

Exhibit 3

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HORNBECK OFFSHORE SERVICES, * Docket 10-CV-1663-F
LLC, et al *
 *
versus * New Orleans, Louisiana
 *
KENNETH LEE "KEN" SALAZAR, *
et al * August 11, 2010, 10:00 a.m.
* * * * *

ORAL ARGUMENT BEFORE THE
HONORABLE MARTIN L.C. FELDMAN
UNITED STATES DISTRICT JUDGE

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1 Babich from the Tulane Environmental Law Clinic. I represent
2 Sierra Club, but I'm holding down the table for all of the
3 defendant intervenors.

4 **THE COURT:** Thank you, Mr. Babich. Are you on the
5 faculty at Tulane?

6 **MR. BABICH:** Yes, I am.

7 **THE COURT:** I don't know that we have ever met. It's
8 nice to meet you.

9 **MR. BABICH:** Nice to meet you.

10 **THE COURT:** There's a motion to dismiss or
11 alternatively to stay the Court's previous order granting a
12 preliminary injunction in connection with the first moratorium.
13 I'll hear from the government first.

14 Let me say to both sides first: I want to thank
15 you all for the diligence with which you have pursued this and
16 the professional manner in which you conducted yourselves.
17 Your briefs, which I'm thoroughly familiar with, are very good,
18 both sides, and I appreciate it. I'm not sure members of the
19 public or the media understand when a judge appreciates both
20 sides professionally, but I do. I want to thank you.

21 I am as a result intensely familiar with the
22 issues. I don't want my remarks to be construed as cutting
23 either side off of the allotted time that I have ordered, but I
24 do want to say that there are only really two issues that have
25 focused my attention as a result of your papers and as a result

1 of reading all the cases that you have cited and some cases
2 that our own independent research has uncovered. Those two
3 questions are as follows:

4 As to the question of mootness, if one of the
5 exceptions to mootness applies, what difference does it make
6 what relief these plaintiffs can look to? That, of course, is
7 a mirror image of the question of whether it is no longer a
8 case in controversy.

9 Secondly, the exception that has drawn my
10 closest attention, the exception to mootness, is the question
11 of recurrence.

12 While I don't want to cut anybody off -- and if
13 I am incorrectly focusing on those two questions, I know
14 somebody will tell me, but at least those are the issues that I
15 have the greatest interest in at this time. I'll hear from
16 Mr. Montero first.

17 **MR. MONTERO:** Yes, Your Honor. Guillermo Montero for
18 the defendants. I obviously have a prepared spiel. I'm just
19 going to go straight to it in light of Your Honor's questions.
20 I'll start very briefly by discussing the case in controversy
21 requirement and, in particular, the redressability, which we
22 think is lacking here, and then I will move on to the
23 exceptions. I'll answer Your Honor's questions about
24 recurrence. With the Court's permission, I would like to
25 reserve six minutes of my time for rebuttal, if I may.

1 **THE COURT:** That's fine.

2 **MR. MONTERO:** I'll dispense with most of the
3 contextual comments.

4 **THE COURT:** Oh, by the way, I am also very familiar
5 with the new memorandum decision. When you said you were going
6 to dispense with the contents, I would hope that that's one of
7 the contents you'll dispense with because it already gives the
8 word *torture* a new meaning.

9 **MR. MONTERO:** Were you talking about the July 12 --

10 **THE COURT:** I'm talking about, yes, the July 12
11 memorandum decision, all 22 pages plus exhibits.

12 **MR. MONTERO:** I won't be going through that.

13 **THE COURT:** Thank you. Well, I won't say what I
14 started to say. I might be accused of being religious. Go
15 ahead.

16 **MR. MONTERO:** Fair enough, Your Honor. I'll just say
17 as a matter of context that the crux of the plaintiffs'
18 arguments in this case is that the directive issued on May 28
19 was insufficiently supported by facts, data, and analysis.
20 This Court agreed with that in its preliminary injunction
21 order, explaining that the directive is not likely to survive
22 the arbitrary and capricious standard based on the record at
23 that time before the Court.

24 After receiving the opinion, the Secretary
25 reopened the decision-making process. Ultimately, he rescinded

1 the May 28 directive and he issued a new one on July 12. That
2 new directive is based on a new administrative record and
3 instructs BOEM -- that's the Bureau of Ocean Energy
4 Management -- to withdraw all the suspensions that it had
5 previously issued under the main directive and then to issue
6 new suspensions based on the Secretary's new analysis and
7 conclusions.

8 Now, our position is that the rescission of the
9 May directive moots this case because there's no longer any way
10 in which the plaintiffs' claims in this particular case will be
11 redressable. What I mean by that is there's nothing this Court
12 could hold with respect to the May directive that would relieve
13 the plaintiffs from the injuries that they allege to suffer as
14 a result of suspension of drilling operations. The reason for
15 that is no matter what happens in this particular case, the
16 July directive will remain in place and the drilling operations
17 that were suspended under it will remain suspended.

18 Now, we don't mean to say that the plaintiffs
19 are without recourse. They could certainly challenge the July
20 directive. We are just saying, as Your Honor alluded to, this
21 particular case does not present a live case of controversy.

22 **THE COURT:** There's been no amendment to the
23 complaint in *Hornbeck*; is that correct?

24 **MR. MONTERO:** That's correct, Your Honor. There's
25 not been an amendment or a new complaint.

1 **THE COURT:** There's been no intervention in *ENSCO*.
2 Is that the other case?

3 **MR. MONTERO:** Yes, the *ENSCO Offshore Company* case.

4 **THE COURT:** There's been no intervention in that.

5 **MR. MONTERO:** That's correct. So we think this
6 particular case has to be redressed.

7 In briefing up and analyzing the mootness
8 exceptions, we kept coming back to that. No matter what
9 happens on this with respect to the exceptions, we kept
10 thinking: Well, what could possibly be the relief? That's
11 sort of our theme here.

12 **THE COURT:** How do you explain the Supreme Court's
13 decision in *City of Jacksonville*? I have looked at that
14 opinion perhaps a dozen times and as recently as late last
15 night. Although standing was the central issue in the case,
16 Justice Thomas did directly address the question of recurrence
17 and mootness. The opinion doesn't seem to care whether there's
18 an apparent relief even in the face of a refusal to declare
19 mootness. How do you explain *City of Jacksonville*?

20 **MR. MONTERO:** Your Honor, I would have to review that
21 decision more closely. As the Court is aware, there are three
22 requirements for a case of controversy:

23 Injury. We are not disputing that there is a
24 valid live injury here but certainly traceability. The
25 injuries are traced to the May directive and the arbitrariness

1 and capriciousness that the Court attributed to the May
2 directive and the suspensions that flowed from that directive.

3 **THE COURT:** Well, let me read some of his language in
4 the opinion:

5 ". . . a defendant's voluntary cessation of a
6 challenged practice does not deprive a federal court of its
7 power to determine the legality of the practice.'"

8 Now, I realize maybe you are at a disadvantage
9 because you said you would have to analyze the case more, but
10 let me just give you the thrust of it. Maybe you have some
11 comments.

12 **MR. MONTERO:** Uh-huh.

13 **THE COURT:** Let me start again:

14 "' . . . a defendant's voluntary cessation of a
15 challenged practice does not deprive a federal court of its
16 power to determine the legality of the practice.'"

17 Thomas is distinguishing a case called *City of*
18 *Mesquite*.

19 "Although the challenged statutory language at
20 issue in *City of Mesquite* had been eliminated while the case
21 was pending in the court of appeals" -- I'm sorry. He doesn't
22 distinguish it; he follows it -- "we held that the case was not
23 moot because the defendant's 'repeal of the objectionable
24 language would not preclude it from reenacting precisely the
25 same provision if the district court's judgment were vacated.'"

