to stay the mandate, treated as a motion to stay the effectiveness, entered June 9, 2023 (*denied*) (App 3a).

Simon V. Kinsella v. Bureau of Ocean Energy Management, et al., No. 22-5316. Judgment upon appellees-respondants' motion to dismiss entered February 23, 2023 (*granted*).

United States District Court (D.D.C.):

Simon V. Kinsella v. Bureau of Ocean Energy Management, et al., No. 1:22-cv-02147 (JMC). Judgment upon federal defendants' motion to transfer entered November 10, 2022 (*granted*). *See* Order (App 8a) and Opinion (App 9-19a).

United States District Court (E.D.N.Y.):

Simon V. Kinsella v. Bureau of Ocean Energy Management, et al., No. 2:23-cv-02915 (FB). Judgment upon plaintiff-petitioner's motion for preliminary injunction (D.D.C., No. 1:22-cv-02147, ECF 35) entered without power *before* the ruling to transfer (entered May 17, 2023) became effective contrary to D.C. Circuit order issued April 24, 2023 ("the case was transferred prematurely and in error ... The case in the Eastern District of New York, No. 2:23-cv-02915, has been administratively closed") *See* E.D.N.Y. Docket entry 04/19/2023 (App 20a) and Docket entry 05/18/2023 "preliminary injunction is denied" (App 21a-22a). Petitioner was not notified. *See* MEMO and ORDER (App 28a-36a).

TABLE OF CONTENTS

Questions Presented .... (i)
Parties to Proceedings .... (ii)
Related Cases .... (iii)
Table of Content .... (v)
Table of Authorities .... (vi)
Constitution, Statutes, and Regulations .... (ix)

Petition for a Writ of Certiorari 1

Opinions below 1
Jurisdiction 1
Statutory and Regulatory Provisions Involved 1
Preserving the Record 1

Statement 2
PROCEDURAL ABUSE:
District Court for the District of Columbia 2
District Court Order to Transfer 6
Court of Appeals for the D.C. Circuit 7

Background 10
Project: South Fork Wind (SFW) 10
Bureau of Ocean Energy Management 10
Fraud: PFAS Contamination 12
Fraud: Project Cost ($2 billion) 14
Fraud: South Fork RFP 15

Reasons for granting the petition 16
1. Petitioner will likely succeed on the merits 18
2. Petitioner will likely suffer irreparable harm 23
3. The balance of equities favors Petitioner 31
4. Injunctive relief favors the public interest 36

Conclusion 37

TABLE OF AUTHORITIES

Cases: Page

Agency for Int'l Development v. Alliance for Open Society, 140 S. Ct. 2082 (2020) ... 23

American Civil Lib. U. v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986) ... 29

Amoco Production Co. v. Gambell, 480 U.S. 531 (1987) ... 31

Archdiocese of Wash. v. Wash. Metro. Area Transit Auth., 897 F.3d 314 (D.C. Cir. 2018) ... 37

Armstrong v. Manzo, 380 U.S. 545 (1965) ... 22

Baltimore Gas & Electric Co. v. Natural Res. Defense Council, Inc., 462 U.S. 87 (1983) ... 19, 20

Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290 (D.C. Cir. 2006) ... 24, 29

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991) ... 19

Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288 (D.C. Cir. 2009) ... 17-18

Elrod v. Burns, 427 U.S. 347 (1976) ... 23

Feltman v. Sarbov, 366 A.2d 137 (D.C. 1976) ... 34

Fine v. McGuire, 433 F.2d 499 (D.C. Cir. 1970) ... 22

Gordon v. Holder, 721 F.3d 638 (D.C. Cir. 2013) ... 36, 37

Grannis v. Ordean,
234 U.S. 385 (1914) 22

Jacob v. Roberts,
223 U.S. 261 (1912) 22

Kleppe v. Sierra Club,
427 U.S. 390 (1976) 19

Kelley v. Everglades District,
319 U.S. 415 (1943) 17

League of Women Voters of U.S. v. Newby,
838 F.3d 1 (D.C. Cir. 2016) 36-37

Lynch v. Donnelly,
465 U.S. 668 (1984) 24

Mathews v. Eldridge,
424 U.S. 319 (1976) 22

Michigan v. Envtl. Prot. Agency,
135 S. Ct. 2699 (2015) 19

Percoco v. United States,
No. 21-1158, 598 U.S. ---, --- S. Ct. ---, 2023 WL 3356527 (May 11, 2023) 37-38

Pursuing Am.' Greatness v. Fed. Election Comm'n,
831 F.3d 500 (D.C. Cir. 2016) 17-18, 31, 36

Pyne v. Jamaica Nutrition Holdings Ltd.,
497 A.2d 118 (D.C. 1985) 20, 21, 34-35

Railroad Comm'n of Tex. v. Pullman Co.,
312 U.S. 496, 500, 61 S.Ct. 643, 85 L.Ed. 971 (1941) 31

Sage v. Broadcasting Publications, Inc.,
997 F. Supp. 49 (DDC 1998) 34-35

Simon Schuster v. Crime Victims Bd.,
502 U.S. 105 (1991) 36

Starnes v. McGuire,
512 F.2d 918 (D.C. Cir. 1974) 8

Tripati v. Henman,
No. 85-170 (D.Ariz. May 13, 1987) 8

Tripati v. Henman,
No. 86-231 (D.Ariz. April 14, 1987) 8

United States v. Williams,
836 F.3d 1 (D.C. Cir. 2016) 20, 35

Van Dusen v. Barrack,
376 U.S. 612 (1964) 16-17

Washington v. Reno,
35 F.3d 1093 (6th Cir. 1994) 36-37

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982) 31

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 17, 31

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Constitution 2, 3, 6, 21, 24, 29, 30, 36, 37
Fifth Amendment 2, 4, 10, 16, 17, 32, 37
Due Process Clause 6, 23, 25
Establishment Clause 24, 25, 29
Freedom of Information Act 6
5 U.S.C. § 552(a)(4)(B) 6
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1404 .... 7, 16, 17

National Environmental Policy Act (NEPA),
42 U.S.C. 4321 *et seq.* 6, 10, 19, 21, 26-27, 35
42 U.S.C. 4331(a) 21
42 U.S.C. 4332 19

NEPA Regulations, 40 C.F.R.:
§ 1502.14 19
§ 1506.5 18

Outer Continental Shelf Lands Act (OCSLA)
43 U.S.C. § 1331 *et seq.* 6, 10, 11
43 U.S.C. § 1332 .... 10, 18

OCSLA Regulations, 30 C.F.R.:
§ 585.626 11
§ 585.627 .... 11, 14, 34, 35
§ 585.628 11
§ 585.628(f) 10

Federal Rules of Civil Procedure:
Rule 9(b) 2, 9

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The orders of the court of appeals (App. 3a, 4a-5a, 6a, 7a) are unreported. The order and opinion of the district court for D.C. (App. 8a, 9a-19a) are unreported. The orders and opinion of the district court for E.D.N.Y. (App. 20a-27a, 28a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals ordered Petitioner's emergency motion for a temporary restraining order and preliminary injunction be *denied,* and the petition for a writ of mandamus seeking review of the district court order to transfer be *denied,* entered May 17, 2023. (App 4a-5a) The judgment of the court of appeals ordered Petitioner's motion to stay the mandate (treated as a motion to stay the effectiveness) be *denied*, entered June 9, 2023. (App 3a). The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions are set out in the appendix to the petition (App 36a-38a).

