No. 23-975

IN THE

Supreme Court of the United States

SEVEN COUNTY INFRASTRUCTURE COALITION, *et al.*,

Petitioners,

v.

EAGLE COUNTY, COLORADO, *et al.*,

Respondents.

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

BRIEF OF RESPONDENTS EAGLE COUNTY, COLORADO AND CENTER FOR BIOLOGICAL DIVERSITY, LIVING RIVERS, SIERRA CLUB, UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT, AND WILDEARTH GUARDIANS IN OPPOSITION

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QUESTION PRESENTED

In *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), this Court held that when an agency is examining the environmental effects of a proposed action under the National Environmental Policy Act (NEPA), the agency's analysis is limited to those effects it has statutory authority to consider in making its decision. Here, the Surface Transportation Board has such authority to consider the reasonably foreseeable effects of its approval of a new rail line.

The question presented is:

Whether *Public Citizen* limits an agency's NEPA analysis to only those environmental effects an agency directly regulates even where the agency has authority to base its decision on other reasonably foreseeable effects resulting from its decision.

CORPORATE DISCLOSURE STATEMENT

Under Supreme Court Rule 29.6, Respondents Center for Biological Diversity, Living Rivers, Sierra Club, Utah Physicians for a Healthy Environment, and WildEarth Guardians state they have no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States and that no publicly held corporation owns 10% or more of the groups' stocks because none of the groups has ever issued any stock or other security.

Rule 29.6 does not apply to Respondent Eagle County, Colorado.

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INTRODUCTION

This petition does not meet any of the Court's criteria for granting certiorari.

There is no conflict with this Court's precedents. *Department of Transportation v. Public Citizen* held that the National Environmental Policy Act (NEPA) does not require an agency to consider any effects of an action under review when the agency lacks the discretion to act based on those effects. 541 U.S. 752 (2004). Here, petitioners agree that the Surface Transportation Board (Board) can act based on environmental effects—as it long has—when deciding whether to authorize a railway. The D.C. Circuit below applied *Public Citizen* and concluded that NEPA therefore requires the Board to analyze those effects, because that analysis informs the Board's decision to approve or deny the Uinta Basin Railway (Railway).

There is no circuit split. Instead, the circuits all read *Public Citizen* the same way the court below did: as limiting an agency's obligation under NEPA to gather and disclose information to those effects the agency has the authority to weigh in its decisionmaking. The cases sometimes hold that agencies must consider certain environmental effects, and sometimes hold that other agencies need not do so. But that reflects only that courts carefully apply *Public Citizen* to the distinct statutory authorizations and environmental effects at issue in each case before them.

The issue raised by petitioners is not important, not even to this case. Addressing it could not change the outcome below because the question presented implicates

just one of many grounds on which the court below vacated the Board's decision. The Board's decision also violated NEPA in additional ways, violated the Endangered Species Act, and violated the Board's organic statute, the Interstate Commerce Commission Termination Act (the ICCT Act). As for petitioners' primary policy concerns, Congress recently addressed them when amending NEPA to streamline NEPA's procedures.

Finally, granting the petition would only lead to an affirmance because the decision below correctly applied *Public Citizen* to the specific statute and foreseeable environmental effects at issue.

The petition should be denied.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The Interstate Commerce Commission Termination Act. The ICCT Act grants the Board authority to approve rail line construction and operation. 49 U.S.C. §§ 10501, 10901(a). In determining whether to authorize a rail line, the ICCT Act requires the Board to determine whether rail construction is "inconsistent with the public convenience and necessity." *Id*. §§ 10901(c), 10902(c).

A party may seek authorization of a rail line through the ICCT Act's full application procedures, *id*., or it may petition the Board for exemption from those procedures when, among other things, the procedures are "not necessary to carry out the transportation polic[ies]" codified in 49 U.S.C. § 10101, *id*. § 10502(a)(1). The fifteen

transportation policies listed in 49 U.S.C. § 10101 "must guide the [Board] in all its decisions." *Alamo Exp., Inc. v. ICC*, 673 F.2d 852, 860 (5th Cir. 1982). When considering an exemption, the Board "must consider all aspects of the [transportation policies] bearing on the propriety of the exemption and must supply an acceptable rationale therefor." *Ill. Com. Comm'n v. ICC*, 787 F.2d 616, 627 (D.C. Cir. 1986).

All parties agree that the Board must also consider a project's environmental impacts, and may deny a railway project if environmental concerns outweigh the applicable transportation policies in 49 U.S.C. § 10101 that the project furthers, also referred to as the project's "transportation benefits." Pet.23. This authority to grant or deny a rail project is based on the Board's mandate to license railroad construction and operation based on the "public convenience and necessity." 49 U.S.C. § 10901(c); Pet.App.37a. It is also based on the Board's discretion to balance 49 U.S.C. § 10101's transportation policies, including environmental policies to protect "public health and safety" and promote "energy conservation." 49 U.S.C. §§ 10101(8), (14).

