No. 22-703

In the Supreme Court of the United States

AMERICAN PETROLEUM INSTITUTE, ET AL., PETITIONERS

v.

ENVIRONMENTAL DEFENSE CENTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALASKA, IDAHO, MONTANA, OKLAHOMA, AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

In the amici States, the oil-and-gas industry is part of the lifeblood of the economy. In Texas and along the Gulf Coast, the exploration and production of oil and gas have been integral to the development and growth of the economy for over a century. New technology has allowed that economic driver to expand to other regions. Offshore exploration and production, in particular, have been critical to that development throughout the twentieth century and have propelled many States into the twenty-first century with record levels of economic prosperity.

The Ninth Circuit's decision in this case poses a direct threat to the States' interests in promoting the expeditious and orderly exploration and production of oil and gas in the Gulf of Mexico. Through an unjustifiably capacious interpretation about what constitutes "final agency action," the court has empowered litigants to use the Administrative Procedure Act ("APA") to deploy a host of environmental statutes to stymie innovative and productive approaches to offshore exploration at preliminary stages of a federal agency's decisionmaking process. If not corrected, this approach to "final agency action" threatens to snuff out creative approaches to harnessing national resources before they even get off the ground. Because such an outcome would imperil the development of critical national energy resources, amici States urge this Court to grant the petition.

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. On February 15, 2023, counsel of record for all parties received notice of amici's intention to file this brief.

SUMMARY OF ARGUMENT

I. Oil-and-gas exploration and production have been integral components of economic growth since the dawn of the twentieth century. The discovery of an economically productive oilfiled at Spindletop in 1901 birthed an industry that would take the State of Texas from a regionally significant agricultural economy to a global destination for the exploration and production of oil and gas. The move to offshore production in the mid-twentieth century, encouraged by Congress, helped to sustain this growth through the twenty-first century. And today, oil-and-gas exploration and production remain key sectors of the economy; the industry has propelled the Gulf Coast region to unprecedented economic prosperity.

II. This Court should grant the petition because the Ninth Circuit's broad conception of "final agency action" not only jeopardizes that economic driver for the States within its jurisdiction, but it also conflicts with the decisions of three of its sister circuits. The court concluded that the Department of the Interior's issuance of an Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") related to the use of well-stimulation treatments constituted final agency action under the APA merely because that interlocutory decision might be used in a hypothetical, subsequent decision to issue a permit. But that is true for *any* interlocutory agency decision. The Ninth Circuit's holding that the FONSI nonetheless constituted final action by the Department confuses the *practical* consequences of an agency decision with the decision's *legal* consequences, and its holding conflicts with the decisions of three of its sister circuits that carefully police this distinction.

Review is also warranted because the Ninth Circuit's decision threatens to empower litigants to bog down critical national energy projects in duplicative, costly, and time-consuming review before agencies even make the decision to move forward with a project. The natural consequence of such a legal regime will be to discourage such projects from being initiated in the first place.

ARGUMENT

I. Oil and Gas Exploration and Production Is a Vital Component of Amici States' Economies.

The presence of oil in Texas has been known for hundreds of years, and it has been an important resource for nearly as long. For example, discharge from tar pits was used by indigenous peoples to treat rheumatism or skin diseases. Tex. State Libr. & Archives Comm'n, *The Oil Wars*, Hazardous Bus.: Indus., Regul. & the Texas R.R. Comm'n 1, https://tinyurl.com/yxz2u59x (last visited Feb. 27, 2023). And oil floating in Galveston Bay was used by wayfaring European explorers in the sixteenth century to caulk their leaky boats. Mary G. Ramos, *Oil & Texas: A Cultural History*, Tex. Almanac, https://tinyurl.com/4sdxer48 (last visited Feb. 27, 2023).

But it was not until the dawn of the twentieth century that the full power of oil as an economic driver was harnessed. The discovery of oil at Spindletop in 1901 set off a half-century of exploration and production that transformed the Texas economy into a global industrial force. By the middle of the twentieth century, oil-and-gas exploration began to move offshore, and by the century's end, discoveries under the seafloor propelled Texas and the broader Gulf Coast region to even greater economic heights. More than a hundred years after Spindletop, the oil-and-gas industry remains a powerful engine of growth for the economy of the region, which now hosts

the largest refining center in the United States as well as the Nation's Strategic Petroleum Reserve. *SPR Storage Sites*, DEP'T OF ENERGY, https://tinyurl.com/5y68z66s (last visited Feb. 27, 2023).

