No. 23-975

In the
Supreme Court of the United States

SEVEN COUNTY INFRASTRUCTURE COALITION and UINTA BASIN RAILWAY, LLC,
Petitioners,

v.

EAGLE COUNTY COLORADO and CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Courts of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The disclosure statement in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

The petition in this case asks whether the National Environmental Policy Act requires an agency to study environmental impacts beyond the proximate effects of an action within its regulatory authority. Five circuits, relying on *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), say no. These courts recognize that *Public Citizen*'s "manageable line" for identifying effects that are caused by an agency's action will "approximate the limits of an agency's area of control." *N.J. Dep't of Env't Prot. v. U.S. Nuclear Regul. Comm'n*, 561 F.3d 132, 139 (3d Cir. 2009). As a result, agencies litigating in these circuits must study only "those effects proximately caused by the actions over which they have regulatory responsibility." *Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 710 (6th Cir. 2014). More distant effects can be left to other regulators. *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1295–96 (11th Cir. 2019). In the D.C. Circuit, by contrast, courts do not ask what activities an agency regulates or whether another regulator has authority. *Sierra Club v. FERC (Sabal Trail)*, 867 F.3d 1357, 1373 (D.C. Cir. 2017). All that matters is what factors the agency can consider on the merits. *Id.*

The briefs in opposition try to bury this circuit split by reframing the question. Everyone agrees, they say, that NEPA does not require an agency to collect information it cannot act on. Eagle Cnty. Opp.15 (citing *Sabal Trail*, 867 F.3d at 1372–73). But like the D.C. Circuit, they mistake that narrow point of agreement for a broader consensus that if an agency has substantive "authority to consider and disapprove" an action based on "harm to the environment," then NEPA requires the agency to study that harm. U.S.Opp.15

(citing *Sabal Trail*, 867 F.3d at 1373; Pet.App.37a). In this way of thinking, the only relevant NEPA question is whether the harm is reasonably foreseeable. *Public Citizen*'s analysis of proximate cause and "limited statutory authority" is irrelevant—even though five circuits have used that analysis to limit agencies' NEPA responsibilities. Pet.App.36a–37a.

Respondents do not want the Court to resolve this dispute over agencies' NEPA responsibilities because they prefer the D.C. Circuit's narrow view of *Public Citizen*. Indeed, the White House Council on Environmental Quality's new NEPA rules rejected *Public Citizen*-based language requiring "a reasonably close causal relationship" between an agency action and its effects. Eagle Cnty. Opp.27 (quoting 85 Fed. Reg. 43304, 43343 (July 16, 2020)). In its place, CEQ "reinstituted the 'principle of reasonable foreseeability'" that governed the D.C. Circuit's decision here. *Id.* (quoting 87 Fed. Reg. 23453, 23465 (Apr. 20, 2022)). CEQ also "reexamined its interpretation of and reliance on the *Public Citizen* decision" and concluded that the last administration's reading of *Public Citizen* did not "comport with" its current "view of the proper scope of effects analysis . . . ." 87 Fed. Reg. at 23464. Thus, like the courts of appeals, the two most recent Presidential administrations disagree about what *Public Citizen* means.

The time to resolve these disagreements is now. As the amici supporting the petition emphasize, the proper scope of NEPA is an urgent issue across a wide range of industries. This Court's intervention would restore manageable lines to the NEPA process, where they have too often been missing.

ARGUMENT

I. The circuits disagree about the question presented.

A. To paper over the circuit split identified in the petition, Respondents latch on to the narrowest possible reading of *Public Citizen*. On this view, *Public Citizen* applies only when an agency "lacks the power to act on" the information in a NEPA document. 541 U.S. at 768; *see* U.S.Opp.10. But that is not all that *Public Citizen* says, and it is not the question presented here. The petition asks whether, under *Public Citizen*, NEPA requires an agency to study environmental impacts beyond the proximate effects of actions within its regulatory authority. The circuit courts have answered that question differently.