Accordingly, the Board has denied rail projects based on their environmental effects alone. *See The Indiana & Ohio Railway Co.—Construction and Operation—Butler, Warren, & Hamilton Cntys., Oh.*, 9 I.C.C. 2d 783, 790–91, 1993 WL 287692, at *5 (1993) (denying construction project under ICCT Act based on environmental record). The Board's decisions have also considered environmental effects outside of its direct regulatory reach, such as "improved air quality by diverting trips from transportation modes with higher emissions . . . to

high-speed rail, which has lower emissions." *Cal. High-Speed Rail Auth.—Constr. Exemption—In Merced, Madera and Fresno Cntys., Cal.*, FD 35724, 2013 WL 3053064, at *16 n.113 (STB served June 13, 2013).

The National Environmental Policy Act. NEPA's aims are to ensure (1) "[an] agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts," and (2) "the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Public Citizen*, 541 U.S. at 768 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

To further these goals, NEPA requires that for any "major Federal action[ ] significantly affecting the quality of the human environment," the agency must prepare a "detailed statement" (environmental impact statement or EIS) describing the proposed action's "environmental impact" and "alternatives to the proposed action," among other things. 42 U.S.C. §§ 4332(2)(C)(i), (iii) (2022).[1] The statute does not limit the type of environmental effects agencies must disclose; instead, it directs agencies to implement its provisions "to the fullest extent possible." *Id.* § 4332 (2022).

1. Both NEPA and the Council on Environmental Quality's implementing regulations have been amended since the Board's 2021 order. Neither set of amendments applies retroactively to the order. *See* Pet.App.26a (applying 2019 regulations).

Council on Environmental Quality (CEQ) NEPA regulations require an agency to analyze and disclose a proposal's impacts without regard to whether another agency regulates those effects. They direct agencies to broadly disclose "indirect effects" that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," 40 C.F.R. § 1508.8(b) (2019). Agencies must also disclose effects that "result[ ] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id.* § 1508.7 (2019).

The Board's NEPA regulations require it to analyze a broad set of factors, consistent with the ICCT Act's directives. These include the proposed railway's impacts to energy resources and energy efficiency, air quality, noise, public health and safety, biological resources, water, and coastal resources. 49 C.F.R. §§ 1105.7(e)(3)–(9) (2019). The circuits recognize that the Board must analyze foreseeable environmental effects of rail projects that the Board does not directly regulate, such as downstream impacts to air quality from combustion of coal carried on the rails and a rail project's effects on land-use, water quality, and wildlife. *See Mid States Coal. for Progress v. STB*, 345 F.3d 520, 549–50 (8th Cir. 2003) (finding the Board violated NEPA by failing to disclose foreseeable effects); *N. Plains Res. Council, Inc. v. STB*, 668 F.3d 1067, 1077–79, 1082–86 (9th Cir. 2011) (same).

B. *Public Citizen*'s Scope of Environmental Review

This Court held in *Public Citizen* that NEPA does not require agencies to disclose all effects of every agency action. Rather, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Public Citizen*, 541 U.S. at 770.

In *Public Citizen*, the plaintiff challenged a Federal Motor Carrier Safety Administration (FMCSA) rule governing the operation of Mexican trucks in the United States. The plaintiff argued that the agency violated NEPA by failing to consider the increased emissions that would result from the new regulation. *Id.* at 765–66. Congress required FMCSA to issue a regulation before the President's decision to lift a congressionally imposed moratorium on new Mexican truck entries could take effect. Technically, "but for" the regulation, increased cross-border traffic and pollution would not occur. *See id.* But, in reality, once Congress's moratorium lifted, FMCSA had no choice but to allow new Mexican trucks into the country. *Id.* at 766.

This Court held that FMCSA was not required to consider the rule's cross-border traffic effects, citing two principles for interpreting the reasonable scope of NEPA review. *First*, a "'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA." *Id.* at 767. Instead, "courts must look to the underlying policies or legislative intent" of the statute authorizing agency action to determine the effects for which an actor is responsible and those for which it is not.

Id. (citations omitted). *Second*, NEPA's "rule of reason" requires agencies to "determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." *Id.* at 767–68 (citations omitted). Accordingly, where the environmental information "would have no effect on [the agency's] decisionmaking," the EIS need not include that information. *Id.* at 768.

Applying these principles, the Court held that "the legally relevant cause of the entry of the Mexican trucks [was] *not* FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA's discretion." *Id.* at 769. FMCSA "could not refuse to perform" the congressionally mandated rulemaking, and "[i]t would not . . . satisfy NEPA's 'rule of reason' to require [the] agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform." *Id.*

C. Procedural History

The Railway. Petitioners seek to develop and operate an 88-mile rail line whose "undisputed purpose . . . is to expand oil production in the Uinta Basin." Pet. App.36a. The Railway would link the Basin's oil fields to the national rail network at Kyune, Utah, connecting to an existing Union Pacific rail line. Pet.App.7a, 36a. Up to 9.5 daily trains, each nearly two miles long, would transport oil extraction materials into the Uinta Basin and up to 350,000 barrels of waxy crude oil out of the Basin, predominantly to refineries in Houston and Port Arthur, Texas and Louisiana's Gulf Coast. Pet.App.30a,

40a. The Railway is projected to increase oil production in the Uinta Basin by 400%. Pet.App.227a. Petitioners have no plans to ship other commodities on the Railway, which would be financially reliant on oil development for its viability. Pet.App.216a–217a.

