No. 12-935

In the Supreme Court of the United States

AMERICAN INDEPENDENCE MINES AND MINERALS COMPANY, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' assertions of purely economic interests established prudential standing to challenge an environmental impact statement prepared by the United States Forest Service pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is unpublished. The district court's amended opinion (Pet. App. 6-57) is reported at 733 F. Supp. 2d 1241. The district court's original opinion (Pet. App. 58-83) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2012. A petition for rehearing was denied on October 26, 2012 (Pet. App. 85-86). The petition for a writ of certiorari was filed on January 24, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, to ensure that federal agencies consider the environmental consequences of proposed major federal actions. 42 U.S.C. 4321. "[A]lthough NEPA states its goals in sweeping terms of human health and welfare, these goals are *ends* that Congress has chosen to pursue by *means* of protecting the physical environment." *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 773 (1983) (footnote omitted). NEPA is a procedural statute. It promotes Congress's goals by prescribing the process through which an agency must make its decisions; it does not mandate particular substantive results. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Under NEPA, an agency must prepare a detailed, comprehensive environmental impact statement (EIS) only if it proposes to take a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). In the course of preparing an EIS, an agency must consider "alternatives to the proposed action." 42 U.S.C. 4332(2)(C)(iii).

2. In 2005, the United States Forest Service adopted a Travel Management Rule governing the use of motor vehicles on National Forest System lands. 70 Fed. Reg. 68,264 (Nov. 9, 2005). The Forest Service was prompted to adopt the rule by an increase in the use of motor vehicles within the National Forest System. *Id.* at 68,265. Based on its assessment of the negative effects that the use of motor vehicles has on soil, water quality, wildlife habitat, and the recreational experience of other National Forest visitors, the Forest Service concluded

that "[a] designated and managed system of roads, trails, and areas for motor vehicle use is needed." *Ibid.*

The Travel Management Rule requires each administrative unit or ranger district in the National Forest System to designate the roads, trails, and areas that are open to public motor-vehicle use. 36 C.F.R. 212.51(a). Once a particular unit or district makes its designations, motor-vehicle use that is not permitted by the designations is prohibited, 36 C.F.R. 261.13, except insofar as such "[m]otor vehicle use * * * is specifically authorized under a written authorization issued under Federal law or regulations," 36 C.F.R. 212.51(a)(8), 261.13(h).

3. In 2008, after preparing an EIS, the Forest Supervisor for the Payette National Forest issued a decision designating a system of roads, trails, and areas within the McCall and Krassel Ranger Districts that would be open to motorized travel. C.A. Supp. E.R. 4-77. The decision prohibited any motor-vehicle use that would be inconsistent with those designations, absent written authorization from the Forest Service. *Id.* at 10-13. With respect to the Big Creek area of the Forest, the decision designated some roads and trails as open to public motor-vehicle use, but also committed the Forest Service to undertake "additional site-specific NEPA" analysis to decide whether to designate additional routes. *Id.* at 20. The decision also confirmed that it "do[es] not preclude use of motorized vehicles where reasonable and necessary to conduct mineral exploration or operations pursuant to the Mining Laws." *Id.* at 25-26. The decision specified that persons wishing to use motor vehicles on undesignated routes for mining purposes may apply for written authorization to do so. *Ibid.*; see 36 C.F.R. 228.4, 228.12.

Petitioners filed an administrative appeal, arguing that the decision was invalid because the EIS's consideration of a "no action" alternative failed to take account of some existing roads and trails in the Big Creek area. C.A. E.R. 45-50. The Forest Service's Appeal Deciding Officer rejected petitioners' argument, concluding instead that the decision adequately addressed petitioners' concern by committing to perform further site-specific analysis of the Big Creek area and to consider designating additional roads and trails in that area. *Id.* at 57-58.