1 "There is no mere risk that Jacksonville will
2 repeat its allegedly wrongful conduct; it has already done so.
3 Nor does it matter that the new ordinance differs in certain
4 respects from the old one."

5 "The gravamen of petitioner's complaint is that
6 its members are disadvantaged The new ordinance may
7 disadvantage them to a lesser degree than the old one" -- it
8 was a minority set-aside case -- "but insofar as it accords
9 preferential treatment . . . it disadvantages them in the same
10 fundamental way."

11 Now, I'm not saying and I'm not even reaching
12 the question of whether the July 12 memorandum decision is
13 valid or not and whether it complies with the Administrative
14 Procedure Act. I'm not saying that, and that was present in
15 this case. There had already been a determination that the
16 change was not substantial enough to prevent the recurrence of
17 the same kind of harm.

18 Now, *City of Jacksonville* didn't involve the
19 Administrative Procedure Act. That may be a big difference. I
20 don't know. The decision itself held that there was no
21 mootness because there was a threat or in this case there was,
22 in fact, a recurrence of the same harm. I keep looking at the
23 opinion and saying, "Well, what was somebody supposed to do
24 next?" It's not clear from the opinion.

25 The opinion seems to shrug off the fact that the

1 certainty of what the relief was was not present. That's why
2 I'm questioning you about *City of Jacksonville* because most of
3 these other decisions in the courts of appeal and a couple of
4 district court opinions are perhaps distinguishable for one of
5 three reasons.

6 The first example in the -- I always chuckle
7 when I think about the name of the case. What's it's called?
8 The *Silvery Minnow* case. I shouldn't chuckle. Thank God my
9 friend Sean O'Keefe survived that wreck, and he was on his way
10 to go fishing.

11 In the *Silvery Minnow* case, the fact of
12 recurrence was not even argued. It wasn't an issue. None of
13 the exceptions were an issue in that very lengthy Tenth Circuit
14 opinion. In some of the cases, the change was admittedly quite
15 substantial, so there was no probability of recurrence. Then
16 in a couple of the cases that have been cited in the briefs --
17 and I'm not sure which side even cited them anymore -- there
18 was a change, and the change acknowledged the grievances that
19 had been asserted. So, again, recurrence or avoidance of
20 judicial review was not an issue.

21 I'm being quite open with both of you-all. The
22 one case I keep coming back to is *City of Jacksonville*.

23 **MR. MONTERO:** Understood, Your Honor. Thank you. I
24 will try to respond to all of that.

25 Now, the first thing that comes to mind is once

1 a case reaches the Supreme Court, there's a lot of procedural
2 history behind it --

3 **THE COURT:** True.

4 **MR. MONTERO:** -- and remanding some things so that it
5 goes all the way back to the district court may effectively, in
6 fact, deprive the plaintiffs from securing any lasting relief.
7 That may very well be why Justice Thomas at that point, under
8 that procedural posture, decided to decide the case before him
9 rather than remanding it where it would ultimately be --

10 **THE COURT:** Well, there was a dissent by
11 Justice O'Connor, which I think Justice Brennan joined in,
12 which she said, "No, this is moot." So, in a very curious way,
13 Justice O'Connor's dissent almost strengthens the question I'm
14 asking. At any rate, go ahead.

15 **MR. MONTERO:** I agree, Your Honor. What I would say
16 is in this case there is already a vehicle for judicial review.

17 **THE COURT:** The second case.

18 **MR. MONTERO:** The second case, that's correct. So
19 why the plaintiffs would want to pursue this particular
20 vehicle --

21 **THE COURT:** I'm going to ask them that, obviously.
22 If you want to turn and ask them that now, you can do so and
23 save my voice.

24 **MR. MONTERO:** I will not. Here I just want to refer
25 the Court to the *Schering Corp. v. Shalala* case, and we cited

1 this on page 6 of our reply. In that particular case, just
2 very briefly, the FDA had issued a letter putting forth a
3 certain interpretation of the Food & Drug Act. The
4 interpretation of that letter was challenged by industry. The
5 FDA later issued a regulation putting forth a similar
6 interpretation of the Food and Drug Act.

7 The plaintiffs insisted on challenging the
8 letter for whatever reason, and the court said, "We cannot
9 reach back to the 1990 letter and issue a judgment on the
10 meaning of the statute because the letter has no current
11 operative effect. It cannot govern future action." So the
12 proper course for the plaintiffs in that case was to challenge
13 the new regulation and for the court to rule on the meaning of
14 the Food and Drug Act in the context of this new
15 vehicle/regulation.

16 **THE COURT:** What circuit is that?

17 **MR. MONTERO:** That's the D.C. Circuit.

18 **THE COURT:** Was that the case in which Judge Wright
19 dissented?

20 **MR. MONTERO:** I can't recall, Your Honor.

21 **THE COURT:** Okay.

22 **MR. MONTERO:** The other thing I will point out is
23 Your Honor was alluding to distinguishing some of these cases
24 perhaps on the notion that the change was quite substantial,
25 that the new agency action was very different from the prior

1 one, and we submit that that actually occurred here. So
2 plaintiffs are saying that the July directive --

3 **THE COURT:** I don't know that, though, do I?

4 **MR. MONTERO:** That's correct, Your Honor.

5 **THE COURT:** I'm sure that people on both sides, other
6 than the lawyers, would love to speculate that I know or don't
7 know that. It makes nice cover stories around the world. I
8 don't know that and I'm not informed about that yet.

9 **MR. MONTERO:** Understood, Your Honor.

10 **THE COURT:** I'm not going to prejudge that --

11 **MR. MONTERO:** Absolutely, and that's exactly what we
12 are asking.

13 **THE COURT:** -- despite of my vast oil interests.

14 **MR. MONTERO:** I'm taking no position on that either,
15 Your Honor.

16 **THE COURT:** I know you don't.

17 **MR. MONTERO:** See, now you've distracted me.

18 **THE COURT:** You were telling me about the rightness
19 of your position --

20 **MR. MONTERO:** Yes. Now I recall.

21 **THE COURT:** -- and how the Secretary has done no
22 wrong this time, how he has complied with the Administrative
23 Procedure Act, and how Mr. Rosenblum's clients and ENSCO have
24 absolutely no case whatsoever.

25 **MR. MONTERO:** Thank you, Your Honor.

1 **THE COURT:** And I said I didn't know that one way or
2 the other, although it makes for nice media.

3 **MR. MONTERO:** The Court was alluding to the fact that
4 in some of these cases the changes are quite substantial.

5 **THE COURT:** Right.

6 **MR. MONTERO:** It's instructive in this context to
7 look at exactly what it is that the plaintiffs were
8 challenging. First, let me clarify. We are not taking the
9 position that the end result of the decision is substantially
10 different. It is, in fact, substantially similar. There are
11 some important distinctions, but that's not what the case law
12 requires.

13 In the framework of the voluntary cessation
14 doctrine, the plaintiffs have to show -- or there has to be no
15 reasonable expectation the alleged violation will occur.
16 Remember in this context that the plaintiffs allege that there
17 were insufficient facts, data, and analysis and that that
18 constituted a violation of the APA.

19 The only way that's going to recur in the new
20 decision is if the suspension is issued based on the same
21 facts, data, analysis, conclusions, etc., that were put forward
22 and underlie the May directive and that this Court determined
23 were arbitrary and capricious.

