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, et al.,
Respondents.

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

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BRIEF AMICUS CURIAE OF THE PROPERTY AND ENVIRONMENT RESEARCH CENTER IN SUPPORT OF PETITIONERS

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Interest of Amicus Curiae[1]

The Property and Environment Research Center (PERC) is dedicated to advancing conservation through markets, incentives, property rights, and partnerships. As the national leader in market solutions for conservation, PERC has over 40 years of research and a network of respected scholars and practitioners. Through research, law and policy, and innovative field conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife.[2] Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

Summary of Argument

The National Environmental Policy Act (NEPA) serves an important and laudable goal of ensuring that government agencies consider the environmental consequences of their proposed actions. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Implemented correctly, it also facilitates public participation in the decision-making process. *Id.* However, its misapplication threatens to

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[1] PERC affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PERC, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] *See* Shawn Regan & Tate Watkins, *A Different Shade of Green*, 39 PERC Reports 30 (2020), https://www.perc.org/2020/07/06/a-different-shade-of-green/; Terry L. Anderson & Gary Libecap, *Environmental Markets: A Property Rights Approach* (2014); Terry L. Anderson & Donald R. Leal, *Free Market Environmentalism* (rev'd ed. 2001).

undermine the statute's purpose "to promote" federal agency efforts that "prevent or eliminate damage to the environment[,]" by making the process unworkable even for these efforts. 42 U.S.C. § 4321.

The D.C. Circuit's rule applied below, along with the substantively similar rule in the Ninth Circuit, disrupts even environmentally beneficial agency actions by demanding costly and time-consuming examination of effects for which the agency's action is not the legally relevant cause and that the agency "lacks authority to prevent, control, or mitigate[.]" *Eagle Cnty., Colo. v. Surface Transp. Bd.*, 82 F.4th 1152, 1177, 1180 (D.C. Cir. 2023); *see also Sierra Club v. Fed. Energy Regul. Comm'n*, 867 F.3d 1357, 1371–75 (D.C. Cir. 2017); *Or. Nat. Res. Council Fund v. Brong*, 492 F.3d 1120, 1123–24 (9th Cir. 2007). Under this interpretation, NEPA litigation is limited only by a plaintiff's imagination, creating fraught litigation risks that force agencies to prepare environmental analyses so long, dense, and conjectural that they undermine rather than advance NEPA's goals to facilitate public participation and ensure informed agency decision-making. *See Dept. of Transp. v. Pub. Citizen*, 541 U.S. 752, 768–70 (2004).

While the facts of this case (construction of a rail line and its potential effects on energy development and climate change) are far removed from PERC's conservation interests, we file this brief to draw the Court's attention to the environmental consequences of undermining NEPA's workability. NEPA does not apply only to federal infrastructure or development projects but to any major agency action that has environmental effects, regardless of whether those effects are a net negative or positive. The D.C. and

Ninth Circuits' rule has been used to challenge many conservation efforts, including restoring degraded forest ecosystems,[3] markets for voluntary water conservation,[4] mitigating the effects of wild horses on native wildlife,[5] restoring native rangelands by reintroducing bison,[6] and renewable energy development.[7]

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[3] *Or. Nat. Res. Council Fund*, 492 F.3d. 1120 (holding that an agency's NEPA analysis for a forest restoration project was deficient because the agency did not also consider the effects of private activities on adjacent land).

[4] *Cnty. of Mohave v. Bureau of Reclamation*, No. CV-2208246-PCT-MTL, 2024 WL 706962, (D. Ariz. Feb. 21, 2024) (*Mohave I)* (holding that an agency's NEPA analysis of transferred water moving through federal infrastructure was deficient because the agency did not consider the effects of private landowners' sale of water, of a state's decision to approve that sale, and private land use changes due to future sales). The district court recently narrowed its prior remedy, recognizing that vacating past and ongoing water trades would be unduly disruptive. *Cnty. of Mohave v. Bureau of Reclamation*, No. CV-2208246-PCT-MTL, 2024 WL 3818611, (D. Ariz. Aug. 13, 2024).