A. The birth of the Texas oil-and gas-industry

1. The birth of Texas's oil-and-gas industry was ushered in by the advent of a new method for oil extraction: drilling. Historically, oil was captured either by harvesting liquid that seeped through the ground to the surface or by digging for it by hand. JUDITH WALKER LINSLEY, GIANT UNDER THE HILL: A HISTORY OF THE SPINDLETOP OIL DISCOVERY AT BEAUMONT, TEXAS, IN 1901 1, 12 (2002). But in 1859, two Pennsylvanians developed a new method that involved penetrating deep underground to access previously untapped oil reserves. *Id.* Seven years later, in 1866, Lyne T. Barret would deploy this drilling method in Nacogdoches County, Texas, and, upon striking oil, created the State's first producing oil well. Ramos, *supra*. Barret's well, however, was only capable of producing a meager ten barrels of oil per day. Tex. State Libr. & Archives Comm'n, *supra*, at 1.

Because oil was cheaper to produce elsewhere, it would be decades before an economically viable oil-production operation would get off the ground in Texas. *Id.*; Ramos, *supra*. That all changed in 1894 when crews drilling for water in Corsicana, Texas, stumbled instead upon oil. DIANA DAVIDS HINTON & ROGER M. OLIEN, OIL IN TEXAS: THE GUSHER AGE, 1895-1945 4 (2002). This discovery prompted an influx of "wildcatters," and by the end of 1897, the Corsicana oilfields had forty-three wells producing almost 66,000 barrels of oil per year. *Id.* at 4-5.

The majority of early production was for local use, and the contamination and waste from the excess supply of oil prompted city leaders to contract with the

managing partner of a Pennsylvania oil company for the construction of pipelines, storage tanks, and a refinery. *Id.* at 5. The creation of a local infrastructure for oil production proved prescient: by 1900, the Corsicana oilfields were producing more than 800,000 barrels of oil per year, and opportunities for small contractors and producers to profit were plentiful. *Id.* at 5-6.

While the success of the Corsicana oilfields "showed that petroleum development could be profitable in [Texas]," *id.* at 7, the discovery of oil in early 1901 outside of Beaumont would transform a local business venture into an industry that would power the Nation, if not the world, Ramos, *supra.* That discovery, known as Spindletop, took place mid-morning on January 10, 1901, when drilling caused an oil well to blow, sending water, sand, rocks, gas, and oil hurtling hundreds of feet in all directions. *Id.*; Tex. State Libr. & Archives Comm'n, *supra*, at 2. For the next nine days, the well spewed forth a six-inch column of oil more than 100 feet high. HINTON, *supra*, at 30; Tex. State Libr. & Archives Comm'n, *supra*, at 2. "The size of the Spindletop gusher ensured that virtually every oilman who could get to Spindletop did," since an "equal did not exist in America." Hinton, *supra*, at 30, 32. That single well would ultimately produce more than 70,000 barrels of oil per day, and at its peak production, in 1902, the oilfield produced 17.5 million barrels per year. Roger M. Olien, *Oil and Gas Industry*, Tex. State Historical Ass'n, https://tinyurl.com/487me6js (last updated Jan. 29, 2022).

The impact of the Spindletop discovery was "instantaneous." Tex. State Libr. & Archives Comm'n, *supra*, at 2. The population of Beaumont quintupled in just three months, *id.*, due to the flood of wildcatters hoping to make the next big discovery, laborers looking for

work, and service- and supply-related manufacturing firms—such as refineries, pipelines, and oilfield-equipment manufacturers and dealers, Ramos, *supra*. Over the next several years, multiple oilfields were established throughout the Gulf Coast region, Olien, *supra*, as well as in other parts of Texas, Ramos, *supra*.