4. a. Petitioners filed suit in district court. Petitioners alleged that they were "affected adversely by the closure of roads within" the Forest "resulting from the Travel Management Rule and its implementation" because petitioners require motor vehicles to conduct their mining activities. C.A. E.R. 4-5, ¶¶ 25, 28. Petitioners further alleged that the EIS prepared in connection with the Forest Supervisor's 2008 designation decision violated NEPA because it did not consider all roads and trails in the Big Creek area for designation. *Id.* at 11-15.[1]

b. On May 12, 2010, the district court granted the Forest Service's motion to dismiss, holding that petitioners lack prudential standing. Pet. App. 58-84. The court explained that, in order "[t]o bring an action under the [Administrative Procedure Act (APA), 5 U.S.C. 702], a plaintiff must demonstrate both constitutional and prudential standing." Pet. App. 64. A plaintiff can

[1] The complaint presented a number of other claims that petitioners declined to pursue on appeal. See Pet. C.A. Reply Br. 2 n.2. Among those claims were petitioners' allegations that the EIS failed to sufficiently analyze the decision's effects on mining and economic interests in the Forest. C.A. E.R. 15-20.

demonstrate prudential standing under the APA by showing that "the interest sought to be protected by the complainant" is "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Ibid.* (quoting *National Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998)). The court reasoned that, "[i]n a NEPA action, the zone of interests protected is environmental" and that "[a] plaintiff asserting 'purely economic injuries does not have standing to challenge an agency action under NEPA.'" *Id.* at 65 (quoting *Nevada Land Action Ass'n* v. *United States Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993)).

The court explained that petitioners' alleged interest was pecuniary in nature in that they sought unrestricted vehicular access to mineral resource development sites. Pet. App. 67. Any injury to that interest, the court held, was not within the zone of interests protected by NEPA because petitioners failed to "link[] their pecuniary interest in mineral resource development to the physical environment or to an environmental interest contemplated by NEPA." *Ibid.* The court rejected as insufficient petitioners' allegations that they attempt to mitigate or minimize the environmental effects of their mining-related operations, noting that such allegations "only demonstrate[] the manner in which [petitioners] operate their business and not whether [petitioners'] interests also align with the environmental interests protected by NEPA." *Id.* at 68.

c. On June 10, 2010, petitioners filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). The motion was untimely by one day. See Pet. App. 2. Petitioners requested, in part, that the court "remove from its decision the factual

conclusion that '[petitioners'] access on these roads would degrade the environment, not protect the environment.'" C.A. Supp. E.R. 174-175. Petitioners further asked the district court "to amend its judgment and deny the [government's] motion to dismiss on the basis the allegations in" petitioners' complaint "may be construed to satisfy the 'linkage' test set out in" Ninth Circuit decisions to establish prudential standing. *Id.* at 175. The court granted petitioners' request that the court remove the statement that petitioners' activities degrade the environment, but denied the motion in all other respects. Pet. App. 46, 52-53, 57.

5. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-5. The court of appeals rejected the government's argument that the court did not have jurisdiction over petitioners' appeal because petitioners' untimely Rule 59(e) motion did not toll the time for filing a notice of appeal from the order of May 12, 2010. *Id.* at 3. The court of appeals held that the government forfeited its objection to the timeliness of the motion by failing to raise it in the district court and concluded that the unobjected-to untimeliness of the Rule 59(e) motion was not a jurisdictional bar. *Ibid.* The court of appeals went on to hold that the district court had not abused its discretion in denying petitioners' Rule 59(e) motion to amend its judgment granting the Forest Service's motion to dismiss. *Id.* at 3-4. The court of appeals also stated its agreement with the district court's holding that petitioners lack prudential standing because their "purely economic interests do not fall within NEPA's environmental zone of interests." *Id.* at 4-5.

