No. 23-975

In the Supreme Court of the United States

SEVEN COUNTY INFRASTRUCTURE COALITION, ET AL.,
PETITIONERS

v.

EAGLE COUNTY, COLORADO, ET AL.

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

BRIEF OF ENERGY TRANSFER LP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Energy Transfer LP is one of the largest and most diversified midstream energy companies in North America, owning and operating through its subsidiaries over 125,000 miles of pipelines and associated energy infrastructure across 44 States, transporting the oil and gas products that make modern life possible. Energy Transfer has a direct and substantial interest in the question presented in this case because Energy Transfer and its subsidiaries regularly develop infrastructure projects that require federal permits and authorizations for which environmental analysis under the National Environmental Policy Act (NEPA) is often required.

In particular, many of Energy Transfer's pipelines and related infrastructure are subject to permitting requirements under statutes administered by the U.S. Army Corps of Engineers (Army Corps) and the Federal Energy Regulatory Commission (FERC). When evaluating whether to issue permits, those agencies engage in NEPA review as a matter of course. And, much as occurred following the Surface Transportation Board's (STB) approval of the new rail line at issue here, project opponents routinely intervene at the agency level and then seek judicial review and vacatur of the granted permits on grounds that the government purportedly failed to engage in sufficiently wide-ranging NEPA analysis. Indeed, recent years have

[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person aside from *amicus curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

seen opponents of energy infrastructure markedly increase their efforts to weaponize NEPA and transform that procedural statute into a tool to force their preferred substantive outcomes—blocking the project or at minimum delaying and increasing the costs of much-needed projects that help deliver energy and energy products to American households and businesses.

Amicus accordingly has a strong interest in the outcome of this case. *Amicus* presents this brief not only to explain why the majority of circuits are correct to reject the D.C. Circuit's near-limitless expansion of NEPA,[2] but to provide further context regarding the negative real-world effects of unbounded NEPA review that inevitably flow from the D.C. Circuit's rationale. As *amicus* explains, affirming the D.C. Circuit would bless a strategy by which opponents of infrastructure projects have transformed NEPA to demand that agencies use it as a vehicle to analyze (and give weight in their substantive decisionmaking to) causally attenuated environmental effects far beyond those agencies' regulatory authority or expertise. The D.C. Circuit's approach has demonstrably harmed the development of much-needed energy infrastructure, and usurps the role of Congress and the States in making policy judgments regarding questions of national energy and environmental policy. As a leading midstream energy company, *amicus* has a unique perspective on the

[2] Indeed, the D.C. Circuit itself has adopted a more appropriately limited understanding of NEPA's scope in some prior cases, leading to significant tension within that circuit's own caselaw. Compare *Sierra Club* v. *FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016), with *Sierra Club* v. *FERC (Sabal Trail)*, 867 F.3d 1357, 1373-1374 (D.C. Cir. 2017).

problematic consequences of the D.C. Circuit's expansion of NEPA, as well as a critical stake in the question presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The question presented is whether NEPA requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority. The answer is no. That conclusion directly follows from a straightforward application of NEPA and this Court's precedents, particularly *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004). Courts have correctly concluded that federal agencies are not required to analyze the effects of activities over which they do not and cannot exercise regulatory authority. As explained further below, any other conclusion would undermine NEPA's purposes and scramble the careful division of regulatory authority between Congress, States, and different federal agencies. Instructive here is the reasoning courts have applied to properly limit the scope of the Army Corps' NEPA review in circumstances similar to the STB's review here. An examination of cases involving Army Corps permits under the Clean Water Act (CWA)—a regulatory context *amicus* is intimately familiar with—confirms the soundness of reasoning found in this Court's decision in *Public Citizen* and why it should apply to all agency NEPA reviews.

2. The same reasoning courts have applied to properly limit the scope of the Army Corps' NEPA review is equally applicable here. The STB regulates

rail infrastructure; it does not regulate oil drilling and oil refining, and it is not required to analyze the effects of those activities under NEPA. The D.C. Circuit's contrary conclusion rested, among other things, on the unexamined assumption that the STB's authority to evaluate whether a rail line is in the "public convenience and necessity" means it can make a decision based on essentially any environmental impact of third-party upstream or downstream activities, no matter how tenuously related to the limited statutory authority the STB exercises. That assumption simply repeats and compounds the D.C. Circuit's error in *Sierra Club* v. *FERC (Sabal Trail)*, 867 F.3d 1357 (D.C. Cir. 2017), which made the same mistake with regard to FERC. In fact, both *Sabal Trail* and the decision below are wrong. Both decisions run directly contrary to this Court's precedent regarding *both* the scope of NEPA (i.e., *Public Citizen* and prior precedents), and the scope of broad "public interest" standards such as the "public convenience and necessity" criteria applied by the STB and FERC.

3. The decision below was not just legally wrong. Its unsound reasoning, and that of *Sabal Trail* before it, poses a significant threat to energy infrastructure development in the United States. The D.C. Circuit's acceptance of Respondents' limitless view of NEPA plays into the hands of a cynical litigation strategy that opponents of energy infrastructure have used to impose their anti-development policy preferences on the country. Such efforts to pursue endless, scorched-earth NEPA litigation against energy infrastructure permits of all kinds—oil, gas, solar, wind, etc.—have delayed and raised the costs of projects that Congress,

the States, and federal agencies have decided should be approved and built. Congress never intended NEPA to be weaponized in this manner. And Respondents' legally erroneous understanding of NEPA would, if accepted, amplify and incentivize this negative dynamic.

