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 Writ of Certiorari to the
United States Court of Appeals for the District of Columbia

BRIEF FOR THE AMERICAN EXPLORATION & MINING ASSOCIATION, ALASKA MINERS ASSOCIATION, ARIZONA MINING ASSOCIATION, COLORADO MINING ASSOCIATION, IDAHO MINING ASSOCIATION, MINNESOTA EXPLORATION ASSOCIATION, INC. DBA MININGMINNESOTA, MONTANA MINING ASSOCIATION, NEVADA MINING ASSOCIATION, NEW MEXICO MINING ASSOCIATION, SOUTH DAKOTA MINERAL INDUSTRIES ASSOCIATION, UTAH MINING ASSOCIATION, WOMEN'S MINING COALITION, AND WYOMING MINING ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

Amici curiae are a diverse group of organizations involved in developing and mining various metals and non-fuel minerals that are critical to life in the twenty-first century. Amici and the communities in which they live and work all suffer from a protracted environmental-

[1] Pursuant to this Court's Rule 37.6, counsel for amici curiae state that no party or counsel for a party, or any other person other than amici curiae and their counsel, made a monetary contribution to fund the preparation or submission of this brief.

review process that hampers development of critical mineral and materials projects at the pace and scale required to meet national demand.

The American Exploration and Mining Association ("AEMA") is a 129-year-old organization with 1,800 members in forty-six states. AEMA's members have been active since the 19th century in the entire mining life cycle, beginning with prospecting and exploration, advancing through development and mineral extraction and processing, and concluding with mine reclamation and closure. More than eighty percent of AEMA's members are small businesses or work for them.

The Alaska Miners Association, Arizona Mining Association, Colorado Mining Association, Idaho Mining Association, MiningMinnesota, Montana Mining Association, Nevada Mining Association, New Mexico Mining Association, South Dakota Mineral Industries Association, Utah Mining Association, and Wyoming Mining Association represent the mining industries in eleven states that collectively produced $41.61 billion worth of non-fuel minerals in 2023.[2]

The Women's Mining Coalition is a grassroots organization whose members work in all sectors of the mining industry, including the hardrock and industrial minerals, coal, energy generation, manufacturing, transportation, and service industries.

Amici's mining projects are essential to all facets of modern American life, including renewable-energy generation and transmission, transportation, technology and computing, and more.

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[2] U.S. GEOLOGICAL SURVEY, MINERAL COMMODITY SUMMARIES 2024, at 10–11, tbl. 3 (Jan. 31, 2024), https://tinyurl.com/mvvatysf.

SUMMARY OF ARGUMENT

Fifty years of agency practice and flawed judicial decisions have turned the National Environmental Policy Act of 1970 ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, into a tool of obstruction. Congress called for reasonably informed decisionmaking—not an endless quest for perfect information. At the agency level, NEPA has become a vehicle for *avoiding* decisions, rather than for making reasonably informed ones. And in the courts, NEPA has become a vehicle for endless technical second-guessing.

Amici are uniquely situated to provide this Court with insight into the broken NEPA process. Amici and their members regularly engage with federal decisionmakers to obtain authorization for projects requiring federal approval. Amici are thus, in addition to being developers of critical minerals and materials, active collaborating partners with agencies and diverse stakeholders nationwide. As such, amici offer three points to inform the Court's decision in this case.

First, dramatically reducing current NEPA delays—beyond being compelled by the statute itself—is essential to developing critical minerals and materials sufficient to meet national demand. Unfortunately, slow and overly expansive NEPA analysis (beyond that called for by statute) inhibits the development of critical minerals and materials in the United States. This Court's input is needed to right-size NEPA review.

Second, the D.C. Circuit erred in this case when it required the Surface Transportation Board to analyze environmental effects far beyond the Board's authority to regulate. The D.C. Circuit's decision is irreconcilable with this Court's NEPA jurisprudence, especially *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004). *See id.* at 770 ("[W]here an agency has no ability to pre-

vent a certain effect due to its limited statutory authority," the agency "need not consider" that effect).

Third, and most importantly, this case presents an important opportunity for this Court to provide lower courts and agencies with straightforward, actionable instructions on how to halt the seemingly endless NEPA carousel. NEPA review should once again be limited to the *actionable* information needs of agencies and the *reasonably foreseeable* effects of proposed actions. Any other approach will continue leaving agencies and project proponents unable to predict their NEPA obligations and will hamstring the efficient development of critical minerals and materials.

The Court should reverse the judgment below and reorient NEPA review to its original design.

