No. 11-1378

In The Supreme Court of the United States

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE WESTERN ENERGY ALLIANCE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ROBERT C. MATHES
Counsel of Record
KATHLEEN C. SCHRODER
BJORK LINDLEY LITTLE PC
1600 Stout Street, Suite 1400
Denver, Colorado 80202-3110
(303) 892-1400
rmathes@bjorklindley.com
kschroder@bjorklindley.com

Counsel for Amicus Curiae Western Energy Alliance

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Western Energy Alliance ("Western Energy") respectfully submits this amicus curiae brief in support of the Petition for a Writ of Certiorari filed by the State of Wyoming. This brief and its contents also fully support the Petition for a Writ of Certiorari filed by Colorado Mining Association in Docket No. 11-1384.[1]

INTERESTS OF AMICUS CURIAE

Western Energy is a non-profit trade association that represents 400 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. Western Energy members own federal oil and gas leases throughout the West, including oil and gas leases that are directly impacted or could be impacted by the Protection of Inventoried Roadless Areas Rule, 36 C.F.R. §§ 294.10-294.14 (66 Fed. Reg. 3244 (Jan. 12, 2001)) (the "Roadless Rule"). In the Rocky Mountain region alone, 7.6 million acres of inventoried roadless

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith or are already on file with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

areas that are subject to the Roadless Rule hold potential for oil and gas production. Forest Service Roadless Area Conservation, Final Environmental Impact Statement (2000) ("Roadless Rule FEIS") 3-259.

The Roadless Rule dramatically curtails Western Energy members' ability to conduct oil and gas exploration and development activities throughout a substantial portion of the West. Road construction is essential to economical oil and gas development and production on National Forest lands. Roads provide necessary access to leaseholds to transport materials to drill new oil and gas wells and for routine maintenance over the lifetime of the wells. Timber removal may be necessary to build drilling pads for future wells. The Roadless Rule's prohibition on road construction and timber removal in inventoried roadless areas stymies oil and gas development on National Forest lands in several respects. First, the Roadless Rule prohibits the construction of new roads and removal of timber on any new federal oil and gas leases within inventoried roadless areas. Second, the Roadless Rule prohibits construction of roads across unleased inventoried roadless areas to access existing federal oil and gas leases and any new leases. Because a federal oil and gas lease does not confer a right of access, *Petroleum Ass'n of Wyoming*, 133 IBLA 337, 343 n.4, GFS (O&G) 14 (1995); 2 Law of Fed. Oil & Gas Leases § 22.01 (2011), the Roadless Rule's narrow exception for the construction of roads "in conjunction with the continuation" of existing federal oil and gas leases, *see* 36 C.F.R. § 294.12(b)(7), does not allow construction of roads across unleased inventoried

roadless areas to access existing leaseholds. Finally, the Roadless Rule may prevent the expansion of existing oil and gas operations in or adjacent to inventoried roadless areas. The Forest Service has recognized these limitations could render 11.3 trillion cubic feet of natural gas and 550 million barrels of oil unrecoverable. 66 Fed. Reg. 3244, 3268 (Jan. 12, 2001). Therefore, the Roadless Rule has a tremendous impact on Western Energy members and their ability to continue and expand oil and gas development on and near Forest Service System lands.

SUMMARY OF ARGUMENT

The Roadless Rule is sweeping in its breadth and limitations on future resource development. With one national rule, the Forest Service effectively eliminated multiple use activities, and particularly mineral development, on 58.5 million acres of Forest Service lands—one-third of all National Forest System lands in the entire United States. As the United States Court of Appeals for the Ninth Circuit recognized, under the Roadless Rule, this "vast national forest acreage, for better or for worse, was more committed to pristine wilderness, and less amenable to road development for purposes permitted by the Forest Service." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1106 (9th Cir. 2002).