4. Respondents' professed belief in the usefulness of the additional NEPA analysis they have demanded cannot withstand scrutiny. The STB has correctly made clear that the additional analysis Respondents demand will not be useful for its decisionmaking. The failure of some courts to appropriately credit such reasonable judgments is precisely what has turned NEPA into a tool to block needed infrastructure altogether or severely delay its development, not uncommonly by as much as *5-10 years*. And it has transformed NEPA review from what it was intended to be—a useful, efficient procedural exercise—into a costly and largely unproductive game in which agencies produce overlong NEPA documents in an effort to bulletproof their decisions against inevitable lawsuits brought by development opponents. This Court can and should pare back this unwarranted expansion of NEPA by reaffirming and amplifying *Public Citizen*.

ARGUMENT

I. Agencies Are Not Required to Analyze Upstream and Downstream Impacts of Activities They Do Not Regulate.

The question presented in this case is whether NEPA requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority. A

straightforward application of NEPA's text and purposes, as well as longstanding precedent, dictates the answer: no. This Court already held as much in *Public Citizen*. But, were any further confirmation needed, the correctly decided appellate cases involving challenges to Army Corps authorizations under the CWA provides it. An examination of the Army Corps' role in permitting energy projects provides an especially stark illustration of why the D.C. Circuit's contrary approach is legally wrong and has unacceptable practical consequences.

A. As Multiple Courts Have Held, the Army Corps Is Not Required to Expand Its NEPA Analysis Beyond the Proximate Effects of the Activities It Regulates.

1. A majority of circuits agree that NEPA does not require agencies to engage in far-reaching analysis of the environmental effects of third-party upstream and downstream activities with no substantial relationship to the defendant agency's statutory authority, regulatory responsibilities, or expertise. See Pet. Br. 5-6; Pet. 14-17. At least three circuits have correctly resolved this question in cases involving Army Corps approvals under Section 404 of the CWA, 33 U.S.C. § 1344. See *Ctr. for Biological Diversity* v. *U.S. Army Corps of Eng'rs*, 941 F.3d 1288 (11th Cir. 2019); *Kentuckians for the Commonwealth* v. *U.S. Army Corps of Eng'rs*, 746 F.3d 698 (6th Cir. 2014); *Ohio Valley Env't Coal.* v. *Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009). The D.C. Circuit's decision below is an outlier.

As one of the largest and most diversified midstream energy companies in North America, Energy

Transfer has extensive experience with NEPA, including both the Army Corps and FERC permitting processes. *Amicus* is thus well-positioned to explain and elaborate on why, in the context of Army Corps permitting, the Fourth, Sixth, and Eleventh Circuits were correct to reject project opponents' efforts to expand the scope of the Corps' NEPA reviews. As explained further below, once the Army Corps' statutory authority and its discrete role in infrastructure permitting is properly understood, those decisions were clearly correct. This Court should reject the D.C. Circuit's limitless understanding and application of NEPA for much the same reasons the Fourth, Sixth, and Eleventh Circuits rejected the same basic attack on *Public Citizen* in regard to Army Corps approvals.

2. In order to effectuate its purpose to "restore and maintain * * * the Nation's waters," 33 U.S.C. § 1251(a), the Clean Water Act (CWA) prohibits discharging "pollutants" into "navigable waters" without a permit. *Id.* §§ 1311(a), 1362(12)(A); see *Sackett* v. *EPA*, 143 S. Ct. 1322, 1330 (2023). "Pollutant" and "navigable waters" are defined so broadly as to respectively include dirt or sand being spilled into a small stream. *Sackett*, 143 S. Ct. at 1330, 1336. As a result, construction projects—particularly linear infrastructure like pipelines, which often must cross a number of streams along their miles-long routes—commonly require a permit for discharges of dredged or fill material into jurisdictional waters. The Army Corps is authorized to issue such permits under CWA Section

404. See 33 U.S.C. § 1344(a); *Sackett*, 143 S. Ct. at 1330-1331.[3]

The Army Corps is thus involved as one permitting agency (typically among several others) for a huge range of infrastructure projects. And it is true that large projects often could not be built at all without Army Corps permits, because they cannot feasibly be constructed without "pollutants"—even dirt—entering jurisdictional waters. But however "necessary" the Army Corps' regulatory role is, that role often remains "small" in the greater scheme. *Aracoma*, 556 F.3d at 195. The Army Corps' authority and duty under the Clean Water Act is to protect water quality, not to act as a panoptic arbiter of whether and when any infrastructure of any size should be built anywhere in the United States, based on potential actions of other agencies and third parties far distant up or down the supply chain.

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[3] The Army Corps can also issue general permits to cover categories of similar activities, thereby avoiding the need for covered projects to go through the full (and lengthy) individual-permit application process. See 33 U.S.C. § 1344(e). One of the Army Corps' general permits, Nationwide Permit 12, covers qualifying oil and gas pipeline activities. See U.S. Army Corps of Eng'rs, *Decision Document: Nationwide Permit 12* (Jan. 4, 2021), https://tinyurl.com/57jxf4hh. Tellingly, anti-pipeline litigants—including some of the same organizations that are Respondents here—have cited the D.C. Circuit's decision in this case as ostensible support in an ongoing lawsuit seeking vacatur of Nationwide Permit 12. See Notice of Suppl. Authority, *Ctr. for Biological Diversity* v. *Spellmon*, No. 22-cv-2586 (D.D.C. Sept. 11, 2023). Needless to say, vacatur of Nationwide Permit 12 would have devastating consequences for oil and gas pipeline development in the United States.