Petitioners petitioned the Board for an exemption to construct and operate the Railway.

The Board's proceedings. The Board prepared an EIS, which purported to disclose the Railway's potential environmental effects, including impacts to air quality, water resources, and land use. The Board determined that the Railway would cause an additional 3,300 oil wells to be drilled in the Uinta Basin over fifteen years. Pet. App.104a–105a. However, the Board studied the effects of only those new oil wells that would be drilled "within several hundred feet of the rail line." Pet.App.30a. It excluded considering the effects of the other wells, reasoning that it "has no authority or jurisdiction over development of oil and gas in the Basin nor any authority to control or mitigate the impacts of any such development." Pet.App.108a.

The Board also "projected reasonably foreseeable routes" for the oil trains, and identified the refineries that likely would receive the oil extracted from the Basin. Pet. App.111a, 35a. From this analysis, the Board predicted that half of the oil newly produced from the Basin would be transported on the Railway to existing lines to be "delivered to Houston and/or Port Arthur, Texas, and another 35 percent to the Louisiana Gulf Coast." Pet. App.30a. The refiners in these locations "would refine the crude oil transported by the [Railway] into various fuels

and other products," resulting in increased emissions that "could represent up to approximately 0.8% of nationwide [greenhouse gas] emissions." Pet.App.106a. However, except for the portion of the route between Utah and Denver, Colorado, the Board otherwise declined to consider either the downstream effects of transporting the Basin's oil on predicted routes or the effects of refining it at expected destinations. Pet.App.110a–112a.

The Board also reviewed petitioners' petition for exemption by considering 49 U.S.C. § 10101's transportation policies promoting a sound rail transportation system and sound economic conditions to support its approval of the Railway. The Board concluded that two transportation policies encompassing public health, safety, and environmental considerations were adequately considered through the EIS process and did not raise significant concerns. Pet.App.82a–83a, 120a–121a, 206a–207a.

After "considering the entire record" and "weighing the [Railway's] transportation merits and environmental impacts," the Board granted the Railway an exemption. Pet.App.122a. The Board noted that "the construction and operation of this Line is likely to produce unavoidable environmental impacts." Pet.App.118a. Nonetheless, it concluded that the Railway's benefits from oil production and transportation supported the Railway's authorization. Pet.App.119a.

Board member Oberman dissented, criticizing the Board's reliance on *Public Citizen* to reason that increased oil production could not be effects of the Board's action because the Board lacks regulatory authority over oil production: "*Public Citizen*, which the majority relied

upon" actually "lay[s] bare the flaw in the majority's reasoning." Pet.App.138a. He explained: "Had Congress itself authorized construction of a railroad out of the Basin, or vested that authority in another federal agency, but left to the Board the narrower responsibility of deciding where that line should be placed and the details of its construction, then perhaps *Public Citizen* would be instructive." Pet.App.138. Here, however, "the Board has independent and plenary authority, and exclusive jurisdiction, over whether a line of railroad should be built in the first instance." Pet.App.138a.

D.C. Circuit proceedings. Respondents here sought review in the D.C. Circuit, and a unanimous panel vacated the Board's decision and remanded the matter to the Board. The court held "[t]he deficiencies here are significant," including "numerous NEPA violations," violations of the Endangered Species Act, and failure at "every juncture" to "supply an acceptable rationale as to its consideration of the relevant Rail Policies . . . in violation of the ICCT Act." Pet.App.61a, 69a–70a.

Among the NEPA violations—and the only one this petition addresses—the court held that the Board failed to "quantify reasonably foreseeable upstream and downstream impacts on vegetation and special-status species of increased drilling in the Uinta Basin . . . , as well as the effects of oil refining on environmental justice communities [on] the Gulf Coast." Pet.App.70a.

While "impacts from upstream gas production and downstream gas combustion are not always as a categorical matter a reasonably foreseeable effect of a project that will facilitate the transport of gas," the court explained, "[t]he

analysis is necessarily contextual." Pet.App.32a (cleaned up). The court noted that the Board had predicted where and how much reasonably foreseeable drilling, transport, and refining of oil would be attributable to the Railway, yet it failed to take the next step to estimate environmental harms that would result, or explain why it could not do so. Pet.App.33a–35a.

Addressing *Public Citizen*, the court recognized that "[t]he Board concededly has exclusive jurisdiction over the construction and operation of the railway, including authority to deny the exemption petition if the environmental harm caused by the railway outweighs its transportation benefits." Pet.App.36a. Accordingly, "[t]he Board . . . cannot avoid its responsibility under NEPA to identify and describe the environmental effects of increased oil drilling and refining on the ground that it lacks authority to prevent, control, or mitigate those developments." Pet.App.36a. Importantly, "[t]hese are effects the Board ultimately has the authority to prevent." Pet.App.66a.

