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 CIRCUIT

## BRIEF OF THE AMERICAN PLANNING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF NO PARTY

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## STATEMENT OF INTEREST OF *AMICUS*

The American Planning Association (APA) is a non-profit membership organization founded in 1978 to advance the art and science of planning and development at the local, regional, state, and national levels. APA and its professional institute, the American Institute of Certified Planners (AICP), represent more than 39,000 practicing planners, elected officials, and citizens in 47 regional chapters and every state.[1]

APA members work in both the public and private sectors, on behalf of government agencies and private landowners and developers, to formulate and implement planning, zoning, and other development regulations. APA has long educated the nation's planning professionals on the planning and legal principles that underlie land-use planning and regulation through publications and training programs. APA advocates for planners' interests by filing *amicus curiae* briefs on important land-use law questions in state and federal courts across the country.

APA's interest in this case relates to environmental review's importance to planners, both at the national and community levels. The availability and public dissemination of complete and accurate information about a given action lies at the heart of good planning practice and reasoned

1. Pursuant to Supreme Court Rule 37.6, APA affirms that no counsel for a party authored this brief in whole or in part, and that no such counsel or party, other than APA or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

public decisionmaking.[2] The National Environmental Policy Act (NEPA) requires and provides this essential information to planners and the public, enabling better understanding of and planning for complex and potentially irreversible environmental impacts. NEPA's application will often, as intended, raise issues and offer strategies for impact mitigation by levels of government that are of special concern to professional planners. Without this tool, such impacts and strategies might not otherwise be examined as a matter of any federal, state, or local policy. In many cases, therefore, NEPA requires the only environmental review given to complex projects, including those with interstate consequences.

## SUMMARY OF ARGUMENT

This case presents a narrow question that should receive an equally narrow answer. With the President's approval, Congress has already substantively changed the governing statute, so this should not be a case "for the ages."

Because the relevant words in NEPA are clear, a court dedicated to textualism should give the text of NEPA

2. "Special concern for the long-range consequences of past and present actions," and "the interrelatedness of decisions and their unintended consequences," are so significant to the field of professional planning that they appear in the AICP code of ethics as public interests that "people who participate in the planning process shall continuously pursue and faithfully serve." *See* Am. Inst. of Certified Planners, AICP Code of Ethics and Professional Conduct, Section A.1.3–4 (Nov. 2021), *available at* https://planning-org-uploaded-media.s3.amazonaws.com/document/add38c5d-71d4-4915-92d6-650140adf7fbAICP-Code-of-Ethics-and-Professional-Conduct-2021.pdf.

the same respect accorded to other clear statutes. As Congress recently demonstrated, bipartisan majorities in each chamber know how to change the words of NEPA when that is their intention.

NEPA was adopted with the stated intent of providing a complete understanding of the environmental impacts, both direct and indirect, of major federal actions and decisionmaking. The Question Presented involves whether NEPA requires analysis of all anticipated environmental effects of a project, when some of the impacts can only be mitigated by state or local governments or other federal agencies, rather than the lead federal agency. Such information is particularly valued because, in many states, NEPA is the only mechanism available to recommend non-federal mitigation of such impacts, even if the impacts would not occur without the subject federal action. If NEPA's text does not decide the case, the Court should avoid interpreting NEPA in ways that leave gaps or vacuums in the statute's ability to inform government agencies and the public of both direct and indirect impacts of a major agency action.

APA's membership includes experts who perform environmental review, submit sophisticated recommendations to those performing environmental review, and benefit from the information that environmental review provides. They, and the public, benefit when environmental review under NEPA achieves its recognized goal of informing "a larger audience" than the lead agency of the potential environmental impacts of a proposed project. Without NEPA review of the entirety of environmental impacts, many decisions would be made with incomplete information and the public

would be deprived of a sufficient understanding of how their environment would be affected by proposed federal actions.

## ARGUMENT

### A. This Court should succinctly answer the Question Presented (as an interpretation of the pre-2023 version of NEPA), and stop without opining on other issues.

This Court's October 2024 session is an awkward time for the Court to weigh in on the meaning of what was—until mid-2023—the primary federal environmental review statute, known for more than a half-century as NEPA.[3] While this particular environmental review was conducted under a 2021 version of NEPA, the most relevant parts of NEPA have been supplanted and augmented by "the BUILDER Act."[4] After being

3. The "Question Presented" in Petitioners' Certiorari Petition is "[w]hether the National Environmental Policy Act requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority." Cert. Pet. at i.

