

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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KRISTI NOEM, Governor of South Dakota, *et al.*,

*Plaintiffs-Appellants,*

v.

DEB HAALAND, U.S. Secretary of the Interior, *et al.*,

*Defendants-Appellees,*

CHEYENNE RIVER SIOUX TRIBE, *et al.*,

*Intervenor Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA

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**BRIEF OF THE NATIONAL PARKS CONSERVATION ASSOCIATION  
AS *AMICUS CURIAE* SUPPORTING DEFENDANTS-APPELLEES AND  
INTERVENOR DEFENDANTS-APPELLEES AND SUPPORTING  
DISMISSAL OR, ALTERNATIVELY, AFFIRMANCE**

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## **CORPORATE DISCLOSURE STATEMENT**

The National Parks Conservation Association (NPCA) is a nonprofit organization. NPCA does not have a parent corporation, and no publicly held corporation has a 10 percent or greater ownership interest in the organization.

*/s/ Janine M. Lopez*

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Janine M. Lopez

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

The National Parks Conservation Association (NPCA) has been the leading voice of the American people in protecting and enhancing our National Park System since 1919. NPCA and its 1.6 million members and supporters advocate for national parks and work to protect and preserve the nation’s most iconic and inspirational places for present and future generations.

Mount Rushmore National Memorial (the Memorial), located in the Black Hills region of South Dakota, is one of the nation’s most recognizable national parks. More than 2 million people visit the Memorial each year to enjoy the park’s distinctive mountain sculpture and the surrounding natural landscape of pine forest, granite peaks, and wetlands. The Memorial extends over 1,278 acres and “commemorate[s] the founding, expansion, preservation, and unification of the United States.” National Park Service, Foundation Document Overview, Mount Rushmore National Memorial (2015), <https://bit.ly/2ZKxgE3>.

Annual Fourth of July fireworks displays between 1998 and 2009 worsened the water and soil quality at the Memorial and led to more than twenty wildfires. JA238-39, JA256-57. The fireworks even damaged the sculpture itself—the monument that South Dakota and its *amici* stress is a “national shrine . . . to

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<sup>1</sup> All parties have consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel funded the preparation or submission of this brief.

independence’ and ‘self-government.’” Br. of *Amici Curiae* States at 4 (quoting Calvin Coolidge, *Speech at Mount Rushmore* (Aug. 10, 1927)); *see also* South Dakota Br. 3. The Memorial’s Foundation Document, published by the National Park Service (NPS) in 2015, specifically identifies fireworks as a major threat to the sculpture because of this history. JA152. As an advocate for park conservation, NPCA has consistently opposed calls to return fireworks to the Memorial; in 2020, the organization and its experts submitted comments to NPS explaining at length the serious risks fireworks posed to health, safety, the environment, and tribal resources. *See* NPCA, Comment Letter on Mount Rushmore National Memorial Independence Day Holiday Fireworks Event Environmental Assessment (Mar. 30, 2020) [hereinafter NPCA Comments], *available at* <https://bit.ly/39S8Avb>. NPCA thus has a substantial interest in defending the agency’s denial of South Dakota’s most recent request.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Since 1916, Congress has charged the National Park Service (NPS) with the responsibility to “promote and regulate” the use of the national parks in a manner consistent with the parks’ “fundamental purpose.” 54 U.S.C. § 100101(a). That purpose has remained the same for more than a century—namely, “conserv[ing] the scenery, natural and historic objects, and wild life” in the parks and providing for their enjoyment “in such manner and by such means as will leave them



unimpaired for the enjoyment of future generations.” *Id.*; *see also* National Park Service Organic Act, Pub. L. No. 64-235, § 1, 39 Stat. 535, 535 (1916). Consistent with this statutory directive, NPS has long made clear that it may deny a special use permit like the one at issue here if the agency determines that the permitted activity will “adversely impact[]” “public health and safety, environmental or scenic values, [or] natural or cultural resources,” among other things. 36 C.F.R. § 1.6(a); *see also* 54 U.S.C. § 100101(b) (absent a specific direction from Congress, NPS cannot authorize activities that are “in derogation of” the parks’ conservation purpose).

NPS considered exactly these factors in denying South Dakota’s request to hold fireworks at the Memorial in July 2021. Among other things, the agency reasonably concluded that ongoing monitoring of perchlorate contamination and the risk of wildfires counseled against allowing the event. NPS had made clear the previous year that it would conduct exactly this kind of monitoring after the 2020 fireworks display, and it was more than reasonable for the agency to evaluate the environmental impact of that event before allowing another one to proceed. NPS also appropriately relied on tribal considerations to deny South Dakota’s request. The agency had promised to conduct a survey of tribal cultural resources within the Memorial in 2020, but the survey had been delayed due to the pandemic. The

agency sensibly decided that it should complete the survey before greenlighting an event that could irreparably damage sacred sites.