[5] *Am. Wild Horse Pres. Campaign v. Zinke*, No. 1:16-CV-00001-EJL, 2017 WL 4349012, (D. Idaho Sept. 29, 2017) (Plaintiff argues that whenever a project saves an agency money, NEPA requires it to consider not only the effects of the project but the effects of any potential alternative uses of the money saved by the project).

[6] Notice of Appeal, Statement of Reasons, and Petition for Stay, *State of Mont. v. Bureau of Land Mgmt.*, MT-010-22-02 (Dept. of Interior Off. of Hearings and Appeals filed Aug. 25, 2022), available at https://governor.mt.gov/_docs/Notice_of_Appeal_Statement_of_Reasons_Petiton_for_Stay_signed. pdf (Plaintiff argues that agency's analysis of a conservation organization changing the type of livestock that graze federal land was deficient because the agency did not consider the effects of all the organization's private conservation activities, including effects on local agricultural businesses.).

[7] *Or. Nat. Desert Ass'n v. Jewell*, 840 F.3d 562 (9th Cir. 2016).

And this misuse of NEPA is only increasing, with NEPA lawsuits becoming more frequent and more likely to target environmentally beneficial activities. Nikki Chiappa et al., *Understanding NEPA Litigation: A Systematic Review of Recent NEPA-Related Appellate Court Cases* 3 (2024) (noting that circuit courts have heard 56% more NEPA appeals over the last decade and that cases disproportionally target forest restoration efforts).[8] Often, as here, this standard is being used to bootstrap review of private activities, including private conservation efforts, onto a NEPA challenge concerning a tangential agency activity. *See, e.g.*, *Or. Nat. Res. Council Fund*, 492 F.3d at 1133–34; *Mohave I*, 2024 WL 706962 at *9–11.

To avoid these adverse consequences, the Court should reaffirm its holding in *Public Citizen* that a "'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA," and clarify that an agency is not required to analyze under NEPA the environmental effects of actions not its own and outside its regulatory authority. *See* 541 U.S. at 767–68. This results in a manageable standard for agencies to determine what they are required to examine and avoids the analysis-paralysis risk posed by the decision below. *Id.* at 767; *see* James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions of Agency Reform*, 12 N.Y.U. Env't L.J. 74, 83 (2003). As discussed below, such analysis-paralysis too often threatens environmentally beneficial projects,

[8] https://thebreakthrough.imgix.net/Understanding-NEPA-Litigation_v4.pdf.

precisely those that NEPA was intended to promote. 42 U.S.C. § 4321.

Argument

I. NEPA affects many environmentally beneficial activities and its workability is a critical conservation issue

Petitioners present this case as a conflict between environmental bureaucracy and economic development,[9] but the consequences of the Court's decision will extend far beyond infrastructure and energy projects. And, although this Court's recent environmental law cases have tended to involve fossil fuel development and climate change,[10] that too is not representative of the typical NEPA conflict or litigation. Instead, the typical case is over less sensational stuff, such as forest restoration, federal-land management, and water conservation. *See* Nikki Chiappa et al., *supra*, at 10; *see also* Eric Edwards & Sara Sutherland, *Does Environmental Review Worsen*

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[9] *See, e.g.,* Pet'r's Br. at 2 (describing the decision below as converting NEPA into "an anti-development treadmill"); *id.* at 7 (describing NEPA as having a "bloated, anti-development form"); *id.* at 18–19 (criticizing the decision below as erecting "a substantive roadblock to development"); *id.* at 48 (describing environmental groups as "opponents of progress"); *id.* at 49 (asking the Court to "unshackle agencies and infrastructure-development projects from NEPA-litigation purgatory").