4. Both the D.C. Circuit decision below (issued more than two months after the enactment of the BUILDER Act), reversing a Surface Transportation Board decision from 2021, and the Petition for Certiorari, rest on pre-2023 authorities. *See Eagle Co. v. Surface Transp. Bd.*, 82 F.4th 1152, 1179 (D.C. Cir. 2023) (relying on *Sierra Club v. FERC* (*Sabal Trail*), 867 F.3d 1357, 1368 (D. C. Cir. 2017)); Cert. Pet. at 1–2 (relying on 42 U.S.C. § 4332(2)(C) (2019)). And while there were amendments to the implementing regulations in 2020 and 2022, the agency's 2021 decision applied "pre-2020 regulations." *Eagle Co.*, 82 F.4th at 1175.

introduced in earlier sessions of Congress as the "Building U.S. Infrastructure through Limited Delays and Efficient Reviews (BUILDER) Act,"[5] it was reintroduced in the 118th Congress in 2023 as H.R. 1577, then was absorbed (with its original title included) into an omnibus "must pass" measure increasing the federal debt limit, as Division C, title III, § 321 of the Fiscal Responsibility Act of 2023. That Act passed on June 3, 2023, as Pub. L. 118–5, 137 Stat. 38. As enacted, it struck the previous five essential elements of the "detailed statement" (constituting the primary NEPA review document, often an Environmental Impact Statement) and replaced them with substantively different requirements. Pub. L. 118-3, Div. 3, title III, § 321(a)(3) (codified at 42 U.S.C. § 4332(2)(C)). It also added a specific disclaimer stating that "[a]n 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." *Id.* § 321(b) (codified as 42 U.S.C. § 4336(a)(4) (2023)).

This case does *not* require the Court to interpret or apply the BUILDER Act, because it is reviewing a lower court's application of the pre-amendment version of the operative law.[6] And because it is not the Court's role to decide, in the first instance, a question not passed upon

5. *See* 116th Cong., Second Sess., H.R. 8333; 117th Cong., First Sess., H.R. 2515.

6. Petitioners' opening brief acknowledges that the BUILDER Act is "not directly applicable to this pre-Act project[.]" Pet. Br. at 27.

by a lower court,[7] it should not attempt to construe the BUILDER Act in this case. Unless the Court wishes to revive the practice of analyzing "subsequent legislative history,"[8] the Court should not attempt to decide what the 2023 Congress's revisions to a 1969 statute reflect about the meaning of that statute before its amendment.

Nor should the Court give into the temptation to address, let alone decide, issues unnecessary to answer "the Question Presented." As the second Justice Harlan wrote, "this Court does not decide important questions of law by cursory dicta inserted in unrelated cases." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968). This Court's avoidable dicta can have a disruptive and

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7. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) ("Ours is 'a court of final review and not first view.' *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110, 122 S.Ct. 511, 151 L.Ed.2d 489 (2001) (per curiam) (internal quotation marks omitted). Ordinarily, 'we do not decide in the first instance issues not decided below.' *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470, 119 S.Ct. 924, 142 L.Ed.2d 929 (1999).").

8. This Court's consideration of "subsequent legislative history" largely ended with Justice Scalia's critiques of it. *See, e.g.*, *Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990) (Scalia, J. concurring) ("The legislative history of a statute is the history of its consideration and enactment. 'Subsequent legislative history'—which presumably means the post-enactment history of a statute's consideration and enactment—is a contradiction in terms. . . . Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote."). Contrary to a suggestion in Petitioners' opening brief, Justice Scalia and Bryan Garner's 2012 treatise did not bring back from the dead enough of that doctrine to enable later amendments to a statute to "endorse" certain interpretations of its earlier text. Pet. Br. at 28–29.

perhaps unintended effect on lower courts and on planners who endeavor to heed this Court's rulings.