24 **THE COURT:** Well, I think -- and I would be
25 interested in your response. I think especially in the

1 surreply brief that the plaintiffs filed, if I'm fairly stating
2 it, their concern is that the July 12 memorandum decision was
3 prejudged, is not based upon new information, that the new
4 information fulfills a wish that the Secretary of the Interior
5 had immediately announced after this Court's preliminary
6 injunction in the *Hornbeck* case; and that, therefore, there is
7 a danger of recurrence because the information that is now in
8 the July 12 memorandum decision is essentially an afterthought
9 that was placed in the decision in order to support a judgment
10 that had been already previously made.

11 Of course, they refer to the Secretary's public
12 comments, they refer to his media comments, his testimony
13 before some committee in Washington, and -- I don't know how
14 true this is or accurate because I wasn't there, but it was
15 also reported that when one of the members of the Fifth Circuit
16 panel asked someone on your team -- I don't know if you-all
17 handled the appeal even -- whether or not the Secretary
18 considered himself bound by the judgment of federal courts, the
19 answer was no.

20 So the question of the propriety of the
21 memorandum decision has to be put off for another day, but I
22 think in this case the argument is not that there has been a
23 recurrence because we don't know that --

24 **MR. MONTERO:** Uh-huh.

25 **THE COURT:** -- and that has to await the second case,

1 but that there is the threat of recurrence based upon these
2 observations. I'm just wondering what your comment about that
3 is.

4 **MR. MONTERO:** Thank you, Your Honor. I will just
5 start by saying I'm not familiar with the Fifth Circuit
6 appellate argument.

7 **THE COURT:** The Fifth Circuit.

8 **MR. MONTERO:** Yes.

9 **THE COURT:** Oh, I thought you said "Sixth Circuit."

10 **MR. MONTERO:** Oh, no.

11 **THE COURT:** I have more friends in the Sixth Circuit.

12 **MR. MONTERO:** Okay. I'll just go on record as saying
13 I can't imagine that one of my colleagues would have said that
14 the Secretary was not bound by the determination of an
15 Article III district court. I can imagine a more refined
16 comment --

17 **THE COURT:** Or a court of appeals. I think the
18 question even covered the appellate process as well.

19 **MR. MONTERO:** I think there may have been a more
20 refined statement. I can imagine a situation where there would
21 be some refinement as to the interlocutory nature of the
22 decision or what potential issues the decision reached. I
23 cannot imagine that --

24 **THE COURT:** Well, you didn't handle the appeal, so it
25 might be an unfair question.

1 **MR. MONTERO:** There are a few things I will say here.
2 The press release, for example, I'm familiar with it. There's
3 nothing in the Administrative Procedure Act that requires that
4 an agency have no preference for where it will end up when it's
5 opening a decision-making process.

6 **THE COURT:** If there's a rational connection between
7 the decision and the information.

8 **MR. MONTERO:** That's correct, Your Honor. Agencies
9 issue notices of intent all the time. They issue proposed
10 rules all the time. It doesn't mean that anything after that
11 point is a post hoc rationalization or that notice of intent is
12 a preordained decision.

13 The other thing that I was getting at earlier
14 was in terms of the alleged violation only recurring if the
15 facts, data, reasoning that underlie the May decision are the
16 impetus for the new decision and how the July directive makes
17 sure that doesn't happen, Your Honor asks, "Well, how do I know
18 that the July directive is different?" Well, there are a
19 couple things there.

20 First is it cannot be prejudged. It's
21 presumptively valid. Agencies and their decisions are entitled
22 to a presumption of regularity. It will be reviewed. It will
23 be judged in the context of the *ENSCO* case, and if the
24 plaintiffs here were to amend their complaint or intervene in
25 that case --

1 Incidentally, that case will be resolved
2 presumably prior to this case because we already have a
3 briefing schedule. We have a hearing date of September 22 on a
4 motion for summary judgment.

5 **THE COURT:** Right, assuming that date holds for
6 whatever reason. Actually, that was to accommodate the
7 government's request that they needed more time.

8 **MR. MONTERO:** We appreciate that, Your Honor. I will
9 say, going back to how substantial were the changes, again this
10 goes back to what were the alleged violations. In the new
11 decision-making process, the Secretary I think made clear that
12 it heard and understood this Court's guidance. It addressed
13 that guidance, I think, in that way, showing the utmost respect
14 to this Court's guidance.

15 **THE COURT:** Oh, I don't disagree with that. I think
16 that the July 12 memorandum decision was respectful.

17 **MR. MONTERO:** Thank you, Your Honor.

18 **THE COURT:** I do agree with that. If I didn't agree
19 with it, the Secretary of the Interior would be here in court
20 personally this morning.

21 **MR. MONTERO:** I understand our conversation would
22 probably not be quite as cordial.

23 **THE COURT:** Oh, it would be completely impartial. Go
24 ahead. I interrupted you. You were talking about the July 12
25 memorandum decision.

1 **MR. MONTERO:** So the Court is well familiar with
2 that. I will just point out some of the things the Court
3 identified in its decision that were lacking in the May one.
4 The Court noted that the Secretary had failed to explain the
5 relationship between the factual findings and the scope of the
6 suspensions, the duration of the suspensions; that they had
7 failed to cogently explain why he had exercised the discretion
8 the way that he did; that he had failed to analyze the safety
9 threat posed by the individual rigs.

10 Our position is that the July directive does
11 fill all those legal gaps, the directive and the administrative
12 record on which it is based, so in that way it guarantees that
13 new suspensions will not be based on the alleged arbitrariness
14 and capriciousness that this Court attributed to the May
15 directive.

16 Having said that, I really do want to get back
17 to what I think is our central theme here, which is I don't
18 think there's anything the Court can do in this particular
19 case, which only challenges the May directive, which will end
20 up enjoining or lifting or in any way affecting the current
21 suspensions. Those suspensions are the only thing that serve
22 as a source of injury to the plaintiffs.

23 Now, if there was no feasible way in which to
24 challenge the July directive, this may present a situation
25 where the May directive becomes the vehicle to issue a

1 statement as to what the Outer Continental Shelf Lands Act or
2 the APA requires or doesn't require and whether the Secretary
3 has violated those acts in the context of the May directive,
4 but here we have a new action. It is ripe for judicial review,
5 and it is already before the Court and we have a hearing date.
6 So our position is --

7 **THE COURT:** I'm not all that impressed with the
8 argument about evasion of judicial review. That's why I have
9 sort of come down on my curiosity, let's put it that way, about
10 the recurrence exception to mootness.

11 **MR. MONTERO:** Understood, Your Honor.

12 **THE COURT:** That's why I said what I said in my
13 opening statements.

14 **MR. MONTERO:** Your Honor, I would like to ask how
15 much time I have left.

16 **THE COURT:** I don't know. You have set me off
17 course. I'm not sure. I would have to say you have --
18 assuming we started on time, you have about 15 minutes left, 20
19 minutes.

20 **MR. MONTERO:** I thought I only had 20 minutes total?

21 **THE COURT:** How much time did I give you--all?

22 **MR. ROSENBLUM:** 20 minutes a side, Your Honor.

23 **THE COURT:** 20 minutes? Oh, I'm sorry. Tomorrow I
24 have uncharacteristically given each side an hour in a case.
25 Well, see, I was thinking an hour. Why don't you take about

1 five more minutes, and then I will give you your six minutes
2 rebuttal. I'll give Mr. Rosenblum a little more time as well.

3 **MR. MONTERO:** Thank you, Your Honor. I will just say
4 one last thing before sitting down and this is in response to
5 the surreply. Plaintiffs argue that the Secretary somehow is
6 trying to avoid any inquiry into the regularity of the decision
7 process that led up to the July directive. I want to be very
8 clear that no one on the federal side is trying to shield the
9 July directive from review. Plaintiffs can certainly challenge
10 it if they wish.