ARGUMENT

Both the text of NEPA and this Court's earliest cases interpreting it strove for efficient, coordinated, and timely environmental reviews. But NEPA as implemented today produces nothing of the sort. Instead, environmental reviews today routinely prevent or create serious delays for critical mineral and infrastructure projects. Protracted environmental impact analysis—often featuring thousands of pages and years of drafting—seriously hampers the predictability and timeliness of federal decisionmaking, frustrates public participation, and discourages investment in critical minerals and other infrastructure. NEPA has thus become a near-insurmountable impediment to major infrastructure projects, to the detriment of the American economy and national security. This Court's intervention is needed to halt the ever-evolving "Calvinball" NEPA jurisprudence of some circuit courts.

Amici encourage this Court to return NEPA to its fundamental "rule of reason." The Court should correct the D.C. Circuit's erroneous holding that agencies must consider potential environmental impacts far outside their regulatory domain. And more broadly, this case presents an important opportunity for this Court to make the NEPA process cleaner, clearer, and altogether more effective.

A. Increasing NEPA efficiency is essential to developing critical minerals and materials at the pace and scale necessary to meet national demand.

The United States is currently failing to meet essential infrastructure needs across multiple economic sectors. Amici, as developers of critical mineral and material projects, have valuable insights into the reasons why. In particular, extensive NEPA review—beyond the information reasonably useful to decisionmakers or the public—has created delays, increased costs, and prevented the successful buildout of essential projects.

1. The United States' development of critical minerals and materials is insufficient to meet national demands.

Across all sectors of the U.S. economy, there is substantial demand for new and improved infrastructure and greater domestic production of natural resources, especially metals and non-fuel minerals. Yet investment in and development of these critical projects—including mining and energy production and transmission—is severely lagging.[3] The immense difficulties that currently plague the

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[3] *See, e.g.,* EBP & Am. Soc'y Civil Eng'rs, Failure to Act: Electric Infrastructure Investment Gaps in a Rapidly Changing Environment 3 (2020), https://tinyurl.com/shakpfyh (observing that the United States is facing a $208 billion shortfall by

NEPA review process are a primary reason why: those delays and difficulties discourage critical investment.

Multiple presidential administrations (across both major political parties) have highlighted the need to invest in critical infrastructure.[4] Congress has similarly raised the alarm, most recently through passage of the bipartisan Infrastructure Investment and Jobs Act, which provides funding for clean water, shores up supply chains, and supports infrastructure resiliency.[5]

Despite this apparent commitment to infrastructure development, investment and buildout have fallen well behind demand. The Department of Energy's 2023 National Transmission Needs Study has reported, for example, that from 2010 to 2020, annual investment in large electric transmission projects actually *decreased*, despite steadily increasing demand.[6] A related 2023 study from Lawrence Berkeley National Laboratory found that there are more than 1,000 gigawatts of clean energy stuck in "interconnection queues" due to transmission con-

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2029 and a $338 billion shortfall by 2039 in investment to ensure a reliable energy system).

[4] *See, e.g., Fact Sheet: Biden-Harris Administration Kicks Off Infrastructure Week by Highlighting Historic Results Spurred by President Biden's Investing in America Agenda* (May 13, 2024), THE WHITE HOUSE, https://tinyurl.com/375p2s3y; *Remarks by President Trump on the Rebuilding of America's Infrastructure: Faster, Better, Stronger | Atlanta, GA* (July 15, 2020), THE NATIONAL ARCHIVES (Trump White House), https://tinyurl.com/43k88wun.

[5] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021); *see also Fact Sheet: The Bipartisan Infrastructure Deal* (Nov. 6, 2021), THE WHITE HOUSE, https://tinyurl.com/4h26wy27.

[6] DEP'T OF ENERGY, NATIONAL TRANSMISSION NEEDS STUDY 21–24 (Oct. 2023), https://tinyurl.com/dn3kpv9h.

straints, among other reasons.[7] Because transmission is not being built, clean energy projects are unable to come online.

As another example, President Biden in March 2022 exercised his authority under the Defense Production Act, 50 U.S.C. § 4533, and ordered the Department of Defense to expand domestic production of "the strategic and critical materials necessary for the clean energy transition—such as lithium, nickel, cobalt, graphite, and manganese for large-capacity batteries."[8] Failing to do so, President Biden declared, would "severely impair the national defense capability."[9] In response, the Department of Defense has directly invested hundreds of millions of dollars in mineral and other projects. In May 2024, for instance, with domestic production capacity lagging, the Department announced a nearly $15 million investment in privately owned cobalt and graphite mines in Canada.[10] Such investments must be "essential to the national defense" and directed at development that is otherwise not expected to occur domestically "in a timely manner." 50 U.S.C. § 4533. In other words, the Department has

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[7] Joseph Rand et al., *Queued Up: Characteristics of Power Plants Seeking Transmission Interconnection As of the End of 2022*, LAWRENCE BERKELEY NAT'L LAB'Y (Apr. 2023), https://emp.lbl.gov/queues.