PRESERVING THE RECORD

On July 20, 2022, Petitioner submitted to the district court (on USB thumb drive) 207 exhibits (provided to Defendant Bureau of Ocean Energy Management on February 22, 2021). The court accepted the files (D.D.C., No. 1:22-cv-02147, ECF 3).

On November 29, 2022, Petitioner included "a USB Flash Drive containing the files submitted in the district court (docket 1:22-cv-02147)" (D.C. Cir., No. 22-5317, 1976909, at vii). The documents form part of the record.

STATEMENT

The Fifth Amendment to the United States Constitution guarantees that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law ...." If our Constitution is to have meaning, its guaranteed rights must be dependable. Petitioner invokes those guarantees now.

Three federal courts denied Petitioner the fundamental right to a fair hearing. The judgments of the district courts (for the District of Columbia and the Eastern District of New York (E.D.N.Y.)), and the Court of Appeals for the D.C. Circuit, have so far departed from the accepted and usual course of judicial proceedings, sanctioned (unconstitutional) procedure in aid of perpetuating fraud by a federal regulatory agency as to call for an exercise of this Court's supervisory power.

PROCEDURAL ABUSE:
District Court for the District of Columbia

Seven months ago (November 2, 2022), Petitioner filed as of right First Amended Complaint that "state[s] with particularity the circumstances constituting fraud" (Fed. R. Civ. P. 9(b)) involving *nine* Bureau of Ocean Energy Management (BOEM) officials, named defendants (parties and potential witnesses) who participated in a fraudulent environmental review. BOEM has *not* answered the amended complaint. BOEM did *not* answer the

complaint filed ten months ago (July 20, 2022). BOEM did *not* respond to a summary judgment motion, including eighty-nine material facts where there is no genuine dispute (D.C. Cir., No. 22-5317, Doc. 1999552-21), filed eight months ago (September 26, 2022). Each time, BOEM had an opportunity to deny the allegations but did *not*. The district court repeatedly turned to procedural abuse in aid of protecting federal agency officials who knowingly made materially false statements concerning an offshore wind project, violating Petitioner's constitutional right to due process.

The evidence of fraud is disturbing. It conclusively shows that BOEM deliberately falsified the review of an offshore wind project promoted by South Fork Wind LLC (SFW),[1] concealing extensive environmental contamination harmful to human health (*see* Kinsella Affidavit, D.C. Cir., No. 22-5317, Doc. 1999552-02, ¶¶ 9-67)(App 39a-49a), the project cost ($2 billion) and its adverse socioeconomic impact (*id.*, ¶¶ 68-91)(App 49a-56a), procurement manipulation that stifled competition (*id.*, ¶¶ 92-106)(App 56a-62a), and other material facts such as adverse population-level effects on an essential fish habitat for Atlantic Cod (Cox Ledge), and a viable alternative offering the same energy at half the price.

Seven instances of BOEM's fraudulent review are prominently upfront in Petitioner's First Amended Complaint.[2] The district court accepted the amended complaint but refused to recognize substantive allegations of fraud or named defendants under the

---

[1] Formerly Deepwater Wind South Fork LLC

[2] *See* First Amended Complaint, *excerpts,* D.C. Cir., No. 22-5317, Doc. 1999552-22 (at 1-7)

five fraud claims introduced into the complaint. BOEM's only defense is for the courts to deprive Petitioner of a hearing on his fraud claims in violation of the Fifth Amendment. On November 29, 2022, Petitioner filed a Petition for a Writ of Mandamus seeking review of the district court's practice of denying Petitioner's rights to respond to defendants' motions and a fair hearing *five times in two months,*[3] as follows—

(1) September 13, 2022— the district court granted defendants' motion to extend time "for The Government to file its responsive pleading to the Complaint" that defendants filed *the day before*, thereby denying Petitioner the opportunity to respond. *See* No. 22-5317, Doc. 1999552-03, ("**D.D.C. DOCKET**") (at 4, MINUTE ORDER 09/13/2022).

Frustrated, Petitioner filed (September 26, 2022) a cross-motion for partial summary judgment and statement of material facts with eighty-nine facts where there is no genuine dispute (*see* No. 22-5317, 1999552-21). In response, BOEM filed a motion to strike or stay the briefing (October 6, 2022) (D.D.C. Docket, at 4, ECF 24).

(2) October 9 (Sunday)— the district court granted defendants' motion to strike or stay the briefing (filed three days earlier) on Petitioner's summary judgment motion (*stayed*), denying Petitioner the opportunity to respond (D.D.C. Docket, at 5, MINUTE ORDER 10/09/2022).

(3) November 9— A month later, the court ruled to *strike* Petitioner's summary judgment motion, "[i]t is premature given that the defendants haven't

---

[3] *See* Reply to Federal Defendants' Opposition to Mandamus Petition, No. 22-5317, Doc. 1994449, *corrected*)

formally responded" (*see* Hearing Tr., November 9, 2022, No. 22-5317, Doc. 1994062-11, at 3:8-9), "just so that the docket is cleaned up and that defendants don't have this outstanding obligation" (*id.*, 3:21-22). Petitioner did not have an opportunity to respond before the court ruled to *strike* (D.D.C. Docket, at 7, MINUTE ORDER 11/10/2022).

On November 2, 2022, Petitioner filed First Amended Complaint (as of right) concurrently with a motion for a temporary restraining order and preliminary injunction (D.D.C. DOCKET, at 5-6, ECF 34 and 35). The district court accepted the amended complaint (during the November 9 hearing) — "I will grant ... Mr. Kinsella's motion to amend the complaint, which he was free to do as a matter of course at this stage of the proceedings ... when we are referring ... to any allegations, we are all talking about the same operative complaint."[4]

However, the district court did not address or allow comment on the amended complaint's five claims of fraud (and nine BOEM officials named defendants under those claims) or seven instances of fraud prominently upfront.[5] The D.C. Circuit admitted the district court did *not* "consider or allow argument on [Petitioner's five] claims of fraud" (or nine defendants, potential witnesses, named under the claims)(App 5a). During the November 9 hearing, the court did *not* grant Petitioner the opportunity to address issues regarding allegations of fraud (or BOEM's review).

(4) November 9— The district court ruled to transfer the case absent a hearing on claims of fraud

[4] *See* November 9, 2022, Hearing Tr. (at 2:20-25 and 21:1-2)(D.C. Cir., No. 22-5317, Doc. 1994062-11).

[5] *See* First Amended Complaint, *excerpts*, No. 22-5317, Doc. 1999552-22, at 3-10)

or contemplation of parties and potential witnesses. It was the fourth time the district court denied Petitioner the right to respond or speak to fraud issues at a fair hearing.

(5) November 9— "[T]he Court DENIES [Petitioner's] Motion for a Temporary Restraining Order 35 for the reasons stated on the record at the hearing."[6] However, for the same reasons the hearing on the transfer order was deficient, the hearing on the TRO was also defective because it failed to address critical fraud arguments. Without considering critical elements of fraud (by BEOM *and* SFW), the court had no reason to question whether SFW's economic injury resulted from wrongdoing or fraud when weighing the equities in consideration of injunctive relief. It was the fifth time the district court had denied Petitioner his fundamental constitutional right to a fair hearing on fraud claims and due process of law.