11 Our position is it would be improper to
12 undertake a review process of that decision which is not
13 properly before the Court, without the administrative record,
14 in the context of this motion to dismiss, so they should file a
15 complaint just like the *ENSCO* plaintiffs did.

16 **THE COURT:** Thank you very much.

17 **MR. MONTERO:** Thank you, Your Honor.

18 **THE COURT:** All right.

19 **MR. ROSENBLUM:** May it please the Court.

20 **THE COURT:** Why don't you just turn to Mr. Montero's
21 closing comments. Let's assume that I were to say it's not
22 moot. Then what?

23 **MR. ROSENBLUM:** This case continues --

24 **THE COURT:** Yes, it continues.

25 **MR. ROSENBLUM:** -- and we reach a result which

1 recognizes that the gravamen of this case -- I think it was
2 your words, Judge, when you were quoting somebody in the
3 *Jacksonville* decision.

4 **THE COURT:** Justice Thomas.

5 **MR. ROSENBLUM:** The gravamen of this case, with all
6 due respect --

7 **THE COURT:** Am I the only person who has read *City of*
8 *Jacksonville*?

9 **MR. ROSENBLUM:** I have not, Judge.

10 **THE COURT:** You have not?

11 **MR. ROSENBLUM:** I have not, so I'm going from your
12 comments, Your Honor. From what you indicated, Judge, I
13 believe there is reference to the -- I think it's the
14 *Friends of the Earth* case that talks about the same issue of
15 recurrence, but let me make sure, Judge, I answer your
16 question.

17 The gravamen of this lawsuit is a blanket
18 punitive moratorium on deepwater drilling.

19 **THE COURT:** But the blanket punitive moratorium on
20 deepwater drilling that was issued May 28 has been rescinded.

21 **MR. ROSENBLUM:** What the government calls the July 12
22 directive is the same animal.

23 **THE COURT:** So your argument is recurrence, but you
24 have not hunted that same animal. You have only hunted an
25 animal that is now extinct.

1 **MR. ROSENBLUM:** What we should say, Judge, is it's
2 not really recurrence; it's defiance.

3 **THE COURT:** Well, I'm not prepared to say that
4 because perhaps another violation of the Administrative
5 Procedure Act could be characterized as defiance, but it seems
6 to be utterly premature to even get to that point because
7 that's separate litigation. That case will depend, its
8 outcome, on whether or not the government complied with the
9 Administrative Procedure Act.

10 It may have. It may not have. I don't know. I
11 think it's inappropriate to characterize the July 12 memorandum
12 decision as defiance. It may be proper to characterize it as a
13 clear example of recurrence of the same harm. If you turn out
14 to be correct about that, then of course the exception to
15 mootness applies. That's why I keep dwelling on this question
16 that I asked you and which Mr. Montero closed his argument on.

17 Let's assume that I say there is a danger of
18 recurrence, that I hold that and that, therefore, the May 28
19 suspension order is not moot. Then what? It has been
20 rescinded.

21 **MR. ROSENBLUM:** What we suggest, Your Honor, with all
22 due respect, it really has not been rescinded because what the
23 Secretary announced on June 22 -- not July 12, Judge. If you
24 look at the chronology -- and you're very familiar with it,
25 Your Honor, so I really don't want to take my limited time to

1 refresh that. If you look at the knee-jerk reaction of the
2 DOI, within hours, Judge -- within hours. Your opinion came
3 over the electronic system at about 12:20. Within hours the
4 DOI issued its press release not that they are going to
5 consider, not that they are going to acquire more data, not
6 that they are going to do a new look. They said, we would
7 suggest, in defiance -- with all respect of your judicial
8 authority, Your Honor, they said, "It's right. We are going to
9 continue in place."

10 The next day the Secretary, in front of the
11 appropriations subcommittee, in response to two questions from
12 two senators, Senator Murkowski and --

13 **THE COURT:** Was it Landrieu? I don't remember.

14 **MR. ROSENBLUM:** I have it, Judge. Senator Lamar
15 Alexander.

16 **THE COURT:** That's it.

17 **MR. ROSENBLUM:** The question from Senator Alexander
18 was: "Mr. Secretary, do you plan to issue a new moratorium on
19 all exploration of oil in the Gulf of Mexico at depths of more
20 than 500 feet?"

21 Now, the Secretary could have said, "Well, we
22 are going to consider what Judge Feldman said. We are going to
23 acquire new data. We are going to do a reanalysis. We are
24 going to get back into the trenches and look at the factors and
25 even consider perhaps some economic factors," which even on

1 Sunday morning on *Meet the Press*, Carol Browner said they
2 haven't considered the economic impact of the moratorium, but
3 that's not what the Secretary said.

4 This was June 23, Judge. He said, "The answer
5 to that is yes, Senator Alexander." So the decision wasn't
6 made on July 12. It was made on the 22nd of June in immediate
7 response to you. That's why I go so far, Judge, with all due
8 respect, to calling it defiance.

9 Your Honor, we are looking at what is alleged to
10 have been a six-month moratorium. Even today the press -- and
11 some of them are here -- refer to as a six-month moratorium.
12 If we are taking the July 12 date --

13 **THE COURT:** I don't always believe what I hear in the
14 press.

15 **MR. ROSENBLUM:** I don't either, Judge. My point is
16 there is confusion. My fundamental point is: If it's supposed
17 to last six months, then the recurrence issue, the whole reason
18 you have those judicially recognized exceptions to the mootness
19 doctrine, is to prevent a sham. In fact, in the words of
20 Judge Wiener in the *Sossamon* case at the Fifth Circuit, he used
21 that actual acknowledgment of a sham of what's happening here.

22 We are up to number two, Judge. Well, we get to
23 the *ENSCO* case, if we should leave it for that day, Judge, and
24 let's assume you come down and you strike it down. Well, how
25 about number three?

1 **THE COURT:** But you're not even in the *ENSCO* case.

2 **MR. ROSENBLUM:** I don't believe we need to be in the
3 *ENSCO* case, Judge, because I believe that the well-recognized
4 exceptions to that mootness doctrine, of the recurrence but
5 avoiding review or the voluntary cessation doctrine, either one
6 of those exceptions, gives me a live controversy to be here.

7 When you look at the undisputed facts, Judge --
8 and you're right. I agree with you 100 percent, which is why
9 we did not make a facial attack to number two. You don't have
10 to decide today, Judge -- and you have said it -- whether
11 number two is identical to number one. You don't have to go
12 that far. We don't ask you to go that far.

13 What we suggest, Judge, is on this motion to
14 dismiss on the basis of mootness, there are two well-recognized
15 exceptions and either one of those exceptions -- under the
16 jurisprudence that we talk about and what I have heard your
17 comments about in terms of the *Jacksonville* case, either one of
18 those gets you to the conclusion that this case is not moot.

19 **THE COURT:** Just for a second, let's assume that I
20 were to decide that the case is not moot because of the
21 applicability of one or the other exceptions. Let's also make
22 a further assumption, fanciful or realistic, that the
23 Fifth Circuit affirms me and that, finally, the Supreme Court
24 either denies writs or takes the case and ultimately upholds
25 this decision. Then what? What do you do?

1 **MR. ROSENBLUM:** What do I do? We go to trial on the
2 merits or, actually, I file a summary judgment that supports my
3 declaratory judgment action that you declare a blanket
4 six-month moratorium on deepwater drilling is illegal and that
5 you permanently -- not preliminarily, but you permanently
6 enjoin it. Otherwise, Judge, exactly why you have those
7 exceptions to the mootness doctrine and --

8 **THE COURT:** Because of especially the recurrence
9 issue.