### B. In answering the Question Presented, the Court should honor its commitment to textualism and plain meaning.

"Section 101 of NEPA [before the BUILDER Act] declares a broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989) (*Robertson*) (citing 83 Stat. 852 (codified at 42 U.S.C. § 4331)). It does so through statutory text that is unmistakably clear, rather than nuanced or ambiguous. To pick a particularly relevant example, Section 102 of NEPA, as revised and as codified as 42 U.S.C. § 4332(2)(C), stated:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) **all agencies** of the Federal Government **shall—**
>
> * * *
>
> (C) **include in** every recommendation or report on proposals for legislation and **other major Federal actions significantly affecting the quality of the human environment**, a detailed statement by the responsible official on—

> (i) **the environmental impact of the proposed action,**
>
> (ii) **any adverse environmental effects** which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (vi) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C) (2019) (emphasis added) (as revised by Pub. L. 94–83, Aug. 9, 1975, 89 Stat. 424). Notably, the text of NEPA applicable in this case does not limit the "environmental impact of the proposed action" or "any adverse environmental effects which cannot be avoided" by reference to the statutory authority of the federal agency charged with the review. Indeed, the text that defines the scope of the required environmental review includes no limiting language that varies depending on agency jurisdiction or reach. APA agrees with the Federal Respondents' conclusion that "confining agencies' NEPA obligations to the consideration of environmental effects they already directly regulate would contravene Congress's command that '*all* agencies of the Federal Government' shall 'to the fullest extent possible' comply

with the obligation to prepare an environmental impact statement in connect with major actions that have significant environmental effects." Fed. Resp. Br. at 31–32 (emphasis in the brief ) (quoting 42 U.S.C. § 4332).

NEPA's text also demonstrates that Congress and President Nixon understood that a single federal agency may not possess all relevant expertise to analyze economic impacts and all jurisdiction to mitigate them—because NEPA itself requires "the head of the lead agency shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." 42 U.S.C. § 4332(2)(C).[9]

As this Court observed on the final day of its most recent term, "the best course, as always, is to stick with the ordinary meaning of the text that actually applies[.]" *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2454 (2024). There, the Court rejected a contrary interpretation that had been followed by every Circuit that had reached the question—except for a single opinion from the Sixth Circuit that was based on the controlling statute's text. *Id.* at 2449 (citing with approval *Herr v. United States Forest Serv.*, 803 F.3d 809, 820–22 (6th Cir. 2015)). And in *Loper Bright Enterprises v. Raimondo*, when choosing between a textual interpretation of the Administrative Procedure Act (which did not differentiate

9. The BUILDER Act has gone further, in requirements now codified in 42 U.S.C. § 4336a(a)(3). As the Federal Respondents' brief explains, the Act as now amended "forbids the lead agency from disregarding an effect based solely on the fact that another agency has more direct 'jurisdiction by law' over the effect." Fed. Resp. Br. at 32 (quoting 42 U.S.C. § 4336a(a)(3)).

based on an agency's chosen interpretation) or following decades of this Court's own precedents and continuing to imply into the text such a distinction, this Court chose to follow statutory text rather than *stare decisis*. 144 S. Ct. 2244, 2261–62 (2024) ("[B]y directing courts to 'interpret constitutional and statutory provisions' without differentiating between the two, Section 706 makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are not entitled to deference. . . . The text of the [Administrative Procedure Act] means what it says.").

The parties disagree about whether the lower court's decision conflicts with *Department of Transportation v. Public Citizen*, 541 U.S. 752, 763–70 (2004). But *Public Citizen* was not derived from NEPA's text in any significant respect. After a passing reference to the phrases "major Federal actions" and "significantly affecting the quality of the human environment" in Section 4332(2)(C), the Court devoted the rest of its analysis to tools such as the text of administrative interpretations of NEPA (embodied in federal regulations, rather than statutory text),[10] an analogy to tort law, a "rule of reason" which the Court held was "*inherent* in NEPA and its implementing regulations," and limiting language in prior judicial glosses on the implementing regulations, rather than statute's unambiguous text. *Id.* at 764, 766–70 (emphasis

10. In *Public Citizen*, the Court framed the question as whether a certain event "is an 'effect' of " the agency's "issuance of the Application" and certain rules, which tracked an administrative regulation which defined "effects" for purposes of applying another administrative rule. 541 U.S. at 763–64. It therefore assumed that the agency's interpretation of NEPA embodied in those regulations was controlling on the Court itself.

added). Such methods of interpretation were unsurprising in 2004, but would be surprising today because of the dominant role textualism now plays when this Court interprets statutes. Unless this Court is willing to declare that those tools are just as robust and widely available to litigants and lower courts today as they were two decades ago, it should act consistently with the textualism of *Loper Bright* and *Corner Post* when construing NEPA.

### C. If the Court is open to non-textual interpretations of NEPA, it should consider how the limitation on NEPA sought by Petitioners would create a "policy vacuum."