[10] *See W. Va. v. Env't Prot. Agency*, 597 U.S. 697 (2022); *BP P.L.C. v. Mayor and City Council of Baltimore*, 593 U.S. 230 (2021); *Util. Air Regul. Grp. v. Env't Prot. Agency*, 573 U.S. 302 (2014); *Am. Elec. Power Co., Inc. v. Conn.*, 564 U.S. 410 (2011); *Mass. v. Env't Prot. Agency*, 549 U.S. 497 (2007).

the Wildfire Crisis? How environmental analysis delays fuel treatment projects 3–10 (2022).[11] This is because NEPA does not target infrastructure or development but covers any "major Federal actions significantly affecting the quality of the human environment," including conservation activities intended to and expected to be environmentally beneficial. 42 U.S.C. § 4332(C); *see San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 652 n.52 (9th Cir. 2014) (suggesting that NEPA applies to projects that have only beneficial environmental impacts).

The strongest evidence of where the consequences of this Court's decision will fall is provided by a database the Environmental Protection Agency maintains of every environmental impact statement (the most demanding level of review under NEPA) issued since 1987. *See* Env't Prot. Agency, *Environmental Impact Statement (EIS) Database*.[12] According to that database, the Forest Service prepared 254 final environmental impact statements between August 2014 and July 2024, the most of any agency. *Id.* That exceeded the second-place agency, the Bureau of Land Management (BLM), by more than 50%. *Id.* The agency at the center of this case, the Surface Transportation Board, in contrast,

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[11] https://www.perc.org/wp-content/uploads/2022/06/PERC-PolicyBrief-NEPA-Web.pdf.

[12] https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search.

finalized only three environmental impact statements over the same period. *Id.*[13]

NEPA's disproportionate burden on the federal land management agencies is also reflected in litigation, which has noticeably increased in the last decade. According to the Breakthrough Institute, an environmental research center, 59% more NEPA cases have been appealed to circuit courts in the last decade, compared to the prior one. Nikki Chiappa et al., *supra*, at 2. The most common subject of this litigation was federal-land management, especially the Forest Service's efforts to restore unhealthy forests. *Id.* at 6, 10–11. And, while less common, nearly a third of NEPA energy cases sought to stop clean energy production. *Id.* at 13.

This process and litigation have taken a toll on agencies' ability to fulfill their core functions. The Forest Service, for instance, takes an average of 19 months to complete an environmental assessment for a forest restoration project, and an average of 34 months to complete an environmental impact statement. *See* Edwards & Sutherland, *supra*, at 6. In addition to these up-front delays, NEPA legal challenges take about 4.2 years from the date of

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[13] While the Surface Transportation Board produced very few environmental impact statements, other energy and transportation related agencies produced more, although still far less than the federal land management agencies. *See id.* (reporting that the Federal Highway Administration and Federal Energy Regulatory Commission finalized 84 and 79 environmental impact statements, respectively).

publication of the final environmental analysis to the conclusion of the appeal. Nikki Chiappa et al., *supra*, at 2. But the average litigation delay is longest for federal land management projects (4.8 years). *Id.* at 6.

Because the consequences of NEPA conflict fall disproportionately on federal land management agencies, whether NEPA is efficient and effective is a critical issue in the West. More than 90% of federal land is in Western states, where it makes up 50% of land in these states. Carol Vincent et al., Cong. Rsch. Serv., R42346, *Federal Land Ownership: Overview and Data* 6–8, 19 (2020).[14] An efficient and effective NEPA process is especially important to the Forest Service's ability to restore unhealthy Western forests and, thereby, protect wildlife habitat, water quality, and other environmental values threatened by the wildfire crisis. *See* Forest Serv., *Confronting the Wildfire Crisis: A Strategy for Protecting Communities and Improving Resilience in America's Forests* (2022);[15] Edwards & Sutherland, *supra*, at 3–10; Forest Serv., *The Process Predicament: How Statutory, Regulatory, and Administrative Factors Affect National Forest Mgmt.* (2002).[16]

There are about 80 million acres of federal forests that need restoration but, due to NEPA and other

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[14] https://sgp.fas.org/crs/misc/R42346.pdf.

[15] https://www.fs.usda.gov/sites/default/files/fs_media/fs_document/Confronting-the-Wildfire-Crisis.pdf.