Given that the Board has "authority to deny an exemption to a railway project on the ground that the railway's anticipated environmental and other costs outweigh its expected benefits," the court held, "the Board's argument that it need not consider effects it cannot prevent is simply inapplicable." Pet.App.36a–37a.

Petitioners sought rehearing en banc. Their petition did not raise the question presented here. No member of the court called for a vote. The petition was denied. Pet. App.73a.

REASONS FOR DENYING THE PETITION

I. The Question Presented Does Not Warrant Certiorari.

The D.C. Circuit properly stated the rule from *Public Citizen* and applied it to the Board's action here. Petitioners would read *Public Citizen* differently than the court below, but no court has adopted their reading. *Public Citizen* does not hold that an agency need only consider effects it regulates, *see* Pet.21, and no circuit has adopted that rule, contrary to petitioners' claim. As for petitioners' claim that some circuits conclude that certain agencies did not need to consider certain environmental effects when acting, those cases do not establish a split. Instead, they establish that these courts each applied *Public Citizen* to the different statutory and regulatory schemes and factual contexts in those cases.

A. The D.C. Circuit's caselaw does not conflict with *Public Citizen*.

1. Consistent with *Public Citizen*, the D.C. Circuit requires that an agency evaluate information about environmental effects under NEPA where the agency has the "power to act on [that] information." *Public Citizen*, 541 U.S. at 768. Below, the D.C. Circuit required just that. It ruled that because "the Board has authority to deny an exemption to a railway project on the ground that the railway's anticipated environmental and other costs outweigh its expected benefits," the argument that the Board "need not consider effects it cannot prevent" is "inapplicable." Pet.App.37a. The Board could not rely on the scope of its authority as an excuse to avoid

considering oil production effects because "[t]hese are effects the Board ultimately has the authority to prevent." Pet.App.66.

The D.C. Circuit properly focused on the scope of the Board's statutory authority to *weigh* the upstream and downstream effects caused by the Railway's construction and operation. The court recognized that "[t]he Board concededly has . . . authority to deny the exemption petition if the environmental harm caused by the railway outweighs its transportation benefits." Pet.App.36a. That broad authority made the Board's approval the legally relevant cause of those reasonably foreseeable upstream and downstream effects, so NEPA required that the Board analyze and disclose those effects. *See* Pet.App.36a.

2. Petitioners criticize the D.C. Circuit for failing to read *Public Citizen* as holding that an agency may not consider any environmental effect that the agency cannot itself directly regulate—even where the agency has authority to consider those effects in its decisionmaking. Pet.18. However, it is petitioners' argument that rests on a misreading of *Public Citizen*.

Public Citizen instructs that "where an agency has no ability to prevent a certain effect due to its limited statutory authority *over the relevant actions*, the agency cannot be considered a legally relevant 'cause' of the effect." 541 U.S. at 770 (emphasis added). There, the action at issue was authorization of cross-border operations from Mexican motor carriers. "[B]ecause FMCSA ha[d] no discretion to prevent the entry of Mexican trucks, its [environmental review] did not need to consider the environmental effects arising from the entry." *Id.* By

contrast, the Board here has undisputed authority over the Railway's construction and operation, including undisputed authority to weigh environmental effects against transportation benefits in its decisionmaking. Pet. App.36a. *See also supra* at 9 (Board member Oberman's dissent addressing *Public Citizen*).

The Board's longstanding NEPA regulations reinforce this reading of *Public Citizen*. They require applicants to disclose the impacts rail projects will have on air quality, noise, biological resources, and water, even though the Board does not directly regulate those effects. *See* 49 C.F.R. §§ 1105.7(e)(5)–(6), (8)–(9). Those effects include impacts reaching beyond the direct *physical* impacts resulting from the Railway's construction and operation, such as "overall energy efficiency," as well as effects from increased rail traffic on existing railroads "down-line" of the new construction. *Id.* §§ 1105.7(e)(4)(i)–(iii), (e)(11)(v). Petitioners' misinterpretation of *Public Citizen* is irreconcilable with the way the Board and other agencies are authorized to consider information about environmental effects to make better informed decisions over agency actions.

Petitioners' position is also irreconcilable with NEPA's purpose to ensure the agency considers information "concerning significant environmental impacts" before making its decision, and to publish this information so the public can weigh in on the proposed action. *Public Citizen*, 541 U.S. at 768. Limiting agencies to effects that they directly regulate, rather than effects Congress has authorized them to consider, does not comport with NEPA's purpose or rule of reason—"that agencies determine whether and to what extent to prepare an EIS

based on the usefulness of any potential information in the decisionmaking process." *Id.* at 767.