ARGUMENT

The Ninth Circuit's unpublished, nonprecedential decision does not warrant review by this Court. Petition-

ers ask the Court to consider whether a plaintiff asserting economic interests has prudential standing to bring a NEPA claim. It is unclear, however, whether the court of appeals addressed the merits of the district court's order finding no prudential standing or merely reviewed the denial of petitioners' motion pursuant to Federal Rule of Civil Procedure 59(e) to alter or amend the judgment. If the court did intend to review the order finding no prudential standing, there is a question whether it had jurisdiction to do so because petitioners' time for filing a notice of appeal may not have been tolled by the filing of their untimely Rule 59(e) motion. Even if the Court were to resolve that jurisdictional question in petitioners' favor, moreover, review of the prudential standing question would not be warranted because the district court correctly concluded that petitioners lack prudential standing to assert their only remaining NEPA claim, that decision does not conflict with any decision of this Court or of any other court of appeals, and petitioners' claim is in any event moot in light of further action taken by the Forest Service.

1. Review of the prudential standing question petitioners assert is not warranted here because the Court could not reach that issue without first deciding a jurisdictional question not addressed in the petition for a writ of certiorari.

a. Petitioners did not file their notice of appeal within 60 days of the district court's order of May 12, 2010, granting the Forest Service's motion to dismiss, as required by Federal Rule of Appellate Procedure 4(a)(1)(B); see 28 U.S.C. 2107(b). The time for filing a notice of appeal may be tolled by the "timely fil[ing] in the district court" of, *inter alia*, a Rule 59(e) motion to alter or amend the district court's judgment. Fed. R.

App. P. 4(a)(4)(A)(iv). Petitioners did not file a timely motion pursuant to Rule 59(e); their motion was one day late. Pet. App. 2. Federal Rule of Civil Procedure 6(b)(2) provides that a district court "must not extend the time to act under," *inter alia*, Rule 59(e). The Forest Service did not object to the untimeliness of petitioners' motion, and the district court ultimately granted it in part and denied it in part. Pet. App. 2-3. Petitioners filed a notice of appeal within 60 days of the district court's order disposing of their Rule 59(e) motion.

This Court has never considered whether the rule that a Rule 59(e) motion must be timely filed in order to toll a party's time for filing a notice of appeal under Federal Rule of Appellate Procedure 4 is a jurisdictional rule. The courts of appeals are divided on that question. At least two courts of appeals have held that an untimely Rule 59(e) motion can toll the time for filing a notice of appeal if the opposing party does not object to the timeliness of the motion. See *Obaydullah* v. *Obama*, 688 F.3d 784, 787-791 (D.C. Cir. 2012), petition for cert. pending, No. 12-8932 (filed Feb. 26, 2013); *National Ecological Found.* v. *Alexander*, 496 F.3d 466, 476 (6th Cir. 2007). Other courts of appeals disagree, holding that an untimely Rule 59(e) motion does not toll the time for filing a notice of appeal, even when the opposing party does not object to the motion's untimeliness, because the limits in Rule 4 are jurisdictional. See *Blue* v. *International Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 582-583 (7th Cir. 2012); *Barner* v. *Williamson*, 461 Fed. Appx. 92, 95-96 (3d Cir. 2012), petition for cert. pending, No. 12-8385 (filed July 12, 2012); *Green* v. *Drug Enforcement Admin.*, 606 F.3d 1296, 1300-1302 (11th Cir. 2010).

The court of appeals in this case did not explicitly address that question in that it failed to mention Federal Rule of Appellate Procedure 4 when holding that it had jurisdiction over the appeal. Pet. App. 3. The court relied on prior circuit precedent holding that "Rule 6(b) [of the Federal Rules of Civil Procedure], the rule governing time limits for Rule 59(e) motions, is a claim-processing rule subject to forfeiture." *Ibid.* The court noted that the government failed to object to the untimeliness of the Rule 59(e) motion and concluded that the government had therefore "forfeited that argument." *Ibid.* After noting that courts of appeals "review the denial of a Rule 59(e) motion to amend for abuse of discretion," the court went on to hold that the district court did not abuse its discretion in denying petitioners' motion. *Id.* at 3-4.