[16] https://www.fs.usda.gov/projects-policies/documents/Process-Predicament.pdf.

factors, only 2 million acres are being treated annually. Edwards & Sutherland, *supra*, at 2. This forest restoration backlog fuels larger and more destructive wildfires that harm forest health, wildlife habitat, air and water quality, and outdoor recreation. Holly Fretwell & Jonathan Wood, *Fix America's Forests: Reforms to Restore National Forests and Tackle the Wildfire Crisis* 4 (2021).[17] For instance, in 2020 in California alone, wildfires released 112 million tons of carbon dioxide, the equivalent of adding 25 million cars to the road. Cal. Air Res. Bd., *Draft Report: Greenhouse Gas Emissions of Contemporary Wildfire, Prescribed Fire, and Forest Management Activities* (Dec. 2020).[18] And, since 2020, between 15 and 20% of Giant Sequoias have been killed by wildfire because, while the species is adapted to wildfire, it is not adapted to the catastrophic blazes that occur frequently today. *See* Jim Robbins, *To Protect Giant Sequoias, They Lit a Fire*, N.Y. Times (July 9, 2024).[19]

Forest restoration, including mechanical thinning and prescribed fire, is urgently needed to address this environmental crisis. *See Confronting the Wildfire Crisis*, *supra*. Where these treatments are applied, fires are easier to suppress, less likely to burn

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[17] https://www.perc.org/wp-content/uploads/2021/04/fix-americas-forests-restore-national-forests-tackle-wildfire-crisis.pdf.
[18] https://ww3.arb.ca.gov/cc/inventory/pubs/ca_ghg_wildfire_forestmanagement.pdf.
[19] https://www.nytimes.com/2024/07/09/science/redwoods-wildfires-indigenous-tribes-california.html.

intensely, and less likely to threaten forest health, wildlife, and water quality. In Oregon's 400,000-acre Bootleg Fire, for instance, areas thinned and treated with prescribed fire had lower fire intensity and avoided the crown-fire that threatens old-growth and large trees. Edwards & Sutherland, *supra*, at 2. When such treatments are delayed or discouraged by an inefficient NEPA process or litigation, however, forest health and the environment too often pay the price. *See, e.g., N. Cascades Conservation Council v. Forest Serv.*, No. 2:22-CV-00293-SAB, 2024 WL 188374, (E.D. Wash. 2024) (acknowledging that a substantial part of the area intended for a forest restoration project was severely burned during the two years that the project was being reviewed under NEPA).

As Petitioners note in their brief, a lawsuit need not be filed to have these effects. Without clear legal sideboards on agencies' obligations, the mere threat of litigation may be enough to spur an agency to "produc[e] piles of paperwork that exhaustively discuss every potential impact of the proposed action" in the hopes of mitigating litigation risk. Tripp & Alley, *supra*, at 83. There is strong evidence that this phenomenon has already affected the Forest Service's ability to restore forests. Surveys of agency personnel find that decisions about the level of NEPA review and the time devoted to that review are influenced more by litigation risks than the significance of any environmental impacts. Michael J. Mortimer et al., *Environmental and Social Risks: Defensive National*

Environmental Policy Act in the US Forest Service, 109 J. of Forestry 27 (2011).[20] And this is reflected in the time it takes the agency to implement a project, with projects that are later litigated spending more time on the NEPA process at the front end. Edwards & Sutherland, *supra*, at 10 (finding that environmental impact statements for forest restoration projects that are later litigated take almost a year and a half longer to prepare than environmental impact statements for non-litigated projects).

In deciding this case, PERC urges the Court not to limit its focus to the (relatively uncommon) energy and climate change facts presented here but to consider the broader range of agency activities implicated by its decision, especially federal agencies' ability to restore struggling forests in the West. An efficient and effective NEPA process is critically important to that conservation work.