[8] Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as Amended, 87 Fed. Reg. 19775, 19775 (Mar. 31, 2022). Critical materials are those that are essential to the economic and national security of the United States yet are exposed to vulnerable supply chains. *See* 30 U.S.C. § 1606(a)(3).

[9] 87 Fed. Reg. at 19776.

[10] *Department of Defense Awards $14.7 Million to Enhance North American Cobalt and Graphite Supply Chain* (May 16, 2024), U.S. DEP'T OF DEFENSE, https://tinyurl.com/yp7ebhvw.

determined it must invest in foreign mineral projects because the process in the United States is failing.

Congress likewise has stressed the importance of secure mineral and material supply chains for economic and national security. Committees in the House and Senate have detailed the fragility of mineral supply chains and the exploding global demand for critical minerals and materials.[11] A pair of studies by S&P Global recently found that "energy transition-related U.S. demand for the critical minerals lithium, nickel, and cobalt, taken together, will be 23 times higher in 2035 than it was in 2021."[12] Just to achieve net-zero carbon emissions goals by 2050, global copper production must double within the next decade—"an expansion that current exploration trends or projects in the feasibility stage of development are incapable of meeting."[13] Today, the United States can meet just half of its copper demand through domestic sources.[14]

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[11] *E.g.*, *Full Committee Hearing on Domestic Critical Mineral Supply Chains* (Mar. 31, 2022), SEN. COMM. ON ENERGY & NAT. RES., https://tinyurl.com/5d54n5rm; *Unleashing America's Energy and Mineral Potential | Full Committee Oversight Hearing* (Feb. 8, 2023), HOUSE COMM. ON NAT. RES., https://tinyurl.com/kmfpxs6b; *Full Committee Hearing to Examine Opportunities for Congress to Reform the Permitting Process for Energy and Mineral Projects* (May 11, 2023), SEN. COMM. ON ENERGY & NAT. RES., https://tinyurl.com/5dehcnw9.

[12] S&P GLOBAL, INFLATION REDUCTION ACT: IMPACT ON NORTH AMERICA METALS AND MINERALS MARKET 11 (Aug. 2023), https://tinyurl.com/3a8t6zee.

[13] IHS MARKIT, THE FUTURE OF COPPER: WILL THE LOOMING SUPPLY GAP SHORT-CIRCUIT THE ENERGY TRANSITION? 11–12 (July 2022), https://tinyurl.com/bdd5beue.

[14] *Id.* at 59–62.

To meet these identified needs across the economy, America needs to build much more infrastructure, more quickly. Amici are among those answering the call. But the unnecessarily expansive and inefficient NEPA review process frequently stands in the way.

2. Overly expansive NEPA analyses are a major obstacle to the approval of critical minerals and materials development.

a. Amici have substantial experience with NEPA's simple mandate that federal agencies provide a "detailed statement" regarding the "reasonably foreseeable environmental effects" of "major federal actions." 42 U.S.C. § 4332(2)(C)(i). In reality, the implementation of NEPA is anything but simple. Amici have regularly been forced to wait years, to watch investments dwindle and costs rise, and to be bogged down by litigation as agencies try to satisfy NEPA's ever-shifting requirements.

The problem is well documented: Expansive and lengthy NEPA reviews have plagued major infrastructure projects for decades, including important energy and mineral projects. In 2020, a Council on Environmental Quality ("CEQ") study determined that the median time to complete an environmental impact statement is over three years. The study also found that fewer than a quarter are completed in less than two years, not counting the additional delays that are likely to arise in connection with litigation challenging the sufficiency of the final statement.[15] Complex, multi-jurisdictional infrastructure projects often take much longer. The National Association of Environmental Professionals has similarly reported that,

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[15] EXEC. OFF. OF THE PRESIDENT, CEQ, ENVIRONMENTAL IMPACT STATEMENT TIMELINES (2010–2018) 1, 4 (June 12, 2020), https://tinyurl.com/5h7jj3wz.

from notice of intent to final publication, most environmental impact statements take between three to four years to complete.[16] And despite decades of agency-led attempts to streamline the process, these delays persist.[17] In fact, one recent study concluded that it takes longer to develop a mining project in the United States (about twenty-nine years from first discovery to first production) than any other country except for Zambia (at thirty-four years).[18]

Delays are attributable to a variety of factors, including public consultation, technical study, and the interests of agencies in protecting their decisions from potential litigation.[19] For example, the more environmental effects that agencies must review, the longer the review process

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[16] NAT'L ASSOC. OF ENV'T PROFS., 2022 ANNUAL NEPA REPORT (July 2022), https://tinyurl.com/yeys784h.