To the extent the court of appeals limited itself to reviewing the district court's order denying petitioners' Rule 59(e) motion, the court of appeals was correct both that it had jurisdiction to do so on appeal and that the district court did not abuse its discretion in denying the motion. Indeed, petitioners do not challenge the court of appeals' holding that "the district court did not abuse its discretion in refusing to identify a theory for prudential standing that arguably was mentioned in a 39-page, single-spaced attachment to the complaint, but such theory was neither articulated in the 33-page complaint nor argued in response to the motion to dismiss." Pet. App. 4. Review of that order would not, however, entail review of the merits of the district court's underlying order holding that petitioners lack prudential standing. A litigant may not use a Rule 59(e) motion to relitigate matters already decided in the judgment the litigant seeks to have amended. *Exxon Shipping Co.* v. *Baker*,

554 U.S. 471, 485 n.5 (2008) (quoting 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2810.1, pp. 127-128 (2d ed. 1995)) ("Rule 59(e) permits a court to alter or amend a judgment, but it 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'"). To the extent the court of appeals limited its review to the district court's denial of petitioners' Rule 59(e) motion, therefore, the questions purportedly presented in the petition for a writ of certiorari are not actually presented in this case and the petition should be denied.

b. It is not entirely clear, however, whether the court of appeals also intended to pass on the merits of the district court's order of May 12, 2010, holding that petitioners lack prudential standing. Although the court did not mention Rule 4 in purporting to reject the government's jurisdictional argument, see Pet. App. 3, the government's jurisdictional argument was based on Rule 4's tolling provision. See Gov't C.A. Br. 1-2. And, although the only standard of review the court of appeals mentions pertains to review of the district court's denial of the Rule 59(e) motion, see Pet. App. 3, the last two paragraphs of the court of appeals' opinion can be construed as passing on the merits of the district court's prudential standing order, not merely the denial of the Rule 59(e) motion, see *id.* at 4-5. If that was the court of appeals' intent, there is a substantial question whether the court had jurisdiction to review that order. See *Bowles* v. *Russell*, 551 U.S. 205, 209-213 (2007) (time to file notice of appeal is "jurisdictional" because it implements a statutory deadline); 28 U.S.C. 2107(b) (notice of appeal must be filed within 60 days after judgment entered). Before this Court could review the prudential

standing questions presented in the petition for a writ of certiorari, it would have to decide whether petitioners' time for appealing that judgment was tolled by the untimely (but unobjected-to) filing of petitioners' Rule 59(e) motion—and whether the court of appeals accordingly did or did not have jurisdiction to decide the prudential standing question. The necessity of resolving that difficult jurisdictional question before reaching the questions presented is a sufficient reason to deny the petition. And to the extent the Court were inclined to grapple with the jurisdictional question, it should wait for a case in which it is clearly presented and was addressed by the court of appeals in a published precedential decision and in a less ambiguous and cryptic way.

2. Even if there were no potential jurisdictional bar in this case, review of the court of appeals' unpublished decision would not be warranted. The district court and court of appeals correctly held that petitioners' purely economic interests do not fall within the zone of interests intended to be protected by NEPA, and that decision does not conflict with any decision of this Court or of any other court of appeals.

a. In order to establish prudential standing to pursue their claim (brought pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, see Pet. App. 63-64) that the Forest Service violated Section 102(2)(C) of NEPA, petitioners must establish that their asserted injury "arguably fall[s] within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997). "Whether a plaintiff's interest is arguably protected by the statute within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in

question * * * , but by reference to the particular provision of law upon which the plaintiff relies." *Id.* at 175-176 (internal quotation marks and alterations omitted). The court of appeals correctly held that petitioners' purely economic interests are not within the zone of interests protected by the NEPA provision petitioners invoke.

Petitioners' only remaining claim alleges a violation of Section 102(2)(C)(iii) of NEPA, 42 U.S.C. 4332(2)(C)(iii), which requires an agency to consider alternatives to any proposed major federal action significantly affecting the quality of the human environment. In their petition for a writ of certiorari, petitioners rely on other NEPA provisions that do not form the basis of their claim and cannot provide the basis for petitioners' prudential standing. See Pet. 4, 14-15 (citing 42 U.S.C. 4331(a) and (b)(5)).