District Court Order to Transfer

On July 20, 2022, Petitioner filed his complaint in Washington, D.C., a permissible venue easily commutable between the courthouse and three federal agency defendants' offices where the causes of action occurred giving rise to the claims under federal law—the National Environmental Policy Act (NEPA), Outer Shelf Continental Lands Act (OCSLA), Due Process Clause, and the Freedom of Information Act (FOIA). The District of Columbia is a forum with recognized expertise in FOIA complaints.[7]

The district court ordered the case be transferred from Washington, D.C., a convenient location for *all*

---

[6] *See* D.D.C. DOCKET, MINUTE ORDER 11/10/2022 (D.C. Cir., No. 22-5317, Doc. 1999552-03, at 7)

[7] 5 U.S.C. § 552(a)(4)(B)

parties and potential witnesses chosen by Petitioner, to the district court in the E.D.N.Y., three hundred miles from three federal agency defendants' offices, nine BOEM officials (defendants and potential witnesses named in five fraud claims) and the seventeen causes of action. The courthouse in Central Islip is convenient for *no parties or potential witnesses.*

Court of Appeals for the D.C. Circuit

On November 29, 2022, Petitioner filed a Petition for a Writ of Mandamus seeking review of the district court's order transferring the case without a hearing or considering the convenience of parties and potential witnesses according to 28 U.S.C. § 1404.

On February 23, 2023, the assigned panel, Circuit Judges Wilkins, Rao, and Walker, ordered "the United States and South Fork Wind LLC [SFW] enter appearances and file responses to the mandamus petition" (App 7a), which they did (on March 27, 2023). Petitioner filed a timely reply (*see* No. 22-5317, Doc. 1994449, *corrected*).

On April 19, 2023, in what appeared to be an attempt to evade appellate scrutiny, the district court transferred the case to the E.D.N.Y. without power *before* the court of appeals had ruled on the mandamus petition. An emergency motion filed that day sought return of the files (*id.*, Doc. 1995489).

On April 24, 2023, a D.C. Circuit order confirmed that "the case was transferred prematurely and in error ... [and] [t]he case in the Eastern District of New York, No. 2:23-cv-02915, has been administratively closed" (*id.*, Doc. 1996148) (ORDER App 6a)(E.D.N.Y Docket, App 20a).

However, the next day, the E.D.N.Y. case was "reassigned to Judge Frederic Block and Magistrate

Judge Steven Tiscione (as related to 22-cv-1305) for all further proceedings." (E.D.N.Y. Docket, App 20a-21a), and on May 1, reopened— "[o]rder[] by Judge Frederic Block" (*see* E.D.N.Y. Docket, 05/01/2023, App 21a). Petitioner had *not* been notified that his case had been reassigned and reopened.

Concerned about agency malfeasance by BOEM and continuing (unlawful) construction it approved based on fraud, Petitioner filed a motion for a temporary restraining order and preliminary injunction enjoining construction activities of respondent SFW on May 16, 2023 (at 9:02 p.m.).

On May 17, 2023 (12:10 p.m.), only hours after the motion had been filed, a *new* panel (Circuit Judges Millet, Pillard, and Rao) decided the case (initially assigned to Circuit Judges Wilkins, Rao, and Walker). The new panel denied the mandamus petition, thus affecting transfer, *and* denied injunctive relief (App 4a-5a). Such a swift decision left little time for consideration on the merits.

The court of appeals' order denying the mandamus petition (App 4a-5a) relies on a case concerning a prisoner in Arizona who sought to overturn a transfer order based on an alleged denial of access to legal materials, where he had filed *the same claims* in another U.S. District Court (in Arizona). "[T]he Arizona district court has found, on two previous occasions, that the law library at FCI-Tucson is constitutionally adequate. *See Tripati v. Henman,* No. 86-231 (D.Ariz. April 14, 1987); *Tripati v. Henman,* No. 85-170 (D.Ariz. May 13, 1987)." *Id.* In that case, the court concluded transfer was warranted "due to its familiarity with the related civil suits filed there [in Arizona in *federal court*] by Tripati[,]" citing "*Starnes v. McGuire,* 512 F.2d at 932" (*id.*), another

case concerning a prisoner and habeas issues. This case is *not* a habeas action, and Petitioner Kinsella is *not* a prisoner. Petitioner has commenced *only one* action in *any court* (federal or state), where he "state[s] with particularity the circumstances constituting fraud" (Fed. R. Civ. P. 9(b)) concerning *nine named BOEM officials* (defendants and potential witnesses) and a fraudulent environmental review by *a federal agency*.

The court of appeals' order denying injunctive relief gave no reason for its denial in conflict with this Court precedent (*see* p. 17).

The next day (May 18), the E.D.N.Y. court ordered "[p]laintiffs motion [in D.D.C., No. 1:22-cv-02147, ECF] 35 for a preliminary injunction is DENIED. Ordered by Judge Frederic Block on 5/18/2023" (App 21a)(App 28a-35a). The order was without power.

D.C. Circuit Rule 41(3) states that—

> No mandate will issue in connection with an order granting or denying a writ of mandamus ... but the order or judgment ... will become effective automatically 21 days after issuance ....

Twenty-one days after issuance of that order is June 7, 2023. However, the E.D.N.Y. court denied Petitioner's preliminary injunction on May 18, 2023 (App 28a-35a), twenty days *before* the transfer had become effective. The (unlawful) order denying Petitioner a preliminary injunction was *not* without prejudice. Petitioner had *not* been notified and was unaware of the proceedings. There was no hearing. The caption on the E.D.N.Y. court order (App 28a) *ex*cludes eight defendants (BOEM officials) named in

Petitioner's five fraud claims. The E.D.N.Y. court ignored Petitioner's amended complaint as if it, the defendants, and the fraud claims do not exist.

The E.D.N.Y. court order denying injunctive relief violates Petitioner's Fifth Amendment right to a hearing on fraud claims that had also been denied him in the D.C. district court and the D.C. Circuit.

BACKGROUND

Project: South Fork Wind (SFW)

The Project BOEM approved is an offshore wind farm (130 megawatts) approximately 19 miles southeast of Block Island, Rhode Island, and 35 miles east of Montauk Point, New York, in the Atlantic Ocean. The project includes high-voltage (138 kV) transmission and related infrastructure installed underneath local laneways and streets through a residential neighborhood in Wainscott, N.Y. (for approximately two-and-a-half miles).

SFW commenced construction in February 2022.

Bureau of Ocean Energy Management

Under Outer Continental Shelf Lands Act (OCSLA) regulations, BOEM has authority to "approve, disapprove, or approve with modifications" (30 C.F.R. § 585.628(f)) construction and operations plans for multi-billion-dollar offshore development in marine environments on the "[O]uter Continental Shelf [that] is a vital national resource reserve held by the Federal Government for the public" (43 U.S.C. § 1332(3)).

BOEM is the lead federal agency responsible for SFW's environmental review pursuant to the NEPA and the OCSLA. It developed the Final Environmental Impact Statement (FEIS) (August 16, 2021) for SFW's Construction and Operations Plan

(COP) (May 2021) and issued a Record of Decision (ROD) approving the FEIS (on November 24, 2021).

According to the ROD,

> [OCSLA] regulations at 30 C.F.R § 585.628 require BOEM to review the COP and all information provided therein pursuant to 30 C.F.R. §§ 585.626 and 585.627, to determine whether the COP contains all the information necessary to be considered complete and sufficient for BOEM to conduct technical and environmental reviews [*see* 22-cv-02147, ECF No. 45.2, at D-5, PDF 97, second paragraph].[8]

The ROD confirms that—

> Throughout the review process, BOEM evaluated the information [that] ... South Fork Wind submitted, and determined that the information provided was sufficient in accordance with the regulations [*id.*, at D-6, PDF 98, second paragraph].
>
> OREP has determined that the COP includes all the information required in 30 C.F.R. §§ 585.626 and 585.627 for the Proposed Project [*id.*, third paragraph].