10 **MR. ROSENBLUM:** And it's a sham. If you look at what
11 Judge Wiener says in the *Sossamon* case, he recognized that you
12 can't be in a situation where somebody has in my -- and my
13 clients have spent the money for us on an expedited basis,
14 which we appreciate of the Court because of the national
15 significance. They have spent a number of dollars to get us
16 here, Judge. What the government wants to do at every step of
17 the way is put it off to another day so it becomes after they
18 decide that they are going to withdraw this moratorium.

19 That's exactly why you recognized, Judge, that
20 the preliminary injunction needed to be heard quickly. Even
21 the motion to stay that you denied here and then they bring it
22 to the Fifth Circuit, the Fifth Circuit recognized it needed to
23 be heard quickly so that you don't have the recurrence
24 situation and the prejudice to the plaintiffs attacking what
25 you have here. That's precisely why you have those exceptions.

1 If as the government says, "Well, Hornbeck,
2 Chouest, Bollinger, file an amendment," well, we will be back
3 here in three weeks if we are able. We will be back here in a
4 month. Maybe we will be back in six weeks. When we get up to
5 the Fifth Circuit, even if they expedite it, Judge -- and we
6 have been moving pretty quick. Even if we expedite it, it is a
7 complete sham. In fact, it is, we would suggest, a sham to the
8 Court's right of judicial review. That's exactly why you have
9 these exceptions to the mootness doctrine.

10 Your Honor, your reference to what one of the
11 government lawyers may have said at the Fifth Circuit -- and it
12 may be, from my memory, the attorney was asked -- and I believe
13 it was Mr. Gray. It was not Mr. Montero. They said that the
14 DOI was going to issue a new moratorium no matter what the
15 ruling that the Fifth Circuit did on the stay motion.

16 Now, whether you interpret that the way you put
17 the language on it or not, that's what I remember them saying.
18 I think it was Judge Smith or maybe it was -- it wasn't Judge
19 Wiener. I think it was Judge Smith, Your Honor, that asked the
20 question. The point is that was very easy for the DOI lawyer
21 to say because that was July 8, Judge. That morning the DOI
22 said if the Fifth Circuit doesn't give them the stay, they are
23 going to come out with a new moratorium.

24 They had already decided on June 22, weeks
25 earlier, that they were going to come out with, quote, a new

1 moratorium. For the government to suggest as they do, Judge,
2 in their papers that this is a, quote, new agency action, a new
3 decision, a reanalysis, a process, let alone, quote, a thorough
4 deliberative process, a genuine action, a reasoned
5 reconsideration, or some process -- and you heard it this
6 morning -- that requires the presumption of regularity, with
7 all due respect, that's outrageous, Judge, when you recognize
8 within a couple of hours after you issued your opinion the
9 Secretary did all these things.

10 There was no reanalysis. To suggest that the
11 normal presumption of regularity that we recognize the
12 administrative departments are entitled to exists in this case
13 is simply belying the undisputed facts of what the Secretary
14 said in the press release and what he said to the two senators.

15 Really, what we would suggest you have here is a
16 preordained decision. It was announced on the 22nd of June,
17 and it was announced to chill the drilling in the Gulf. That's
18 what's going on here, Judge. It was announced to chill the
19 drilling in the Gulf.

20 In fact, the Fifth Circuit's opinion denying the
21 stay -- because they asked the question to the government at
22 argument: "Well, if we do or we don't, do you expect that
23 there is going to be a commencement of drilling?" Again, I
24 forget which judge asked it. That shadow, if you want to even
25 call it a shadow, of coming out with a second, quote,

1 moratorium, that is the sham that we suggest disregards, with
2 all due respect, the right that my clients have to proper and
3 full judicial review. It was end motivated, Judge. It's a
4 carbon copy. Now, you don't have to, as a matter of this case,
5 decide that today. You have said that already.

6 **THE COURT:** If you're not familiar with *City of*
7 *Jacksonville* and if you had to rely on one prior decision of a
8 federal court, what case would you think would be most helpful
9 to the position you are taking?

10 **MR. ROSENBLUM:** I would bring you actually two, if I
11 can, Judge. I would bring you the Fifth Circuit *Sossamon* case.

12 **THE COURT:** I don't think that applies.

13 **MR. ROSENBLUM:** Excuse me?

14 **THE COURT:** I don't think *Sossamon* applies because in
15 *Sossamon* the change was a complete reversal of the complained
16 of change.

17 **MR. ROSENBLUM:** That's exactly the point, Judge.

18 **THE COURT:** Well, why does that help you? Here you
19 are saying the change isn't a reversal; it's the same. It's
20 the mirror image of what I struck down before.

21 **MR. ROSENBLUM:** When it is a substantive difference,
22 when there is a new rule-making process, then you don't fall
23 within those exceptions. When you have the sham that you have
24 here, as Judge Wiener talked about in the *Sossamon* case,
25 that -- this second moratorium, whether it came out on the 22nd

1 of June or it came out on July 12, it is the same animal. In
2 fact, Judge, if you look -- and you have read it. If you go to
3 page 9 of the July 12, 22-page --

4 **THE COURT:** Oh, please. Go ahead.

5 **MR. ROSENBLUM:** -- document that you don't want to
6 torture yourself with, Judge.

7 **THE COURT:** No, I already have.

8 **MR. ROSENBLUM:** If you go to footnote 6 --

9 **THE COURT:** Wait, wait, wait. Let me find it. Here
10 it is. Page 12, footnote 6?

11 **MR. ROSENBLUM:** Footnote 6. I believe it's on
12 page 9.

13 **THE COURT:** Oh, page 9. Sorry. Your point is? Go
14 ahead.

15 **MR. ROSENBLUM:** The Secretary in that tortured
16 document, Judge, said, "In my May 28 suspension decision" --

17 **THE COURT:** I didn't say it was a tortured document.
18 I said it was torture for me to have to read all 22 pages of it
19 and the charts and everything.

20 **MR. ROSENBLUM:** That's why I'm bringing you right to
21 this footnote, Judge.

22 **THE COURT:** Go ahead.

23 **MR. ROSENBLUM:** The Secretary said, "In my May 28
24 suspension decision, I used a 500-foot water depth delineation
25 as part of the description of the suspension. This 500-foot

1 delineation served as a shorthand proxy for the risks
2 associated with using subsea BOPs or surface BOPs on floating
3 facilities. To avoid any possible confusion over the use of
4 the proxy, I have chosen to make this new suspension decision
5 in reference to the types of blowout prevention"

6 **THE COURT:** That's repeated throughout the July 12
7 memorandum.

8 **MR. ROSENBLUM:** He says it's "functionally
9 equivalent," Judge.

10 **THE COURT:** Right.

11 **MR. ROSENBLUM:** Let me also remind you -- although
12 I'm sure you are ahead of me on this, as you always are,
13 Your Honor -- the May 28 one-page memorandum did not have any
14 depth delineation in it at all. You remember, we talked about
15 500 feet. The safety report was 1,000 feet. The suggestion --
16 and they're calling it a directive. Actually, the May 30, 2010
17 memo from the MMS at that time, that was a directive. They are
18 trying to put all these labels.

19 You remember, they don't want to talk about the
20 "M" word here, the moratorium. That's what this lawsuit is
21 about. Whether you put the July 12 clothing on this
22 moratorium, you put on what Secretary Salazar said on the 22nd
23 or the next day in front of Congress, we are talking about a
24 blanket indiscriminate shutdown of an entire industry with the
25 stroke of a pen. That's what this lawsuit is about.