The district court correctly recognized that the scope of review in a challenge like this one is narrow. JA651. Because NPS “considered the relevant factors” and “committed no clear error of judgment” in denying South Dakota’s request, *Niobrara River Ranch, LLC v. Huber*, 373 F.3d 881, 884-85 (8th Cir. 2004), the agency’s decision is not arbitrary or capricious. And because Congress has provided far more than an “intelligible principle” to guide NPS’s discretion, the statute does not plausibly raise any nondelegation concerns. *See Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). Accordingly, if the Court does not dismiss this appeal as moot, it should affirm the judgment of the district court.

## ARGUMENT

### I. THIS CASE IS MOOT

This case arose from the agency’s denial of South Dakota’s request to hold a fireworks display at the Memorial in July 2021—a date that has come and gone. NPCA agrees with the Cheyenne River Sioux Tribe (“Tribe”) that *all* of South Dakota’s claims are moot as a result, including the State’s nondelegation challenge to the NPS Organic Act. *See Tribe Br.* 1-2, 14-26. This follows from basic mootness principles; the Supreme Court has instructed that the “personal interest that must exist at the commencement of the litigation (standing) must continue

throughout its existence.” *Friends of the Earth, Inc. v. Laidlaw Env’t. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Here, the only “interest” that gave South Dakota standing to sue was the State’s inability to hold the 2021 fireworks event due to the permit denial. The passage of time has extinguished that interest, and the allegedly overbroad delegation in the Organic Act does not injure South Dakota in any other concrete way. *Cf. Alvarez v. Smith*, 558 U.S. 87, 93 (2009) (a dispute “abstracted from any concrete actual or threatened harm[] falls outside the scope of the constitutional words ‘Cases’ and ‘Controversies’”).

The fact that South Dakota “intends to request a permit” in future years (Br. 1) is not enough to justify review. The agency may or may not grant future permit applications, depending on the circumstances and record that exist at that time. NPS’s decisions on those applications must be evaluated based on the reasons the agency provides, which are highly unlikely to be identical to the reasons provided this year. *See Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 560 (9th Cir. 2019) (dismissing nondelegation challenge where the plaintiff’s “alleged injury rest[ed] on a speculative chain of future possibilities” and assumptions about what the agency would do). South Dakota thus has not shown that it is likely to be “subjected to the *same action* again,” as necessary to justify review under the mootness exception for issues that are capable of

repetition yet evading review. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (emphasis added).

Nor has South Dakota shown that the issues are likely to evade review. Indeed, the State has *already* submitted an application to hold a fireworks display in July 2022.<sup>2</sup> If NPS denies that permit, the courts will have ample opportunity to assess both the reasonableness of that decision and the constitutionality of the agency’s permitting authority. The Court should therefore reject South Dakota’s invitation to issue an ““advisory”” opinion “rest[ing] on hypothetical underpinnings,” as that is exactly the type of opinion that Article III forbids. *Missouri ex rel. Nixon v. Craig*, 163 F.3d 482, 484 (8th Cir. 1998).

## **II. THE DISTRICT COURT CORRECTLY UPHELD THE DENIAL OF SOUTH DAKOTA’S PERMIT APPLICATION**

NPS provided a number of compelling reasons for denying South Dakota’s permit application. As the government and the Tribe explain, each reason was adequately supported by the evidence. *See* Gov’t Br. 15-21; Tribe Br. 28-30. And any one of those reasons is independently sufficient to uphold the agency’s decision. *See Org. for Competitive Mkts. v. U.S. Dep’t of Agric.*, 912 F.3d 455, 459 (8th Cir. 2018) (agency decision must be upheld if “supportable on *any* rational basis” (emphasis added)); 36 C.F.R. § 1.6(a), (d) (authorizing NPS to deny

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<sup>2</sup> Mitch Klein, *Noem Administration Applies for 2022 Mount Rushmore Fireworks Permit*, Keloland (Sept. 29, 2021), <https://bit.ly/3F3K3Bv>.

a permit whenever “public health and safety, environmental or scenic values, . . . or the avoidance of conflict among visitor use activities” would be “adversely impacted” (emphasis added)). This brief focuses on three of the reasons with which NPCA is most familiar: the need to monitor perchlorate contamination, the risk of wildfires, and the importance of working with affiliated tribes to safeguard tribal cultural resources. *See* NPCA Comments at 3-6.