[17] Even in 1978, CEQ lamented that "the environmental impact statement has tended to become an end in itself, rather than a means to making better decisions." National Environmental Policy Act – Regulations, 43 Fed. Reg. 55978 (Nov. 29, 1978). In 2020, CEQ suggested that environmental impact statements should generally be completed within two years, a requirement later codified by the Fiscal Responsibility Act amendments to NEPA. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304-01, 43308-13 (July 16, 2020); 42 U.S.C. § 4336a(e).

[18] *See* MOHSEN BONAKDARPOUR ET AL., S&P GLOBAL, MINE DEVELOPMENT TIMES: THE US IN PERSPECTIVE 20 (June 2024), https://tinyurl.com/bde8t9hv.

[19] Alyson C. Flournoy et al., *Harnessing the Power of Information to Protect Our Public Natural Resource Legacy*, 86 TEX. L. REV. 1575, 1582–1583 (2008) ("Another consequence of the emphasis on comprehensiveness is that it delays completion of [environmental impact statements], therefore delaying the agency's consideration of the information in the document as part of its underlying decisionmaking process.").

will take—and the longer the environmental impact statements themselves, with corresponding increases in the time that it takes to prepare them. Moreover, in part because of the wide array of interests affected by major federal actions, NEPA is the most litigated federal environmental statute, with an average of over one hundred cases filed annually.[20] Delays arising from such litigation add to the difficulties associated with NEPA review.

Long and unpredictable NEPA timelines, together with high litigation risks, contribute to extremely slow development and discourage investment. Developers may choose not to undertake significant projects altogether, for risk of falling prey to the "paralysis by analysis" that is too often a feature of NEPA.[21] And indeterminate permitting horizons mandate greater assumption of upfront risk, a decidedly unattractive prospect to investors already facing potentially distant returns. The effects are far-reaching. As amici know well, delays in authorization for critical infrastructure projects reverberate throughout the national economy, from technology and healthcare to energy and transportation to national security.[22]

Amici's mineral development projects serve critical needs. Exploration and development of domestic sources of critical minerals and materials is a key component of

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[20] *See* CONGRESSIONAL RSCH. SERV., NATIONAL ENVIRONMENTAL POLICY ACT: JUDICIAL REVIEW AND REMEDIES 1 (Sept. 22, 2021), https://tinyurl.com/mrha23tu.

[21] *See* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 929 (2002) ("The rigors of EIS production, coupled with the risk of judicial reversal, may induce the agency to delay any action until 'all the facts are in'—the familiar problem of 'paralysis by analysis.'").

[22] *See, e.g.*, Rand et al., *supra* note 7.

America's transition to clean, renewable energy. Congress and the Executive Branch have each recognized the important role that domestic metals and other minerals mining will play in the expansion of clean energy, including solar power, wind energy, and battery storage. And expanding the nation's supply of affordable, reliable, and renewable sources of power is crucial for a sustainable energy future nationwide. Amici also supply metals and minerals necessary for expanded public transportation, enhanced computing, and the cell phones in Americans' pockets.

b. A few examples illustrate why the average environmental review time can be so long—and so problematic—for projects like amici's.

For one, NEPA delays frequently obstruct renewable energy and transmission projects.[23] Law professors J.B. Ruhl and James Salzman recently published an exhaustive analysis of NEPA and other impediments to timely development of clean energy.[24] Among other projects studied, they found that the largest land-based wind farm in the United States, proposed in 2008 for federal land in Wyoming, will not be completed until 2026—assuming no further delays from litigation.[25] Another study found that

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[23] *See, e.g.*, *Wild Virginia* v. *United States Forest Serv.*, 24 F.4th 915, 925 n.6 (4th Cir. 2022) (describing how vacatur of "several decisions of state and federal agencies approving" a natural gas transportation project led to "ongoing delays[,] increas[ed] cost uncertainty," and, ultimately, project cancellation); *Public Emps. for Env't Resp.* v. *Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016) (observing that the Cape Wind offshore wind project "slogged through state and federal courts and agencies for more than a decade").

[24] J.B. Ruhl & James Salzman, *The Greens' Dilemma: Building Tomorrow's Climate Infrastructure Today*, 73 EMORY L.J. 1 (2023).