NEPA is often the only comprehensive environmental analysis of a project's environmental impacts. Thus, over the past 55 years, many states, localities, and federal agencies have come to rely on the lead federal agency's analysis. Such reliance is why it would be harmful to limit the lead federal agency's understanding of the full environmental impact of its potential actions simply because jurisdiction to mitigate certain consequences ultimately lies with other public bodies.[11]

As this Court acknowledged in *Public Citizen*, in *Robertson* the Court had recognized that NEPA "'guarantees that the relevant information will be made available to a larger audience that may also play a role in both the decisionmaking process and the implementation

11. *See* Thomas Daniels, Environmental Planning Handbook 48 (2d. ed. 2017) (highlighting the interdependencies of environmental impacts, such as "irreversible and irretrievable commitments of resources" that would be involved in the proposed action).

of that decision.'" *Public Citizen*, 541 U.S. at 768 (quoting *Robertson*, 490 U.S. at 349). It did not purport to overrule *Robertson* on this (or any other) point; indeed, *Public Citizen* also acknowledged "NEPA's core focus on improving agency decisionmaking," 541 U.S. at 769 n.2. But that did not include a hypothetical presidential decision to lift a moratorium President Reagan had previously set. *Id.* at 760, 769. In that setting, *Public Citizen* explained, "the 'larger audience' can have no impact on FMCSA's decisionmaking, since, as just noted, FMCSA simply could not act on whatever input this 'larger audience' could provide." *Id.* at 769.

This has mistakenly prompted several lower courts to treat the specific federal agency performing NEPA environmental review as the sole member of every "larger audience" described in *Robertson*, even when there are other agencies—including federal ones—with closely related decisionmaking responsibilities that could benefit from the results of such review. *See*, *e.g.*, *Center for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1294–96 (11th Cir. 2019); *Kentuckians for Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 710 (6th Cir. 2014). This set of Circuits includes one that had continued to recognize after *Public Citizen* that one of two purposes of NEPA was to "'guarantee[ ] that 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.'" *City of Oxford, Ga. v. FAA*, 428 F.3d 1346, 1353 (11th Cir. 2005) (quoting *Public Citizen*, 541 U.S. at 798).

This Court should resist the "somewhat circular[ ]" notion that "if 'the "larger audience" can have no impact

on [the federal agency's] decisionmaking,' the information-production purpose has no function to serve[.]" J.B. Ruhl & Kyle Robisch, *Agencies Running from Agency Discretion*, 58 Wm. & Mary L. Rev. 97, 181 n.295 (2016) (second bracketed alteration in original). Understanding inter-related impacts, interdependent impacts, interstate impacts, secondary impacts, "domino" impacts, long-range impacts, and life-cycle impacts gleaned from environmental review under NEPA is essential to sound planning.[12] They would be lost to planners and their communities under an admittedly limited scope of environmental review that ends where the lead agency's own remedial power ends, despite the importance of this information to other agencies with "downstream" remedial power. That would harm the complementary local planning and mitigation actions undertaken by state and local governments (and other non-federal authorities), as well as the public at large.[13] To put it simply, NEPA currently plays a cornerstone role in how communities plan for and conduct policy related to environmental matters, including land-use planning and comprehensive planning. Planning for the protection and conservation

12. *See*, *e.g.*, Joseph DeAngelis et al., Am. Planning Ass'n, Planning Advisory Service Report No. 596, Planning for Infrastructure Resilience 14 (2019) (emphasizing the importance of identifying and evaluating "cascading hazards" within environmental impacts (also known as "domino" effects)).

13. Diana C. Mendes, *Environmental Impact Assessment*, *in* Am. Planning Ass'n, Planning and Urban Design Standards: Student Edition 310 (Frederick R. Steiner & Kent Butler eds., 2007) ("Environmental impact assessment involves systematically identifying, evaluating, discussing, and documenting the potential beneficial and adverse consequences of implementing a project, development, or program.").

of the local environment involves a combination of local initiatives and federal or state regulations.[14]

Limiting the reach of NEPA's statutory text, much of which was preserved under the BUILDER Act, would leave communities without the benefit of a policy instrument that allows for the impacts of significant federal actions to be fully evaluated, especially in states without state environmental protection acts (so-called "little NEPAs"). However, even if state-based policies were enacted somewhat correctively in the future, states would still lack clear authority to consider interstate-type impacts (or other aspects of the federal-state division of labor in regulation) that are unique to federal authority (and are apparent here). This would thereby deprive communities of essential information from the NEPA/BUILDER Act process that has been used for planning purposes by local communities since NEPA's inception.