The Army Corps can deny permits if it determines that "*the discharge of * * * materials*" into jurisdictional waters "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas * * * , wildlife, or recreational areas." *Ctr. for Biological Diversity*, 941 F.3d at 1296 (quoting 33 U.S.C. § 1344(c)) (emphasis added). In other words, the Army Corps can deny or condition permits to carry out its regulatory responsibility to protect jurisdictional waters. But it cannot categorically refuse a permit for just any reason, including its dislike of some broader undertaking for which a Section 404 permit is one necessary condition, based on policy rationales that lack a meaningful connection to the Army Corps' specific statutory responsibilities. *Ibid.* Congress does not "hide elephants in mouseholes," *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), and it did not hide in the Clean Water Act a silent delegation of czar-like powers to approve or scuttle construction projects for any reason, such as a policy preference against increased natural gas usage in downstream markets.

Yet project opponents, realizing that vacatur of a single Army Corps permit can stop construction in its tracks, have sought to wield NEPA lawsuits to secure their preferred policy outcomes, demanding that the Army Corps engage in environmental analysis of activities at best tangentially related to the permitted activities, the purposes of the Clean Water Act, or the Army Corps' distinct role as a regulator of discharges into navigable waters. See, *e.g.*, *Ctr. for Biological Diversity*, 941 F.3d at 1293-1294 (environmental consequences of fertilizer production using phosphate ore

sourced from the mine for which Army Corps discharge permit was needed); *Kentuckians*, 746 F.3d at 701 (environmental consequences of "surface [coal] mining in general," including various asserted "public health impacts" therefrom, as opposed to effects of "discharge of dredged or fill material" *per se*); *Aracoma*, 556 F.3d at 188 (environmental consequences of "entire valley fill project" associated with coal mine, not just discharges into jurisdictional waters). In these litigants' view, such remote consequences—however removed from the discharges at issue or the Army Corps' regulatory charge under the Clean Water Act—should nonetheless be deemed "effects" of the permitted "discharges," because without the Army Corps permits, the broader projects would not move forward, nor might the economic activity those projects might in turn enable.

3. The Fourth, Sixth, and Eleventh Circuits rightly rejected such attempts to expand NEPA, which run headlong into *Public Citizen*. The identified "effects" were not effects, within NEPA's meaning, of the *discharges* the Army Corps regulates—i.e., *proximate* effects of those discharges. *Accord Pub. Citizen*, 541 U.S. at 767. The disconnect between the Army Corps' limited regulatory authority and these attenuated phenomena (such as eventual downstream use of minerals sourced from a mine for which a Section 404 permit was needed) "breaks the chain" of proximate causation under NEPA and places such considerations beyond the scope of the analysis required of the Army Corps.

Any other approach would not only consign *Public Citizen* to the dustbin; it would run roughshod over

Congress' deliberate choice *not* to give the Army Corps (or other agencies) the powers of a comprehensive "environmental-policy czar." *Ctr. for Biological Diversity*, 941 F.3d at 1299. Consider, for example, oil pipelines. As discussed, sizable oil pipelines generally do require Army Corps permits, as crossing some kind of "navigable water" is practically inevitable for lengthy linear infrastructure. However, the Army Corps is not tasked with judging whether there should be more or fewer oil pipelines in the United States, whether those pipelines should be sited to deliver commodities from particular supply basins to users downstream, or whether the activities oil pipelines facilitate (such as upstream drilling and downstream refining) are good or bad. On the contrary, oil pipeline siting decisions fall to the States. See Colin P. O'Rourke, *Oil Pipeline Regulation: The Current Patchwork Model and an Improved National Solution*, LSU J. Energy L. & Res. (Feb. 2, 2016), https://tinyurl.com/2c5dkvvw.

The Clean Water Act cannot credibly be interpreted to override this federal-state balance. Nor can NEPA—a purely procedural statute that does not alter the scope of agencies' underlying substantive regulatory powers, see *Pub. Citizen*, 541 U.S. at 756-757—alter that division of authority. Yet Respondents' view of NEPA, by brushing past these limits, would effectively extend federal oversight into areas within the ambit of the States. See, *e.g.*, *Aracoma*, 556 F.3d at 189 (describing States' exclusive jurisdiction to permit and regulate surface coal mining).

B. The Same Reasoning Applicable to the Army Corps Applies to the STB and FERC, and the D.C. Circuit's Contrary Approach Is Wrong.

1. The same reasoning that prevailed in the Army Corps cases applies here, and the D.C. Circuit's superficial contrary reasoning must be rejected. For starters, the D.C. Circuit was wrong about the scope of the STB's regulatory authority. The D.C. Circuit asserted, without any serious analysis, that the STB has authority to consider attenuated upstream and downstream environmental effects stemming from highly indirect "but-for" consequences of its permitting decisions—a broader scope of authority than the Fourth, Sixth, and Eleventh Circuits (correctly) held the Army Corps wields under the CWA. But the D.C. Circuit's cavalier reasoning was mistaken. Just as the Army Corps serves as a regulator and permitting authority for *discharges into navigable waters* (not oil pipelines or coal mines), the STB serves as a regulator and permitting authority for *railroads* (not oil drilling and oil refining). The cases are on all fours.

2. In reaching a contrary conclusion, the D.C. Circuit reasoned that because the STB applies a "public convenience and necessity" standard when making permitting decisions, it can consider even the highly attenuated "but-for" consequences of a new rail line, such as potentially facilitating oil drilling and oil refining by reducing transportation costs. Pet. App. 37a; see 49 U.S.C. §§ 10901(c), 10902(c). But the only authority the D.C. Circuit cited for that surprising proposition was *Sabal Trail*. Pet. App. 37a (citing 867 F.3d at 1373). And *Sabal Trail*, in turn, was dead wrong

about the breadth of the phrase "public convenience and necessity."