[25] *Id.* at 38.

nearly half of all new electric transmission lines face opposition or NEPA litigation that slows development.[26]

In 2017, Columbia Professor Michael Gerard noted that reaching the government's climate goals "will require a program of building onshore wind, offshore wind, utility-scale solar, and associated transmission that will exceed what has been done before in the United States by many times, every year out to 2050."[27] Mentioning NEPA delays specifically, Professor Gerard pleaded in 2022 that America "not just plod along with business-as-usual environmental regulation toward a world of killing heat and mass human migration and species extinction."[28]

The success of renewable energy projects is further hampered by delays in mining for critical minerals and materials. Environmental impact analysis for the ASARCO LLC Ray Mine land exchange in Arizona, for example, took decades to complete. In June 1999, BLM released a final environmental impact statement evaluating the impacts of a land exchange proposed by ASARCO to consolidate its copper mine holdings. More than eleven years later, the U.S. Court of Appeals for the Ninth Circuit ruled that BLM needed to supplement the analysis.[29]

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[26] *See* Ted Boling & Kerensa Gimre, *Evidence-Based Recommendations for Overcoming Barriers to Federal Transmission Permitting*, NISKANEN CENTER & CLEAN AIR TASK FORCE 20 (Apr. 2024), https://tinyurl.com/2hppvhhv.

[27] Michael B. Gerrard, *Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity*, 47 ENV'T L. REP. 10591, 10591 (2017).

[28] Michael B. Gerrard, *A Time for Triage*, 39(6) ENV'T F. 38, 44 (2022).

[29] *Center for Biological Diversity* v. *U.S. Dep't of the Interior*, 623 F.3d 633 (9th Cir. 2010).

It took BLM almost nine years to do so.[30] Including litigation delays, the NEPA process stretched *over 20 years*.[31]

Another example is the Resolution Copper project: a brownfield expansion in Arizona's historic copper belt, the development of which Congress has enacted specific legislation to support, that could meet twenty-five percent of America's demand for copper in coming decades—if it can ever start production.[32] The transition to clean energy will require enormous amounts of copper, which is partly why copper is designated by the Department of Energy as a critical material.[33] Besides copper, the Resolution project would produce a variety of other critical and strategic minerals, including indium, tellurium, and bismuth.[34] All

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[30] Notice of Availability of the Ray Land Exchange Final Supplemental Environmental Impact Statement/Proposed Resolution Management Plan Amendments, Arizona, 84 Fed. Reg. 33284-01 (July 12, 2019).

[31] The Coeur Kensington Gold Mine in Alaska similarly experienced a 17-year freeze in production because of NEPA delays and litigation. *See* SNL METALS & MINING, PERMITTING, ECONOMIC VALUE AND MINING IN THE UNITED STATES 16–17 (2015), https://tinyurl.com/yeys92kh.

[32] *About Us*, RESOLUTION COPPER, https://tinyurl.com/mr2f8b7a (last visited Sept. 3, 2024). *See* Southeast Arizona Land Exchange and Conservation Act, 16 U.S.C. § 539p(a).

[33] *See* IHS MARKIT, *supra* note 13, at 9 ("Unless massive new supply comes online in a timely way, the goal of Net-Zero Emissions by 2050 will be short-circuited and remain out of reach"); Notice of Final Determination on 2023 DOE Critical Materials List, 88 Fed. Reg. 51792, 51792 (Aug. 4, 2023).

[34] *Strategic Minerals*, RESOLUTION COPPER, https://tinyurl.com/2bwxvxy6 (last visited Sept. 3, 2024).

three are designated as critical minerals because of their valuable technology and pharmaceutical uses.[35]

Resolution submitted a mine plan of operations to the United States Forest Service in 2013, and the Forest Service deemed the plan to be administratively complete the following year.[36] To facilitate Resolution's access to the ore beneath surrounding federal lands not already owned by Resolution, Congress in 2014 enacted and President Obama signed the Southeast Arizona Land Exchange and Conservation Act, the express purpose of which was to "expedite" completion of an environmental impact statement analyzing the likely effects of a proposed land swap—federal lands overlying the mining claims for Resolution-owned lands near federal properties elsewhere in Arizona—as well as the land exchange itself.[37] (The publication of the environmental impact statement and the land exchange are each mandated by the statute.[38])

In 2015, the Forest Service hired a third-party contractor to help prepare the environmental impact statement and set a schedule of approximately four-and-a-half years to complete and publish the document. The agency officially began the process in early 2016 and released the

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[35] 2022 Final List of Critical Minerals, 87 Fed. Reg. 10381, 10381–10382 (Feb. 24, 2022). There is no current American source of indium or bismuth, and the United States produces only one percent of the world's tellurium, far less than it consumes. The mine's co-products would also include rhenium—used for fighter jets and turbine blades—and molybdenum, a steel alloy. United States production of these minerals is far below the country's needs.

[36] *Project Overview*, RESOLUTION COPPER, https://tinyurl.com/yenpeznb (last visited Sept. 3, 2024).

