CASE NO. 20-35411

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

350 MONTANA, ET AL.,

Plaintiffs-Appellants,

V.

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

Defendants-Appellees,

SIGNAL PEAK ENERGY, LLC,

Intervenor Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
NO. 9:19-CV-00012-DWM

BRIEF OF AMICI CURIAE STATE OF MONTANA AND 15 OTHER STATES IN SUPPORT OF PETITION FOR REHEARING EN BANC

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INTEREST OF AMICUS CURIAE

Amici Curiae States of Montana, Alabama, Alaska, Arizona, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah, and Wyoming ("the States") seek to promote responsible energy production and leasing on public lands—including coal leasing—within their borders and throughout the United States.[1] To do so, manipulative abuses of procedural environmental statutes like the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, must stop. These distortions undermine other laws and harm the American people.

SUMMARY OF ARGUMENT

The Court should grant the petition to rehear this case en banc and correct the panel's erroneous decision in which the majority faulted the United States Department of Interior ("Interior") for failing to use a scientific method that the panel, itself, declined to define and that no one asked Interior to adopt.

Nine years ago, Signal Peak first asked Interior to approve a mining plan modification for its Bull Mountain mine. *See 350 Montana v.*

[1] Pursuant to Circuit Rule 29-2(a), "a State … may file an amicus brief without the consent of the parties or leave of court."

Haaland, 29 F.4th 1158, 1164 (9th Cir. 2022). Interior approved the modification in 2015 and 2018, issuing four environmental assessments ("EA"s) covering Signal Peak's leased tracts (2011, 2015, 2018, and 2020), and three findings of no significant impacts ("FONSI") (2011, 2015, and 2018). *Id.* at 1164–65. Throughout the process, environmental groups sued to halt expansion of the mine on grounds ranging from a purported problem of coal trains derailing due to bear collisions to the present disagreement over whether Interior can precisely trace incremental impacts of a local project to a global climate phenomenon. *Id.* at 1166. According to Interior, over the 11.5-year lifetime of the mine expansion, the project will increase annual global greenhouse gas ("GHG") emissions by 0.04%. *Id.* at 1193 (Nelson, J. partially dissenting).

The panel majority concluded that Interior acted arbitrarily and capriciously by "fail[ing] to articulate convincing reasons" why this 0.04% increase was minor. *Id.* at 1164. But the panel's far-reaching conclusion stepped beyond the well-settled role courts play when reviewing agency NEPA decisions. The majority fails to discuss any overlooked, missed, or ignored data. At each step, the majority's conclusions rely upon the same data Interior relied upon in its 2018 EA. *See id.* at 1066–67

(acknowledging Interior analyzed climate change); *id* at1173 n. 21 (applying combustion emissions to domestic emission totals); *id* at 1074 ("Our opinion relies on the three metrics the agency used in its EA"); *id.* at 1192 (Nelson, J. partially dissenting) ("Not only did the 2018 EA provide all the data to make this comparison, neither NEPA nor its implementing regulations impose any such requirement in the first place."). And as Judge Nelson observed, neither the majority nor Plaintiffs presented "any evidence … to suggest that science delineates any specific environmental harm in the action area from (at most) a 0.04% incremental increase in annual global GHG emissions." *Id.* at 1194 (Nelson, J. partially dissenting). It appears the majority—looking at all the same facts Interior did—simply disagreed with Interior's conclusion.

Worse still, the majority remanded for the district court to conduct "fact finding" on whether Interior can scientifically measure the incremental impact of one Montana project on global climate change—a question Interior already answered in the negative. In short, the majority fails to find fault with the scientific analysis or methodology in the record, and instead substitutes its gut judgment that coal emissions cannot possibly be classified as minor given the "threat presented by global

warming." *Id.* at 1175.