2. The frenzy of oil exploration and production during the first several decades of the twentieth century was instrumental in the development of the regional economy as it exists today. "Refineries that rivaled the largest in the world were built," and "[p]ort facilities along the coast were dredged to accommodate tanker ships." Tex. State Libr. & Archives Comm'n, *supra*, at 2. By the end of the 1920s, "the volume of petroleum products moving from the Houston Ship Channel made the Port of Houston second only to New York in tonnage." Hinton, *supra*, at 137. That port remains vital today and serves industries in regions far outside Texas—including States within the Ninth Circuit. *See generally* THE PORT OF HOUS. AUTH., THE 2018 ECON. IMPACT OF MARINE CARGO ACTIVITY AT THE PORT OF HOUS. ON THE STATE OF TEXAS & THE UNITED STATES (Apr. 5, 2019), https://tinyurl.com/32pdcy2c.

Moreover, the oil-and-gas industry's boom also nurtured the growth of other, related industries—after all, exploration and production companies "needed lumber and timber, rope, steel cable, pipe, casing, and other supplies." Tex. State Libr. & Archives Comm'n, *supra*, at 2. And close association with the oil industry transformed modest cities and villages into today's mighty metropolises. Olien, *supra*. "[B]y 1929," for example, "27 percent of all manufacturing employees in Harris County"—where Houston is located—"were employed by refineries." *Id.* The success of the oil industry through the 1930s

earned Houston the moniker "the city the Depression forgot." RICHARD H. KRAEMER, CHARLDEAN NEWELL & DAVID F. PRINDLE, TEXAS POLITICS 12 (10th ed. 2009). And the oil-and-gas industry thus became an increasingly vital source of public revenue for the State. Olien, *supra*.

By the 1940s, "Texas was by far the most important petroleum-producing state in the United States," providing "close to half a billion barrels of crude oil in 1940," which constituted "36.5 percent of all domestic oil"—"twice the volume of California, the next largest producing state." HINTON, *supra*, at 219. That year, the "value of oil and gas produced in Texas was greater than the value of all crops raised in the state." *Id.* at 220. "[A] quarter million Texans worked in some phase of the petroleum industry—in drilling, production, marketing, natural gas, gasoline plants, carbon-black plants, equipment and supply, wholesaling and retailing." *Id.* The industry accounted for half of all state and local tax revenues. *Id.* And as one writer summed it up, "[i]n a scant half-century, the petroleum industry had become the dominant economic force in Texas." *Id.*

B. Offshore drilling in the Gulf of Mexico

Many of the most prominent discoveries of oil and gas in Texas in the early twentieth century occurred onshore. But offshore oil-and-gas exploration would prove to be a fertile undertaking during the second half of the century, as onshore exploration yielded less fruit and global energy demand increased. *See* Nat'l Comm'n on the BP Deepwater Horizon Oil Spill & Offshore Drilling, *A Brief History of Offshore Oil Drilling* 1 (Staff Working Paper No. 1, 2010), https://tinyurl.com/45a79stf.

The first offshore drilling for oil in Texas occurred in 1908 in the marshes of Galveston Bay, where oil was

discovered 1,600 feet below ground. Priscilla Meyers Benham, *Goose Creek Oilfield*, Tex. State Historical Ass'n, https://tinyurl.com/yxdkrkfn (last visited Feb. 27, 2023). Although such wells were not initially a commercial success, the 1918 discovery of a "gusher" producing 8,000 barrels a day led to a rush of oilmen seeking riches from this new technique for obtaining fossil fuels. *Id.*

Over the ensuing decades, technological improvements allowed companies to drill further and further from the shore. In 1937, what had been confined to marshes that were offshore in name only extended "a record one mile from the beach." WILLIAM L. LEFFLER, RICHARD PATTAROZZI & GORDON STERLING, DEEPWATER PETROLEUM EXPLORATION & PRODUCTION: A NONTECHNICAL GUIDE 6 (2d ed. 2011). A decade later, one company drilled the first productive well beyond the sight of land—10.5 miles from the shore. Nat'l Comm'n, *supra*, at 2. This operation "usher[ed] in the great and enduring oil bonanza that the Gulf of Mexico has provided," LEFFLER, *supra*, at 8, and has solidified the position of the Gulf Coast as the centerpiece of the Nation's network of refineries—even for oil and gas produced far afield, *Tex. State Energy Profile*, U.S. ENERGY INFO. ADMIN., https://tinyurl.com/5h3w97ax (last updated May 19, 2022).