1 **THE COURT:** Which they can do if they comply with the
2 mandate of the Administrative Procedure Act. You agree with
3 that?

4 **MR. ROSENBLUM:** Well, Judge, the only little
5 limitation I would say is you remember that OCSLA requires it
6 on a lease or a unit basis, so I'm not so sure they can ever do
7 a blanket one. I think they have to do it on an individualized
8 basis. In fact, in your memorandum you criticized the
9 government because they didn't make any individualized
10 approach.

11 **THE COURT:** In the July 12 memorandum decision, they
12 addressed that, and the Secretary basically says, "I remain
13 unconvinced."

14 **MR. ROSENBLUM:** That's lip service, Judge. It's the
15 epitome of post hoc rationalization. What they did, Judge --
16 and it's clear as a bell. They sat down and tried to end
17 justify the decision that had been preannounced on the 22nd,
18 within hours of this Court's ruling, to try to back in and
19 cross every T and dot every I of everything that was in the
20 briefs -- and Ms. Hainkel gets most credit for writing the
21 briefs, Judge -- everything in those briefs, or what you had
22 said in your opinion, or what the Fifth Circuit had said in
23 other cases, and they tried to cross every T and dot every I.
24 That's exactly what, number one, the law does not require you
25 to do.

1 Is the government entitled in a normal case to a
2 second bite? Absolutely. Not when it's prejudged, not when
3 it's we are looking at post hoc rationalization. That's the
4 problem here. Then you put it in the context, Judge -- and I
5 have no clue how much I have left.

6 **THE COURT:** You have about 30 seconds.

7 **MR. ROSENBLUM:** Then you put it in the context,
8 Judge, that we are looking at a decision which by itself is
9 limited -- supposed to be limited, at least -- to no more than
10 six months, when you put that together --

11 **THE COURT:** Well, actually there's what my mentor
12 Judge Wisdom used to call "weasel words" in the decision. The
13 Secretary infers that he might cancel the suspension before,
14 but he also says he reserves the right to basically not
15 necessarily be bound either way by the November 30 date.

16 **MR. ROSENBLUM:** All of that is chill, Your Honor. It
17 is all chill to keep what's going on in the Gulf, and three
18 rigs have already left and a lot of the people that have been
19 supporting the --

20 **THE COURT:** Three or two?

21 **MR. ROSENBLUM:** My understanding is three: Two
22 Diamond rigs and one other one. All of the support services
23 from my clients -- and that's who I'm here on behalf of,
24 Judge -- have been kept busy in the interim helping on the
25 spill. Thankfully, it looks like that well is capped. The

1 doomsday scenario that we told you was coming, it has already
2 come, and it's about to really come. We urge you, Judge, to
3 deny these motions.

4 I haven't even gotten to the second one, but for
5 the same reason, Judge, the exceptions to the mootness doctrine
6 apply.

7 We would suggest, if I can just end with this,
8 Judge, given the Secretary's immediate reaction to your ruling,
9 the government cannot come in here and credibly suggest that
10 they give any legitimate consideration consistent with their
11 requirements under the *State Farm* case. Rather than
12 immediately comply, they immediately disregarded it because of
13 their desire to blindly chill what's happening in the Gulf.

14 It is post hoc explanations, and under the
15 *Gardner* case there's simply, quote, an inadequate basis for the
16 exercise of substantive review, and they're insufficient to
17 overcome the exceptions that we suggest we have in the mootness
18 case.

19 Finally, Judge, I would be remiss if I did not
20 talk about Justice Scalia.

21 **THE COURT:** Here we go. Somebody in the media
22 actually called his chambers about the fact that we are
23 friends.

24 **MR. ROSENBLUM:** Judge, I looked to find if there's a
25 case that's relevant, and the *Bancorp* case is exactly relevant.

1 In that case in 1994, Judge Scalia recognized ". . . that a
2 party cannot use its own discontinuance of challenged conduct
3 while an appeal is pending as a basis to seek to vacate an
4 injunction."

5 **THE COURT:** Is this a new case?

6 **MR. ROSENBLUM:** This is the *U.S. Bancorp* case.

7 **THE COURT:** That's been cited in your brief?

8 **MR. ROSENBLUM:** Absolutely.

9 **THE COURT:** It was?

10 **MR. ROSENBLUM:** Absolutely.

11 **THE COURT:** I don't remember the name. Go ahead.

12 I'm sorry to interrupt. Read to me again what he wrote because
13 I interrupted you.

14 **MR. ROSENBLUM:** Justice Scalia in the *U.S. Bancorp*
15 case recognized ". . . that a party cannot use its own
16 discontinuance of challenged conduct while an appeal is pending
17 as a basis to seek to vacate an injunction." We would direct
18 you to pages 25 through 27 of that decision. It's at 513 U.S.
19 18.

20 **THE COURT:** Is that a concurrence or was he writing
21 for the majority?

22 **MR. ROSENBLUM:** A unanimous court.

23 **THE COURT:** Unanimous and written by him?

24 **MR. MONTERO:** Justice Scalia. I believe I'm correct
25 on that, Your Honor.

1 **MR. ROSENBLUM:** Finally, Judge, let me end with this.
2 We believe what you have here is a direct effort to circumvent
3 the gate-keeping responsibilities that we ask you to
4 acknowledge to prevent a circumvention and a manipulation of
5 judicial review. It's making, Judge, a mockery of the judicial
6 process of: "Well, we will come out with number two and we'll
7 see what happens, then we'll come out with number three."

8 The administration's game plans, their tactics,
9 with the principles of judicial review, we suggest must be put
10 to an end. *Marbury v. Madison* -- and I cited it before,
11 Judge -- would require no less. Just as Justice Scalia
12 recognized in that same case, in the context of applying
13 vacatur, where mootness results from a settlement, equitable
14 principles and the public --

15 **THE COURT:** By the way, Scalia wouldn't have agreed
16 with *Marbury v. Madison*.

17 **MR. ROSENBLUM:** Would he have agreed with the steel
18 seizure case, Judge? That's a little bit more contemporary.

19 **THE COURT:** It's also a little bit more political. I
20 don't know.

21 **MR. ROSENBLUM:** Well, my point is, Judge, that the
22 ability for the court systems to evaluate and get review of
23 what the government has done, that is being made a mockery of
24 if you find this lawsuit moot. We urge you to deny both these
25 motions. The law, equity, and the public interest -- and we

1 have the lieutenant governor sitting here today, Judge -- for
2 the broader interests require no less. Thank you.

3 **THE COURT:** I expressed my gratitude to the
4 lieutenant governor last time and I do so again.

5 Before somebody in the media goes running to the
6 telephone, I have not announced what I personally know Justice,
7 Scalia believes about *Marbury v. Madison*. All right. Please
8 don't. I'm having dinner with him on August 22. I'll find out
9 for you then what he thinks and I'll let you know. Don't go
10 running around telling people that I said Justice Scalia --

11 **MR. ROSENBLUM:** Your Honor, the *Bancorp* case is a
12 unanimous decision by Justice Scalia.

13 **THE COURT:** By Justice Scalia? Okay. There is an
14 interesting book by a guy named Larry Kramer on judicial review
15 called *The People Themselves*. I may be one of two people in
16 the world who read it. I wonder who the other person is.

17 Go ahead. Now, both arguments have started with
18 "Well, I'm not familiar with this" and "I'm not familiar with
19 that," and both arguments have ended up with very impressive
20 eloquence. So why don't you respond to Mr. Rosenblum's
21 argument about sham because that's pretty serious stuff.

22 **MR. MONTERO:** Yes, Your Honor. Absolutely.