On January 18, 2022, BOEM "approved the Construction and Operations Plan (COP) that South

[8] *See* Record of Decision (ROD), issued by BOEM on November 24, 2022. Available at boem.gov— www.boem.gov/renewable-energy/state-activities/south-fork

Fork Wind, LLC initially submitted on June 29, 2018, and last updated on May 7, 2021 ...." [9]

Fraud: PFAS[10] Contamination

SFW's COP acknowledges that onshore construction "activities [] could impact water quality and water resources ... includ[ing] the installation of the underground transition vault at [] Beach Lane ... [and] installation of the underground SFEC [South Fork Export Cable] [] [o]nshore route ...." [11] BOEM's FEIS contradicts SFW's COP. BOEM asserts that "[t]here are no onshore construction activities under the Proposed Action that would require ground disturbance at depths at or near groundwater resources, and all activities would meet permit and regulatory requirements to continue protecting groundwater as drinking water resources ... Onshore subsurface ground-disturbing activities would not be placed at a depth that could encounter groundwater, and would therefore not result in impacts on water quality." [12] BOEM states that "groundwater quality in the analysis area appears to be good" (No 22-5317, Doc. 1999552-16, at 1).[13] BOEM knew its statements

---

[9] *See* SFW COP (May 2021) (at 4-67, PDF 235, ¶ 6)—www.boem.gov/sites/default/files/documents/renewable-energy/South-Fork-Construction-Operations-Plan.pdf

[10] **PFAS**: Per/– and Polyfluoroalkyl Substance contamination.

[11] BOEM SFW COP Approval Letter, January 18, 2022 (at 1)—www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/SFWF-COP-Approval-Letter.pdf

[12] *See* FEIS (at H-28, PDF 660, ¶ 3). Available at boem.gov—www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/SFWF%20FEIS.pdf

[13] *See* Final Environmental Impact Statement (FEIS), August 16, 2021 (at H-23, PDF 655). Available at boem.gov (see link)—www.boem.gov/renewable-energy/state-activities/south-fork

on the project's impact on groundwater and existing groundwater quality were false.

In February 2021, nine months *before* BOEM approved the FEIS (November 24, 2021), BOEM received and uploaded (to regulations.gov) Petitioner's comments and 207 exhibits. Petitioner's letter asked BOEM "that the documents be incorporated by reference and form part of my comments ... and that BOEM, as lead agency, conduct[s] a broad review of the whole Project ...."[14]

The documents included multiple site characterization reports for two adjacent properties on either side of SFW's proposed construction corridor through Wainscott (two prepared for New York State Department of Environmental Conservation and another for the Town of East Hampton), hundreds of laboratory test results for PFAS contamination of private drinking water wells from Suffolk County Department of Health Services (SCDHS), testimony, and maps. The evidence shows beyond doubt that groundwater in the area where SFW proposed constructing concrete infrastructure for high-voltage transmission cables encroaching into and at the capillary fringe of a sole-source aquifer contains high levels of PFAS contamination exceeding regulatory limits. One document, an EPA "FACT SHEET" (2016) on "PFOA & PFOS[15] Drinking Water Health Advisories," reads— "[E]xposure to PFOA and PFOS over certain levels may result in adverse health effects, including developmental effects to fetuses during pregnancy or to breastfed infants (e.g., low birth weight, accelerated puberty, skeletal

[14] *See* D.C. Cir., No. 22-5317, Doc. 1999552-12, at 2, 5th ¶)

[15] Perfluorooctanoic Acid (PFOA); Perfluorooctane Sulfonate (PFOS).

variations), cancer (e.g., testicular, kidney), liver effects (e.g., tissue damage), immune effects (e.g., antibody production and immunity), thyroid effects and other effects (e.g., cholesterol changes)."[16]

In Suffolk County, thirty-two percent (32%) of all wells with PFOA or PFOS contamination exceeding regulatory limits are in the exact same area where South Fork Wind proposed installing its underground concrete infrastructure.[17] Neither BOEM's FEIS nor SFW's COP mentions either chemical compound. *See* Kinsella Affidavit (D.C. Cir., No. 22-5317, Doc. 1999552-02, ¶¶ 9-53)(App 39a-46a).

Fraud: Project Cost ($2 billion)

In 2018, Petitioner informed BOEM of SFW's "fail[ure] to comply with 30 CFR 585.627(a)(7) with specific regard to its potential negative impact upon employment" and of the Project cost, "$1,624,738,893." Now that cost is $2,013,198,056. BOEM knew that SFW came at a price but failed to acknowledge or consider the project cost in its socioeconomic impact analysis. BOEM's one-sided economic analysis accounts for *beneficial* Project-related spending in the local economy but ignores the cost burden to ratepayers ($2 billion), which would *adversely* impact the local economy. The Project cost outweighs SFW's claimed beneficial spending many times over. For every dollar SFW puts into the economy, it takes out

---

[16] *See* EPA FACT SHEET PFOA & PFOS (2016) at link—https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf

[17] *See* Newsday, published April 4, 2022, 'Forever chemicals' found in Suffolk's private water wells since 2016 (D.C. Cir., No. 22-5317, Doc. 1999552-17, at 3-6) (www.newsday.com/long-island/environment/private-wells-testing-contaminants-drinking-water-pfas-v49xdvtl)

a multiple of that amount. *See* Kinsella Affidavit (D.C. Cir., No. 22-5317, Doc. 1999552-02, ¶¶ 68-91)(App 49a-56a).

Fraud: South Fork RFP

On November 8, 2021, NYSPSC General Counsel Robert Rosenthal admitted that "[i]n January 2017, LIPA ... awarded SFW a PPA [power purchase agreement] for the supply of energy at an average price of 22 cents per kWh" and that "LIPA plans to purchase the same offshore wind renewable energy from another wind farm, Sunrise Wind, for 8 cents per kWh ... The two offshore wind farms – SFWF and Sunrise Wind Farm – are only two miles apart and are owned and controlled indirectly by the same joint and equal partners, Ørsted and Eversource."[18] At the prices admitted by Mr. Rosenthal, ***SFW is overpriced by $1,025,415,962*** (*see* Kinsella Affidavit, ¶¶ 105-106)(App 61a-62a)

BOEM asserts that the "power purchase agreement executed in 2017 result[ed] from LIPA's technology-neutral competitive bidding process[,]" referring to the South Fork RFP (*id*, ¶ 102)(App 60a). SFW makes the same false claim in its COP (*id*, ¶ 103)(App 60a). Nine months *before* BOEM approved the Project, Petitioner provided BOEM with substantiating evidence contradicting BOEM's and SFW's claim. The documents show the South Fork RFP advanced proposals *based on* technology (*not* technology-neutral), was a manipulated procurement that stifled competition, permitted favoritism, and was *not*

[18] *See* Verified Petition (D.C. Cir., No. 22-5317, 1999552-09, ¶¶ 62-64) and Verified Answer (*id.*, 1999552-10, ¶¶ 62-64) in *Simon V. Kinsella v. NYSPSC* (index 2021-06572, N.Y. App. Div., 2d Dept.).

competitive (*id.*, ¶¶ 92-106)(App 56a-62a). BOEM approved SFW's project regardless.

REASON FOR GRANTING THE PETITION

The district court for D.C. repeatedly denied Petitioner answers to his complaint, amended complaint, and a response to his summary judgment motion and statement of material facts, violating his Fifth Amendment rights to due process of law.

The courts consistently deny Petitioner a hearing on his five fraud claims and consideration of named defendants under those claims, violating his Fifth Amendment right to a hearing on his claims.