In the 1980s, that position was furthered when, with the help of technological advances, several oil companies discovered oilfields in the Gulf of Mexico at depths previously unexplored and more productive than those in shallower waters (less than 1,000 feet). TYLER PRIEST, THE OFFSHORE IMPERATIVE: SHELL OIL'S SEARCH FOR PETROLEUM IN POSTWAR AMERICA 227-28, 243-251 (Tex. A&M Press 2007). These discoveries helped to touch off thirteen consecutive years of increased offshore

production from 1991 to 2003. Nat'l Comm'n, *supra*, at 8. During this period of time, deep-water production surpassed production from shallower waters. *Id.* at 9. And with onshore production declining during this time period, offshore production began to play an ever more prominent role in the region's economy. *Id.*

C. Disputes over, and the development of, offshore oil-and-gas exploration

While technological advancements spurred oil-and-gas exploration offshore, it simultaneously precipitated a protracted legal battle between several States and the federal government over which sovereign had the right to lease the submerged lands, including in the Gulf of Mexico, for offshore oil-and-gas exploration. *See Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1887 (2019); John C. Whitaker, Striking a Balance: Env't & Nat. Res. Policy in the Nixon-Ford Years 260 (Am. Enter. Institute for Pub. Pol'y Rsch. 1976).

1. The opening salvo in this dispute was a proclamation and executive order issued by President Truman in 1945, which declared the entire continental shelf to be "subject to [the] jurisdiction and control" of the United States and gave responsibility for its management to the Secretary of the Interior. Proclamation No. 2667, 10 Fed. Reg. 12,303 (Sept. 28, 1945); Exec. Order No. 9633, 10 Fed. Reg. 12,305 (Sept. 28, 1945). Despite this, a number of States with oil-rich coast lines continued to lease land in the Gulf of Mexico for purposes of oil-and-gas exploration. Whitaker, *supra*, at 260.

2. Eventually, the United States filed original actions against California, Texas, and Louisiana in this Court seeking to quiet title and enjoin the States from leasing any land in the waters off their respective coasts. *United States v. Texas*, 339 U.S. 707, 709 (1950); *United*

States v. Louisiana, 339 U.S. 699 (1950); *United States v. California*, 332 U.S. 19 (1947); *see Whitaker*, *supra*, at 260. For its part, Texas responded that it had possessed title to those submerged lands when it was a Republic and that it did not give up such title when it was annexed and admitted to the Union. *Texas*, 339 U.S. at 711.

In each of these divided cases, this Court sided with the federal government. The Court held that Texas had relinquished any rights it may have had in those offshore lands as an incident to its admission into the Union.[2] *See Texas*, 339 U.S. at 718-19. The Court also held that ownership of the offshore lands was not an incident of state sovereignty such that Louisiana or California had acquired it upon entering the Union. *California*, 332 U.S. at 31; *Louisiana*, 339 U.S. at 705. These decisions appeared to sound the death knell for oil-and-gas exploration on the Gulf Coast: although this Court's judgments forbade only *the States* from issuing new permits for oil-and-gas exploration, the Solicitor of the Department of the Interior had concluded that the federal government also lacked the statutory authority to grant such leases. Whitaker, *supra*, at 260. Thus, "[b]y the end of 1950, leasing on the continental shelf was dead in the water." *Id.* The impact of this moratorium was so significant that President Eisenhower made "restor[ing] to the coastal states the entitlements they had lost a few years before" an issue in his 1952 presidential campaign and his legislative agenda. *Id.* at 261.

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[2] These decisions received withering criticism from eminent scholars and practitioners of the day. *See, e.g.*, Roscoe Pound, *Critique on the Texas Tidelands Case*, 3 BAYLOR L. REV. 120 (1951); Price Daniel, *Sovereignty & Ownership in the Marginal Sea*, 3 BAYLOR L. REV. 243 (1951).