**A. NPS Reasonably Denied the Permit in Light of Ongoing Monitoring of Perchlorate Contamination**

Perchlorate is a chemical commonly used as an oxidizer in fireworks. *See* JA253. No one disputes that perchlorate exposure above certain levels can adversely affect a person’s health. Most notably, perchlorate exposure can interfere with thyroid hormone production and impair neurodevelopment, particularly in infants, young children, and fetuses. *See, e.g.,* JA257; *Drinking Water: Final Action on Perchlorate*, 85 Fed. Reg. 43,990, 43,991 (July 21, 2020).

Between 2011 and 2015, the U.S. Geological Survey (USGS) found high concentrations of perchlorate (up to 54 ug/L) in the surface water, groundwater, and drinking water at the Memorial. *See* USGS, *Perchlorate and Selected Metals in Water and Soil within Mount Rushmore National Memorial, South Dakota, 2011-15*, Report No. 2016-5030 at 17 (2016) [hereinafter USGS Study], *available at* <https://on.doi.gov/3B86Fic>; *see also* JA253-54. The USGS directly linked the elevated levels of perchlorate to past fireworks displays. JA253, JA256. Notably,

these levels remained elevated well after the fireworks events ceased in 2009. Between 2013 and 2020, perchlorate concentrations in the Memorial’s drinking water ranged from 12 ug/L to 29 ug/L. *See* CEA Engineers, P.C., Mount Rushmore National Memorial Independence Day Holiday Fireworks Event Environmental Assessment at 19 (Mar. 24, 2020) [hereinafter CEAPC Report], <https://bit.ly/3FenwCr>; *see also* USGS Study at 17 (finding perchlorate concentrations in one of the Memorial’s drinking water wells ranged from 17 ug/L to 38 ug/L between 2011 and 2015).<sup>3</sup>

NPS acknowledged in 2020 that reinstating fireworks displays would lead to more contamination, “with perchlorate levels gradually increasing in surface and groundwater after each event.” JA140. Although the NPS allowed the 2020 event to proceed, it made clear that the agency would conduct ongoing monitoring of the soil and water quality to “evaluate the event’s impact” on levels of perchlorate and other chemicals. JA234; *see also* JA257. NPS indicated that future permitting decisions would depend on the results of this monitoring. *See* JA234. That is exactly what took place. The data reviewed by NPS after the 2020 fireworks display “registered an increase in perchlorate at some sites . . . including in the

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<sup>3</sup> The persistence of perchlorate contamination results from its chemical profile; it is a “stable compound that does not degrade for decades in groundwater and surface water.” CEAPC Report at 5; *see also id.* at 6 (explaining that soil conditions in the Memorial are not conducive to degradation of perchlorate).

park’s drinking water.” JA216. The agency planned to conduct “[a]dditional monitoring” in 2021 to “continue evaluating perchlorate trends,” *id.*, and it was not arbitrary or capricious to await the outcome of those studies before approving another major fireworks event. *See Niobrara River Ranch*, 373 F.3d at 883-84 (agency’s decision to deny permits for river use until a biological study of alleged overuse was complete was neither arbitrary nor capricious).

South Dakota dismisses the threat of perchlorate contamination, noting that the Environmental Protection Agency (EPA) recently declined to regulate perchlorate under the Safe Drinking Water Act (SDWA). *See* 85 Fed. Reg. 43,990.<sup>4</sup> That argument is misguided for multiple reasons. First, NPS is not bound by the EPA’s drinking water advisories when making permitting decisions. It is well within the agency’s discretion to tolerate a lower level of water contamination in places of tremendous natural, historical, and cultural significance, particularly given the threat that contamination poses to aquatic life in the Memorial. *See* 54 U.S.C. § 100101(a) (instructing NPS to “conserve . . . wild life”); NPCA Comments at 3, 11 (explaining that elevated perchlorate levels in surface water

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<sup>4</sup> Notably, the EPA informed the D.C. Circuit in February 2021 that it is actively reviewing this decision. *See* Unopposed Motion for Abeyance, *NRDC v. EPA*, No. 20-1355 (D.C. Cir. Feb. 5, 2021); *see also* Status Report by EPA at 1-2, *NRDC v. EPA*, No. 20-1335 (D.C. Cir. Aug. 10, 2021) (explaining that the EPA is “gathering updated information on perchlorate levels in drinking water . . . to aid decision-making”). In light of that representation, the court is holding a challenge to the agency’s decision in abeyance.

pose risks to the health of aquatic species); *cf.* JA259 (explaining that “adverse impacts on birds, mammals, amphibians, and invertebrates could result from increased perchlorate levels following future fireworks displays”).