3. Contrary to petitioners' contention that the claimed error here traces back to the D.C. Circuit misapplying *Public Citizen* in *Sierra Club v. FERC* (*Sabal Trail*), 867 F.3d 1357 (D.C. Cir. 2017), the D.C. Circuit has consistently applied the same, correct understanding of *Public Citizen* to different statutory schemes. Pet.18. In *Sabal Trail*, plaintiffs challenged FERC's approval of a natural gas pipeline because the agency's NEPA review did not analyze the emissions that would result from burning the natural gas at power plants, a downstream consequence of the pipeline. The D.C. Circuit acknowledged *Public Citizen*'s "touchstone" rule: "An agency has no obligation to gather or consider environmental information if it has no statutory authority to act on that information." *Sabal Trail*, 867 F.3d. at 1372–73 (citing *Public Citizen*, 541 U.S. at 767–68).

The court then identified FERC's "broad" statutory authority "to consider 'the public convenience and necessity' when evaluating applications to construct and operate interstate pipelines," and to "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment." *Id.* at 1373 (citing 15 U.S.C. § 717f(e)). Because FERC's approval was the "legally relevant cause" of those downstream combustion emissions, NEPA required FERC to analyze and disclose those impacts. *Id.*

Sabal Trail contrasted FERC's broad authority to consider environmental effects in approving a pipeline with FERC's "narrow" authority in approving gas export

terminals, which was at issue in an earlier decision, *Sierra Club v. FERC* (*Freeport*), 827 F.3d 36 (D.C. Cir. 2016). *Sabal Trail*, 867 F.3d at 1373. In *Freeport*, the court held that FERC was *not* required to consider the effects of the anticipated *export* of gas from an export terminal "because the Department of Energy, not [FERC], has sole authority to license the export of any natural gas going through the [export] facilities." *Freeport*, 827 F.3d at 47. For gas exports, the Department of Energy had narrowly delegated FERC authority over the export facility construction decision. *Id*. at 40–41.

In those "specific circumstances," FERC's action could not be considered the legally relevant cause of the effects because it "'has no ability to prevent a certain effect due to' that agency's 'limited statutory authority over the relevant action[ ].'" *Id.* at 47 (quoting *Public Citizen*, 541 U.S. at 771). FERC "could not act on" information concerning the effects of gas exports, because the Department of Energy, not FERC, had sole legal authority to allow gas exports and to prevent their adverse effects. *Id.* at 48 (citation omitted); *see also Ala. Mun. Distribs. Grp. v. FERC*, Nos. 22-1101, 22-1171, 22-1256, 22-1273, 2024 WL 1864820, at *2, *4 (D.C. Cir. Apr. 30, 2024) (following *Freeport*, holding that because the Department of Energy had "exclusive authority" to authorize gas exports, NEPA did not require FERC to consider a proposed pipeline's downstream emissions arising from such exports).

The relevant D.C. Circuit caselaw, including the decision below, reflects a consistent and proper application of *Public Citizen* and NEPA. Here, "given that the Board has authority to deny an exemption to a railway project on the ground that the railway's anticipated environmental

and other costs outweigh its expected benefits, the Board's argument that it need not consider effects it cannot prevent is simply inapplicable." Pet.App.37a.

B. There is no circuit split.

There is no circuit split regarding whether *Public Citizen* allows agencies to ignore reasonably foreseeable effects that they have the authority to consider because they cannot directly regulate those effects. Moreover, no circuit court has ever endorsed petitioners' reading. Rather, in other circuit decisions the required disclosure of impacts in each case depended on the agency's statutory authority to take effects into account in making its decision, consistent with *Public Citizen* and D.C. Circuit caselaw. The varying outcomes in these cases do not result from a circuit split over *Public Citizen*'s meaning, but from the different statutory contexts and the relative foreseeability or remoteness of the particular effects in each case.

Corps permitting authority under the Clean Water Act. Petitioners cite three cases addressing the Army Corps of Engineers' authority to allow mine waste discharges into U.S. waters. Pet.14–18. In each case, the courts held that the Corps' limited discretion over the proposed action, not its lack of regulatory authority over the action's effects, narrowed the scope of environmental effects that the Corps must disclose. These holdings comport with both *Public Citizen* and the D.C. Circuit's holdings.

In *Center for Biological Diversity v. U.S. Army Corps of Engineers* (*CBD*), the Eleventh Circuit addressed the

environmental effects the Corps must consider when granting a permit to discharge pollutants into U.S. waters. 941 F.3d 1288 (11th Cir. 2019). There, a phosphate ore mining company sought a permit to discharge dredged material from its mining into a nearby wetland. The court considered plaintiffs' claims that NEPA required the Corps to analyze the effects of the mining, specifically, of the use of mined phosphate ore to make fertilizer and the harmful waste that process produces.