Such a "policy vacuum" for local planning applications would likely give rise to a variety of state-based efforts to fill it, some of which would increase the likelihood of a hodge-podge of inconsistent and "splintered" corrective actions across states. For example, if the Surface Transportation Board's own limited statutory authority leaves it unable to investigate the clearly related impacts on Colorado ski resorts of turning dormant railroad lines into paths for long, frequent trains of crude oil headed from Utah to Gulf-coast refineries, and Colorado then fills that vacuum with its own environmental-review requirements, the underlying problem might return to this Court again, as a Dormant Commerce Clause or other

14. Jordan Yin, Urban Planning for Dummies 150 (2012).

extraterritoriality conflict. Similarly, if Colorado's review favors locally profitable ski resorts over trains passing from Utah to Louisiana, the stage is set for an interstate conflict that NEPA could be avoided by evaluating environmental impacts with a federal overview.

Finally, the Court should also consider the effect of narrowing NEPA review to the lead agency's remedial powers upon the quality of the information gathering and analysis conducted. "Comments may be the most important contribution from citizens because they promote informed decision making." Council on Envt'l Quality, A Citizen's Guide to NEPA: Having Your Voice Heard 20 (Jan. 2021).[15] More precisely, comments on a preliminary environmental document from related government bodies and other entities with relevant expertise, and the lead agency's response to those comments, can play a significant iterative role in improving the quality of the analysis in the final document, and thereby improve the permitting and other approval processes that follow.[16] In this way, overlooked potential mitigation measures could be found, as well as potential shortcomings in the preliminary document's initial solutions. As the implementing rules recognize, "accurate scientific analysis, *expert agency comments*, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b) (2019) (emphasis added).

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15. *Available at* https://ceq.doe.gov/docs/get-involved/citizens-guide-to-nepa-2021.pdf.

16. "At appropriate points in the final statement, the agency shall discuss any responsible opposing view that was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised." 40 C.F.R. § 1502.9(b).

Conversely, if the scope of the NEPA process cannot extend beyond those potential problems that the lead agency itself acknowledges it could remedy or solve, then important comments that could result in an improved final document can be rejected out of hand, without a response from any agency. In the long run, narrowing the reach of NEPA in this way would have a chilling effect on the willingness of planners to make the effort to scrutinize preliminary environmental review documents and to submit comments, because of the increasing likelihood that the agency will construe its jurisdiction narrowly as a reason to avoid the need for a substantive response. It is one thing for a court decision to spare lead agencies the need to "'ferret out" every possible consideration," Pet. Br. at 5 (quoting *Vermont Yankee v. Nat. Res. Def. Council*, 435 U.S. 519, 551 (1978)), or "'to expend considerable resources developing expertise.'" Pet. Br. at 18 (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983)). It would be yet another for the Court to narrow NEPA's meaning to the point that information submitted by experts about mitigating environmental impacts is disregarded because it would not be the lead agency's job to put those steps in place.

Petitioners accept this Court's statement in *Robertson* that "NEPA merely prohibits uninformed—rather than unwise—agency action." Pet. Br. at 4 (quoting *Robertson*, 490 U.S. at 351). NEPA has never required federal agencies to mitigate all the direct and indirect impacts arising from its approval. It requires up-front information gathering and assessments of options. When a federal agency is asked to grant a limited permit to a project with wide-ranging, indirect, and interstate impacts, some of which can only be mitigated by other public bodies than

the lead agency, it is not too much to expect the lead agency to also analyze *those* impacts under NEPA.

Governmental agencies may decide to approve projects with serious unmitigated impacts, but they should not do so without the fullest information possible. Fifty-five years of experience and applications of NEPA reflect that more complete information is better. In this case, the evidence shows impacts from a federal decision occurring many miles away from the approved project. NEPA does not prevent approval of the project, it simply requires that the federal agency and every other agency with permit approval have complete information before they make their decisions.

## CONCLUSION

NEPA has been a mechanism critical to informed planning and other decisionmaking. Disregarding the indirect or "downstream" impacts of federal actions would also disregard the text of the statute, the reality of environmental impacts, and the critical necessity of analyzing the complete environmental impacts of governmental decisions as a single process.

Amicus Curiae American Planning Association respectfully requests that it consider the views set forth above in considering this matter.

Respectfully submitted,

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