The D.C. Circuit says that agencies must go beyond the question, "'What activities does [the agency] regulate?'" and instead study any environmental "factors" that the agency can "consider" when evaluating an application. *Sabal Trail*, 867 F.3d at 1373; Pet.App.37a. Respondents agree. They reason that when a statute or rule gives an agency "authority to consider and disapprove" a project "based on the increased harm to the environment that the project would cause," the "statutory authority" limit in *Public Citizen* does not apply. U.S.Opp.15. Even if the harms at stake are "overseen by another federal agency or state permitting authority," they must be part of the first agency's NEPA review. *Sabal Trail*, 867 F.3d at 1375.

On this point, the circuits are plainly split. The Eleventh Circuit pans *Sabal Trail* for "breezing past" *Public Citizen*'s effort to "clarify[] what effects are cognizable under NEPA." *Ctr. for Biological Diversity*, 941 F.3d at 1300. For its part, the Eleventh Circuit

holds that because independent regulators "break the causal chain" under NEPA, an agency can sensibly "draw the line at the reaches of its own jurisdiction." *Id*. at 1295. This line "respects the jurisdictional boundaries set by Congress and inherent in state-federal cooperation." *Id*. at 1295–96.

Other courts likewise focus on the relationship between NEPA causation and an agency's regulatory jurisdiction, not the agency's mere "authority to consider and disapprove" an action based on environmental harm, U.S.Opp.15. Thus, the Third Circuit finds "the limits of an agency's area of control" to be a "manageable line" that identifies "causal changes" requiring NEPA review. *N.J. Dep't of Env't Prot.*, 561 F.3d at 139. The Sixth Circuit similarly holds that an agency may limit its NEPA review "to the effects proximately caused by the specific activities" the agency authorized. *Kentuckians*, 746 F.3d at 706. The Fourth Circuit is even more specific, holding that *Public Citizen* identifies "proximate causation" as "the relevant measure of the causal relationship between the agency action and the environmental effects." *Ohio Valley Env't Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 196 (4th Cir. 2009). And the Seventh Circuit reasons that because "but-for causation alone 'is insufficient to make an agency responsible for a particular effect . . . ,' an agency is on the hook only for the decisions that it has the authority to make." *Protect Our Parks, Inc. v. Buttigieg*, 39 F.4th 389, 400 (7th Cir. 2022) (quoting *Public Citizen*, 541 U.S. at 767).

The D.C. Circuit never asks how an agency's regulatory authority relates to NEPA causation. Here, the Surface Transportation Board lacked regulatory authority to "prevent, control, or mitigate" distant effects regulated by other agencies. Pet.App.36a–37a.

But the court of appeals held that because the Board had the "authority to deny" a permit based on "environmental harm," NEPA required it to study all reasonably foreseeable effects. *Id*. *Public Citizen* was "inapplicable." *Id*.; *see Sabal Trail*, 867 F.3d at 1373.

B. Without addressing this conflict over regulatory jurisdiction and proximate cause, Respondents claim that the decisions in the Third, Fourth, Sixth, Seventh, and Eleventh Circuits are simply applying *Public Citizen*'s narrow holding. U.S.Opp.10–12. In each case, Respondents say, the agency was reasonably excluding "a particular environmental effect from its NEPA analysis" because, "under the governing statutory and regulatory scheme," the agency "had 'no ability to prevent' that effect." *Id*. at 10 (quoting *Public Citizen*, 541 U.S. at 770). But the cases will not bear that interpretation.

Three of the five cases aligned against the D.C. Circuit's reading of *Public Citizen* involve Clean Water Act section 404 permits issued by the Corps of Engineers. The Corps, as this Court recently noted, has "asserted discretion to grant or deny permits based on a long, nonexclusive list of factors that ends with a catchall mandate to consider 'in general, the needs and welfare of the people.'" *Sackett v. EPA*, 598 U.S. 651, 661 (2023) (quoting 33 C.F.R. § 320.4(a)(1)). For sheer breadth, that discretion surpasses the "public convenience and necessity" standard that prompted the D.C. Circuit to require an expansive NEPA review in *Sabal Trail*. 867 F.3d at 1373. Yet none of the three courts addressing Corps permits on the other side of the split did the same. To the contrary, the Sixth Circuit pointed out that the Corps' "public interest review" is not a NEPA obligation. *Kentuckians*, 746 F.3d at 712. And while the Eleventh Circuit did say that

the agency in *Sabal Trail* had broader statutory authority, its larger discussion turns on regulatory jurisdiction and proximate cause, not the Corps' ability to prevent effects. *Ctr. for Biological Diversity*, 941 F.3d at 1294–1300.