[37] 16 U.S.C. § 539p(a) ("The purpose of this section is to authorize, direct, facilitate, and expedite the exchange of land between Resolution Copper and the United States.").

[38] 16 U.S.C. § 539p(c)(1), (c)(9).

final statement just short of five years later in January 2021 (already a year behind schedule).[39] But soon after, in March 2021, the Forest Service withdrew the statement for further evaluation, leaving the land exchange on hold and the mine project in limbo.[40] More than three years later in August 2024, the government reported in related litigation that it still has no target date for republishing the environmental impact statement.[41] Thus, nearly a decade after Congress ordered the government to "expedite" a land exchange to facilitate development of a critical copper resource, with a host of critical mineral and material co-products, the government still does not know when it will complete its statutorily mandated NEPA review.

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Amici support NEPA's goals, including transparency in federal decisionmaking. But the national interest demands that decisions actually be made in a reasonable way and on a reasonable timeframe.

3. Congress's 2023 NEPA amendments highlight the importance of right-sizing NEPA review.

Recognizing the high costs of NEPA-related paralysis in critical infrastructure development, Congress recently passed the most comprehensive amendments to NEPA since it was enacted more than fifty years ago.

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[39] Tonto National Forest; Pinal County, AZ; Resolution Copper Project and Land Exchange Environmental Impact Statement, 81 Fed. Reg. 14829-02 (Mar. 23, 2017); U.S. DEP'T OF AGRIC., FINAL ENVIRONMENTAL IMPACT STATEMENT: RESOLUTION COPPER PROJECT AND LAND EXCHANGE (Jan. 15, 2021), https://tinyurl.com/detdnz58.

[40] National Environmental Justice Advisory Council; Notification of Virtual Public Meetings, 86 Fed Reg. 12943-01 (Mar. 5, 2021).

[41] Joint Status Report at 2, *Apache Stronghold* v. *United States*, No. 21-cv-50 (D. Ariz. Aug. 5, 2024), ECF No. 136.

The Fiscal Responsibility Act ("FRA") of 2023, Pub. L. No. 118-5, 137 Stat. 10, passed by Congress and signed by President Biden, codifies many of the updated regulations that CEQ had promulgated in 2020 to increase the efficiency of NEPA review.[42]

In a new section 111, Congress for the first time defined a "major federal action" triggering NEPA review as "an action that the agency carrying out such action determines is subject to substantial Federal control and responsibility." 42 U.S.C. § 4336e(10). Previously, NEPA contemplated that agencies would self-police the contours of the terms "major," "federal," and "action," with the courts available as a backstop. While the FRA amendments leave a role for the agencies (to "determine[]" whether an action "is subject to substantial Federal control and responsibility"), they provide useful clarity in defining what it means for a federal action to be "major."

For major federal actions to which NEPA applies, the FRA amendments also clarify the basic requirements for an environmental impact statement in section 102(2)(C). 42 U.S.C. § 4332(2)(C). The law now provides that an agency must consider the "*reasonably foreseeable* environmental effects of the proposed agency action," including by analyzing a "*reasonable* range" of alternatives that are "technically and economically feasible" and meet the purpose and need of the proposed action. *Ibid.* (emphases added).[43]

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[42] *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304-01 (July 16, 2020).

[43] *See also* 40 C.F.R. § 1508.1(ii) ("Reasonably foreseeable means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision."); *Sierra Club* v.

Finally, the FRA codifies presumptive deadlines and page limits for environmental reviews under NEPA, including a judicially enforceable two-year limit for environmental impact analyses. *See* 42 U.S.C. § 4336a(e).

Congress's emphasis on foreseeability, reasonableness, and timeliness reflects the concern—shared by amici based on their experience—that the current application of NEPA fails to meet its goals, including to "fulfill the social, economic, and other requirements of present and future generations of Americans," 42 U.S.C. § 4331(a), and to "achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities," *id.* § 4331(b)(5). The FRA amendments are critical to moving the needle. For one thing, Congress chose enforceable deadlines and page limits for NEPA reviews that are significantly stricter than current practice. And Congress's choice of the word "substantial" to describe the sort of federal ties required to trigger NEPA indicates its resolve to place reasonable limits on not only *which* agency actions trigger NEPA but also the *scope* of the review required.

The FRA amendments emphasize the need for right-sized, informative, and actionable analyses for decisionmakers, in line with NEPA's original intent. But there is still more important work to do, especially in light of court decisions like the D.C. Circuit's in this case.