Sabal Trail addressed FERC's authority to authorize interstate natural gas pipelines under the Natural Gas Act (NGA)—another regulatory domain where *amicus*, as a leading midstream oil and gas company, has extensive experience. Section 7 of the NGA requires a certificate from FERC before an interstate natural gas pipeline may be built, and codifies a "public convenience and necessity" standard for FERC to apply when evaluating applications. See 15 U.S.C. § 717f(c), (e). In *Sabal Trail*, the D.C. Circuit reasoned that the factors FERC may consider in deciding whether to authorize a natural gas pipeline include "adverse environmental effects." 867 F.3d at 1373. And it further assumed—without any analysis of the NGA's broader text, structure, or history—that the environmental effects FERC may consider include not just the localized effects of the transportation infrastructure actually being permitted (i.e., the pipeline itself), but the knock-on effects of *downstream use* of natural gas that might later be *transported* through the pipeline, such as GHG emissions from downstream combustion of gas in power plants. *Id.* at 1374.

But that analysis was wrong at the threshold. In particular, it violates the cardinal rule that statutory language must be "interpreted in * * * context, not in isolation." *Sw. Airlines Co.* v. *Saxon*, 142 S. Ct. 1783, 1788 (2022) (internal quotation marks omitted). As this Court has explained, when Congress authorizes an agency to evaluate whether a project is in the "public convenience and necessity" or the "public interest," it does *not* confer "a broad license to promote the

general public welfare," *NAACP* v. *Fed. Power Comm'n*, 425 U.S. 662, 669 (1976). "Rather, the words take meaning from the purposes of the regulatory legislation." *Ibid.*; accord *Pub. Utils. Comm'n* v. *FERC*, 900 F.2d 269, 280-281 (D.C. Cir. 1990) (Williams, J.). And, under the NGA, FERC's charge is to "encourage the orderly development of plentiful supplies of * * * natural gas at reasonable prices." *NAACP*, 425 U.S. at 669-670 (rejecting proposition that FERC's authority to regulate in the "public interest" under the NGA encompasses efforts to prevent employment discrimination). The NGA is economic regulatory legislation designed to increase access to affordable natural gas and prevent abuses of market power. Indeed, nowhere in the NGA's text or voluminous legislative history is there a single reference to *any* environmental considerations playing a role in FERC's decisionmaking. And while the localized environmental effects of pipeline construction and siting might qualify as "subsidiary" considerations FERC can permissibly consider in its decisionmaking, *id.* at 670 & n.6, the same cannot be said of distant upstream and downstream environmental effects with a tenuous-to-nonexistent relationship to FERC's authority over interstate transportation facilities.

The D.C. Circuit's contrary decisions ignore the careful division of policymaking and regulatory responsibility between the federal government and States, and between particular branches and agencies of the federal government. As FERC observed on remand from *Sabal Trail*, "it is for Congress or the Executive Branch," not FERC, "to decide national policy on the *use* of natural gas." *Fla. Se. Connection, LLC*,

162 FERC ¶ 61,233, P 29 (2018) (emphasis added). And federal legislation specifically preserves state authority over both upstream natural gas production and downstream electric power generation, such as the power plants in *Sabal Trail*. See 15 U.S.C. § 717(b) (upstream production); 16 U.S.C. § 824(b)(1) (downstream electric power generation); cf. *Sabal Trail*, 867 F.3d at 1381-1382 (Brown, J., concurring in part and dissenting in part) (describing Florida's "exclusive authority" over power plants).

FERC's role is more limited: it regulates interstate natural gas *transportation* facilities and pricing, to ensure ready access to supplies at reasonable prices. FERC would overstep that regulatory role if it "den[ied] a pipeline certificate on the basis of impacts stemming from the end use of the gas transported," such as GHG emissions from combustion. *Fla. Se. Connection*, 162 FERC ¶ 61,233, P 29. Thus, under *Public Citizen*, the effects of downstream activities outside FERC's regulatory domain lack the requisite "close causal relationship" to its pipeline approvals, *Pub. Citizen*, 541 U.S. at 767 (citation omitted), and—contrary to the D.C. Circuit's erroneous decision in *Sabal Trail*—need not be analyzed under NEPA.

To sum up: Congress did not enact the Clean Water Act or grant the Army Corps authority to issue permits under that Act in order to transform the Army Corps into a comprehensive regulator of pipelines or mines, much less the downstream use of energy products, in derogation of the historical powers of other federal and state regulators. Nor did it enact the Natural Gas Act or the Interstate Commerce Commission Termination Act in order to turn FERC or the STB, respectively,

into energy- or climate-policy dictators, in derogation of the historical powers of yet other state and federal regulators (and, for that matter, Congress itself). FERC and the STB regulate discrete *instrumentalities of transit*—pipelines and railroads—and their duties under NEPA are limited to considering the effects of those instrumentalities of transit, not the products that may be shipped or the downstream activities those products may facilitate.

The D.C. Circuit's contrary decisions—this case for the STB and *Sabal Trail* for FERC—rely on an understanding of the term "public convenience and necessity" that is flatly contrary to this Court's caselaw. See *NAACP*, 425 U.S. at 669-670 (broadly worded "public interest" standard in NGA limited to statute's regulatory purposes); see also *N.Y. Cent. Sec. Corp.* v. *United States*, 287 U.S. 12, 24-25 (1932) (cited in *NAACP*, 425 U.S. at 669) (same analysis as to facially broad "public interest" language under Interstate Commerce Act). The point is only further confirmed by this Court's recent emphasis that the clearest statement of legislative intent is required to infer a delegation of the sweeping, czar-like authority the D.C. Circuit has casually, and incorrectly, read into the words "public convenience and necessity." See *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2608 (2022).