Respondents' efforts to distinguish the Third and Seventh Circuit decisions are even weaker. They admit that the Third Circuit cited the Federal Aviation Administration's authority over airspace as support for its conclusion that the Nuclear Regulatory Commission need not study the effects of an airborne terrorist attack. U.S.Opp.11–12 (citing *N.J. Dep't of Env't Prot.*, 561 F.3d at 139, 140). But if FAA's authority can limit NRC's NEPA review, *Sabal Trail*'s claim that another agency's oversight "cannot substitute for a proper NEPA analysis," 867 F.3d at 1375, must be wrong. Nor does the Seventh Circuit's discussion of causation and jurisdiction adopt Respondents' and the D.C. Circuit's narrow reading of *Public Citizen*. The Seventh Circuit holds instead that "NEPA requires agencies to consider only environmental harms that are both factually and proximately caused by a relevant federal action." *Protect Our Parks*, 39 F.4th at 399. That is why, when an agency lacks "authority" over an action, it is not "on the hook" for that action's effects. *Id.* at 399–400.

It is true that agencies need not report on environmental effects that they have no "power to act on." *Public Citizen*, 541 U.S. at 768. But five circuits understand *Public Citizen* as also limiting NEPA review to the proximate effects of actions within an agency's regulatory authority. *Kentuckians*, 746 F.3d at 710. That Respondents and the D.C. Circuit take a different, narrower view of *Public Citizen* only highlights this circuit split.

II. The CEQ rule changes underscore the dispute over *Public Citizen* and the importance of this case.

A. Respondents' embrace of *Sabal Trail* mirrors CEQ's recent changes to its NEPA rules. As the petition explains, the last administration amended the NEPA rules in 2020 to "codify a key holding of *Public Citizen*" by expressly excluding "effects that the agency has no authority to prevent . . . because they would not have a sufficiently close causal connection to the proposed action." 85 Fed. Reg. at 43344. To that end, the 2020 CEQ rules defined "effects" to include only effects that "have a reasonably close causal relationship to the proposed action or alternatives . . . ." *Id*. at 43375; *see Public Citizen*, 541 U.S. at 767 ("NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause.") (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

The new Presidential administration reversed the 2020 changes to CEQ's rules. Despite *Public Citizen*'s "reasonably close causal relationship" holding, CEQ dropped that language from the rules, believing that a "close causal relationship" requirement "could inappropriately constrain consideration of reasonably foreseeable impacts . . . ." 86 Fed. Reg. 55757, 55766 (Oct. 7, 2021). The 2022 final rule thus cemented the "principle of reasonable foreseeability" as the prime limit on NEPA review, *Public Citizen* notwithstanding. 87 Fed. Reg. at 23465; *see id*. at 23464–65 (describing CEQ's reinterpretation of *Public Citizen*).

In a new rule finalized after the petition here, CEQ goes even further. Citing *Sabal Trail*, this new rule requires agencies to quantify downstream greenhouse gas emissions, rejecting commenters' claims that such

a requirement would "go beyond what case law generally already requires . . . ." 89 Fed. Reg. 35442, 35508–09 (May 1, 2024). CEQ also dismisses the idea that *Public Citizen* "announced a categorical limit on agencies considering the reasonably foreseeable indirect effects of their actions," effectively limiting *Public Citizen* to its "specific factual and legal context." CEQ-2023-0003-82042 at 822–823. CEQ even questions *Public Citizen*'s holding that "a 'but for' causal relationship" cannot support NEPA review, saying that it "must be read" in its "context." *Id.* at 824.

By adopting *Sabal Trail*'s approach, CEQ gives "nearly every agency" power "to disapprove a project based on any environmental effect at any point upstream or downstream from the project, including where the agency's action is not the proximate cause of those effects." NAACO Br.10 (emphases omitted); *see id*. at 17 (explaining that the new NEPA rules "will render NEPA review even more boundless and unmanageable"). This is just the sort of "environmental-policy czar" approach that the Eleventh Circuit warned against. *Ctr. for Biological Diversity*, 941 F.3d at 1299. To make its point, the Eleventh Circuit asked rhetorically whether an "unbounded view" of agency authority would force a pipeline permitting agency to consider "whether the country's reliance on fossil fuels is really in the public interest." *Id.* Five years later, CEQ has published NEPA rules that tell agencies to address precisely that sort of question. 89 Fed. Reg. at 35566 (amending the NEPA rules to require analysis of "climate change-related effects," including "quantification of greenhouse gas emissions").