Second, even if the agency were focused solely on the safety of drinking water, NPS could reasonably be concerned about even low levels of perchlorate contamination. As NPCA’s experts explained in their comments, Massachusetts and California have adopted drinking water perchlorate standards (2 ug/L and 6 ug/L, respectively) that are considerably more restrictive than the one EPA proposed. *See* CEAPC Report at 19-20. These standards illustrate that NPS could reasonably regard the levels of perchlorate found at the Memorial as a real risk to both visitors and long-term staff residing on site. *See* NPCA Comments at 12.

Finally, the EPA’s decision not to regulate perchlorate does not imply that perchlorate exposure is *safe*. The agency continued to recognize the contaminant’s potential adverse impact on health, but determined that high levels of perchlorate did not “occur in public water systems with [the] frequency” necessary to justify regulation under the SDWA. *See* 42 U.S.C. § 300g-1(b)(1); 85 Fed. Reg. at 43,991-92. In particular, EPA found that only a relatively small number of water systems had perchlorate levels greater than the proposed threshold, due to successful state and local mitigation efforts. 85 Fed. Reg. at 43,997; *id.* (noting “correspondingly small population served” by those systems). The EPA’s action



therefore does not undermine NPS's determination that it should fully evaluate the risk of perchlorate contamination before approving another fireworks display.

**B. NPS Reasonably Denied the Permit in Light of the Serious Risk of Wildfires**

NPS also relied on the risk of wildfires in denying South Dakota's permit. The agency had acknowledged in the 2020 environmental assessment (EA) that previous fireworks displays at the Memorial led to more than twenty separate wildfires. JA239. Although those fires had been "quickly suppressed," the agency recognized that a wildfire in a dry year was "more likely to result in a high-consequence fire burning outside the boundaries of the Memorial." JA239, JA245; *see also* JA139 ("larger wildfire" with "observable impacts" is possible in a dry year). That fact is critically important. As NPCA's expert explained, "[d]ry summers (*i.e.*, dry fire seasons) are common in the Black Hills" and only becoming "more common" due to climate change. *See* Peter Brown, Review of Mount Rushmore National Memorial Independence Day Holiday Fireworks Event Environmental Assessment 2 (Mar. 27, 2020) [hereinafter Brown Review], *available at* <https://bit.ly/2Y98DQQ>; *see id.* at 2-4 (concluding that the 2020 EA

understated the risk of a “severe and destructive” escaped fire, given current forest conditions, changes in fuel structures, and potential weather variables).<sup>5</sup>

At the time the application was denied in March 2021, the Black Hills was in a “severe drought” and most of the Western United States was in “some type of drought status.” JA219. NPS reasonably (indeed, correctly) anticipated that “an active and destructive fire season . . . could come earlier than normal,” “exert[ing] extreme pressure on firefighting personnel and equipment.” *Id.*; see Derrick Bryson Taylor, *South Dakota Wildfires Prompt Mount Rushmore to Close*, N.Y. TIMES, Mar. 30, 2021, <https://nyti.ms/3D15Gk3> (explaining that three wildfires had “prompted the closure” of the Memorial, “forced the evacuation of about 400 homes,” and required the efforts of approximately 250 firefighters). South Dakota offers no reason for second-guessing the agency’s judgment that a fireworks display during a “severe drought” would potentially endanger the Memorial, the surrounding communities, and the lives of first responders.

### **C. NPS Reasonably Denied the Permit in Light of the Ongoing Survey of Tribal Cultural Properties**

As the Tribe explains, Congress has directed federal agencies making permitting decisions to consider the impact that granting a permit will have on

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<sup>5</sup> Additional concerns include an infestation of mountain pine beetles, which has killed trees in the Black Hills and thus provided fuel for wildfires. See Brown Review at 1-2.

“historic propert[ies],” which may include properties of “traditional religious and cultural importance to an Indian tribe.” 54 U.S.C. §§ 302706, 306108; *see* Tribe Br. 28-29. In 2020, NPS sought the views of sovereign tribes in the Black Hills area about the proposed fireworks display at the Memorial. Several tribes explained that they considered the fireworks event a “desecration” of sacred lands, JA211-12, and NPS responded by agreeing to conduct a survey of Tribal Cultural Properties (TCPs) *before* the event took place, *see* JA264. That survey was delayed due to the pandemic. JA212. But the 2020 fireworks event proceeded anyway, “strain[ing]” the agency’s relationships with the tribes. JA213.