23 **THE COURT:** I don't know that one has to go to the
24 extreme of sham in order to talk about recurrence, but I will
25 let you have an opportunity to respond. By the way, I'm going

1 to ask for some post briefing.

2 **MR. MONTERO:** Thank you, Your Honor. Starting with
3 the argument the Secretary could issue a series of decisions to
4 moot the prior one, we again reiterate the Secretary is
5 entitled to a presumption of regularity.

6 **THE COURT:** Is he entitled to a presumption of
7 regularity in view of the apparently undisputed public
8 comments -- forget about the court of appeal business, but
9 apparently the undisputed comments that are in the record
10 immediately after and then several days later, after this Court
11 issued its decision?

12 **MR. MONTERO:** Yes. Absolutely, Your Honor. I think
13 maybe another way of phrasing that question is, "Do those
14 public comments rebut his presumption of regularity?" and we
15 would say no. Again, I just go back to the point that an
16 agency decision maker is certainly entitled to and I think
17 expected to know where he wants to go when he opens a
18 decision-making process. It doesn't mean that the agency
19 decision maker is closed off to the examination of evidence.

20 **THE COURT:** Well, you're arguing the merits of *ENSCO*
21 now. You're falling into the same trap that Mr. Rosenblum fell
22 into. You're arguing the merits of a case that's not before me
23 until September 22. The impact of these public comments, which
24 he characterizes as preordaining a result, could have some
25 nexus with the notion of the threat of recurrence.

1 **MR. MONTERO:** It would have a nexus with the notion
2 of recurrence if the illegality recurs, and we have identified
3 the illegality is a violation of APA, the procedural
4 requirements through the path, not the end result, if there is
5 an illegality. This whole notion of a preordained result, what
6 we are really getting at is was there genuine consideration.
7 The best way to determine if there is genuine consideration is
8 to review the administrative record and the decision itself and
9 that will reflect whether there was, in fact, genuine
10 consideration.

11 Now, that won't happen in this case, but that
12 doesn't mean the Secretary will somehow escape judicial review
13 because it will happen in any challenge to the July case, and
14 there already is one.

15 **THE COURT:** You mean *ENSCO*.

16 **MR. MONTERO:** The *ENSCO* case, that's correct,
17 Your Honor. So I will just go back to the notion that the
18 Secretary's statements are very analogous to a notice of intent
19 which agencies put on their Web sites and publish in the
20 Federal Register all the time, and some are required to do
21 under statute, or a proposed rule which agencies are required
22 to do under the APA. It is a statement of intent as to where
23 the agency wants to go.

24 I will respond to Mr. Rosenblum's citation to
25 the *Food Marketing Institute* case. There the court said, "The

1 agency's action on remand must be more than a barren exercise
2 of supplying reasons to support a preordained result. Post hoc
3 rationalizations by the agency on remand are no more
4 permissible than are such arguments when raised by appellate
5 counsel," cited on page 14 of their opposition brief.

6 The procedural posture for that case,
7 Your Honor, was a challenge to the very agency action that was
8 at issue, that was challenged in the complaint, and that was
9 review based on its administrative record. That case actually
10 supports what we are saying here. This Court should apply
11 whatever standard of review is appropriate in the July case.

12 If the Court decides a heightened standard of
13 review is appropriate there -- we disagree. We have cited case
14 law for the proposition that it is the same arbitrary and
15 capricious standard. But if this Court disagrees, it may apply
16 a heightened standard, and we will argue whether that's
17 appropriate.

18 The cases that plaintiffs cite do not stand for
19 the proposition that the Court may prejudge the validity of any
20 agency action in the context of mootness.

21 **THE COURT:** Well, contrary to some opinion that has
22 been expressed, I don't intend to prejudge anything.

23 **MR. MONTERO:** Thank you, Your Honor.

24 **THE COURT:** I should say: Contrary to some
25 uninformed opinion that has been expressed, I don't intend to

1 prejudice anything. I want that to be clear. Go ahead. I'm
2 sorry.

3 **MR. MONTERO:** Thank you, Your Honor. We talked about
4 there's a very pragmatic argument. Again, this is going back
5 to the, you know, "This is all a sham." Well, it only takes a
6 one-page decision to moot out the prior decision to really
7 bring a sham on this Court. We are talking about a decision
8 here, the July directive, which is lengthy. I think on its
9 face it is an exercise of good faith.

10 **THE COURT:** It's certainly lengthy.

11 **MR. MONTERO:** I would say it's both. Just as a
12 pragmatic matter, I have already said the July directive will
13 probably be decided before there's any judgment on the merit as
14 to the May directive.

15 The last thing I will say is, in terms of
16 recurrence of the same harm, does that apply here -- and this
17 is getting back to the *Jacksonville* case -- no. The alleged
18 violation is procedural. Moreover, there's no redressability.

19 How do we get around *Jacksonville*? Well,
20 *Jacksonville*, as Your Honor noted, is not an APA case.

21 **THE COURT:** You have read it between the time you sat
22 down and the time you have gotten up again?

23 **MR. MONTERO:** I am relying on this Court's scholarly
24 recitation of the *Jacksonville* case, but that was not an APA
25 case.

1 **THE COURT:** It was not. It was a minority set-aside
2 case.

3 **MR. MONTERO:** Under *Florida Power & Light*, the
4 Supreme Court has said that when a Court finds an agency action
5 is arbitrary and capricious, except in -- let me just find the
6 exact language here.

7 "If the agency has not considered all relevant
8 factors or if a reviewing court simply cannot evaluate the
9 challenged agency action on the basis of the record before it,
10 the proper course . . . is to remand to the agency for
11 additional investigation or explanation."

12 **THE COURT:** Which case is that?

13 **MR. MONTERO:** *Florida Power & Light Company v. NRC*.
14 We cite it at page 5 of our reply brief.

15 **THE COURT:** Is that a Supreme Court case?

16 **MR. MONTERO:** Yes. Absolutely.

17 **THE COURT:** It is?

18 **MR. MONTERO:** Yes.

19 **THE COURT:** Who wrote the opinion?

20 **MR. MONTERO:** I could not say, Your Honor.

21 **THE COURT:** I remember the language, but I can't
22 remember who wrote it. Anyway, go ahead.

23 **MR. MONTERO:** Well, the notion is when a district
24 court or an appellate court finds that an agency has erred, it
25 doesn't close the substantive part of the decision-making;

1 rather, the matter is remanded to the agency to correct the
2 procedural error that the court unearthed.

3 I will also cite here to *FCC v. Pottsville*
4 *Broadcasting*. That's a very early Supreme Court --

5 **THE COURT:** Hold your thought. I don't know that I
6 agree that you can simply shrug this dispute off as involving
7 only procedural error because procedural errors, of course,
8 involve substantive harm. Even the Secretary of the Interior
9 in the July 12 memorandum decision acknowledged the harm and
10 problems that his decisions have already caused in the
11 industry. He, in fact, cited a letter from Governor Jindal and
12 then again basically said, "But I'm not persuaded. I've
13 weighed the arguments. I've decided to go this way instead of
14 that way."

15 So there is substantive harm. I would not be
16 willing to accept your argument that this is simply an innocent
17 issue of whether the Administrative Procedure Act was or was
18 not followed, was faithful to the process, because there has
19 been harm. That harm has even been acknowledged by the
20 Secretary of the Interior in the July 12 memorandum decision.

21 **MR. MONTERO:** That's correct, Your Honor. We
22 acknowledge it in this courtroom as well. Nobody is saying
23 that the economic harm that people in this state are suffering
24 is not significant. What we are talking about is an
25 illegality. So when I say -- and perhaps I said this loosely.