In response to his urging, Congress passed the Submerged Lands Act of 1953, Pub. L. 83-31, 67 Stat. 29 (codified at 43 U.S.C. § 1301 *et seq.*); Whitaker, *supra*, at 261. That Act fixed the seaward boundaries of the coastal States at three miles and provided an opportunity for the States bordering the Gulf of Mexico to prove a further entitlement out to nine miles—which Texas did. Whitaker, *supra*, at 261; 43 U.S.C. §§ 1301(a)(2), (b); *see United States v. Louisiana*, 363 U.S. 1, 37-64 (1960). Just a few months later, Congress enacted the Outer Continental Shelf Lands Act of 1953 ("OCSLA"), Pub. L. 83-212, 67 Stat. 462 (codified at 43 U.S.C. § 1331 *et seq.*), which gave the federal government jurisdiction over the lands beyond those reserved to the States and up to the edge of the United States' jurisdiction and control; it also authorized the Secretary of the Interior to lease the federal portions of the shelf. Whitaker, *supra*, at 261; 43 U.S.C. §§ 1334-1354.

3. The reopening of the Gulf of Mexico for oil-and-gas exploration and production following the passage of OCSLA proved to be a boon for the United States: in 1954, offshore oil production constituted a miniscule 2% of total oil production, but by 1971 it had risen to account for 20% of production. Nat'l Comm'n, *supra*, at 3. Moreover, the country had come "almost exclusive[ly] [to] rel[y] on . . . oil production" from the Gulf Coast region. *Id.* at 4.

Interest in offshore development continued to grow throughout the 1970s, spurred by fears of dependence on foreign oil—fears that were driven home by an oil embargo instituted against the United States by members of the Organization of Petroleum Countries in retaliation for the United States' support for Israel during the 1973 Arab–Israeli War. *Id.* at 5; *Oil Embargo, 1973-1974*, U.S.

Dep't of State Office of the Historian, https://tinyurl.com/2p88xpr2 (last visited Feb. 27, 2023). Due to the boom-and-bust cycles of the entire oil-and-gas industry, however, by the end of the 1980s, offshore production had increased by only 5% from the beginning of the decade. Nat'l Comm'n, *supra*, at 6, 7.

To encourage the development of deep-water exploration begun in the 1980s, Congress passed the Outer Continental Shelf Deep Water Royalty Relief Act of 1995, Pub. L. 104-58, 109 Stat. 557, 563-66 (codified at 43 U.S.C. § 1337), which eliminated the obligation to pay royalties to the federal government on new leases issued between 1996 and 2000. Nat'l Comm'n, *supra*, at 11. Congress then passed the Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594, 739 (codified at 43 U.S.C. § 1356a), which channeled federal revenues from offshore oil-and-gas production into a fund to be distributed to coastal States to improve their coastlines. Nat'l Comm'n, *supra*, at 14. Texas has used the $109 million allocated under this program to fund ninety-three state projects that involved coastal conservation, research, and restoration. *Coastal Impact Assistance Program*, Tex. Gen. Land Office, https://tinyurl.com/5n84c8wd (last visited Feb. 27, 2023).

4. Today, the oil-and-gas industry remains the engine powering the Texas economy. The State continues to be "the top crude oil- and natural gas-producing state in the nation," accounting for 42% of the Nation's crude-oil production and 26% of its natural-gas production in 2022. TEX. OIL & GAS ASS'N, ANNUAL ENERGY & ECON. IMPACT REPORT 2022 17 (Jan. 2023), https://tinyurl.com/3va3as6t; *Tex. State Energy Profile*, *supra*. And offshore production has played an increasingly prominent role in this output. Bureau of Ocean Energy

Mgmt., *Offshore Oil & Gas Economic Contributions*, https://tinyurl.com/ymd58jxs (last visited Feb. 27, 2023).

As important here, Texas "has the most crude oil refineries and the most refining capacity of any state"—up to 32% of the Nation's refining capacity, which serves industries in States far outside the immediate Gulf Coast region. *Tex. State Energy Profile*, *supra*. Indeed, the Gulf Coast region alone accounts for more than a quarter of the Nation's production, and it refines oil extracted in the State, offshore in the Gulf of Mexico, from the United States Strategic Petroleum Reserve, and from foreign countries. *Gulf Coast Refin. Capacity*, Greater Hous. P'ship (Apr. 14, 2021), https://tinyurl.com/3p5y78ud. Consequently, the oil-and-gas industry employed nearly half a million Texans in fiscal year 2022. TEX. OIL & GAS ASS'N, *supra*, at 5. Millions more are employed by individuals in other States, including those within the Ninth Circuit. *See* AM. PETROLEUM INST., IMPACTS OF THE OIL & NAT. GAS INDUS. ON THE U.S. ECONOMY IN 2019 E-1, E-3 (July 2021), https://tinyurl.com/yckksezw.