The Eleventh Circuit held that because the Clean Water Act tells the Corps to consider only the effects of the proposed discharge, the Corps did not need to consider the general effects of the mining operation. The Act authorizes the Corps to deny a permit only if "the discharge of such materials . . . will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." *Id.* at 1298 (citing 33 U.S.C. § 1344(c)). The Eleventh Circuit explained that, by statute, "only if the allowed *discharge*" unacceptably harmed these resources could the Corps deny a permit. *Id.* The court concluded that "[b]ecause the Corps cannot deny a permit *because of* " general effects of the phosphate ore mining, "which are beyond the scope of § 1344(c), the Corps was not required to consider those effects." *Id.* (emphasis added).

Although the *CBD* court questioned the D.C. Circuit's approach in *Sabal Trail*, the courts' reasoning is the same in both cases despite the different outcomes. The Eleventh Circuit found *Sabal Trail* easily distinguishable, explaining that "[t]he scope of the agency's statutory authority in *Sabal Trail* was much broader than" in *CBD*,

whereas the Corps lacked "authority to deny a discharge permit based on the public convenience and necessity of the operation of [downstream] fertilizer plants." *Id.* at 1299–1300. Contrary to petitioners' assertion that the Corps' authority in *CBD* was as broad as FERC's general "public interest" authority in *Sabal Trail*, Pet.20, the Eleventh Circuit held that the Corps' controlling statute "authorizes the Corps to deny a permit only if the *discharge itself* will have an unacceptable environmental impact." *CBD*, 941 F.3d at 1299 (emphasis added).

In addition, the Eleventh Circuit distinguished *Sabal Trail* on the grounds that the applicant's discharge into the wetlands was only "one small piece of [the applicant's] mining operations" and many chain links removed from the eventual harmful effects of the phosphate ore mine. *Id.* The Eleventh Circuit explained "[t]hat articulated causal chain bears little resemblance to the two-link version in *Sabal Trail*." *Id.* Given these dispositive distinctions, the fact that the Eleventh Circuit took issue with some aspects of the analysis in *Sabal Trail* affords no basis for this Court's review.

The two other Corps cases on which petitioners rely—*Ohio Valley Environmental Coalition v. Aracoma Coal Co.* 556 F.3d 177, 195 (4th Cir. 2009) and *Kentuckians for the Commonwealth v. U.S. Army Corps of Engineers*, 746 F.3d 698 (6th Cir. 2014)—are likewise consistent with the D.C. Circuit caselaw. In both *Ohio Valley* and *Kentuckians*, the courts held that the Corps was not required to consider the effects of the larger coal mining operations when deciding whether to grant a permit to dispose of waste from those mining operations in streams. The courts held that the Corps' NEPA review regulations

expressly limited the Corps to considering effects of the proposed discharge itself, just as the Eleventh Circuit found the same express intent in the Clean Water Act. *Ohio Valley*, 556 F.3d at 194 (citing 33 C.F.R. Pt. 325, App. B § 7(b)(1) (2008)); *Kentuckians*, 746 F.3d at 707 (same).

Moreover, both circuits reached the same conclusion as the Eleventh Circuit: that the Corps lacked the authority to consider the effects of the general mining operations. Both explained that a separate statute, the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1253 (2000), enacted a comprehensive scheme governing surface coal mining, which contemplated that the states would have "exclusive" authority to regulate and permit coal mining operations. *Ohio Valley*, 556 F.3d at 195; *Kentuckians*, 746 F.3d at 709 (recognizing Congress intended such decisions be left to "one decisionmaker," i.e., state agencies). Accordingly, both concluded that the Corps did not have the authority to consider the broader effects of that coal mining when deciding whether to grant the discharge permit. *See Kentuckians*, 746 F.3d at 709; *Ohio Valley*, 556 F.3d at 195–196.

Allowing the Corps to deny the discharge permit based on those effects and effectively "thwart" the coal mine would have frustrated Congress's intent to delegate coal mine permitting to the states. *Kentuckians*, 746 F.3d at 709; *see Ohio Valley*, 556 F.3d at 196 (noting duplicative federal review could render the state's permitting scheme "meaningless"). Like the decision below, *Ohio Valley* and *Kentuckians* looked to the scope of the Corps' decisionmaking authority, not whether it had authority to regulate the environmental effects at issue.

National Park Service's authority over a local government decision. Petitioners also cite *Protect Our Parks, Inc. v. Buttigieg*, 39 F.4th 389 (7th Cir. 2022), *see* Pet.17, but that case is also consistent with the D.C. Circuit's interpretation of *Public Citizen*. There, the Seventh Circuit considered whether the National Park Service, in conducting a NEPA review of the City of Chicago's chosen site for the Obama Center, was required to consider alternative locations. The court's decision focused on the agency's lack of statutory authority over site selection. Although the Park Service's approval was needed to build at the site that the City had selected, the agency had "no authority to choose another site for the Center or to force the City to move the Center." *Id.* at 400. Moreover, the Park Service was "obligated" to approve the chosen site if the location satisfied statutory criteria, which the Service found were met. *Id.* The court's analysis aligns with *Public Citizen* and with the D.C. Circuit's holding in the case below and in *Sabal Trail*.