The Roadless Rule's effects on mineral development are dramatic. The Roadless Rule will make development of 11.3 trillion cubic feet of undiscovered

natural gas and 550 million barrels of undiscovered oil all but impossible. 66 Fed. Reg. 3244, 3268 (Jan. 12, 2001). 550 million barrels of oil is approximately equivalent to the amount of oil the lands in the entire State of Wyoming could produce in ten years and the amount of natural gas the entire state of Colorado could produce in seven years.[2] At a time when the United States is experiencing a historic boom in production of both oil and natural gas in areas such as North Dakota and Pennsylvania, the Forest Service's decision to limit oil and gas development in inventoried roadless areas denies the United States a significant source of domestic energy from federally owned lands as well as much-needed royalties into federal and state coffers. *See* 30 U.S.C. §§ 226(b)(1)(A), 191(a) (2011). The Roadless Rule will also result in the direct and indirect loss of 3,095 total jobs. 66 Fed Reg. at 3268. Thus, the Roadless Rule will profoundly and negatively impact the nation's economy and efforts to make our country energy independent.

The U.S. Court of Appeals erred by upholding the Secretary of Agriculture's decision to issue the Roadless Rule because the rule exceeds the Secretary's authority and was not issued in accordance with federal law. First, by issuing the Roadless Rule, the Secretary of Agriculture exceeded his rulemaking

[2] Based on production rates in 2009. U.S. Energy Information Admin., Dep't of Energy, http://205.254.135.7/state (last visited June 7, 2012).

authority prescribed by Congress in the National Forest Management Act, 16 U.S.C. §§ 1600-14 (2011). Second, the Secretary of Agriculture impermissibly created *de facto* Wilderness in inventoried roadless areas. Finally, the Secretary of Agriculture promulgated the Roadless Rule without complying with the procedural mandates of the National Environmental Policy Act, 42 U.S.C. §§ 4321-70 (2011). These issues warrant review by this Court and the grant of *certiorari* in this case.

ARGUMENT

I. The Forest Service Failed to Comply with the National Forest Management Act

The Roadless Rule undisputedly alters the management of National Forests across the country by limiting the construction of new roads and removal of timber in 58.5 million acres of inventoried roadless areas. When promulgating the Roadless Rule, the Secretary of Agriculture bypassed the forest planning mandates of the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600-14. NFMA imposes both substantive and procedural requirements on the Forest Service by requiring the development of management plans—known as forest plans—for each unit of the National Forest System. 16 U.S.C. § 1604(f)(1); *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1270 (10th Cir. 2011). Under NFMA, the Secretary of Agriculture must "develop, maintain, and, as appropriate, revise land and resource management plans for units

of the National Forest System." 16 U.S.C. § 1604(a). Once developed and adopted for a single National Forest, the forest plan controls the management of that forest. *Id.* § 1604(i). Different uses of National Forest lands require a formal amendment of the governing forest plan. *Id.* § 1604(d), (f)(4). Forest plans and amendments to these plans must be prepared pursuant to specific procedures that allow for significant input of citizens and local governments. *Id.* §§ 1604(d), (f)(4-5), 1612(a). Congress designed this format planning process "to curtail agency discretion and to ensure forest preservation and productivity." *Sierra Club v. Thomas*, 105 F.3d 248, 249-50 (6th Cir. 1997), *rev'd on other grounds, Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998).

The Forest Service does not claim to have complied with the procedural mandates of NFMA when promulgating the Roadless Rule. Instead, the Forest Service erroneously maintains that it could promulgate the Roadless Rule solely through its general rulemaking authority under the Organic Act. The error in this position is obvious. An agency cannot apply one statute while ignoring another. Although the Organic Act granted the Forest Service broad discretion to regulate the National Forests, *see United States v. Grimaud*, 220 U.S. 506 (1911), Congress has since limited that discretion with more specific statutes such as NFMA. *See United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998).