1 When I say procedural harm, I meant procedural illegality,
2 substantive illegality. So there's no allegation of
3 substantive illegality here.

4 I will make one exception here, which is this
5 notion that the regulations themselves seem to contemplate an
6 individualized determination. Under *Auer v. Robbins* and
7 *Thomas Jefferson v. Shalala*, the Secretary is entitled to great
8 deference in the interpretation of its own regulations. The
9 standard of review that this Court must apply is the
10 Secretary's interpretation and implementation of the
11 regulations, is it a plausible one.

12 So even if, well, it kind of sounds like the
13 regulation contemplates this, if the Secretary's interpretation
14 is a plausible one and is not flatly contradictory to the terms
15 of the regulation, then the Secretary will win on that battle.

16 **THE COURT:** I don't disagree with that.

17 **MR. MONTERO:** So that is the only substantive alleged
18 violation I see here. Everything else is: You didn't consider
19 this; you didn't consider that; you didn't explain your
20 decision. So that has been corrected here.

21 So we distinguish *Jacksonville* on the basis that
22 the APA specifically contemplates, as interpreted by the
23 Supreme Court, a remand to the agency where the agency will
24 correct those errors. Is that frustrating to plaintiffs
25 sometimes? Absolutely, because it doesn't get at their

1 underlying injury, it doesn't correct -- it doesn't create a
2 situation where they are economically benefited. I understand
3 that, but it corrects the illegality. It's the illegality that
4 we are here arguing about, not the injury which we all
5 acknowledge.

6 **THE COURT:** All right. I think it's time to wind up.

7 **MR. MONTERO:** Thank you, Your Honor. That's all.

8 Having distinguished *Jacksonville*, we will just say that once
9 again the May --

10 **THE COURT:** You did a good job distinguishing a case
11 you haven't read.

12 **MR. MONTERO:** Thank you. The May 28 directive, it
13 doesn't matter what happens in this case to it. It's been
14 rescinded. Nothing that this Court could hold with respect to
15 that directive will affect the validity of the July directive
16 or the suspensions that have been issued based on it. Thank
17 you, Your Honor.

18 **THE COURT:** Thank you very much. I appreciate,
19 again, both sides and your submissions. I do want to ask for
20 some additional briefing to be due no later than 5:00 p.m. on
21 August 18.

22 First, I'm going to give each side an even
23 better chance to respond to my questions regarding the
24 applicability of the Supreme Court decision in *City of*
25 *Jacksonville*. If you want a citation, the hard copy citation

1 is 124 L.Ed.2d 586, decided in 1993.

2 Secondly, I want each side -- and I believe it
3 would help me. I want each side, in view of the arguments that
4 have been made today, to submit to me a comparison of the
5 information in the July 12 memorandum decision that was old
6 information, namely information from before May 28, and I want
7 that compared to specifically what new information formed the
8 basis of the Secretary's memorandum decision of July 12. Let
9 me just give you some examples. It's a nonexhaustive list.

10 For example, at page 2, the memorandum decision
11 refers to risks associated with systemic drilling and workplace
12 safety issues and that recent events have made clear that there
13 are systemic problems, but the decision doesn't point to any
14 specific evidence that is post May 28, and I'm curious about
15 that.

16 Similarly, at page 4 of the memorandum
17 decision -- again, this is by way of example only -- the
18 memorandum decision, speaking of essentially the Deepwater
19 Horizon tragedy, says, "We simply do not know if the BP
20 situation is unique." Also, "Testing that has been required
21 for the BOPs on the new relief wells has identified unexpected
22 performance problems," but those problems are unidentified.
23 They are not specified.

24 I again ask: What new evidence post May 28 is
25 in the administrative record now that formed the basis of this

1 new memorandum decision that BP is not unique with regard to
2 the situation that the Secretary refers to?

3 Going on at page 4, the decision comments, "In
4 congressional testimony, industry executives have admitted that
5 the industry is unprepared to stop deepwater oil well blowouts
6 effectively."

7 I'm familiar with at least what I saw on
8 Channel 8, but it was my recollection that there were only
9 three or four executives there. I'm just wondering if there is
10 post May 28 other evidence submitted by other industry
11 representatives about their inability to cope with safety
12 problems in deepwater drilling. I don't know whether that was
13 new stuff or not. I just don't know because the July 12
14 memorandum decision is unclear.

15 There's a reference at page 7 about risks
16 related to deepwater drilling, three specifically: Current
17 status of drilling and workplace safety, etc.; current status
18 of well control, etc.; and current status of spill response.
19 I'm wondering if that is based on new information. It seems to
20 me it probably should have been based on pre May 28
21 information, but it's unclear.

22 Then, again, there's a reference at the bottom
23 of page 7 to certain equipment and drilling conditions
24 undertaken in the deepwater environment that carry heightened
25 risks of producing an event such as the BP Oil spill. Well,

1 again, I would like to know whether that is based upon new
2 information post May 28 or whether it was not.

3 Finally, pages 8 and 9, again as an example, the
4 Secretary says, "We have no guarantee that the operators would
5 not be engaging in the very same activity that led to the BP
6 Oil spill," but I guess that raised my curiosity about is there
7 any post May 28 evidence that they do not engage -- I'm stating
8 that in a double negative, but that comment seems to take the
9 BP Oil spill and generalize it to the entire industry, which as
10 you all know that was of great concern to me in the prior case.
11 It is of concern now to the extent that I'm just curious as to
12 whether there was new information which would tend to give the
13 Secretary insights that would help him not generalize the BP
14 tragedy to the entire industry. I hope I articulated that.

15 "It is clear that the apparent performance
16 problem with the Deepwater Horizon's BOP is not an isolated
17 incident."

18 "The BOPs are manufactured by a very small
19 number of companies, and BOPs used across the industry tend to
20 employ standardized components."

21 Well, that's probably a truism, but is there any
22 post May 28 specific information that would give the Secretary
23 insights into the fact that, therefore, these things are
24 dangerous throughout the industry and that that's of concern to
25 him?

1 As I pointed out in my decision, I believe it's
2 accurate to say, based upon the government's own data in the
3 first memorandum decision, that there have been something like
4 maybe, before the Deepwater Horizon, three blowouts since 1969
5 in the entire world, none of which occurred in the Gulf of
6 Mexico until this horrible event. I believe the Secretary
7 mentions that in the memorandum decision, but in the context of
8 saying, "Oh, well, we didn't keep records until 1969."

9 I think what I'm asking is I would like to see a
10 specific comparison of what was the pre May 28 information and
11 what was the post May 28 information that led, under the
12 Administrative Procedure Act, to the July 12 memorandum
13 decision. So I would like a comparison from both sides.

14 I'll also give you-all a chance to actually read
15 the *City of Jacksonville* case. I would like the submissions by
16 no later than 5:00 p.m. on August 18. I hope that doesn't jam
17 you too much.

18 Unless there are any other questions, I would
19 like to thank everybody. I would like to thank the public for
20 their patience and good manners in listening to this. I hope
21 that maybe you'll come away with a little more understanding of
22 what, in fact, happens in federal court and not what, in
23 mythology, happens in federal court. Thank you very much.
24 Stay safe from this storm that's coming.

25 **THE DEPUTY CLERK:** All rise.

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MR. MONTERO: Thank you, Your Honor.

MR. ROSENBLUM: Thank you, Your Honor.

(WHEREUPON the Court was in recess.)

* * *

CERTIFICATE

I, Toni Doyle Tusa, CCR, FCRR, Official Court Reporter for the United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

s/ Toni Doyle Tusa
Toni Doyle Tusa, CCR, FCRR
Official Court Reporter