All of this has translated into unprecedented economic prosperity. As Texas's Comptroller recently observed, the State's record budget surplus of $32.7 billion is due in no small part to the contributions of the oil-and-gas industry, including the "staggering growth" attributable to collections from the State's oil-and-natural-gas severance taxes. Glenn Hegar, *Hegar: A once-in-a-lifetime legislative session*, AUSTIN AMERICAN STATESMAN (Dec. 30, 2022), https://tinyurl.com/mr3v7s7r; *see* David Blackmon, *Texas is Flush with Money, Largely Thanks to Oil & Gas*, FORBES (Jan. 10, 2023), https://tinyurl.com/2b2babys. In fiscal year 2022, the oil-and-gas industry paid over $24.7 billion in state and local taxes. *Economic Benefits*, Tex. Oil & Gas Ass'n,

https://tinyurl.com/59xj5v2u (last visited Feb. 27, 2023); Tex. Oil & Gas Ass'n, *supra*, at 2. Much of this revenue is anticipated to be put to work by the Texas Legislature this year "to provide tax relief, fund roads, schools and healthcare." Blackmon, *supra.* And that is in Texas alone; it does not include the benefits provided by this vital industry to other amici.

II. The Ninth Circuit's Decision Affecting this Vital Industry Warrants Review.

The Ninth Circuit held that the federal government's issuance of an EA and FONSI regarding the development of oil-and-gas reserves offshore constituted final agency action within the meaning of the APA. This Court should grant review because that decision confuses the practical consequences of a preliminary agency determination with its legal consequences and creates a split of authority with three other circuits on that point. The Ninth Circuit's erroneous analysis empowers litigants to use the APA to weaponize a host of environmental statutes to thwart innovative and productive offshore oil-and-gas exploration activities. Because offshore oil-and-gas exploration and production is a critical industry both nationwide and in Gulf Coast states like Texas, its approach poses an issue of great national importance.

A. The Ninth Circuit's approach to final agency action conflicts with the approach of three of its sister circuits.

The APA only authorizes judicial review of "final agency action." 5 U.S.C. § 704. Finality bears two hallmarks. "First, the action must mark the 'consummation' of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quoting *Chi. & S. Air*

Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948)). "And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (quoting *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

As petitioners have explained (at 14-21), neither prong is satisfied here, and the Ninth Circuit's decision to the contrary conflicts with this Court's precedent. Though that is reason enough to grant the petition, the Court should grant review for an additional reason: the Ninth Circuit's conclusion that "legal consequences will flow" from issuance of the EA and FONSI confuses *practical* consequences with *legal* ones and thereby conflicts with the decisions of three of its sister circuits. If this case were before any of those three circuits, the outcome would have been different.

1. In its brisk analysis of *Bennett*'s second prong, the Ninth Circuit concluded that the federal government's issuance of the EA and FONSI imposes "legal consequences" because it "allowed the permitting process for these [well-stimulation] treatments to proceed." Pet. App. 29a. In particular, the court held that the EA and FONSI authorize permit applicants to omit "any depth, discharge, or frequency limitations" from any future application submitted for approval and "green light[] the unrestricted use of well stimulation treatments, with no cautionary limits." Pet. App. 23a.

But the Ninth Circuit itself acknowledged that "the use of well stimulation treatments will not occur in practice until an individual permit application has been approved." Pet App. 21a. And as the federal government has explained, no permit applications are even pending. *See* Fed. Resp. C.A. Pet. for Reh'g at 1. So, the "legal

consequence" that Ninth Circuit appears to perceive is that the issuance of the EA and FONSI might influence the federal government to approve permits for well-stimulation treatments that might be submitted in the future. Yet the persuasive force of interlocutory agency action on later-in-time action is a *practical* consequence, not a *legal* one. After all, it is the approval or denial of a permit application that "represent[s] the Government's position" on whether well-stimulation treatments may occur in a particular case. *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590, 598 (2016); *see* 30 C.F.R. §§ 250.410, 250.465, 250.513, 250.613. In other words, it is the individual permitting decision—not the EA and FONSI—that authorizes a company to implement well-stimulation treatments, thus "limit[ing] the potential liability" that the company would otherwise face for doing so "without a permit," and causes the environmental harm of which plaintiffs complain. *Hawkes*, 578 U.S. at 599.