The Forest Service's decision to ignore NFMA's mandates has procedural and substantive consequences. Procedurally, the Forest Service curtailed

the local public involvement normally associated with developing Forest Plans through a national rule that directs management of individual forest units. 16 U.S.C. § 1613; 36 C.F.R. §§ 219.6, 219.7 (1999) (since revised). NFMA, and the regulations promulgated pursuant to NFMA in effect when the Roadless Rule was developed, however, required significant public involvement in the development of individual forest plans, such as coordination with local governments. *Id*. Because of these procedures, a plan for a single unit of the National Forest System could take more than five years to develop or revise. *See, e.g.*, 61 Fed. Reg. 65,572 (Dec. 13, 1996) (announcing final environmental impact statement for the Rio Grande National Forest Land and Resource Management Plan); 55 Fed. Reg. 23,256 (June 7, 1990) (announcing start of scoping process); *see also* 77 Fed. Reg. 21,468, 21,472 (Apr. 21, 2008) (noting that a revision to a forest plan requires five to six years). The Forest Service, however, sought to remove local officials and influence from the process because the agency feared local managers would not protect roadless areas to the extent desired by the agency's headquarters in Washington, D.C. The Forest Service reasoned that "[l]ocal land management planning efforts may not always recognize the national significance of inventoried roadless areas and the values they represent." 66 Fed. Reg. 3244, 3253 (Jan. 12, 2001). Although the Forest Service engaged in public processes in the 14 months the agency spent preparing the Roadless Rule, this national rulemaking cannot and did not afford local

governments and citizens the same opportunities provided by the local planning approach under NFMA.

These procedural differences have substantive effects. Oil and gas operators selected potential lease locations and nominated and acquired leases based on the management descriptions and conditions contained in the Forest Plans, with the understanding that the Forest Plans would not be modified without a significant public process. The national Roadless Rule overruled the express intent and management direction of the local forest officials and Forest Plans, which made areas available for oil and gas development. The Forest Service itself acknowledged that exploration and development of oil and gas resources in roadless areas would be limited even where road construction was allowed by the underlying Forest Plan. 66 Fed. Reg. at 3268; Roadless Rule FEIS 3-259. In Colorado alone, 171,500 acres of land previously available for oil and gas leasing and development became virtually impossible to develop, and 7.6 million acres may be similarly affected throughout the Rocky Mountain Area.

The Forest Service disregarded the individual forest planning processes that sought to best manage these resources, as well as the opportunity to consider how oil and gas operations or future exploration would be impacted. Both the United States Court of Appeals for the Ninth and Tenth Circuits conceded as much, observing "there is some practical force in the contention that the Roadless Rule will override local forest-by-forest planning with regard to its intended

scope." *Wyoming*, 661 F.3d at 1271 (citing *Kootenai*, 313 F.3d at 117 n.20). Because NFMA does not allow local interests to be overridden by national action, the Roadless Rule must be set aside.

II. The Roadless Rule Impermissibly Creates *de facto* Wilderness Areas.

Through the Roadless Rule, the Forest Service single-handedly rendered 58.5 million acres of public lands unavailable for multiple use development. This creation of *de facto* Wilderness defies the limits of the Forest Service's authority and the expressed intent of Congress. The Property Clause of the United States Constitution provides Congress with plenary power to enact all necessary rules and regulations respecting federal lands. U.S. Const. art. IV, § 3. This Court has "repeatedly observed" that the "'power over the public land . . . entrusted to Congress is without limitations.'" *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940)). With this authority, Congress reserved unto itself the sole authority to designate and create new Wilderness Areas in the Wilderness Act of 1964. 16 U.S.C. § 1131(a) (2011); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58-59 (2004). Wilderness Areas are defined as areas greater than 5,000 acres "where the Earth and its community of life are untrammeled by man." 16 U.S.C. § 1131(c). In 2001, Congress had designated more than 35 million acres of National Forest System lands as Wilderness.