II. NEPA requires agencies to analyze only reasonably foreseeable effects for which the agency's action is the legally relevant cause

PERC agrees with the United States that NEPA requires an agency to analyze only those environmental effects that (1) its proposed action is the "legally relevant 'cause'" of and (2) are "reasonably

[20] https://www.fs.usda.gov/pnw/pubs/journals/pnw_2011_mortimer001.pdf.

foreseeable." Fed. Resp's Br. at 17 (citing *Pub. Citizen*, 541 U.S. at 769–770). Reasonable foreseeability, in other words, is an additional restraint on the effects that must be analyzed under NEPA, not a substitute for drawing the line on what effects may be lawfully attributed to the agency's action. 42 U.S.C. § 4332(C) (limiting NEPA analyses to "reasonably foreseeable environmental effects *of the proposed agency action*" (emphasis added)).

And on that latter question, this Court has made clear that a "'but for' causal relationship is insufficient[.]" *Pub. Citizen*, 541 U.S. at 767. This is derived not only from the statute's text but also the "rule of reason" that guides interpretation of the statute. *Id.* The purpose of that "rule of reason" is to ensure that NEPA remains an efficient and effective process for understanding the environmental impacts of an agency's activities without grinding those activities to a halt. *Id.*

The D.C. and Ninth Circuits' rule requires agencies to examine the effects of any public or private activities that are likely affected by the agency's decision, even if the agency has no authority over those activities and their effects are far removed from the agency's own action. *See Eagle Cnty.*, 82 F.4th at 1180. This rule has led to a bootstrapping problem, subjecting public and private activities to NEPA that would otherwise not be, simply because a federal agency plays some tangential role in them. This case is an example of this issue, with a federal agency's role

in approving an 88-mile rail line being leveraged for an analysis of private activities hundreds of miles away and far removed from that decision and the agency's authority.

Of greater concern to PERC, however, are examples like *Oregon Natural Resources Council Fund*, in which a BLM project to restore a forest in the wake of fire was challenged. 492 F.3d at 1123–24. The agency analyzed the environmental effects of the logging and other activities authorized on federal land by that project. *Id.* at 1137–40 (O'Scannlain, J., dissenting). But the Ninth Circuit held that this was not enough. Instead, it also required the agency to analyze the effects of private forest management activities on neighboring private land that were not at issue in the project, citing the private landowner's use of public roads as sufficient to pull their activities into the BLM's NEPA analysis. *See id.* at 1134 n.20. With millions of acres in the West checkerboarded, meaning access to private land depends on crossing adjacent public land and vice versa, such reasoning greatly expands agency's NEPA obligations. *See* Bryan Leonard et al., *Stranded land constrains public land management and contributes to larger fires*, 16 Env't Rsch. Letters 114014 (2021) (discussing the extent of the checkerboarding problem and its consequences for land management and wildfires).[21] As in *Robertson*, "it would be incongruous" to require the agency to

[21] https://iopscience.iop.org/article/10.1088/1748-9326/ac2e39/pdf.

analyze in detail such private activities outside of its jurisdiction, even if those activities are on private land adjacent to federal land. *See* 490 U.S. at 333.

Another recent example concerns American Prairie, a nonprofit conservation group that aims to voluntarily restore a grassland ecosystem in Eastern Montana through bison reintroduction and other restoration activities. *See* James L. Huffman, *American Prairie Reserve: Protecting Wildlife Habitat on a Grand Scale*, 59 Nat. Res. J. 35, 45–51 (2019). Because the area the organization is restoring is a checkerboard of public and private land, the BLM plays a tangential role in the organization's efforts. *See id.* When American Prairie acquires from a willing seller private land with associated rights to graze adjacent federal land, it must seek the agency's permission to switch from one type of livestock (cattle) to another (bison). *See* Bureau of Land Mgmt., *Environmental Assessment for American Prairie Reserve Bison Change of Use* (2022).[22] When the agency recently gave such permission, it analyzed under NEPA any significant environmental effects of that switch on the land, and found them to be only beneficial. *Id.*; Bureau of Land Mgmt., *Record of Decision* (2022).[23] Nonetheless, this decision is being

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[22] https://eplanning.blm.gov/public_projects/103543/200243903/20056712/250062894/2022_03_24_APR_EA%20with%20Apps_508.pdf.