3. But even if consideration of upstream and downstream environmental effects fell within the theoretical outer scope of the factors the STB might be permitted to consider in rendering a decision on Petitioners' application, the decision below was still wrong. Respondents' contrary arguments urge an implausibly narrow reading of *Public Citizen* that would virtually

cabin that unanimous decision to its facts, and utterly undermine NEPA's "rule of reason."

The STB reasonably explained that it is in no position to "control" activities like oil drilling and refining, or "mitigate" the environmental effects thereof. Pet. App. 108a. That would remain true even if the STB *were* statutorily authorized, at least as a theoretical matter, to consider the environmental effects of such attenuated activities, including those far distant in both time and space, in its analysis of the public convenience and necessity for rail lines. The reality is that the STB, which has authority only over railroads, cannot stop upstream oil drilling, or the development of alternative mechanisms to transport oil to downstream markets (e.g., expanding road access for trucks). Nor, on the downstream end, can it stop Gulf Coast refineries from sourcing additional crude oil from elsewhere. And it *certainly* cannot set broad energy, climate, or pollution policies; it simply evaluates applications to build rail lines on a case-by-case, project-specific basis. Accord *Sabal Trail*, 867 F.3d at 1383 (Brown, J., concurring in part and dissenting in part) (analogous observations with regard to FERC's ability to control natural gas usage); cf. Pet. Br. 18, 30-31.

In light of that practical and legal reality, the STB reasonably concluded that the analysis of attenuated activities Respondent Center for Biological Diversity demanded was "neither required nor useful." Pet. App. 112a. In so doing, the STB chose a reasonable stopping point for its NEPA review, in light of the limits of its regulatory authority—much like the Army Corps has done in determining that attenuated effects

should be excluded when the Army Corps lacks "sufficient control and responsibility" over those effects. *Kentuckians*, 746 F.3d at 707 (quoting 33 C.F.R. pt. 325, app. B § 7(b)(1)). That sound approach is consistent with, and indeed demanded by, the fundamental logic of *Public Citizen*: namely, that agencies are allowed to determine the scope of NEPA analysis "based on the usefulness of any new potential information to the decisionmaking process," 541 U.S. at 767—a judgment that depends not just on the factual foreseeability of effects, but also their relationship (or lack thereof) to an agency's regulatory authority and the limits of that authority.

II. The D.C. Circuit's Misreading of *Public Citizen* Hinders the Development of Energy Infrastructure, Without Providing Any Countervailing Benefits.

The decision below was not just wrong. Its unsound reasoning, and that of *Sabal Trail* before it, seriously threatens energy infrastructure development in the United States. Practical considerations, no less than legal ones, accordingly support reversal.

A. Project Opponents' Demands for Unbounded NEPA Analysis Are Intended to Create, and Already Have Created, Serious Barriers to Energy Infrastructure Development.

1. The undeniable reality is that demand for energy is growing, and will continue to grow for the foreseeable future. See, *e.g.*, U.S. Energy Info. Admin., *Annual Energy Outlook 2023* at 14-15 (Mar. 2023),

https://tinyurl.com/y6tjzm9v; N. Am. Elec. Reliability Corp., *2023 Long-Term Reliability Assessment* 16, 33 (Dec. 2023), https://tinyurl.com/5cu6unx7. Reasonable minds can differ regarding the best way to meet that demand—for example, what mix of fuels should be deployed for electricity generation, transportation, heating, and other uses. But one thing is clear: such decisions do not lie with agencies like the STB, the Army Corps, or FERC, whose regulatory responsibilities are limited and generally exercised on a project-by-project basis. See *supra* Argument, Part I.B. Rather, broad issues of national energy policy lie principally with Congress and the States, cf. *Fla. Se. Connection*, 162 FERC ¶ 61,233, P 29, and in certain limited respects (e.g., vehicle fuel economy standards) other agencies, see, *e.g.*, *Corporate Average Fuel Economy (CAFE) Standards*, U.S. Dep't of Transp., https://tinyurl.com/28xr9ec7 (last updated Aug. 11, 2014).

That division of policymaking authority appropriately reflects our system of government, under which broad policy questions of "deep economic and political significance" are generally decided by elected representatives in Congress or state legislatures. *West Virginia*, 142 S. Ct. at 2625-2626 (Gorsuch, J., concurring) (citation omitted). However, some opponents of additional fossil-fuel development—dissatisfied with Congress' and state legislatures' judgment in this area—have sought to employ NEPA litigation to force their policy preferences on the nation. Recognizing that energy-related infrastructure projects require a host of federal permits, they have sought to use an expansive interpretation of NEPA to snarl the development of

such projects in interminable procedural litigation. See Christine Tezak, *A Policy Analyst's View on Litigation Risk Facing Natural Gas Pipelines*, 40 Energy L.J. 209, 218 (2019) (describing fossil-fuel opponents' recent strategy of "oppos[ing] midstream infrastructure" through litigation "in an apparent effort to disconnect upstream sources from downstream markets"); see also Allison Good & Corey Paul, *Transmission Trouble: Pipeline Woes Presage Obstacles for Clean Energy Build-Out*, S&P Glob. (Jan. 28, 2021), https://tinyurl.com/4r8k5t9z (similar).

A key part of that litigation strategy hinges on bringing increasingly aggressive NEPA claims, demanding that permitting agencies—even those with distinctly limited regulatory responsibilities—analyze ever-more-distant effects, such as the localized effects of upstream oil and gas production and greenhouse gas emissions from future downstream energy consumption. See, *e.g.*, Pet. App. 31a (demand that STB analyze "environmental effects of downline oil refining on Gulf Coast communities [and] on greenhouse gases from oil combustion"); *Birckhead* v. *FERC*, 925 F.3d 510, 517 (D.C. Cir. 2019) (per curiam) (demand that FERC analyze environmental effects of theoretical future gas production wells when evaluating application to build a single new natural gas compression facility).