The D.C. Circuit admitted "the district court did not explicitly consider or allow argument on [Petitioner's] independent claims of fraud [and nine named defendants under those claims], which were first raised in his amended complaint" (App 5a). Still, acknowledging the district court did *not* consider (explicitly or otherwise) Petitioner's fraud claims, thus denying Petitioner a fair hearing; the D.C. Circuit affirmed the district court's transfer order.

The D.C. Circuit and the district court rulings to transfer the case conflict with the plain language of the statute (28 U.S.C. § 1404)—

> **(a)** For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought ...

The courts' rulings conflict with this Court precedent. In *Van Dusen v. Barrack*, this Court held that the purpose of section 1404(a) "is to prevent the

waste of time, energy and money' and to protect litigants, witnesses and the public against unnecessary inconvenience and expense" (376 U.S. 612, 616 (1964)). "[T]he most convenient forum is frequently the place where the cause of action arose" (*id.*, at 628). "Section 1404(a) provides for transfer to a more convenient forum, not to a forum likely to prove equally convenient or inconvenient" (*id.*, at 646).

On May 17, 2023, the court of appeal for the D.C. Circuit denied Petitioner injunctive relief without a hearing (No. 22-5317, Doc. 1999552-0)(*see* p. 9). The appeals court gave no reason for denying preliminary injunction, contrary to this Court precedent in *Kelley v. Everglades District,* 319 U.S. 415, 416 (1943) ("[T]here must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion [on the relevant issue] can rationally be predicated ... it is not the function of this Court to analyze the evidence in order to supply findings ... sufficient to indicate the factual basis for its ultimate conclusion.")

The courts' orders denying answers to allegations of fraud, a hearing on fraud claims, and injunctive relief compromise proper judicial review of fraud claims and violate Petitioner's Fifth Amendment right to due process of law.

Petitioner's motion for injunctive relief makes a clear showing that "four factors, [when] taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *see also Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288,

1291–92 (D.C. Cir. 2009)." *Pursuing Am.' Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 505 (D.C. Cir. 2016).

Please see Emergency Motion for a Temporary Restraining Order and Preliminary Injunction (No. 22-5317, Doc. 1999552-01, and Kinsella Affidavit (*id.*, Doc. 1999552-02).

1. Petitioner will likely succeed on the merits.

Nine months *before* BOEM approved the FEIS for SFW, BOEM acknowledged receiving conclusive evidence of PFAS contamination in soil and groundwater in the exact same area where SFW proposed installing underground concrete infrastructure for high-voltage transmission cables (*see* Kinsella Affidavit, ¶¶ 9-53)(App 39a-46a). Still, BOEM's FEIS contains no discussion, analysis, test results, or mitigation plans to minimize the project's impact on PFAS contamination. It does not consider the adverse health effects of chemicals the EPA links to cancer (*id,* ¶¶ 54-67)(App 46a-49a). In 2018, Petitioner notified BOEM that it had *not* considered the socioeconomic impact of the project's cost and that it was substantially more expensive than other nearby wind farms (*id,* ¶¶ 68-76) (App 49a-53a). BOEM failed to "independently evaluate the information" submitted by SFW, even after receiving information disproving SFW's claim. BOEM "shall be responsible for [the FEIS'] accuracy." (40 C.F.R. § 1506.5). BOEM did not ensure that SFW's development was "subject to environmental safeguards" (43 U.S.C. § 1332 (3)) concerning onshore PFAS contamination or "consistent with the maintenance of competition" (*id.*) regarding a non-competitive procurement process, where proposals were advanced based on technology (*id.*, ¶ 104). BOEM did *not* discuss alternatives *to avoid* a contaminated

area or obtain the same renewable energy at half the price from an offshore wind farm two miles away owned by the same joint and equal partners. "An EIS must discuss, among other things, 'alternatives to the proposed action,' NEPA § 102(2)(C)(iii), 42 U.S.C. § 4332(2)(C)(iii), and the discussion of alternatives forms 'the heart of the environmental impact statement.' 40 C.F.R. § 1502.14" *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991). BOEM is required to "consider every significant aspect of the environmental impact of [the] proposed action" *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983), and "to disclose the significant health, socioeconomic, and cumulative consequences of the environmental impact" (*id.*, at 106-07). It had to "take a 'hard look' at the environmental consequences before taking a major action" *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21 (1976).

BOEM did *not* consider the ($2 billion) project cost. In 2015, this Court made its position clear in a case concerning an EPA decision to reduce power plants' emissions of hazardous air pollutants, analogous to offshore wind's efforts to reduce the same emissions. There, "[t]he Agency gave cost no thought at all, because it considered cost irrelevant" *Michigan v. Envtl. Prot. Agency*, 135 S. Ct. 2699, 2706 (2015). Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR joined, dissenting, agreed with Justice SCALIA and the majority— "I agree with the majority—let there be no doubt about this—that EPA's power plant regulation would be unreasonable if '[t]he Agency gave cost no thought *at all*.' " *Id.*, (at 2714). Here, BOEM gave the cost ($2 billion) no thought *at all*.

Instead, BOEM not only neglected its duty to "inform the public that it has indeed considered environmental concerns in its decisionmaking process" (*Baltimore Gas, supra,* at 97), it went one step further— it falsified and concealed environmental contamination by asserting "existing groundwater quality in the analysis area appears to be good" (No. 22-5317, Doc. 1999552-16), and falsely stated the project's socioeconomic impact by omitting the project cost and the nature of the procurement process, contradicting evidence it acknowledged receiving *nine months before* approving the project.

BOEM's act satisfies the requisite elements of fraud. Petitioner can "show by clear and convincing evidence" (*Pyne v. Jamaica Nutrition Holdings Ltd.*, 497 A.2d 118, 131 (D.C. 1985)) that BOEM made a "false representation of material fact which is knowingly made" (*id.*) by falsely stating groundwater quality, the project's socioeconomic impact, and the nature of the procurement process, contrary to evidence it acknowledged receiving with the probable consequence of approving the project based on *its own* false representations. One "may infer ... that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted" *United States v. Williams,* 836 F.3d 1, 30 (D.C. Cir. 2016). Knowing the "probable consequences" of its acts would be to approve the project *with* false statements absent accurate information, BOEM issued its ROD approving the FEIS on November 24, 2021. BOEM's false representations would naturally deceive the reader into believing the water quality in Wainscott is good, the price of renewable energy is reasonable, and the procurement was technology-neutral and

competitive, but it was *not*. BOEM deceived the public.

The final element to prove fraud is an "action [that] is taken in reliance upon the misrepresentation." *Pyne v. Jamaica Nutrition Holdings Ltd.*, (*supra*). On October 19, 2018, BOEM published a Notice of Intent to Prepare an Environmental Impact Statement for SFW "[c]onsistent with the regulations implementing the National Environmental Policy Act (NEPA)" (83 Fed. Reg. 53,104).[19] On January 8, 2021, BOEM published a Notice of Availability of a Draft Environmental Impact Statement "[i]n accordance with regulations issued under the National Environmental Policy Act" (86 Fed. Reg. 1520).[20] In response to both notices, Petitioner submitted comments (on November 18, 2018, and February 22, 2021, respectively).[21] Petitioner's February 2021 comments letter specifically requested "that BOEM, as lead agency, conduct a broad review of the whole Project including in all respects the onshore and offshore components and 'use all practicable means and measures'" (quoting NEPA 42 U.S.C. § 4331(a)).[22] Petitioner relied on BOEM to perform a legally sufficient review. However, BOEM deceived the public and Petitioner by failing to perform that review.

In addition, Petitioner can establish that the district courts (in D.C. and the E.D.N.Y.) and the D.C. Circuit deprived him of his Constitutional rights to due process of law.