This "yes to your comprehensive, data-driven conclusions, but what about global warming" doctrine finds no home in the NEPA context. Without some judicial restraint and deference to Interior's scientific expertise, NEPA review will supplant other substantive permitting statutes. Plaintiffs don't and can't challenge Interior's discretion to lease public lands for coal mining. *See* 30 U.S.C. § 201. So they instead weaponize NEPA's procedures to suspend mining plan modifications in a seemingly endless limbo. That defeats the objective Congress sought to advance with NEPA and substantive environmental permitting statutes.

In this case, Interior did the work. It took a hard look at the environmental impacts of the Bull Mountain mine. The panel had no authority to insist that Interior take an undefined "harder," look. It also lacked authority to require Interior to create scientific methodologies that may not exist. The majority decision establishes a rule of perpetually moving judicial goalposts. If it stands, Signal Peak's 9-year misadventure will only be the beginning. Permits will be chronically stymied because of agencies' failure to identify and implement methodologies that don't even exist. The en banc Court can and should step in.

ARGUMENT

NEPA ensures that agencies make decisions based on adequate information "concerning significant environmental impacts" and that "the relevant information" will also be available to the public. *Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008) (en banc). At the same time, NEPA's required environmental analysis is not open-ended—as courts have acknowledged—because agencies have limited time and resources. Thus, "[t]he scope of the agency's inquiries must remain manageable if NEPA's goal of '[insuring] a fully informed and well-considered decision,' … is to be accomplished." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat'l. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978)); *see also Churchill Cnty. v. Norton*, 276 F.3d 1060, 1072 (9th Cir. 2001) ("We are not free to 'impose upon the agency [our] own notion of which procedures are 'best' or most likely to further some vague, undefined public good.'") (quoting *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 549).

"Because judicial review of agency decisions under NEPA is governed by the APA," courts review agency NEPA compliance "under the APA's deferential arbitrary and capricious standard." *Env't. Def. Ctr. v.*

Bureau of Ocean Energy Mgmt., 2022 U.S. App. LEXIS 15343 at *35 (9th Cir. June 3, 2022). Under that highly deferential and "narrow" review, courts "do not substitute [their] judgment for that of the agency." *Barnes v. United States DOT*, 655 F.3d 1124, 1132 (9th Cir. 2011). Relevant here, review of an agency decision to forego an EIS only requires the court to determine "whether the agency has taken a 'hard look' at the consequences of its actions" and whether the agency supplied a "convincing statement of reasons to explain why a project's impacts are insignificant." *350 Mont.*, 29 F.4th at 1170 (quoting *Barnes*, 655 F.3d at 1132). This Court only requires an agency to provide a "convincing statement of reasons" to substantiate its "hard look." *See Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976)).

This Court has noted that "NEPA does not require us to 'decide whether an [environmental review] is based on the best scientific methodology available.'" *Lands Council*, 537 F.3d at 1003 (9th Cir. 2008) (en banc) (quoting *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985)). And when examining an agency's "scientific determination" regarding environmental effects, "as opposed to simple

findings of fact, a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983).

These standards cabin judicial review so that NEPA's procedural requirements don't supersede other statutes' substantive environmental standards. *See Bering Strait Citizens for Responsible Res. Dev. v. United States Army Corps of Eng'rs*, 524 F.3d 938, 947 (9th Cir. 2008) ("NEPA does not contain substantive environmental standards, nor does the Act mandate that agencies achieve particular substantive environmental results.").