Wilderness Data, www.wilderness.net (last visited June 6, 2012).

The Forest Service sought to increase the 35 million acres of National Forest lands that Congress had designated as Wilderness but was frustrated by the pace at which Congress was designating new areas. The Forest Service elected to hasten the process administratively and therefore was forced to circumvent the limits of its authority with the Roadless Rule. When it identified lands that would be subject to the new Roadless Rule, the Forest Service selected the same lands it had proposed for inclusion in the National Wilderness Preservation System decades ago through the Roadless Area Review and Evaluation surveys. 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001). *See* State of Wyoming Petition for Writ of Certiorari at 11-14. The surveys were conducted during the 1970s for the express purpose of identifying areas that could be added to the Wilderness Systems. Rather than waiting for Congress to act, the agency decided to impose its own protections by drastically limiting the allowable activities in the inventoried roadless areas.

By prohibiting both road construction and the cutting of timber within roadless areas, the Forest Service made 58.5 million acres of land unmanageable for anything other than Wilderness. Both federal circuit courts that have addressed the Roadless Rule agree it generally prohibits "nonwilderness" uses and requires areas subject to the Roadless Rule be managed for pristine wilderness. *Wyoming*, 661 F.3d at

1225 n.34; *Kootenai*, 313 F.3d at 1106. The Roadless Rule rendered inventoried roadless areas, once open to multiple use, unavailable for permanent or temporary road construction, timber cutting, or other activities that would potentially distract from their alleged wilderness characteristics. All but 2.9 million acres of the 58.5 million acres burdened by the Roadless Rule contain no roads and, under the new rule, additional roads cannot be constructed. Further, even the 2.9 million acres of National Forest subject to the Roadless Rule that contain roads will eventually become roadless over time because the Roadless Rule prohibits road reconstruction. Maintenance activities alone may be insufficient to prevent the deterioration and the eventual closure of these roads. Thus, lands within roadless areas are virtually indistinguishable from Wilderness. Although the Tenth Circuit correctly recognized that roadless areas will be managed primarily for pristine wilderness and that non-wilderness uses were generally prohibited within inventoried roadless areas, the Tenth Circuit erred in reaching its ultimate conclusion that such lands were not *de facto* Wilderness Areas.

The Roadless Rule's prohibition of road construction and reconstruction profoundly impacts oil and gas lessees with leases in inventoried roadless areas because new oil and gas operations in these areas are virtually impossible. Development is limited on federal leases in inventoried roadless areas issued prior to the Roadless Rule, despite the rule's exemption, 36 C.F.R. § 294.12(b)(7), because roads and timber

removal may be necessary to access the leaseholds. On any new leases issued after the rule, drilling pads cannot be developed on leases if timber removal is required, roads cannot be constructed on the leaseholds, and roads cannot be constructed in inventoried roadless areas to access the leaseholds. Any access to the oil and gas estate beneath new federal oil and gas leases must occur through directional drilling where drilling pads are located outside of roadless areas, but this technique may not be technically feasible. The limitations on oil and gas leases are particularly unnecessary because the surface disturbing operations associated with oil and gas development are temporary. After the oil and gas resources are developed, the roads and drilling locations are eliminated, and the area is recontoured to natural setting, reclaimed, and revegetated. Nonetheless, by prohibiting new roads, the Forest Service has limited, if not eliminated, any possibility of future oil and gas exploration and discovery within inventoried roadless areas.