Section 102(2)(C) of NEPA directs all federal agencies to—

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. 4332(2)(C). This Court has observed that the purpose of Section 102(2)(C) is to protect environmental concerns. See, *e.g.*, *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (holding that an EIS need only assess effects of a project that have a "reasonably close causal relationship" to "a change in the physical environment"); *Weinberger* v. *Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 143 (1981) (holding that Section 102(2)(C)'s two goals are "to inject environmental considerations into the federal agency's decisionmaking process" and "to inform the public that the agency has considered environmental concerns"); *Andrus* v. *Sierra Club*, 442 U.S. 347, 350 (1979) (holding that the "thrust of § 102(2)(C) is * * * that environmental concerns be integrated into the very process of agency decisionmaking").

Petitioners are incorrect (see Pet. 12-15) that Section 102(2)(C) of NEPA is intended to protect economic interests. NEPA is a procedural statute that requires federal agencies to consider the environmental effects of major federal actions. It does not require that an agency take any particular course of action based on its environmental analysis. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). The provision on which petitioners rely, 42 U.S.C. 4332(2)(C)(iii), requires agencies to consider "alternatives to the proposed action." Read in context, it is apparent that that requirement is but one aspect of the overall environmental analysis NEPA requires, which also includes consideration of "the environmental impact of the proposed action" and "any adverse environmental effects which

cannot be avoided should the proposal be implemented." 42 U.S.C. 4332(2)(C)(i) and (ii). Nothing in NEPA even suggests that the requirement that agencies consider alternative courses of action is designed to protect economic interests that are unconnected to environmental concerns. Indeed, although the Council on Environmental Quality's regulations implementing NEPA acknowledge that an agency may take into account economic effects of a proposed action, they also note that "economic * * * effects are not intended by themselves to require preparation of an environmental impact statement." 40 C.F.R. 1508.14. If an EIS is prepared and the economic effects of the proposed action "are interrelated" with "natural or physical environmental effects," the EIS will discuss all of the effects on the human environment. *Ibid.*

Accordingly, in order to establish an injury that falls within the zone of interests protected by Section 102(2)(C) of NEPA, petitioners were required to establish that their asserted injury is an *environmental* injury, at least in part. The district court and court of appeals correctly held that petitioners failed to do so. Petitioners do not seek, even for self-interested reasons, to avoid any injury to the environment caused by the Forest Service's decision. Petitioners merely seek the designation of more roads for public motor-vehicle use in the Big Creek area in the hope of benefiting their mining operations. Petitioners do not allege in their complaint—or explain in their petition for a writ of certiorari—how their purported interest in opening more roads for public motor-vehicle use in that area is an environmental interest.

Petitioners' contentions (Pet. 17, 19) that they conduct their mining activities in an environmentally friend-

ly manner and have commissioned environmental studies are not sufficient to establish that their asserted injury arguably falls within the zone of interests protected by Section 102(2)(C) of NEPA—because those contentions do not establish (or even suggest) that petitioners' inability to use as many forest roads as they would like would cause an injury with "an environmental * * * component." *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010). Petitioners are correct (see Pet. 15) that a plaintiff who has intertwined economic and environmental interests that would be harmed by the alleged NEPA violation does have prudential standing because the environmental component of its interests falls within the zone of interests protected by NEPA. In such a case, the economic component of the plaintiff's interests does not defeat the zone-of-interest environmental component. Here, by contrast, there is no environmental component to the interest petitioners contend is harmed by the Forest Service's alleged violation of Section 102(2)(C) of NEPA. The court of appeals therefore correctly held that petitioners do not have prudential standing.

b. Petitioners argue (Pet. 18-20) that the court of appeals' decision conflicts with this Court's decisions in *Bennett* and *Monsanto*, *supra*. That is incorrect.