I. The panel improperly substituted its own self-contradictory judgment for Interior's.

The bare recitation of the above standards clearly reveals the panel majority's errors. The majority faults Interior's scientific methodology because "the scientific community's understanding has advanced considerably." *350 Mont.*, 29 F.4th at 1176; *but see Lands Council,* 537 F.3d at 1003. And the majority asserts, "Interior's FONSI does not measure up to the 'high quality' and '[a]ccurate scientific analysis' that NEPA's implementing regulations demand of environmental information produced by agencies." *350 Mont.*, 29 F.4th at 1174 (quoting 40 C.F.R. § 1500.1); *but see Balt. Gas & Elec. Co.*, 462 U.S. at 103. Yet the majority attempts

to substantiate these purported deficiencies by retooling the very data from Interior's EA. *350 Mont.*, 29 F.4th at 1173–74 ("Our conclusion that the 2018 EA failed to provide a convincing statement of reasons to explain why the Mine Expansion's impacts are insignificant begins with Interior's own uncontested summary of the scientific evidence concerning the cause and effects of climate change."); *but see Save the Yaak Comm.*, 840 F.2d at 717 (noting that "convincing statement of reasons" simply inform the hard look determination).

The majority even concedes "the record is unclear about the extent to which the agency is capable of resolving uncertainty regarding the magnitude of the project's contribution to the environmental harms identified in the EA." *350 Mont.*, 29 F.4th at 1177. Precisely. That's why courts should generally defer to agencies on methodology and the weighing of scientific evidence. *See Barnes*, 655 F.3d at 1132. Here, Interior considered each dataset the majority referenced and met its obligation to take a hard look. *See 350 Mont.*, 29 F.4th at 1190–92 (Nelson, J. partially dissenting) (detailing Interior's review). NEPA doesn't allow courts to take a second, "harder," look at agency findings and conclusions. Rather, NEPA's design prohibits such judicial second-guessing. "[J]udges," after

all, "are not scientists and do not have the scientific training that can facilitate the making of such decisions." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 148 (1997) (Breyer, J., concurring).

The majority faults Interior's failure to "contextualiz[e] the significance of the project's environmental consequences." *350 Mont.*, 29 F.4th at 1173. And it accuses Interior of inappropriately relying "on an opaque comparison" between project emissions that occur overseas—*e.g.*, Bull Mountain coal burning in South Korea—and global GHG emissions, but not comparing those overseas project emissions to annual emissions in the U.S. and Montana, respectively. *Id.* at 1174.

But that critique provides no relevant information—except to dubiously inflate the perceived impact of the mine expansion. *See Wash. Env't. Council v. Bellon*, 732 F.3d 1131, 1143 (9th Cir. 2013) ("There is limited scientific capability in assessing, detecting, or measuring the relationship between a certain GHG emission source and localized climate impacts"); *Barnes*, 655 F.3d at 1140 (A local project accounting for .03% of U.S. based GHG emissions "does not translate into locally-quantifiable environmental impacts given the global nature of climate change."). At any rate, Interior did consider combustible GHG emissions from the mine

expansion. *See 350 Mont.*, 29 F.4th at 1192 (Nelson, J. partially dissenting). But it need not include "irrelevant and unhelpful calculations"—the very comparisons the panel majority found wanting. *Id.* (Nelson, J. partially dissenting).

II. The panel's flawed standard invites inconsistent application between the States.

The majority's local environmental impact analysis improperly rewards states—like California or New York—that emit more pollution than states like Montana. *See 350 Mont.*, 29 F.4th at 1192 n. 3 (Nelson, J. partially dissenting). Under the majority's analysis, the mine expansion will emit 519% of Montana's total annual GHG emissions. *See id.* at 1173 n.21. By contrast, the project would emit 39% of California's total annual GHG emissions. *See id.* at 1192 n.3 (Nelson, J. partially dissenting). The majority's preferred analytical comparison could lead to a finding that the mine expansion "would have less local effect on climate change" in California than in Montana and make it possible for the same project to be invalidated in Montana but authorized in California. *Id.* at 1192. NEPA doesn't require such absurd results, and this circuit's prior decisions correctly avoided this issue by handling global issues globally. *See Wash. Env't. Council*, 732 F.3d at 1143.