2. Three of the Ninth Circuit's sister circuits have recognized the difference between legal and practical consequences, and they have concluded that interlocutory agency action giving rise to practical consequences that might later lead to downstream legal consequences of a subsequent agency decision does not constitute final agency action.

First, in *Louisiana State v. United States Army Corps of Engineers*, 834 F.3d 574 (5th Cir. 2016), the State of Louisiana sued the Army Corps of Engineers under the APA in a dispute over who would bear the costs in connection with implementing Congress's determination that the Mississippi River Gulf Outlet ("MRGO") should be closed as a federal navigation project. *Id.* at 578. The Corps argued that the relevant final agency

action was the Assistant Secretary of the Army's transmission of a report to Congress outlining recommendations for implementation of the closure. *Id.* at 581-82.

The Fifth Circuit disagreed. *Id.* It observed that the report's recommendations were expressly contingent upon the Corps securing Louisiana's agreement to cost-sharing. *Id.* at 582. And because the report "anticipate[d] the necessity of further agency action before the closure project can be implemented," it was "interlocutory." *Id.* The Fifth Circuit acknowledged that "the Corps' insistence on cost sharing may have put pressure on Louisiana to comply or else risk protracted negotiations with the Corps and a lengthy timetable for completing the closure of the MR-GO," but it concluded that "any such consequences are practical, as opposed to legal, ones." *Id.* at 583. For those reasons, the transmission of the report "failed to create any legal consequences for Louisiana"—there was no final agency action until the later-in-time execution of a memorandum of understanding that bound Louisiana to agreed-upon cost-sharing requirements. *Id.* at 583.

Second, in *Reliable Automatic Sprinkler Co. Inc. v. Consumer Product Safety Commission*, 324 F.3d 726 (D.C. Cir. 2003), a sprinkler-head manufacturer sued the Consumer Product Safety Commission over the Commission's preliminary determination that it intended to deem that the company's sprinkler heads presented a "substantial product hazard" and its concomitant request that the company undertake voluntary compliance action. *Id.* at 729. The company argued that the Commission's initial determination and request for voluntary compliance constituted final agency action because it represented a determination about the agency's regulatory jurisdiction. *Id.* at 731.

The D.C. Circuit also disagreed. *Id.* at 731-32. The court held that while "the agency's investigation *assumes* for now that it has jurisdiction to regulate the sprinkler heads," the Commission "has not yet made any determination or issued any order imposing any obligation on [the company], denying any right of [the company], or fixing any legal relationship." *Id.* at 731-32. Such legal consequences would only flow from a later-in-time "formal, on-the-record adjudication" to which the agency would be required to adhere if it chose to pursue an enforcement action. *Id.* at 732. But "[n]o legal consequences flow from the agency's conduct to date, for there has been no order compelling [the company] to do anything." *Id.* The D.C. Circuit recognized that "there may be practical consequences, namely the choice [the company] faces between voluntary compliance with the agency's request for corrective action and the prospect of having to defend itself in an administrative hearing should the agency actually decide to pursue enforcement." *Id.* "But the request for voluntary compliance clearly has no legally binding effect" in the absence of a formal enforcement action. *Id.*

Third, in *Flue-Cured Tobacco Cooperative Stabilization Corp v. U.S. E.P.A*, 313 F.3d 852 (4th Cir. 2002), several tobacco companies and industry groups sued the EPA in connection with the agency's issuance of a report declaring secondhand tobacco smoke to be a carcinogen. *Id.* at 854. Like the Army Corps of Engineers and the sprinkler-head manufacturer, the companies and industry groups argued that "coercive pressures" the report exerted on third parties rendered the report final agency action. *Id.* at 859.