These litigants' demands for more NEPA analysis are not just broad; they are limitless. For example, project opponents have gone so far as to demand that agencies with even limited authority over some small component of the energy supply chain engage in economic projections of *overseas* energy markets and future emissions in foreign countries. See, *e.g.*, *Ctr. for*

Biological Diversity v. *Bernhardt*, 982 F.3d 723, 736 (9th Cir. 2020) (demand that Bureau of Ocean Energy Management (BOEM) "include emissions estimates resulting from foreign oil consumption" in NEPA analysis for single offshore drilling and production facility).

Ultimately, these project opponents seek to transform NEPA—a procedural statute solely designed to inform agency decisionmaking—into a tool for pushing their substantive policy preferences. Effectively, the goal is to force agencies like the STB, the Army Corps, and FERC to wield their limited regulatory authority as an indirect cudgel to block and disincentivize activities far beyond anything they have statutory authority to oversee or control (e.g., oil and gas production and consumption). *Accord Ctr. for Biological Diversity*, 941 F.3d at 1299 (noting that challengers' stance would "appoint the [Army] Corps" as a "de facto environmental-policy czar").

The playbook is straightforward: find a federal agency charged with NEPA review in connection with some necessary permit for a project, and demand limitless analysis of upstream and downstream effects that might be viewed as stemming, in a "but for" sense, from the overall project, including its potential indirect economic effects on distinct third-party activities. For example, when challenging interstate natural gas pipelines, project opponents tend to target FERC, because it is the designated "lead agency" that prepares NEPA analyses for those projects. 15 U.S.C. § 717n.[4]

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[4] The result has been an attempt, with varying degrees of success, to litigate broad issues of national climate policy in

When challenging oil pipelines (which lack a federal siting authority akin to FERC's under the NGA), project opponents often focus on Army Corps approvals. See, *e.g.*, *Sierra Club* v. *U.S. Army Corps of Eng'rs*, 803 F.3d 31, 44 (D.C. Cir. 2015). Opponents of coal mining also frequently sue the Army Corps. *E.g.*, *Aracoma*, 556 F.3d 177; *Kentuckians*, 746 F.3d 698. Offshore oil drilling opponents have used a similar strategy in challenging BOEM approvals. *Ctr. for Biological Diversity*, 982 F.3d 723. And here, of course, the target agency is the STB. But in all these cases, the same basic legal strategy of expanding and weaponizing NEPA can be found at work.

It bears noting, as well, that the tactical deployment of NEPA litigation to slow or stop energy infrastructure development is by no means limited to projects involving fossil fuels. Although the instant litigation is part of a campaign against fossil fuels in particular, opponents of renewable and zero-emission energy projects have similarly weaponized NEPA to "block clean energy [developments] time and time again." Aidan Mackenzie & Santi Ruiz, *No, NEPA*

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administrative proceedings and petitions for review of practically every interstate natural gas transportation project approval—even for relatively small projects, such as individual compressor stations. See, *e.g.*, *Sabal Trail*, 867 F.3d at 1371-1375; *Otsego 2000* v. *FERC*, 767 Fed. Appx. 19, 21 (D.C. Cir. 2019) (per curiam); *Birckhead*, 925 F.3d at 516-521; *Food & Water Watch* v. *FERC*, 28 F.4th 277, 286-289 (D.C. Cir. 2022); *Ctr. for Biological Diversity* v. *FERC*, 67 F.4th 1176, 1185-1186 (D.C. Cir. 2023); *Ala. Mun. Distrib. Grp.* v. *FERC*, 100 F.4th 207, 213 (D.C. Cir. 2024); *Food & Water Watch* v. *FERC*, 104 F.4th 336, 342-347 (D.C. Cir. 2024); *N.J. Conservation Found.* v. *FERC*, No. 23-1064, 2024 WL 3573637, at *4-7 (D.C. Cir. July 30, 2024).

Really Is a Problem for Clean Energy, Inst. for Progress (Aug. 17, 2023), https://tinyurl.com/2ty8pars. "NEPA proceedings have held up onshore wind, congestion pricing, offshore wind farms, solar farms, geothermal power plants, transmission lines, and mining permits for lithium and copper, critical inputs for clean energy." *Ibid.*; cf. Pet. Br. 4 (discussing Cape Wind offshore wind farm project).

To avoid expanding NEPA beyond its proper scope in the face of such litigation campaigns—and to prevent a procedural law from being turned into a comprehensive anti-development weapon—it is imperative for courts to scrupulously guard the statute's limiting principles. And to date, the majority of courts have applied *Public Citizen* and this Court's other NEPA precedents correctly, rejecting improper attempts to broaden NEPA by requiring analysis of issues far outside the defendant agencies' regulatory authority. See Pet. Br. 5-6; Pet. 14-17. In fact, even the D.C. Circuit did so prior to *Sabal Trail*. See *Sabal Trail*, 867 F.3d at 1382 (Brown, J., concurring in part and dissenting in part) (describing the distinction between *Sabal Trail* and prior D.C. Circuit precedent, which rejected near-identical arguments in challenges to liquefied natural gas terminal approvals, as "doctrinally invisible"). The decision below, however, blessed Respondents' strategic attempt to expand NEPA beyond any rational bounds and use it as a weapon to interfere with energy infrastructure development.