III. The panel directs Interior to adopt a scientific method that might not exist.

The majority's decision gets worse. The crux of the decision requires Interior to quantify the mine expansion's incremental contributions to climate change even after the EA details why no reliable scientific standard exists to measure such project-specific changes. *See 350 Mont.*, 29 F.4th at 1191 (Nelson, J. partially dissenting). The majority wisely upheld the agency decision not to use the one standard the parties proposed. *See 350 Mont.*, 29 F.4th at 1175–77 (Interior appropriately declined to use a social cost of carbon ("SCC") model). But it nevertheless remanded to the district court for "fact-finding" on whether some other now-unknown model could generate its desired impact analysis. However, "no one, not even Plaintiffs, has proposed any sort of method outside of SCC (which the majority rejected) to calculate incremental environmental harms from GHG emissions." *350 Mont.*, 29 F.4th at 1193 (Nelson, J. partially dissenting). Effectively, the majority points to the agency's failure to rely upon a "less reliable scientific theory, which has no scientific support in the record" as the "basis for finding an agency action arbitrary and capricious." *Id.*

IV. The panel's expansion of judicial review subverts NEPA's purpose.

Litigants—including the Plaintiffs in this case—routinely use courts to advance policies they cannot secure through the legislative process. They weaponize NEPA's procedural requirements to thwart energy development under federal leasing statutes like 30 U.S.C. § 201. But NEPA was never meant to judicialize every environmental policy dispute. And Congress never intended that NEPA would be Plaintiffs' preferred vehicle to traffic anti-fossil fuels policies and interminably stifle development. *See Churchill Cnty.*, 276 F.3d at 1079. "The political process, and not NEPA, provides the appropriate forum in which to air policy disagreements." *Metro. Edison Co.*, 460 U.S. at 777.

This case shows what happens when courts fault agencies for failing to complete a NEPA checklist—to which the court keeps adding. *See 350 Mont.*, 29 F.4th at 1164–65. Signal Peak requested its mining plan modification in 2013. Interior approved the plan in 2015. Plaintiffs sued, and a district court decision in 2017 resulted in remand to the agency. Interior issued a new EA and FONSI in 2018. Plaintiffs sued again, ultimately resulting in this appeal in 2022. *Nine years later*, Signal Peak's planned modification remains in limbo. Federal administrations of both

political stripes investigated the proposed plan, determined any environmental impacts were insignificant, and then approved the proposal. Now again, a panel of this Court has intervened and faulted Interior for failing to read in its mind what even the panel cannot perceive.

The en banc Court should correct course.

In 1997, the Council on Environmental Quality ("CEQ") issued a report concluding that, notwithstanding NEPA's successes, NEPA had created real problems in agency decision-making.[2] Agencies created overly lengthy analyses and sought to produce "litigation-proof documents, increasing costs and time but not necessarily quality." *Id.* at iii. The report also said that "[o]ther matters of concern to participants in the Study were the length of NEPA processes, the extensive detail of NEPA analyses, and the sometimes confusing overlay of other laws and regulations." *Id.*

In 2020, CEQ concluded that these problems largely persisted. 85 Fed. Reg. 1684, 1687 (Jan. 10, 2020).

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

The exacting judicial review panels of this Court regularly impose on federal agencies only exacerbates this problem. Federal courts issue between 100 and 140 NEPA decisions each year.[3] Caselaw's ever-developing interpretive overlay—not NEPA's and CEQ's requirements—drives most modern-day agency decision-making. 85 Fed. Reg. at 1688. The panel majority's decision is yet another uniquely egregious example of innovating courts' willingness to transform NEPA's specific procedural requirements into a regulatory thicket from which agency decisions can rarely—if ever—emerge.

CONCLUSION

The Court should grant the petition and rehear this case en banc.

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

Respectfully submitted on June 28, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, Brent Mead, an employee in the Office of the Attorney General of the Montana, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 2,664 words, excluding the parts of the document exempted by Rule 32(f), and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)–(7), and Circuit Rule 29-2(c)(2).

/s/ Brent Mead
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