Nuclear Regulatory Commission's authority to relicense a power plant. Petitioners' reliance on *New Jersey Department of Environmental Protection v. U.S. Nuclear Regulatory Commission*, 561 F.3d. 132 (3d Cir. 2009), is likewise misplaced. *See* Pet.17. There, the Third Circuit rejected the claim that before the Nuclear Regulatory Commission could relicense a nuclear power plant, NEPA required the agency to analyze the effects of a potential terrorist attack on the plant. The court held that third-party terrorist acts and failures of the responsible agencies in preventing an attack would be "intervening forces," breaking the causal chain between the Nuclear Regulatory Commission's relicensing approval and environmental effects of an attack. *New Jersey*, 561 F.3d at 140–41.

Nothing in that decision conflicts with the principle from *Public Citizen* that where an agency has the authority to act on information concerning reasonably foreseeable effects of its proposed action, it is required to consider that information.

Ninth Circuit decisions are consistent with Public Citizen. Contrary to petitioners' assertion, *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020), does not conflict with circuit holdings outside the D.C. Circuit. Pet.19. That case did not concern the agency's authority to consider particular effects, but dealt with whether the agency had enough information to quantify emissions resulting from the project it approved. *Bernhardt*, 982 F.3d. at 737–40; *see also Ctr. for Biological Diversity v. Natl. Highway Traffic Safety Admin.*, 538 F.3d 1172, 1213–15 (9th Cir. 2008) (requiring agency to consider greenhouse gas effects of fuel economy standards, where it "has statutory authority to impose or enforce fuel economy standards . . . , and it could have, in exercising its discretion, set higher standards if an EIS contained evidence that so warranted").

* * *

In sum, the circuit courts have consistently applied *Public Citizen*. There is no conflict among the circuits as to the question the petition presents.

C. The question presented is not an important one.

1. A decision in petitioners' favor would not change the outcome of this case because the D.C. Circuit held that the Board decision was unlawful in at least six additional ways.

As to NEPA, the decision below identified three other violations. The Board failed to take the necessary "hard look" at the significant increase in rail accidents downline, between the rail's terminal in Kyune, Utah and Denver, given the increased rail traffic resulting from the Railway. Pet.App.41a–42a. It failed to consider downline wildfire risks, a failing the court described as "utterly unreasoned." Pet.App.44a. And it failed to consider the downline impacts of loaded oil trains on the Colorado River, with the court noting that the EIS "concededly fails altogether to mention the Colorado River." Pet. App.45a–47a.

The Board also violated the Endangered Species Act. It arbitrarily excluded from the ESA analysis consideration of spill and leak impacts from Railway operations on the Colorado River's four endangered fish. Pet.App.52a–54a.

Finally, the Board violated the ICCT Act twice over. The Board erred when finding that the Railway's benefits outweighed the environmental effects. Pet.App.61a–68a. And, in addition to relying on the EIS's faulty analysis of oil production, wildfire, train accidents, and oil spill effects, the Board failed to analyze the environmentally related transportation policies, "demonstrat[ing] that the Board did not adequately consider the incredibly significant environmental effects identified in the EIS in weighing those impacts against the uncertain transportation benefits of the Railway." Pet.App.65a–66a.

Thus, any ruling on the petition will not change the D.C. Circuit's vacatur of the Board's decision.

2. Recent statutory amendments to NEPA and new NEPA regulations confirm that the question presented does not warrant review.

The 2023 statutory amendments undermine petitioners' claim that certiorari is urgently needed to address the "time and expense of environmental review" under NEPA. Pet.27. The 2023 NEPA amendments include numerous provisions to speed up environmental review, including those that set new time and page limitations on EISs, that clarify the role of lead agencies drafting reviews, and that promote the development of one environmental document where multiple agency approvals are required. 42 U.S.C. §§ 4336a(a), (b), (e), (g) (2023). CEQ's 2024 regulations implementing the 2023 NEPA amendments made further changes to "enhance [the] efficiency" of the NEPA process. 89 Fed. Reg. 35442 (May 1, 2024).

Agencies should be afforded an opportunity to implement these just-enacted regulatory changes subject to review by lower courts, before this Court weighs in on the contention that NEPA procedures need streamlining, as petitioners argue. Pet.24–28. The time and page limits and other changes established in the NEPA amendments need to be implemented before it can be determined whether they address concerns about the allegedly unwieldy review process, assuming those concerns were ever valid.

3. This Court need not intervene because Congress recently reaffirmed longstanding NEPA principles that petitioners ask this Court to revisit.

In its 2023 NEPA amendments, Congress codified the "reasonably foreseeable" standard applied by courts of appeal following *Public Citizen* and CEQ's longstanding requirement that agencies consider "reasonably foreseeable" effects of the proposed action. 42 U.S.C. § 4332(C)(ii) (2023) (EIS must address "any" such "adverse" effects "which cannot be avoided").

Consistent with *Public Citizen*, the NEPA amendments provide that:

> An agency is not required to prepare an environmental document with respect to a proposed agency action if . . . the proposed agency action is a nondiscretionary action with respect to which such agency does not have authority to take environmental factors into consideration in determining whether to take the proposed action.