---

[19] *See* https://www.federalregister.gov/d/2018-22880/p-3. South Fork Wind LLC (formerly Deepwater Wind South Fork LLC)

[20] *See* https://www.federalregister.gov/d/2021-00100/p-3

[21] *See* No. 22-5317, Doc. 1999552-10 and Doc. 1999552-11.

[22] *Id.*, Doc. 1999552-11 (at 2, fifth paragraph).

> [A]s a matter of fundamental fairness the judge must accord an opportunity to be heard at least whenever there is a possibility that the hearing may develop facts bearing on the decision ... *See Fine v. McGuire*, 433 F.2d 499, 501 (D.C. Cir. 1970).

The courts repeatedly denied Petitioner his right to a fair hearing on fraud claims and the contemplation of the convenience of nine BOEM officials and named defendants under those claims (parties and witnesses) before transferring the case and denying injunctive relief.

> The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). See *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

The D.C. Circuit admitted that the district court did not "consider or allow argument on [Petitioner's] independent claims of fraud" and named defendants under those claims (parties and witnesses) but still concluded "transfer was warranted." (App 4a-5a) Petitioner did not have an opportunity to be heard on his claims of fraud.

> Due process of law ... implies the administration of law ... by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing [internal quotes removed]. *See Jacob v. Roberts*, 223 U.S. 261, 262 (1912)

The district court in the E.D.N.Y. ordered that petition's preliminary injunction motion be denied (entered May 17, 2023) twenty days *before* the D.C. Circuit's order denying Petitioner's mandamus petition affecting transfer had become effective (June 7, 2023).[23] The E.D.N.Y. district court lacked jurisdiction to deny preliminary injunction. The court deleted from the order's case caption the BOEM officials named as defendants under the fraud claims(App 28a), and the order itself ignored the fraud claims (App 28a-35a). The E.D.N.Y. court denied Petitioner's preliminary injunction motion without his knowledge, without a hearing absent contemplation of fraud claims.

2. The Petitioner and the public will likely suffer irreparable harm.

> The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976)

Although *Elrod v. Burns* refers to First Amendment freedoms, the same applies to Plaintiff's rights to due process free of bias, but with a distinction. "The First Amendment does not mandate a viewpoint-neutral government" (internal quotes removed). *Agency for Int'l Development v. Alliance for Open Society*, 140 S. Ct. 2082, 2090 (2020) (Justice THOMAS concurring with Justice KAVANAUGH and the majority). The Due Process Clause requires a court to receive, in the first instance, substantive claims with a neutral

[23] *See* D.C. Circuit Rules 41(3)

viewpoint without pre-judging some claims to be set aside and to be wholly ignored, as in the case here regarding Petitioner's fraud claims. Both district courts (in D.C. and the E.D.N.Y.) deprived Petitioner of the right to hear his claims free from prejudice. Petitioner's claims were cherry-picked by the courts to suit a desired outcome.

Harm from the forbidden message

When considering Establishment Clause violations in *Chaplaincy of Full Gospel Churches,* the D.C. Circuit recognized that—

> [O]fficial preference of one religion over another, such governmental endorsement 'sends a message to nonadherents [of the favored denomination] that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.' *Lynch v. Donnelly,*465 U.S. 668, 688, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring)." (square brackets included in original text) [*supra,* at 302]. This harm ... occurs merely by virtue of the government's purportedly unconstitutional policy or practice [*id.*] [S]pecifically, the harm that flows from the 'forbidden message' [*supra,* at 299].

The D.C. Circuit recognized "harm that flows from the 'forbidden message' " when government acts send an adverse message endorsing one religion over

another. Whether it be Establishment Clause or Due Process Clause violations, harm flows from the message unlawful government acts send. In this case, BOEM disregarded its statutorily mandated obligations and engaged in common law fraud against the public interest. The courts' violated Petitioner's Due Process Clause rights in aid of perpetuating BOEM's fraud. Such actions send the wrong message.

Fraud against the public interest by BOEM officials who have a duty to serve the public sends the wrong message to the offshore wind industry it regulates.

Marine Construction

The United States has embarked on one of the largest construction programs in its history. Private developers have submitted building plans for 3,031 offshore wind turbines[24] up to 1,171 feet tall,[25] double the height of the Washington Monument. Each wind turbine could have up to four foundation piles (12,124 piles), each with a diameter of up to 14.8 feet (half the width of the Washington Monument's top section).[26] Each foundation pile might penetrate the seabed down 197 feet.[27] To understand the construction program's scale, look at the Washington Monument and imagine more than three thousand monuments twice the height (half the width) with blades up to 935 feet in diameter[28] and streaks of oil and grease

---

[24] *See* D.C. Cir., No. 22-5317, Doc. 1994062-07 (at 3)
[25] *Id.* (at 1)
[26] *See* SouthCoast Wind (formerly Mayflower Wind), COP, Vol. II, Rev-E (at 9-16, PDF 498, Table 9-10). At boem.gov (under the tap "Construction and Operation Plan")—
https://www.boem.gov/renewable-energy/state-activities/southcoast-wind-formerly-mayflower-wind
[27] *Id.*
[28] *See* D.C. Cir., No. 22-5317, Doc. 1994062-07 (at 3)

running down the sides from the mechanical turbines and rotating hubs. The (3,031) offshore wind turbines require repairs and maintenance and (in total) 4,089,015 gallons of coolant fluids, 8,849,066 gallons of oils and lubricants, and 2,212,425 gallons of diesel fuel,[29] which must be refilled and changed by boat in sometimes rough seas. The industrial-scale offshore development program has inherent risks to life, property, and the marine environment.

As of March 2023, BOEM had auctioned leases to private companies to develop 2.8 million acres of lease area off the U.S. coastline to offshore wind developers.[30] By 2024, BOEM plans to auction an additional 7.1 million acres (*id.*). Including areas for which BOEM has issued a Call for Information and Nominations (Oregon and the Gulf of Mexico), BOEM could potentially lease up to 45.3 million acres (*id.*), about the same size as the twelve largest U.S. National Parks combined.[31]

Any departure from the high standards of excellence that the nation expects of the federal agency overseeing such an ambitious build-out of our coastline could be disastrous. For example, the BP Deepwater Horizon Disaster, Report to the President (2011) reads— "With regard to NEPA specifically, some MMS [BOEM's predecessor] managers

---

[29] *See* South Coast Wind (formerly Mayflower Wind), Draft Environmental Impact Statement, February 2023, Vol. II: Appendix D, Table D2-3. Offshore wind development activities on the U.S. East Coast (at D-79, PDF 83). *See* boem.gov at— https://www.boem.gov/renewable-energy/state-activities/southcoast-wind-draft-environmental-impact-statement

[30] *See* D.C. Cir., No. 22-5317, Doc. 1994062-06 (at 4)

[31] Approximately 45.8 million acres (*id.*, Doc. 1994062-08, at 1)

reportedly 'changed or minimized the ... scientists' potential environmental impact findings in [NEPA] documents to expedite plan approvals.' According to several MMS environmental scientists, 'their managers believed the result of NEPA evaluations should always be a 'green light' to proceed.' " *See* No. 22-5317, Doc. 1994062-09 (at 14). "It should be no surprise under such circumstances that a culture of complacency with regard to NEPA developed" (*id.*).