Again, the Fourth Circuit disagreed. *Id.* at 858-59. It held that the report did not constitute final agency action

because federal law expressly prohibited the report from "having any regulatory effect" or carrying "legally binding authority." *Id.* The court reasoned that the "persuasive value and practical barriers associated with the agencies' recommendations were insufficient to create reviewable agency action under the APA because the challenged agency actions, although they might have influenced" future decisionmakers, "did not create any legal rights, obligations, or consequences." *Id* at 860. Indeed, "even when agency action significantly impacts the choices available to the final decisionmaker," the Fourth Circuit stated, that does not transform interlocutory agency action into final agency action, because the final decisionmaker's action is "the product of independent agency decisionmaking." *Id.*

3. If this case had come before any of these other three Circuits, the EA and FONSI would not have been final agency action merely because they "allowed the permitting process for these [well-stimulation] treatments to proceed," Pet. App. 29a; only the later-in-time issuance of a permit would have constituted final agency action. In holding otherwise, the Ninth Circuit created a rule under which the Fourth Circuit has recognized "almost any agency policy or publication issued by the government would be subject to judicial review." *Flue-Cured Tobacco*, 313 F.3d at 861. But Congress did *not* "create private rights of actions to challenge the inevitable objectionable impressions created whenever controversial research by a federal agency is published." *Id.* Because complicated regulatory regimes often involve balancing multiple interests—here, economic development and environmental protection—they often proceed in multiple, incremental steps. The Court should grant review to make clear that interim "policy statements are

properly challenged through the political process and not the courts." *Id.*

B. The Ninth Circuit's decision threatens to impede state efforts to facilitate offshore oil-and-gas exploration.

Review is particularly important because the Ninth Circuit's decision breaking with its sister circuits on the question of final agency action portends grave consequences for the future of offshore oil-and-gas exploration. Moreover, while trying to hide behind the notion of federalism, the decision threatens what has been a key facilitator of the Gulf Coast's economic growth for the better part of a century, see *supra* at 3-14, as well as an important industry in a number of States within its own jurisdiction. *See, e.g.*, *D.H. Blattner & Sons, Inc. v. N.M. Rothschild & Sons, Ltd.*, 55 P.3d 37, 44 (Alaska 2002) (noting "the present importance of oil drilling to the Alaska economy").

1. The Ninth Circuit's approach to the APA's final-agency-action requirement empowers litigants to wield environmental statutes, such as the Coastal Zone Management Act ("CMZA") and the National Environmental Policy Act ("NEPA"), to challenge preliminary agency actions relating to oil-and-gas production and exploration at earlier and earlier stages.[3] And if permitted to stand, the Ninth Circuit's decision will create opportunities for litigants to indefinitely stymie productive and innovative approaches to offshore oil-and-gas exploration—despite Congress's considered judgement that the Outer Continental Shelf should be "available for

[3] Because neither the CZMA nor NEPA expressly provides for judicial review, respondents relied on the APA's judicial-review provision, 5 U.S.C. § 704, to bring this lawsuit. *See Sackett v. E.P.A.*, 566 U.S. 120, 125-31 (2012).

expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs," 43 U.S.C. § 1332(3).

This is not merely hypothetical: as the federal government told the Ninth Circuit, imposition of a new layer of duplicative consistency review under the CMZA will increase the time it takes to complete the consistency-review process from months to years. Fed. Resp. C.A. Pet. for Reh'g at 17. And by interpreting NEPA to require the federal government to prepare an Environmental Impact Statement ("EIS"), instead of an EA, at a preliminary, nonfinal stage, the Ninth Circuit's decision would necessitate the federal government devoting significant amounts of time and resources to evaluating the effects of a proposed course of action that the agencies may ultimately reject at a final stage of review. *See* Fed. Resp. C.A. Pet. for Reh'g at 11.

2. The Ninth Circuit's approach is all the more troubling because its decision masquerades as a model of federalism. The court concluded its decision by characterizing its analysis of the CMZA issue as advancing the goal of "complementary joint regulation by state and federal governments to advance important interests." Pet. App. 62a. But it is just the opposite. By deputizing private parties to thwart the facilitation of offshore oil-and-gas projects, the Ninth Circuit's decision imperils the interests of States, like the amici States, that wish to encourage such development. To be sure, in the current political environment, California may prefer to throttle oil-and-gas exploration off of its coast, but Texas decidedly does not. And, if the concern were truly federalism, other coastal States should be allowed to make that decision for themselves.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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