2. If the D.C. Circuit's decision were affirmed, the consequences would be grave. No matter how broad an agency's NEPA analysis is, project opponents can *always* demand more. The D.C. Circuit's approach,

with its disregard for NEPA's limitations, encourages them to do precisely that. Under that approach, NEPA litigation—already ubiquitous enough—would proliferate even further. And the practical consequences of such litigation for energy infrastructure development would be serious.

Successful NEPA challenges can, and often do, throw project development into chaos. When a court grants relief in a NEPA lawsuit, the consequences are not limited to giving the agency an additional procedural task (e.g., supplemental environmental analysis) on remand. Very often—as in *Sabal Trail* and this case—the result is outright vacatur of the underlying permits, in their entirety. See *Sabal Trail*, 867 F.3d at 1379 (permits "vacated"); Pet. App. 69a-71a (granting vacatur and describing this as the "normal remedy") (citation omitted). When that occurs, partially constructed or operational projects can grind to a halt, with developers and prospective customers forced to wait for months or years while agencies work to (hopefully) reissue the necessary permits. See, *e.g.*, *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,027, PP 3-5 (2020) (describing multiple lengthy work stoppages for natural gas pipeline due to judicial vacatur of permits). The potential consequences are even more grave when *already operational* projects have their permits vacated due to supposed flaws in a NEPA study—threatening potential shutdown of projects that are already serving current energy needs.[5] And

[5] Indeed, *Sabal Trail* itself vacated authorizations for in-service pipelines that were already providing natural gas required for power generation in capacity-constrained Florida

even when courts grant the more modest remedy of remand without vacatur, cf. *Allied-Signal, Inc.* v. *U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993), it leads to lengthy and expensive follow-on proceedings at the administrative level, during which the project's future may be thrown into doubt. This raises costs and chills investment in the sector. Cf. Tezak, *supra*, 40 Energy L.J. at 209, 220 (analyst describing concerns of "institutional investor clients" in light of project opponents' litigation campaigns).

Proof of the deleterious effects of such anti-infrastructure lawfare is ready in hand. Planned projects can actually be canceled, leading to billions of dollars in deadweight loss. See Adam Barth et al., *The End of the Atlantic Coast Pipeline: What Does It Mean for the North American Natural Gas Industry?*, McKinsey & Co. (Sept. 2, 2020), https://tinyurl.com/54jn6uwt (describing cancellation of Atlantic Coast Pipeline "after six years of debate and litigation"). And even for projects that finally prove victorious in court, are successfully built, and go into operation, such litigation campaigns can impose extreme cost overruns and long delays. See, *e.g.*, Scott Disavino, *Equitrans Delays WV-VA Mountain Valley Natgas Pipe Again, Boosts Cost*, Reuters (Feb. 20, 2024), https://tinyurl.com/3jwn3zxn

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markets. See Intervenor-Resp'ts' Pet. for Reh'g 4-5, 11-15, *Sabal Trail*, No. 16-1329 (D.C. Cir. Oct. 6, 2017). Interruptions in service were prevented, however, because FERC successfully secured a postponement of the court's mandate, *see* Order, *Sabal Trail*, No. 16-1329 (D.C. Cir. Mar. 7, 2018) (per curiam), and FERC was able to take action to reaffirm the authorizations before the mandate issued, *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, P 2.

(describing increase in project costs from $3.5 billion to $7.5 billion for natural gas pipeline due to "numerous regulatory and court fights that * * * stopped work several times since construction began in 2018").

These risks are magnified by the fact that projects of this nature generally require multiple federal permits or authorizations, each of which is typically subject to challenge in court. Cf. Tezak, *supra*, 40 Energy L.J. at 209 (noting instances where opponents of FERC-jurisdictional projects successfully delayed development through litigation "not because the FERC began to lose in court, but because pipeline project opponents succeeded in challenging permits issued by other federal agencies," such as the Army Corps). This makes it possible for project opponents to file numerous lawsuits challenging different permits for the same project, often in multiple forums, with each individual lawsuit potentially posing an existential threat to the project. Where *each* of many required permits is subject to judicial challenge and *every* permit is necessary for the overall project to move forward, the result is an asymmetric playing field in which project opponents need only be lucky once to secure their desired outcome, whereas the government and project developers need to be lucky every time. Cf. Pet. Br. 50.

NEPA was never intended to be a weapon for anti-development litigants to block energy projects they oppose on policy grounds. On the contrary, it is designed to be a purely procedural statute, see *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989), governed by a rule of reason, *Pub. Citizen*, 541 U.S. at 767-768, and cabined by reasonable agency judgments regarding the extent to which additional

environmental analysis would—or would not—be helpful. *Pub. Citizen*, 541 U.S. at 767-768. But due to misguided decisions like the D.C. Circuit's below, it has become a significant impediment to infrastructure development, particularly in the energy sector.

Worse, this kind of litigation threatens to usurp the role of Congress and the States in determining whether and to what extent additional energy infrastructure is necessary or desirable. Cf. *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (emphasizing importance of retaining Congress' policymaking primacy "because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers'"). Such outcomes are inconsistent with NEPA's purposes, inconsistent with Congress' judgment regarding the division of authority between itself and different executive or independent agencies, and ultimately inconsistent with the development of urgently needed infrastructure on reasonable timelines, and at reasonable cost.

B. Respondents' Limitless Expansion of NEPA Would Undermine the Statute's Purposes and Provide No Countervailing Benefits.

1. Respondents have suggested that analyzing attenuated upstream and downstream effects is necessary to inform the STB's decision and apprise the public of environmental effects. See Eagle Cnty. BIO 14. That is incorrect.