Conflicted oversight

The three people overseeing the development of up to 45.3 million acres off the U.S. coastline all worked for a major law firm advising the offshore wind industry, Latham & Watkins LLP. The current U.S. Deputy Secretary of the Interior, Tommy Beaudreau, was a partner in the Washington, D.C. office of Latham & Watkins (2017–2021). The Nominee Report for Mr. Beaudreau lists "DE Shaw Renewable Investments" as a source of compensation. DE Shaw Renewable Investments owned South Fork Wind LLC (formerly Deepwater Wind South Fork LLC) before selling it to Ørsted A/S, another offshore wind developer from which Mr. Beaudreau received compensation. Mr. Beaudreau's Nominee Report lists a Latham & Watkins income of $2.4 million. It identifies the following offshore wind companies—Ørsted A/S, Avangrid Renewables, Vineyard Wind LLC, Beacon Offshore Energy, TOTAL, innogy Renewables US, Dominion Resources, Inc., DE Shaw Renewable Investments, and Anbaric Development Partners. *See* Beaudreau 2020 OGE Nominee Report (*id.*, 1994062-10). The Principal Deputy Assistant Secretary for Land and Minerals Management (L&MM), Ms. Laura Daniel-Davis, who signed

BOEM's Record of Decision for SFW, was a Senior Manager at Latham & Watkins (2001–2007). The Director of BOEM, Elizabeth (Liz) Klein, was an Associate at Latham & Watkins (2006–2010). Counsel representing SFW, Ms. Janice Schneider of Latham & Watkins, served as Assistant Secretary for L&MM (2014–2017).

Officials in charge of our nation's marine resources at the DOI and BOEM are conflicted. This case leaves no room for doubt that public officials blurred the lines between serving the *public* and *private* interests and, with the aid of the courts, attempted to conceal their choice to further SFW's interests to the public detriment.

The wrong message

By engaging in acts contrary to law constituting fraud, BOEM implicitly condones unlawful conduct in others, including developers operating offshore where few people can see what they are doing. BOEM's reckless neglect and fraudulent conduct send a clear message that developers need not comply with regulations and safety standards because BOEM, the regulator, does not. If a developer plans to build on a contaminated site, the message is that BOEM will help you cover it up and approve your project regardless; after all, it did it for SFW. The message is loud and clear: SFW does not have to comply with federal environmental law, so why should we? If federal regulators turn a blind eye to non-compliance and fraudulent representations, and if the courts turn to (unlawful) procedure to thwart proper judicial review, developers and the public will likewise act contrary to law.

Sending the wrong message regarding compliance to developers operating in unforgiving, sensitive, and critical ocean environments and onshore residential communities is harmful (*see* BP Deepwater Horizon Disaster on pp. 26-27).

Harm flows to the public from the message that government acts in violation of statutory, equity, common law, and constitutional law send. The public will lose confidence in the regulatory and judicial process. It demoralizes hardworking staff and scientists at government agencies and judges and officials at courthouses. It implicitly condones unlawful acts by developers, regulators, and the public. If government regulators violate the law and judges ignore the people's constitutional rights, the public will do the same. Such acts erode our constitutional protections.

The harm is irreparable.

In *Chaplaincy of Full Gospel Churches*, the D.C. Circuit finds the harm that flows from the 'forbidden message' is irremediable—

> [T]he inchoate, one-way nature of Establishment Clause violations, which inflict an 'erosion of religious liberties [that] cannot be deterred by awarding damages to the victims of such erosion,' *City of St. Charles,*794 F.2d at 275, we are able to conclude that where a movant alleges a violation of the Establishment Clause, this is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination. [454 F.3d 290, 303 (D.C. Cir. 2006)]

In this case, the harm resulting from the message BOEM's and the courts' violations send also are of an "inchoate, one-way nature ..." It includes the fishing industry struggling to defend the livelihood of its members, who rightly question the integrity of BOEM's decisions. It includes the petitioner, who doubts the integrity of BOEM and the federal courts. While Petitioner's heart still holds hope, experience tells him that a federal environmental review, like a federal court, is a charade and the Constitution is like an elusive mythical creature spoken about but never experienced. This Court can make the constitutional experience real.

Petitioner sends email updates to a list of over one thousand people who forward his emails to others. He posts information on his websites[32] that are accessible to the public. Petitioner communicates his experiences to countless others in an inchoate, one-way nature. Such a disparate group cannot receive damages. An award of damages cannot remediate the harm.

The FEIS states that other "[c]ooperating agencies may rely on this final EIS to support their decision-making." (FEIS, at ii, PDF 6, 3rd ¶). The U.S. Environmental Protection Agency is a listed cooperating federal agency (ROD, at 1, PDF 3, 2nd ¶). Should the EPA rely on BOEM's false representations that "[o]verall, existing groundwater quality in the analysis area appears to be good" (FEIS, at H-23, PDF 655), Wainscott will likely have problems securing federal assistance from the EPA regarding the remediation of harmful groundwater PFAS contamination. This is another example of the harm

[32] www.Wainscott.Life and www.oswSouthFork.info

from BOEM's unlawful act of fraudulently stating groundwater quality, sending the wrong message that ripples through agencies by word of mouth. Wainscott may not get the support it needs. Such harm is irremediable.

3. The balance of equities favors Petitioner.

> In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.' *Amoco Production Co.,*480 U.S., at 542, 107 S.Ct. 1396. 'In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.' *Romero–Barcelo,*456 U.S., at 312, 102 S.Ct. 1798; see also *Railroad Comm'n of Tex. v. Pullman Co.,*312 U.S. 496, 500, 61 S.Ct. 643, 85 L.Ed. 971 (1941). *See Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 24 (2008)

The balance of equities weighs the harm to Petitioner *without* injunctive relief against the harm to SFW *with* injunctive relief. Petitioner considers the harm to Defendant Federal Agencies and the public interest together. *See Pursuing Am.' Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016) ("assessing the harm to the opposing party and weighing the public interest 'merge when the Government is the opposing party' ").

Petitioner without injunctive relief

Petitioner jogs regularly along Beach Lane, where SFW has installed underground infrastructure for high-voltage transmission cables. The permanent concrete duct banks and vaults encroach into groundwater and are installed at the capillary fringe of a contaminated sole-source aquifer. BOEM did not perform the requisite 'hard look' environmental review of the likely chemical interaction between concrete and PFAS compound contaminants. Plaintiff has cause to suspect SFW's infrastructure will become a secondary source of contamination and prolong its harmful effects on the environment near his home. Plaintiff swims and sails in the waters surrounding the onshore construction corridor that is connected via groundwater to SFW's concrete duct banks and vaults. Plaintiff has cause to suspect that SFW's overpriced renewable energy will increase the cost of electricity and adversely impact the local economy more than would have occurred had BOEM considered the project's cost and procurement manipulation. BOEM engaged in fraud, denying Petitioner and the public the right to a legally sufficient environmental review. The federal courts repeatedly deny Petitioner his Fifth Amendment right to a hair hearing on his claims. Without immediate injunctive relief, the harm from the uncertainty due to the lack of an environmental review and the message unlawful government actions send will continue inflicting harm.

SFW with injunctive relief (denying fruits of fraud)

SFW will argue (as it did in the district court) that it "has already mobilized and begun its prep work ... that includes bringing highly specialized equipment that was reserved in advance of construction to the site at great expense, approximately $40 million."

(November 9, 2022, Hearing Tr., at 5:20-25). SFW claims it will suffer potential economic injury should the district court grant Petitioner an injunction. However, the hearing occurred in November 2022, *after* SFW had begun construction. SFW does *not* explain why it failed to consider PFAS contamination when it was widely known in 2017. Suffolk County Department of Health Services issued a Water Quality Advisory on October 11, 2017. *See* Kinsella Affidavit, No. 22-5317, Doc. 1999552-02, ¶ 12)(App 41a). PFAS contamination in Wainscott was widely publicized three years *before* SFW submitted its final COP (May 7, 2021). On January 2, 2020, Petitioner provided SFW with conclusive evidence of extensive PFAS contamination (also provided to BOEM in February 2021). *See* link (last accessed June 17, 2023)—
https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf.