NPS’s 2021 denial letter emphasized the agency’s “commit[ment] to respecting tribal connections with the site and building stronger relationships with associated tribes.” JA130. If the agency hoped to achieve those ends, it had to, at minimum, conduct the promised TCP survey before allowing additional fireworks displays. *Id.* Only after completing the survey could NPS determine what measures were necessary to avoid jeopardizing the newly identified cultural resources. JA212-13 (“This important TCP survey work needs to be completed to help inform and guide permitting decisions.”). In light of NPS’s mandate to “conserve . . . natural and historic objects” within national parks, 54 U.S.C. § 100101(a), it was entirely reasonable for the agency to await the survey findings before allowing a fireworks display that could irreparably damage cultural sites.

**D. The 2021 Permit Denial Is Not Subject to a “More Demanding” Standard of Review**

South Dakota places great weight on NPS’s decision to issue a fireworks permit in 2020. The State argues that the 2021 denial letter had to “explain why [the agency] changed its view” from the previous year. South Dakota Br. 34-35 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), and *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016)); *see id.* at 35 (arguing that “*Encino* and *Fox*’s more demanding standard” applies). The district court correctly rejected the argument that anything other than ordinary arbitrary-and-capricious principles apply.

The Supreme Court’s decisions in *Fox* and *Encino* address the appropriate standard of review for “agency action that *changes* prior policy.” *Fox*, 556 U.S. at 514 (emphasis added); *see also Encino*, 136 S. Ct. at 2126 (discussing agency regulation that “*overrule[d]* its previous position” (emphasis added)). The Court held that the Administrative Procedure Act does not require “all agency change [to] be subjected to more searching review,” as the statutory text “makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.” *Fox*, 556 U.S. at 514-15. The Court noted, however, that an agency may need to provide a “more detailed justification” for a policy change where, for example, “its new policy rests upon factual findings that contradict those which underlay its prior policy.” *Id.* at 515.

The district court correctly held that this case does not involve the kind of agency change that might require a more detailed explanation. JA659-60. The denial of the 2021 permit does not involve any policy “change” at all; South Dakota cannot plausibly claim that NPS had a policy allowing fireworks at the Memorial when no fireworks events took place between 2009 and 2019. JA113. Nor did the 2021 denial somehow “undo[] or revis[e]” a previous decision. *Fox*, 556 U.S. at 515. The 2020 permit issued by NPS expressly stated that it only applied to that year’s event; it did not “mean an automatic renewal of the event in the future.” JA599. South Dakota was allowed to hold the 2020 event covered by the permit, and nothing in the 2021 denial reversed that decision. The agency merely denied a *separate* permit application, on a separate record, which does not require more searching review.

### **III. SOUTH DAKOTA’S NONDELEGATION CHALLENGE IS MERITLESS**

As the district court recognized (JA647-48), a statute does not violate the nondelegation doctrine as long as “Congress has supplied an ‘intelligible principle’ to guide the delegee’s use of discretion.” *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). The Supreme Court has “over and over upheld even very broad delegations,” including statutes that authorize agencies to regulate in “the ‘public interest,’” to set “just and reasonable” rates, and to “issue whatever air quality standards are ‘requisite to protect the public health.’” *Id.* at 2129 (citing cases).

Congress’s delegation to NPS is far more specific than each of these permissible delegations; the agency must exercise its discretion in a manner that “conserve[s] the scenery, the natural and historic objects, and the wild life” in natural parks and “leave[s] them unimpaired for the enjoyment of future generations.” 54 U.S.C. § 100101(a). The Court should therefore summarily reject South Dakota’s nondelegation challenge, which would threaten countless regulations issued by NPS over the past hundred years to conserve our nation’s parks.

## CONCLUSION

The Court should dismiss the appeal as moot or, alternatively, affirm the judgment of the district court.

October 4, 2021

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on October 4, 2021 and will therefore be served electronically upon all counsel.

*/s/ Janine M. Lopez*

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Janine M. Lopez



## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a) and 32(g), the undersigned counsel for *amicus curiae* certifies:

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 27(d) and 29(a)(5) because the brief contains 3,606 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because the brief has been prepared using Microsoft Office Word and is set in Times New Roman font in a size equivalent to 14 points or larger.

/s/ Janine M. Lopez

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