The court of appeals' decision does not conflict with *Bennett* because that case concerned a statute that (unlike NEPA) protects both economic and environmental interests. In *Bennett*, the Court considered whether ranchers and irrigation districts alleging a violation of Section 7 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536, sought to protect an interest that was arguably within the zone of interests to be protected or regulated by that provision. Section 7 of the ESA im-

poses the substantive requirements that each federal agency shall "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of" a species listed as threatened or endangered under the ESA or "result in the destruction or adverse modification of" designated critical habitat. 16 U.S.C. 1536(a)(2); see *Bennett*, 520 U.S. at 157-158. Section 7 of the ESA also requires that agencies "use the best scientific and commercial data available" when fulfilling those requirements. 16 U.S.C. 1536(a)(2). The Court in *Bennett* held that Section 7 is intended in part to protect economic interests because at least one purpose of the data requirement is "to prevent uneconomic (because erroneous) jeopardy determinations." 520 U.S. at 177. The economic interests asserted by the plaintiffs in *Bennett* therefore fell within Section 7's zone of interests, the Court held, and the plaintiffs had prudential standing. *Id.* at 175-177. Here, petitioners claim what they describe as an "economic injury" stemming from their "[in]ability to access and use roads in the Payette National Forest." Pet. 19. That injury to petitioners' "undisputed economic interests," *ibid.*, does not fall within NEPA's zone of interests because, as discussed above, it does not have an environmental component.

The court of appeals' decision also does not conflict with this Court's decision in *Monsanto* because the plaintiffs in *Monsanto* (unlike petitioners) asserted an "injury [that had] an environmental *as well as* an economic component." 130 S. Ct. at 2756 (emphasis added). The Court explained that the "mere fact that [the plaintiffs] also [sought] to avoid certain economic harms that [we]re tied to" their asserted environmental injury did "not strip them of prudential standing." *Ibid.* But the

Court gave no indication that a purely economic injury with no environmental component would satisfy prudential standing requirements. Such an environmental component is lacking here.

c. There is also no merit to petitioners' argument (Pet. 11-18) that the court of appeals' decision conflicts with decisions of the Eighth and D.C. Circuits. On the contrary, as explained below, the courts of appeals have consistently held that NEPA's zone of interests does not include purely economic concerns, but it does allow assertion of economic interests that are intertwined with environmental interests.

Petitioners' reliance (Pet. 11-15) on the Eighth Circuit's decision in *Friends of the Boundary Waters Wilderness* v. *Dombeck*, 164 F.3d 1115 (1999) (*Boundary Waters*), is misplaced. As with the plaintiffs in *Monsanto*, the plaintiffs in *Boundary Waters* alleged injury to interests that had *both* environmental and economic components. See 164 F.3d at 1126. The plaintiffs sought to challenge the adoption of a management plan governing visitor and motorboat use in a wilderness area. See *id.* at 1120. In addition to asserting economic interests related to their NEPA claim, the plaintiffs also alleged an injury arising from "their own inability to fully enjoy the [relevant wilderness area] as a result of the visitor use restrictions." *Id.* at 1126. The *Boundary Waters* plaintiffs therefore asserted environmental interests that were within NEPA's zone of interests. Because that is not true of petitioners, the court of appeals' decision in this case does not conflict with the Eighth Circuit's decision in *Boundary Waters*. This Court has twice denied a petition for a writ of certiorari asserting a conflict between the Ninth Circuit's NEPA prudential standing case law and the Eighth Circuit's

decision in *Boundary Waters*. See *Ashley Creek Phosphate Co.* v. *Scarlett*, 548 U.S. 903 (2006) (No. 05-1209); *Independent Petroleum Ass'n of Am.* v. *United States Forest Serv.*, 534 U.S. 1018 (2001) (No. 01-213).[2] There is no reason for a different disposition here.

Contrary to petitioners' contention (Pet. 15-18), the court of appeals' decision also does not conflict with decisions of the D.C. Circuit. The D.C. Circuit, like the Ninth Circuit, has consistently held that a "NEPA claim may not be raised by a party with no claimed or apparent environmental interest." *Town of Stratford* v. *Federal Aviation Admin.*, 285 F.3d 84, 88 (D.C. Cir. 2002). That court has explained that a plaintiff cannot establish prudential standing if it cannot "connect[] its claimed economic injury to any environmental effects caused by the allegedly defective EIS." *Id.* at 89. That is consistent with the Ninth Circuit's standard. See Pet. App. 4-5; *Ashley Creek Phosphate Co.* v. *Scarlett*, 420 F.3d 934, 945 (9th Cir. 2005) ("[A] *purely* economic injury that is not intertwined with an environmental interest does not fall within [NEPA] § 102's zone of interests.") (emphasis added), cert. denied, 548 U.S. 903 (2006).