The Forest Service may not halt future oil and gas development and other multiple use activities across a swath of National Forest lands without congressional review. Because of the rule's limitations on access to leaseholds, development of existing and future oil and gas leases in inventoried roadless areas becomes prohibitively expensive with no guarantee that wells will be successful. Furthermore, the Roadless Rule will preclude exploration in unleased areas where new information and new development techniques could have led to new discoveries of oil and gas

resources. In 2001, the Forest Service estimated that 11.3 trillion cubic feet of natural gas and 550 million barrels of oil could become unrecoverable as a direct result of the Roadless Rule. 66 Fed. Reg. at 3268. At the time, however, the Forest Service assumed that "areas with economically recoverable deposits are likely to have already been leased." Roadless Rule FEIS 3-319. This figure may be even higher today due to the explosion in new extraction technologies that have created a national oil and gas boom. Yet, because of the Roadless Rule, the United States cannot enjoy the benefits of these new technologies on Forest Service lands. The United States will be denied both a substantial source of domestic energy and the royalties from 12.5% royalty for onshore development of federal lands. 30 U.S.C. § 226(b)(1)(A), 191 (providing for distribution of revenue from federal leases). The Forest Service, through its unilateral decision to render a substantial portion of the nation's oil and gas resources inaccessible, has trespassed on Congress's exclusive authority to create Wilderness. This Court must reverse this significant error.

III. When Enacting the Roadless Rule, the Forest Service did not Comply with the National Environmental Policy Act.

Not only did the Forest Service fail to comply with NFMA, it also evaded the requirements of the National Environmental Policy Act of 1969, (NEPA) 42 U.S.C. §§ 4321-70 (2011), before issuing the Roadless Rule. NEPA is designed to ensure a "fully informed

and well-considered decision" through the preparation of an environmental impact statement (EIS) for any "major Federal action significantly affecting the quality of the human environment." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978); 42 U.S.C. § 4332(2)(C). In its rush to complete the Roadless Rule prior to the end of President Clinton's term, the Forest Service ignored NEPA's procedural mandates. NEPA requires federal agencies to prepare a detailed statement disclosing the potential environmental impacts of a major federal action. 42 U.S.C. § 4332(2)(C). Three different circuit courts have concluded that, in order to comply with the mandates of NEPA, federal agencies must conduct a site-specific analysis of the environmental consequences of a proposed action such as the Roadless Rule. *Conservation Law Found. of New England v. Tenn. Servs. Admin.*, 707 F.2d 626, 630-31 (1st Cir. 1983); *Sierra Club v. Peterson*, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983); *California v. Block*, 690 F.2d 753, 763-64 (9th Cir. 1982). *See also Wyo. Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973), *overruled on other grounds*, *Village of Los Ranchos Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). Two of these decisions involved the Roadless Area Review Evaluations that preceded the Roadless Rule. *Block*, 690 F.2d at 758, 761-62. Despite the holdings of other circuits, the Tenth Circuit found that because the Roadless Rule was a national rule, the Forest Service was entitled to evaluate the effects of the rule only generically. *Wyoming*, 661 F.3d at 1255-56. Contrary to the Tenth Circuit's decision,

however, "NEPA contains no exemptions for projects of national scope." *Block*, 690 F.2d at 765.

The Tenth Circuit also erroneously concluded that because the Roadless Rule generally protects environmental conditions and will not lead to environmental degradation, a site-specific analysis was not required. *Wyoming*, 661 F.3d at 1255 n.34. NEPA clearly applies to all federal actions that significantly affect the quality of the human environment, whether such impacts are beneficial or not. The specificity of an agency's environmental analysis does not vary depending on whether its impacts are perceived to be beneficial. *Sierra Club v. Froehlke*, 816 F.2d 205, 211 n.3 (5th Cir. 1987) (determining that an EIS is required even if there are only beneficial impacts to the environment); *Natural Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1431 (D.C. Cir. 1985) (same); *Nat'l Wildlife Fed'n v. Marsh*, 721 F.2d 767, 783 (11th Cir. 1983) (same); *Envtl. Def. Fund v. Marsh*, 651 F.2d 983, 993 (5th Cir. 1981) (same); *but see Utah Envt'l Cong. v. Russell*, 518 F.3d 817, 831 (10th Cir. 2008) (suggesting, but not determining, that an EIS may not be required where a project only has beneficial impacts); *Friends of the Fiery Gizzard v. Farmers Home Admin.*, 61 F.3d 501, 505 (6th Cir. 1995) (holding that an EIS is not required where a project is found to have only beneficial impacts).