Marsh, 976 F.2d 763, 767 (1st Cir. 1992) ("[T]he terms 'likely' and 'foreseeable,' as applied to a type of environmental impact, are properly interpreted as meaning that the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.") (citing *Barber Lines A/S* v. *M/V Donau Maru*, 764 F.2d 50 (1st Cir. 1985) (Breyer, J.) (explaining the meaning of "likely" and "foreseeable" as applied to tort liability for "financial losses" not associated with physical harm)).

B. The D.C. Circuit's decision is irreconcilable with this Court's NEPA precedent.

In *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2003), this Court unanimously reaffirmed the fundamental "rule of reason" governing NEPA: "where an agency has no ability to prevent a certain effect due to its limited statutory authority," the agency "need not consider" that effect. *Id.* at 770. The Court explained that NEPA's language requires analysis only of environmental effects that bear "a reasonably close causal relationship" with the agency action that is subject to NEPA review. *Id.* at 767. Mere "but for" causation between the agency action and a given effect is "insufficient" to require that the agency review that effect under NEPA. *Ibid.*

The D.C. Circuit's decision below, by contrast, has asserted that where an agency nominally can prevent an environmental effect by simply withholding altogether its approval for a project, the agency must analyze that effect. *See* Pet. App. 37a ("[G]iven 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.").

Setting aside the concerning policy implications of that view—including that it would seem to sanction halting or further delaying essentially all beneficial development of critical infrastructure—this case should have been an easy one under *Public Citizen*. There, as here, requiring the agency to review distant effects over which it has no authority "would serve no purpose in light of NEPA's regulatory scheme as a whole … ." 541 U.S. at 767 n.4 (quotation marks omitted). The Surface Transportation Board has no authority to mitigate or prevent so-called "down-

line" or "upline" effects of the new Uintah Basin Railway. *Cf.* Pet. App. 36a–37a. At most, the Board's authorization for the Railway is a "but for" cause of such effects. This Court has already decided that case.

The D.C. Circuit's decision indicates a misunderstanding of NEPA's purposes. The court erred by second-guessing the Board's reasoned decisionmaking regarding the appropriate scope of its regulatory review. And the court neglected NEPA's emphasis on *procedures* for informed decisions rather than environmentally preferable *outcomes*. Agencies and stakeholders interested in the efficient development of critical infrastructure thus need this Court's assistance to clarify the proper scope of NEPA and to reduce the risk of unnecessary and overly burdensome reviews on critical projects.

C. The Court should clarify the applicable standard in line with NEPA's text and purpose.

This Court should reverse the decision below and hold that the D.C. Circuit's reading of *Public Citizen* was incorrect. More broadly, amici's NEPA experiences demonstrate that the Court should return NEPA to the basic "rule of reason" that animated Congress first in 1969, *see Public Citizen*, 541 U.S. at 767, and again in 2023, *see* 42 U.S.C. § 4332(2)(C)(i). This case presents an important opportunity for this Court to provide lower courts and agencies with straightforward, actionable instructions regarding the scope of NEPA review.

1. Lower courts must adhere to NEPA's hallmark "rule of reason."

Amici are witnesses to how NEPA review can be meandering and time-consuming, even as demand for critical minerals and clean energy is at an all-time high. As this Court put it in *Metropolitan Edison Co.* v. *People*

Against Nuclear Energy, 460 U.S. 766 (1983), "[t]ime and resources are simply too limited … to believe that Congress intended to extend NEPA as far as the Court of Appeals has taken it" here and in other cases. *Id.* at 776.

This Court has repeatedly affirmed in recent years that the scope of agency authority is a question for the courts, not the agencies. *See, e.g.*, *West Virginia* v. *Environmental Prot. Agency*, 597 U.S. 697, 723 (2022) ("Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line." (cleaned up)). The D.C. Circuit, on the other hand, would have agencies do anything and everything necessary to satisfy NEPA, regardless of the reach of their statutory responsibility. *Cf. Loper Bright Enters.* v. *Raimondo*, 144 S.Ct. 2244, 2273 (2024) ("[W]hen a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it.").

Interpreting NEPA as the D.C. Circuit did below creates an untenable situation for agencies and developers alike. If *any* environmental effect that results indirectly from an agency's action must be part of the agency's NEPA analysis—regardless of the agency's ability to regulate or prevent that effect—then the agency would need to "expend considerable resources developing … expertise that is not otherwise relevant to [its] congressionally assigned functions." *Metropolitan Edison*, 460 U.S. at 776. This case is an instructive example. The D.C. Circuit faulted the Surface Transportation Board's analysis of (among other things) greenhouse gas emissions that may result from increased oil refining on the Gulf Coast, risks of wildfires, and effects on Colorado River wildlife. *See* Pet. App. 30a–37a, 42a–47a.