There is no merit to petitioners' contention that the court of appeals "grafted a 'purity of heart' requirement onto NEPA that * * * makes it impossible for any party with any economic interest whatsoever to" establish prudential standing. Pet. 15-16. The Ninth Circuit —like the D.C. Circuit, the Eighth Circuit, and this

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[2] Unlike the plaintiffs in *Boundary Waters*, who alleged that the agency violated NEPA by failing to "consider adequately the economic impact on local economies" of the proposed action, see 164 F.3d at 1126, petitioners abandoned their claims that the EIS insufficiently analyzed the decision's impact on mining and economic interests in the Forest, see Pet. C.A. Reply Br. 2 n.2.

Court in *Monsanto*—has examined the nature of the interests a plaintiff asserts, not the purity of a plaintiff's motives. Petitioners were unable to establish prudential standing here *not* because they were motivated by economic concerns, but because they could not identify an environmental component of the interest they allege will be injured. That would be equally true if petitioners had filed their suit in the D.C. Circuit. See *National Ass'n of Home Builders* v. *United States Army Corps of Eng'rs*, 417 F.3d 1272, 1287 (D.C. Cir. 2005) (noting that, although "[p]arties motivated by purely commercial interests routinely satisfy the zone of interests test," an "allegation of injury to monetary interests alone may not * * * bring a party within the zone of environmental interests as contemplated by NEPA for purposes of standing") (quoting *Amgen Inc.* v. *Smith*, 357 F.3d 103, 109 (D.C. Cir. 2004); *Realty Income Trust* v. *Eckerd*, 564 F.2d 447, 452 (D.C. Cir. 1977)).

Given the agreement among courts of appeals about prudential standing under NEPA, review of the court of appeals' decision here is not warranted. Petitioners are incorrect in asserting a "need for guidance from this Court on the recurring, important issue of prudential standing to bring NEPA claims." Pet. 21. The governing rule is clear: if a plaintiff asserts solely economic interests, it cannot establish prudential standing under NEPA.

3. Even if there were no potential jurisdictional bar to reviewing the questions petitioners present and even if those questions were actually presented here and might warrant further review in an appropriate case, review is not warranted in this case for the additional reason that petitioners' claim is moot.

Petitioners' only unwaived claim alleged a procedural flaw in the NEPA analysis in that the Forest Service, when considering what roads to designate as available for motorized use, allegedly used inaccurate maps indicating that some open roads were in fact closed. See C.A. E.R. 13-14, ¶¶ 97-99; *id.* at 47-52 (administrative appeal referencing roads in the Big Creek area, also known as the MA-13 area). That claim is now moot because, as contemplated by the challenged decision (see C.A. Supp. E.R. 20), the Forest Service has performed further site-specific analysis of the roads and trails in the Big Creek area and has considered additional routes in that area for designation. *Id.* at 78-94. The analysis performed in contemplation of the rule petitioners challenge in this case has therefore been superseded by the more recent site-specific analysis (on which petitioners commented during the administrative process) of the Big Creek area. See Gov't C.A. Br. 41-45. If petitioners are dissatisfied with the Forest Service's decision in the more recent administrative process, they may attempt to challenge the resulting decision. Petitioners here challenge the original decision, and a ruling in their favor would have no practical effect because it would not change the Forest Service's subsequent decision. Petitioners' remaining claim is therefore moot. *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) ("[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed.") (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). And, of course, petitioners are entitled to use the APA to challenge the Forest Service's decision based on alleged violations of other statutes or

regulations to the extent petitioners have standing to assert such claims.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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APRIL 2013