Site-specific analysis would have yielded a more comprehensive assessment of the impacts of the Roadless Rule. For example, in the final EIS, the Forest Service admitted that it had failed to estimate the

amount of economically recoverable oil and gas deposits beneath inventoried roadless areas. Roadless Rule FEIS 3-319 ("the amount of economically recoverable oil and gas beneath inventoried roadless areas is not accurately known"). If the Forest Service had more closely examined the inventoried roadless areas to assess known oil and gas deposits, it may have adopted different management. At a minimum, both the Forest Service and the public would have benefited with a comprehensive understanding of the Roadless Rule's impacts on oil and gas development and other resource uses.

The Forest Service also violated NEPA by failing to supplement its environmental impact statement as required by the Council of Environmental Quality regulations implementing NEPA. Federal agencies must prepare a supplement to either a draft or final EIS if the "agency makes substantial changes in the proposed action that are relevant to environmental concerns" and allow for public comment on the supplement. 40 C.F.R. § 1502.9(c)(1)(i) (2011); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373 (1989). Agencies may not adopt an alternative in the final EIS that was not analyzed in the draft EIS unless the alternative was "qualitatively within the spectrum of alternatives that were discussed" in the draft EIS. 45 Fed. Reg. 18,026, 18,035 (Mar. 23, 1981).

As the State of Wyoming's Petition for Writ of Certiorari describes in detail, the Forest Service dramatically modified the scope of the proposed Roadless Rule between the draft and the final EIS. First, the

final EIS expanded the areas covered by the Roadless Rule by over 2.8 million acres. 66 Fed. Reg. 3244, 3261 (Jan. 12, 2001). Second, the final EIS altered the type of timber that would be subject to the Roadless Rule's prohibition on cutting, sale, or removal from inventoried roadless areas. 66 Fed. Reg. at 3257. The alternatives analyzed in the draft EIS contemplated neither of these substantial modifications. The Forest Service did not prepare a supplemental NEPA document analyzing these changes out of fear it would not complete the rulemaking process prior to the end of President Clinton's term in January 2001. As a result, the public was denied the opportunity to comment on the new alternative before the Forest Service issued the final EIS.

The Tenth Circuit's conclusion that a supplemental EIS is not required in these circumstances contradicts both its own precedent and decisions from the Ninth Circuit. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683 (10th Cir. 2009); *Block*, 690 F.2d at 769-72 (9th Cir. 1982). Because the modified alternative introduced in the final EIS and adopted in the final rule is not within the qualitative impacts analyzed within the existing environmental analyses, a supplemental EIS is required. *New Mexico ex rel. Richardson*, 565 F.3d at 705. Between the draft and the final EIS, the Forest Service subjected an area the size of Connecticut to the Roadless Rule's prohibitions without providing for any meaningful public comment. NEPA does not allow such a drastic change without analysis, and the

Court should not allow such changes to escape public review.

CONCLUSION

With one sweeping rule, the Forest Service altered management of 58.5 million acres of National Forest System lands. In doing so, the Secretary of Agriculture exceeded his rulemaking authority prescribed by Congress, usurped Congress's power to designate Wilderness, and failed to comply with the clear mandates of NEPA. These errors warrant review by this Court and the grant of *certiorari* in this case.

Respectfully submitted,

ROBERT C. MATHES
Counsel of Record
KATHLEEN C. SCHRODER
BJORK LINDLEY LITTLE PC
1600 Stout Street, Suite 1400
Denver, Colorado 80202-3110
(303) 892-1400
rmathes@bjorklindley.com
kschroder@bjorklindley.com

Counsel for Amicus Curiae
Western Energy Alliance

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