See id. § 4336(a)(4) (2023).

The circuits have not yet had an opportunity to consider the 2023 amendments, let alone the 2024 CEQ regulations, in light of *Public Citizen*. Petitioners and their amici disagree on whether the statutory changes have an impact. *Compare* Pet.26 (stating the new legislation "merely codifies the old NEPA rules"), *with* Br. of Amicus Nat'l Gas Ass'n at 22 ("These amendments restrict the scope of NEPA review."). To the extent that the lower courts have not even addressed whether the changes were intended to alter the applicable law, the recent amendments make review particularly unsuitable now.

4. Petitioners' additional policy concerns do not warrant review.

Petitioners' concern that the decision below unleashes unchecked environmental review responsibilities is misplaced. Aside from the reforms Congress just adopted, *Public Citizen* is but one constraint, along with reasonable foreseeability, that limits agencies' environmental review to what is necessary for each agency to make better-informed decisions. Here, Congress through the ICCT Act, not the D.C. Circuit, granted the Board broad discretion to approve rail lines based on the consideration of a range of environmental harms emanating from those approvals. *Public Citizen* constrains agency NEPA review to effects within the agency's authority to consider, keeping agencies within their statutory lane.

Petitioners fail to support their assertion that the Board's analysis of upstream and downstream oil development impacts would render the permitting reviews of other agencies "duplicative" or "meaningless." Pet.16–17. Petitioners do not explain how the Board's consideration of upstream and downstream effects could interfere with another agency's authorization—such as for a particular oil well or refinery operation—or duplicate another agency's permitting review.

In contrast, in the Corps cases discussed above, the courts held that duplicative review would have frustrated Congress's intent to delegate "exclusive" review and permitting authority of the larger mining operation to the states. Petitioners point to no similarly expressed congressional intent to limit the Board's review or authority, in the ICCT Act or any other statute. They even

concede that the ICCT Act requires the Board to weigh the Railway's environmental harms. *See* Pet.23.

Petitioners argue that consecutive administrations' competing changes to CEQ's NEPA regulations demonstrate a need for court intervention, but they miss the mark. Contrary to petitioners' assertion, *see* Pet.24, the 2020 NEPA regulations (since modified) did not seek to redefine the effects that an agency must disclose by tying them directly to an agency's regulatory authority. The regulations sought to limit NEPA review to effects that "have a reasonably close causal relationship to the proposed action or alternatives." 85 Fed. Reg. 43304, 43343 (July 16, 2020). The 2022 NEPA regulations reinstituted the "principle of reasonable foreseeability" and the "rule of reason." 87 Fed. Reg. 23453, 23465 (Apr. 20, 2022). Neither rule sought to categorically exclude effects from NEPA review based on whether an agency directly regulates those effects, as petitioners propose.

Similarly, the CEQ regulations published this month do not indicate that they are intended to correct any misapplication of *Public Citizen*. *See generally* 89 Fed. Reg. 35442.

II. The Decision Below Was Correct.

In addition to setting forth the correct legal standard derived from *Public Citizen*—which is sufficient to deny review—the D.C. Circuit below also correctly applied that standard to the facts, making this Court's review unwarranted.

The D.C. Circuit correctly determined the Board's "exclusive jurisdiction over the construction of the railway"—unlike other statutory and regulatory schemes—gave the Board "authority to deny the exemption petition if the environmental harm caused by the railway outweighs its transportation benefits." Pet.App.36a (citing 49 U.S.C. §§ 10501(c); 10901(b)). The court thus correctly concluded the Board has authority to consider the reasonably foreseeable effects of oil production and refining that the Railway would induce. Pet.App.36a (citing 49 U.S.C. §§ 10501(c); 10901(b)).

The D.C. Circuit correctly found that the Board's action authorizing the Railway could foreseeably cause upstream and downstream oil production effects. Because the record reflected "the Railway's undisputed purpose . . . to expand oil production in the Uinta Basin," the upstream and downstream effects of increased drilling, transporting, and refining of Uinta Basin oil were reasonably foreseeable impacts of the Board's decision. Pet.App.36a. In fact, the court noted that the Board chose to analyze *some* but not all upstream and downstream effects from increased oil production. Pet.App.34a–35a. Still, the court left open the door for the Board to explain why such effects might not be foreseeable or calculable given the information before it. Pet.App.34a–35a.

The D.C. Circuit correctly considered the Railway as the legally relevant cause of the effects resulting from the expected production, transportation, and refining of oil, contrary to petitioners' claims. Pet.14. The Railway is the single, critical action needed to accomplish petitioners' goal of boosting oil production in the Uinta Basin, unlike the discharge permits granted to facilitate larger projects

subject to separate governmental decisions in the Corps cases. Because the Board weighed whether the Railway would "meet the goals" of petitioners to increase oil production in the Basin, NEPA required that the Board disclose the environmental impacts those benefits would cause. Pet.App.119a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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