As explained, the activities Respondents have demanded the STB analyze—such as "the environmental

effects of downline oil refining on Gulf Coast communities" a thousand miles away, and "greenhouse gases from * * * combustion" of oil from such distant refining operations, Pet. App. 31a—fall far outside the STB's regulatory domain. They have nothing to do with the subjects on which the STB has expertise, or on the basis of which the STB reasonably could deny or condition a railroad permit, such as the fairness of rates, effective competition, and the localized environmental effects of the actual rail infrastructure being permitted. See 49 U.S.C. § 10101 (describing federal policies for railroad regulation).

The purpose of NEPA is to provide information that is actually useful to the agency. Its goal is not to create paperwork, or to lard the administrative record with hundreds of pages of (often speculative) environmental analysis that is not materially relevant to the agency's actual decisionmaking process. *Pub. Citizen*, 541 U.S. at 768-769. Yet that is precisely what Respondents are demanding here. The STB has stated—correctly, and in no uncertain terms—that it is not a regulator of these distant activities. Pet. App. 112a. As a railroad regulator, the STB will not, and lawfully cannot, anoint itself a "de facto environmental-policy czar," *Ctr. for Biological Diversity*, 941 F.3d at 1299, over activities such as Gulf Coast oil refining operations. Therefore, NEPA's "informational purpose" is not served by analyzing these distant activities. *Pub. Citizen*, 541 U.S. at 768.

NEPA's purpose *certainly* is not to create a strategic game for litigants seeking ever-broader environmental analyses, motivated by a desire to undermine projects they oppose for policy reasons divorced from

anything over which the defendant agency has authority. Yet NEPA has demonstrably turned into just such a game. Indeed, NEPA's "seemingly innocuous requirement" of preparing an environmental impact statement "has led to more lawsuits than any other environmental statute." James Salzman & Barton H. Thompson, Jr., *Environmental Law and Policy* 340 (5th ed. 2019).

As a result, agencies have a strong incentive to lengthen and expand their NEPA analyses as much as possible, so as to insulate their decisions from *ex post* litigation risk. Accord Pet. Br. 6-7, 49. The consequences of this dynamic have been stark. The Council on Environmental Quality "anticipated in 1981 that federal agencies should be able to complete most [environmental impact statements] in 12 months or less," but by 2016 "the average government-wide completion time had grown to 5.1 years." Mark C. Rutzick, *A Long and Winding Road: How the National Environmental Policy Act Has Become the Most Expensive and Least Effective Environmental Law in the History of the United States, and How to Fix It* 12, Regul. Transparency Project (Oct. 16, 2018), https://tinyurl.com/jtnvuux2. Correspondingly, NEPA documents have expanded "from a handful of pages in the early 1970s to [a] current average of 1,626 pages." Mackenzie & Ruiz, *supra*, https://tinyurl.com/2ty8pars.

The problem is so severe and pervasive that even among commentators sympathetic to an environmentalist policy agenda, NEPA is widely regarded as a failure, and such an impediment to new infrastructure development that it actually creates an affirmative barrier to environmental goals. See, *e.g.*, Mackenzie &

Ruiz, *supra*, https://tinyurl.com/2ty8pars (concluding that NEPA has become a "tax on building new things" that has created an "invisible graveyard of clean energy infrastructure," and urging NEPA reform "[i]f we want to see a clean energy transition in our lifetimes"); Good & Paul, *supra*, https://tinyurl.com/4r8k5t9z (explaining that "clean energy projects * * * fac[e] the same headwinds" of NEPA litigation by determined project opponents). Respondents implicitly ask this Court not only to ignore, but to *accelerate*, this perverse dynamic.[6]

2. Finally, Respondents' suggestion that reasonable foreseeability should be understood in a strictly factual or predictive sense, and that their preferred understanding of that limitation provides a sufficient boundary line for the scope of NEPA review (Eagle Cnty. BIO 26), is wrong. For starters, the 55-year history of NEPA provides no support for the proposition that the watered-down approach to reasonable foreseeability Respondents urge is alone sufficient to keep NEPA analysis appropriately contained. Decades of consistent, order-of-magnitude growth in the size of NEPA documents (and the delays involved in producing them) empirically prove otherwise. Regardless, *Public Citizen*'s legal causation requirement serves

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[6] Recent NEPA amendments on page limits and deadlines, cf. Pet. Br. 29, though helpful, are not a silver bullet. Notably, the page limits do not apply to appendices, see 42 U.S.C. § 4336a(e), which often run into thousands of pages. Open-ended extensions of the deadlines are also available, *id.* § 4336a(g)(2); agencies and project sponsors may be strongly tempted in many instances to seek such extensions, given the threat of costly and disruptive reversal if NEPA documents are not sufficiently "bullet-proofed" in advance.

critical purposes in cabining NEPA analysis to an appropriate scope, above and beyond merely excluding effects that are too speculative or uncertain in a purely predictive sense. Accord *Pub. Citizen*, 541 U.S. at 765-766, 769 (notwithstanding that entry of trucks from Mexico was arguably a "foreseeable" effect of FMCSA action, that action was nonetheless not a "legally relevant cause" of such entry).

To be sure, NEPA's proximate causation requirement prevents agencies from engaging in speculation about possible events that are sufficiently uncertain, as a factual matter, to render any analysis unhelpful. But it also prevents agencies from spending time and resources analyzing matters beyond their regulatory authority or expertise, drawing a line based on what occurrences are or are not subject to sufficient control and responsibility by the agency to render analysis useful. Both limits are crucial, and this Court should affirm and amplify *Public Citizen* and its other precedents regarding NEPA causation—not undermine them, as Respondents implicitly urge.

CONCLUSION

The D.C. Circuit's judgment should be reversed.

Respectfully submitted.

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