[23] https://eplanning.blm.gov/public_projects/103543/200243903/20064856/250071038/APR%20Final%20Decision%20(Drft_v3_7.23.22)%20Fmttd_Cmpld_signed_508.pdf.

challenged under NEPA. Using the D.C. and Ninth Circuit's rule, the plaintiffs in that case argue that it is not enough for the agency to consider the effects of its decision; the agency must also consider the effects of all the group's private activities, especially the effect of its conservation activities on the local agricultural economy. Notice of Appeal, *supra* n. 6, at 13.

Taken to its logical conclusion, the D.C. and Ninth Circuit's rule means that any time a government agency acts as a gatekeeper, even if only coincidentally, for larger state or private activities, its NEPA obligations could balloon as widely as the most creative plaintiff demands. Imagine, for instance, if a federal agency operated a toll booth and was lifting the gate to allow a vehicle through. The effect of that action, properly understood, would be minimal, such as marginally increased traffic on so much of the road as the agency controls. But under the decision below, the agency's lifting of the gate would be treated as the cause of any foreseeable effects the vehicle, its passengers, or its cargo might produce long after they leave that road—all because the vehicle happened to move through the agency's toll gate.

That might seem like hyperbole, but it is not far removed from a recent case in Arizona, *Mohave I*, 2024 WL 706962. As in many parts of the West, the federal government controls critical water infrastructure in Arizona. *See* Bureau of Reclamation, *The Central*

Arizona Project (2000).[24] Whenever the state or private parties exchange water rights to conserve water or reallocate it to a higher-value use, the Bureau of Reclamation is often implicated because the water will pass through its infrastructure. *See Mohave I*, 2024 WL 706962, at *1–2. Such trades are critically important to water conservation in the West and are governed by state, not federal, law. *See* Tate Watkins & Bryan Leonard, *Arizona Water Reform* (2023);[25] *see also U.S. v. N.M*, 438 U.S. 696, 701 (1978). The federal government's role is purely tangential to the trade. For a recent transfer, the Bureau considered the environmental effects of traded water moving through the federal infrastructure, which it found were not significant. *Mohave I*, 2024 WL 706962, at *2. But a district court deemed this insufficient, relying on the D.C. and Ninth Circuits' rule to hold that the agency also had to consider the effects of a private landowner's decision to transfer water rights, the state's decision to approve the transfer, any future transfers that might occur, and any activities or economic development those transfers might facilitate. *See id.* at *9–13. In that case, the bootstrapping problem also raised a significant federalism concern, by bringing the effect of state law and state water rights administration

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[24] https://www.usbr.gov/projects/pdf.php?id=94.

[25] https://www.perc.org/wp-content/uploads/2023/03/Arizona-Water-Reform-FINAL.pdf

within a federal agency's NEPA analysis based on that agency's mere facilitation role.

As these cases show, the D.C. and Ninth Circuits' rule often devolve into "but for" causation: an agency decision plays a tangential but practically significant role in larger state or private activities, yet the environmental effects of those state and private activities are attributed to the agency action. The decision below conflates NEPA's narrow role (analyzing the environmental effects of an agency's own actions) with the wide range of policy factors an agency may consider under a broadly written statute. Under it, an agency must consider any activities made more likely by the agency's action and the effects of those activities so long as the agency can prevent them by declining to move forward with the action and the relevant statute is written broadly enough that the agency could do so for that reason. *Eagle Cnty.*, 82 F.4th at 1180. Consider the effect of such a rule on the federal land management agencies, which may consider virtually any factor under the broad statutes governing their management of federal land. *See, e.g.*, 43 U.S.C. §§ 1732(a), 1733(a). Under the D.C. Circuit's rationale, these statutes would impose no additional limit beyond "but for" causation. Because the D.C. and Ninth Circuits' rule cannot be applied consistent with this Court's admonition against using "but for" causation, the decision below should be reversed as contrary to NEPA and its rule of reason. *Pub. Citizen*, 541 U.S. at 767.