The court of appeals rejected the Board's argument that it could not reasonably predict the greenhouse gas emissions that might result from increased refining on the Gulf Coast because it lacked sufficient information to do so. *See* Pet. App. 30a–37a. According to the court, the Board should "employ some degree of forecasting" to quantify the impacts of increased oil production, *id.* at 35a (quotation marks omitted), even though such forecasting would require developing expertise that otherwise has nothing to do with the Board's statutory transportation-related duties, *see Metropolitan Edison*, 460 U.S. at 776. Regarding the risk of wildfires, the Board concluded that the risk from the Uintah Basin Railway would be low. *See* Pet. App. 42a. The D.C. Circuit simply disagreed about what the available data meant, even while recognizing the rigor of the Board's expert analysis. *See id.* at 44a–45a. For water resources and wildlife, the court's disagreement was even more pedantic: the Board *did* consider effects on "all water resources" adjacent to the project, but because it did not say the words "Colorado River," its analysis was deemed deficient. *Id.* at 46a–47a. Such "mere[] flyspecks" should not be the basis for delaying the Uintah Basin Railway or other critical United States infrastructure projects. *Utahns for Better Transp.* v. *U.S. Dep't of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 2002), *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003).

For amici, whose efforts to develop mining projects critical to national interests are already stifled by overly expansive and indiscriminate environmental review processes, the D.C. Circuit's butterfly-effect approach will only exacerbate delays and all the problems that come

with them.[44] That result could be fatal to a multitude of projects critical to life in the twenty-first century. This Court should use its decision here to reorient the lower courts toward the time-tested NEPA "rule of reason."

2. NEPA review should focus on the actionable information needs of agencies, calibrated to their statutory authority.

Amici urge the Court to give the FRA amendments their full force and return NEPA to first principles. That includes focusing environmental review on the discrete, actionable information needs of each reviewing agency.

For decades, it has been "well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. … Other statutes may impose substantive obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350–351 (1989) (footnote omitted). The NEPA requirement of environmental-impact analysis serves two purposes. First, it "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Id.* at 349. Second, it guarantees relevant information is accessible to stakeholders with interests in the agency's decision. *Id.* at 349–350.

In line with these purposes, this Court has long recognized that NEPA review is not unlimited: "To make an impact statement something more than an exercise in frivolous boilerplate[,] the concept of alternatives must be

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[44] *See, e.g.*, Ruhl & Salzman, *supra* note 24, at 34 ("More litigation, lengthier environmental reviews, and agency actions to avoid conflict work in tandem to increase costs.").

bounded by some notion of feasibility." *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978). "Common sense also teaches us that the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man." *Ibid.* "Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved." *Ibid.*

Congress envisioned that NEPA would focus environmental analysis on information that has real, practical value to decisionmakers. Information that an agency cannot act on has no real value other than to complicate matters and prolong the process. *See Public Citizen*, 541 U.S. at 768. The D.C. Circuit, by contrast, would require an agency to perform an essentially unlimited analysis which, in the end, may still be second-guessed by litigants or judges who can creatively hypothesize some other effect the agency did not initially consider. Agencies and project proponents would be left unable to predict the extent of their NEPA obligations, while the courts would take on the improper role of "environmental-policy czar," *Center for Biological Diversity* v. *U.S. Army Corps of Engineers*, 941 F.3d 1288, 1299 (11th Cir. 2019). The D.C. Circuit's approach exceeds the proper scope of judicial review under NEPA.

For NEPA to meet its goals, the required scope of environmental impact analysis cannot hinge on the creativity of imagination. *See Vermont Yankee*, 435 U.S. at 551 ("every alternative device and thought conceivable by the mind of man"). Rather, it must focus on the *reasonably*

foreseeable effects of proposed actions—the proper analysis of which must be constrained by the scope of the agency's delegated powers. For it is analysis of *those* effects, not cascading consequences far away from a project site, beyond the agency's regulatory authority or experience, that supports the kind of reasoned decisionmaking that Congress intended.

In short, the courts' role is to decide whether agency actions are "reasonable and reasonably explained." *Federal Commc'ns Comm'n* v. *Prometheus Radio Project*, 592 U.S. 414, 423 (2021). And where an agency cannot prevent some environmental effect, it "need not consider" that effect under NEPA for its decision to be reasonable and reasonably explained. *Public Citizen*, 541 U.S. at 770.

This Court's reaffirmation of these basic principles in this case, and its endorsement of the FRA's focus on "reasonable" foreseeability, will help ensure that amici can responsibly and efficiently develop the critical infrastructure that the Nation needs to respond to modern challenges.

CONCLUSION

The judgment of the D.C. Circuit should be reversed.

Respectfully submitted,

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September 4, 2024