Despite knowing the extent of contamination for at least a year before submitting its final COP, SFW did not alter its plans.

In December 2022 and January 2021, SFW tested its onshore construction corridor for PFAS contamination for the first time. The test results showed groundwater PFOA contamination (50 ppt), exceeding regulatory limits five times (*see* No. 22-5317, Doc. 1999552-20, at 1, 5th column). Groundwater PFOS contamination (14.7 ppt) exceeds regulatory limits (*id.*, at 2, 8th column). SFW's testing pre-dates its final COP (submitted on May 7, 2021) by four months. SFW did *not* disclose *its* test results showing PFAS contamination exceeding regulatory limits that the EPA links to cancer and other severe health problems (EPA FACT SHEET, on pp. 13-14)

but included other less harmful contaminants, such as "median groundwater nitrogen levels ... [that] have risen 40 percent to 3.58 mg/L",[33]

SFW (falsely) claimed that its COP "provides a description of water quality and water resource conditions in the ... [onshore] SFEC [South Fork Export Cable] as defined by several parameters including: ... contaminants in water ..." [34] Despite a clear duty to "[d]escribe the existing water quality conditions and your project activities that could affect water quality" (30 CFR 585.627(a)(2)), and to "[d]escribe the general state of water quality in the area proposed for your project by reporting typical metrics for quality including the ... presence or absence of contaminants in water" (*id.*) and any "environmental hazards and/or accidental events causing accidental releases of ... hazardous materials and wastes" (*id.*), SFW remained silent on known onsite PFAS contamination. *See* Kinsella Affidavit (No. 22-5317, Doc. 1999552-02, ¶¶ 146-157)(App 63a-67a).

SFW's false representations of water quality satisfy the requisite elements of fraud. The Petitioner can "show by clear and convincing evidence" (*Pyne v. Jamaica Nutrition Holdings Ltd., supra*) that SFW made a "false representation of material fact which is knowingly made" (*id.*) "The concealment of a fact that should have been disclosed is also a misrepresentation. *Feltman v. Sarbov,* 366 A.2d 137, 140-41 (D.C. 1976). Where a court finds that a party had the duty to disclose material information and

---

[33] *See* COP May 2021 (at 4-61, PDF 229, 1st ¶). *See* SFW COP at boem.gov (under tab "Construction and Operations Plan")—www.boem.gov/renewable-energy/state-activities/south-fork

[34] *Id.*, (at 4-56, PDF 224, 1st ¶)

failed to do so, there is an even greater likelihood that the nondisclosure will constitute fraud. *Pyne v. Jamaica Nutrition Holdings, Ltd.,*497 A.2d 118, 131 (D.C. 1985)" *Sage v. Broadcasting Publications, Inc.*, 997 F. Supp. 49, 52 (DDC 1998). According to BOEM, SFW had a duty to disclose—

> Pursuant to 30 C.F.R. § 585.627, the Lessee [SFW] must submit information and certifications necessary for BOEM to comply with the National Environmental Policy Act of 1969 (NEPA)[8] and other relevant laws. [n.8 "42 U.S.C. § 4321 *et seq.*] *See* ROD (at D-5, PDF 97, third paragraph)

Contrary to its obligations, SFW did *not* submit to BOEM its *own* test results showing onsite groundwater PFAS contamination (but disclosed other less harmful contaminants). SFW falsely represented groundwater quality by omission, knowing it was contaminated, and sought project approval. One "may infer ... that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted" *United States v. Williams* (*supra*). The "probable consequence" of SFW knowingly omitting environmental contamination would likely lead to BOEM's approval of its Project.

The final element of fraud is an "action [that] is taken in reliance upon the misrepresentation." *Pyne v. Jamaica Nutrition Holdings Ltd.*, (*supra*). Petitioner relied on the accuracy of SFW's COP and has read it several times out of concern that SFW would cause harm to him, his family, his community, and his

environment. His concerns have proved to be well-founded. SFW's actions constitute (civil) fraud.[35]

In *Simon Schuster v. Crime Victims Bd.*, this Court "recognized the 'fundamental equitable principle,' ... that '[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity ...' " (502 U.S. 105, 119 (1991)). It is inconsistent with fundamental equitable principles for SFW "to profit by his own fraud" (*id.*), that is, the fraud when it knowingly omitted PFAS contamination from its COP that materially misrepresented groundwater quality and seeking "to take advantage of [its] own wrong" (*id.*) by using its construction (obtained by fraudulent representations) to defeat injunctive relief. SFW wants to keep what it gained through fraud despite the ongoing risks to public health and the environment absent a legally sufficient review.

4. Injunctive relief favors the public interest.

The case cries out for this Court to defend the public interest in having agencies comply with their statutorily mandated obligations and for courts to uphold the Constitution by granting Petitioner a fair hearing on his fraud claims.

> There is generally no public interest in the perpetuation of unlawful agency action. *PAG*, 831 F.3d at 511–12, 2016 WL 4087943, at *8; *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). To the contrary, there is a substantial public interest "in having govern[-]

[35] SFW's COP may have violated 18 U.S.C. § 1001.

> mental agencies abide by the federal laws that govern their existence and operations." *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994). *See League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

There is a public interest in courts guaranteeing Fifth Amendment rights to due process of law, including a fair hearing. "The public interest favors the protection of constitutional rights, *see, e.g.*, *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)" *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 335 (D.C. Cir. 2018).

Federal Defendants may argue that "the Project materially furthers federal renewable energy goals"[36] as they did in the D.C. Circuit. However, SFW's wind farm (130 MW) represents *only one-third of one percent* of U.S. approved offshore wind generating capacity (39,021 MW);[37] thus, it is *not* material. On the contrary, granting injunctive relief at this early stage of offshore wind development would send the industry and regulators a message that the nation expects higher standards. This Court could send that message without *materially* affecting offshore wind resources' overall generating capacity.

CONCLUSION

This Court recognized in *Percoco v. United States* that "an agent of the government has a fiduciary duty to the government and thus to the public it serves"

---

[36] *See* D.C. Cir., No 22-5316, Doc. 1982686 (at 23)

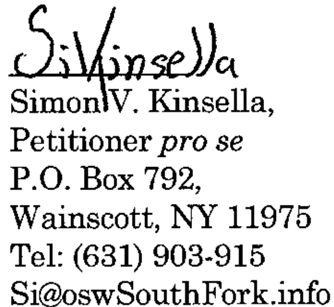
[37] Mayflower Wind's DEIS (February 2023), Volume II: Appendix D (D.C. Cir., No. 22-5317, Doc. 1994062-07, at 3). Table D2-1: OCS Total Generating Capacity (MW) is "39,021"

(No. 21-1158, 598 U.S. ---, --- S. Ct. ---, 2023 WL 3356527 (May 11, 2023)). It follows that if such *agent* has a fiduciary duty, then *actual* public officials employed by the government have a fiduciary duty to the public they serve. Here, clear and convincing evidence shows that public officials violated their fiduciary duty and engaged in common law fraud. Simply put, it cannot be that fraud by a federal regulatory agency is acceptable.

Petitioner has no alternative remedy.

For the reasons stated herein, Petitioner respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted this 22nd day of June 2023,



Simon V. Kinsella,
Petitioner *pro se*
P.O. Box 792,
Wainscott, NY 11975
Tel: (631) 903-915
Si@oswSouthFork.info