B. Amici supporting the petition have highlighted several ways in which *Sabal Trail*'s reading of *Public Citizen* has caused problems. For example, the level of

"[l]egal uncertainty" surrounding NEPA has "led to a sharp decline" in new interstate pipeline capacity. INGAA Br.8. Over-broad NEPA review has also harmed forest management projects, AFRC Br.18–22, mining projects, NAACO Br.21–25, projects on public lands, TN Ranching Br.15, and potential projects on tribal lands, Ute Br.9. Given CEQ's return to the rules that first caused these problems, there is no reason to think that things will change.

Further, because CEQ insists that it is simply "restoring the 1978 definition of 'effects'" to "align the regulations with longstanding agency practice and judicial precedent," 87 Fed. Reg. at 23464, courts do not need more time to consider CEQ's new rules. The most recent CEQ comment responses even observe that "a number of lower courts have cited to the *Public Citizen* case," and explain that "[b]y restoring the substance of the 'effects' definition from the 1978 regulations," the new rule will "allow agencies to consider those cases and other court decisions . . . ." CEQ-2023-0003-82042 at 825–26. So CEQ itself agrees that its new rules do not affect *Public Citizen* or the cases decided under it. Respondents' contrary suggestion, U.S.Opp.17, should thus be ignored.

III. This case is an ideal vehicle.

Respondents also err in briefly suggesting that this case would be a "poor vehicle" for addressing the question presented.

First, Respondents claim that the D.C. Circuit's conclusions about "downline" impacts are not within the question presented. U.S.Opp.18. Downline impacts are alleged environmental harms on other rail lines that carry trains to or from the new Uinta Basin Railway. *See* Pet.11 (explaining that a Union Pacific

line would connect with the Uinta Basin Railway). But those other lines are regulated by the Federal Railway Administration, not the Surface Transportation Board. *Id.* And, as the petition explained, the Board declined to treat downline impacts as indirect effects of the Uinta Basin Railway because it lacked power to "regulate or mitigate" those impacts. Pet.12 (quoting Pet.App.112a). That reasoning falls well within the scope of the question presented. Thus, if the Court grants review and reverses, it will vindicate every part of the Board's NEPA review that the D.C. Circuit vacated.

The Court also regularly decides discrete legal issues within a larger case. *See, e.g.*, *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 340 (2005) (addressing "a portion of the court's decision" in a case that was remanded). There are no alternative holdings here, and the idea that Petitioners could satisfy the D.C. Circuit's erroneous legal standard on remand, U.S.Opp.16–17, begs the question. The need to address other, separate legal issues on remand simply does not present a vehicle problem.

Nor is it relevant that Petitioners did not address *Public Citizen* in the court of appeals, U.S.Opp.18, because the Surface Transportation Board did, D.C. Cir. Doc. 1990826 at 30–34. The D.C. Circuit's rules bar intervenors from "repetition of facts or legal arguments made in the principal . . . brief." D.C. Cir. R. 28(d)(2). Since the Board's principal brief had already made a *Public Citizen* argument, Petitioners could not repeat it. And as shown by the panel's rejection of the Board's argument, the D.C. Circuit directly addressed the question now presented to this Court. Pet.App.36a–37a.

This case is actually an ideal vehicle for answering the question presented. Because the Board has authority to weigh environmental effects in its decisions, the D.C. Circuit applied *Sabal Trail* to hold that NEPA required review of the reasonably foreseeable impacts of upstream oil wells, downstream oil refining, and downline fires, accidents, and spills. Pet.App.36a–37a. It made no difference that those effects were not proximate to the new Uinta Basin Railway—which was the only action within the Board's regulatory authority—or that they were regulated by other agencies. The question in the petition is thus cleanly presented. Further, as amici note, it is rare for NEPA cases to reach this Court because most project proponents would rather accept a remand that lets them continue developing their project. INGAA Br. 13–14. So this case is not only an ideal vehicle, it could be the last vehicle the Court sees for a long time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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