III. The environmental effects at issue in this case are serious but do not merit undermining NEPA's workability

The environmental effects identified by the Respondents, including greenhouse gas emissions and air pollution near refineries are serious. But that does not mean that a NEPA review of a modest rail line can or should be stretched to reach them and the private activities that cause them. Instead, the proper avenue for addressing those effects lies through the federal, state, or local agency with direct control over them.

Allowing these other regulatory agencies to analyze the environmental effects when they are better known, more concrete and less hypothetical, and under direct regulatory control provides for better outcomes. In this case, the D.C. Circuit faulted the agency for not analyzing effects of oil and gas development and refining that is currently unplanned, would occur on "unidentified private, state, tribal, or federal" land, and which the agency has no authority to regulate. *Eagle Cnty.*, 82 F.4th at 1177; *see 350 Mont. v. Haaland*, 50 F.4th 1254, 1288 (9th Cir. 2022) (R. Nelson, J., dissenting) (arguing that the agency need not analyze emissions from a foreign countries use of U.S. produced fuel where the agency has no ability to prevent that use nor the countries from acquiring alternative supply).

Nor is this additional analysis and litigation over it likely to produce real-world benefits. For all the

delay and expense, NEPA lawsuits rarely succeed. Nikki Chiappi, et al., *supra*, at 2 (finding that agencies won 80% of NEPA cases on appeal). And when they do, they often only force the agency to produce additional analysis before reaffirming its prior decision. The only entities that gain in such cases are the small number of litigious groups responsible for most of these cases. *Id.* at 7. Indeed, more than a third of NEPA cases litigated before appellate courts in the last decade were brought by just ten organizations, the top three of which are Respondents. *Id.* at 8 (identifying Sierra Club, Center for Biological Diversity, and WildEarth Guardians as the three most frequent NEPA litigants).[26] For forest restoration projects, this concentration is even more extreme, with ten groups responsible for two-thirds of cases, again with several Respondents represented among the top ten. *Id.* at 10. Affirming the D.C. and Ninth Circuit rule would not bring about better environmental outcomes, it would just foster obstruction and delay by encouraging litigation to

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[26] Given these groups' unusually intense interest in litigation, they should not be assumed to represent the perspective of environmental and conservation groups generally. Other groups, like PERC, have expressed the importance of a workable and efficient NEPA process to environmental progress. *See, e.g.,* The Nature Conservancy, *Statement on Sen. Carper's Draft PEER Act* (May 18, 2023) (expressing support for proposed NEPA reform because it would "improv[e] the efficiency of federal permitting" and "accelerate[] the approval of critical projects that boost the production of clean energy).

force agencies to analyze effects further and further removed from their actions.

The kind of analysis the D.C. Circuit's decision demands would also not facilitate public participation. In this case, the agency's NEPA analysis already spans 3,600 pages, making it inaccessible to anyone except the most sophisticated and well-heeled parties like Respondents. Often NEPA conflicts are driven by the interests of such parties, rather than the common concerns of the public. The Breakthrough Institute analysis of NEPA litigation referenced above, for instance, found that only 2.8% of cases raised the kind of local community concerns often described as "environmental justice" issues. *See id.* at 9.

Adding hundreds more pages to NEPA documents will only exacerbate the problem of those documents being too long, dense, and technical to facilitate meaningful public participation. Congress, for its part, has tried to address this problem by imposing manageable page limits. *See* 42 U.S.C. § 4336a. The D.C. Circuit's demand for conjectural analysis of private activities and effects several steps removed from the agency's action are not only at odds with those limits but contrary to NEPA's purpose of facilitating public participation. *See Pub. Citizen*, 541 U.S. at 768–69.

Conclusion

NEPA is intended to ensure informed decision-making by agencies, not to grind their core functions

to a halt. More NEPA analysis is not an unqualified good but can come at a significant environmental cost. Therefore, it is imperative that the process be efficient and effective to allow agencies to do their work, especially the forest restoration projects that are disproportionately affected by NEPA. The Court should reject the rule adopted by the D.C. and Ninth Circuit conflating the effects of an agency action with the factors an agency can consider under a broadly written statute, a standard indistinguishable from "but for" causation.

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Respectfully submitted,

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