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 UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION AND WESTERN STATES AND TRIBAL NATIONS NATURAL GAS INITIATIVE AS AMICI CURIAE SUPPORTING PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*[1]

The Ute Indian Tribe of the Uintah and Ouray Reservation (the Ute Indian Tribe) is a sovereign federally recognized Indian Tribe composed of three bands of the greater Ute Tribe—the Uintah Band, the White River Band, and the Uncompahgre Band—who today live on the Uintah and Ouray Reservation in northeastern Utah. *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072, 1093 (D. Utah 1981).

The Uintah and Ouray Reservation is in the Uintah Basin, the area which would be serviced by the common carrier rail line that is at issue in this case. The Uintah and Ouray Reservation includes lands in Uintah, Duchesne, Carbon, Wasatch, and Summit Counties in Utah. "Cattle raising and mining of oil and natural gas is big business on the reservation." About the Utes, *available at* utetribe.com.

Western States and Tribal Nations Natural Gas Initiative is a state, county and tribal government-led 501(c)(4) initiative working to facilitate economic development and tribal sovereignty through the development of domestic and global markets for natural gas produced in the Western United States.

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1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that no person or entity other than *amici curiae* and their counsel authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission of the brief. The parties were notified of the intention of amici curiae to file as required by Rule 37.2.

SUMMARY OF ARGUMENT

In *United States Department of Transportation v. Public Citizen*, 541 U.S. 752, 767, 770 (2004), this Court reiterated two prior limitations on court review of an agency's NEPA decisions:

> NEPA requires "a reasonably close causal relationship" between the environmental effect and the alleged cause. The Court analogized this requirement to the "familiar doctrine of proximate cause from tort law."
>
> . . .
>
> [W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA[.]

For the past 138 years the Surface Transportation Board (STB) and its predecessor have not had statutory authority to determine the shippers who can access a common carrier rail line or the products that can be shipped on a common carrier rail line. Common carriers are required to haul all products—whether solar panels or oil, products from rural areas or urban, without discrimination.

But the Court of Appeals for the District of Columbia Circuit held that when the STB was deciding whether to authorize an 88-mile common carrier spur line, the STB was required to prognosticate how and where the spur line would impact oil production and oil refining. Under the D.C. Circuit's interpretation of the NEPA, the STB had to determine where oil that started on that spur line would be sent for refining, and then determine the environmental impact on the distant communities in which that refining would occur. The D.C. Circuit also required the STB to analyze how the spur line would impact future oil production in the Uintah Basin, and then determine the environmental effects from that future development.

As Petitioners showed in their opening brief, the D.C. Circuit's decision was directly and unquestionably contrary to this Court's prior decisions. Unless this Court is going to overturn its prior unanimous statutory interpretation decision in *Public Citizen*, this Court must vacate the D.C. Court's decision.

This Court should reiterate that when an agency has "no ability to prevent a certain effect due to its limited statutory authority," *Public Citizen*, 541 U.S. at 770, the agency need not consider that effect. Where the agency has considered the effects that are within that agency's statutory authority, that is the end of the judicial inquiry, and the agency's decision withstands NEPA review.

ARGUMENT

I. Legal and factual background

A. The need for and benefit from a common carrier rail line into the Uintah Basin.

The Ute Indian Tribe provides governmental services for its members and for its large but sparsely populated reservation. It provides health care, education, housing, and other services. *See generally utetribe.com* (listing and describing tribal programs and services). Unlike other governments, it cannot effectively pay for services through tax receipts. Even if it wanted to, its lands are too sparsely populated to provide much income from tourism, gaming, or similar activities.

What it does have, by fate or good luck, is substantial quantities of superior waxy crude oil. But by fate or bad luck, it does not have the same access to markets as other oil fields in the United States. Gaining that access would create jobs and improve the income of the Tribe and its members. As discussed below, the Tribe would have gained that access if the D.C. Circuit had correctly applied the NEPA and this Court's precedents.

The three Bands that make up the Ute Indian Tribe (the Uintah, White River, and Uncompahgre Bands) originally occupied the land between present day Denver and Salt Lake City. The Uintah Band occupied land in present day Utah, including land in the Uintah Basin in northeastern Utah. The White River and Uncompahgre Bands occupied northwestern and central western Colorado (including all the land now in Eagle County, Colorado).

Following the Meeker Incident in 1879, the non-Indian Coloradans, led by Colorado Governor Frederick Pitkin adopted the rallying cry "The Utes Must Go!,"[2] asserting the United States should forcibly remove the Uncompahgre and White River Bands from Colorado. Peter R. Decker, "*The Utes Must Go!": American Expansion and the Removal of a People*, ch. 6 (2004).

One reason Coloradans wanted the White River and Uncompahgre Bands removed or exterminated was to open land for the main line east-to-west railroad relevant to this case—the railroad through Eagle County Colorado. Gov. Frederick Pitkin to Jay Gould (23 Oct. 1879) (quoted in "*The Utes Must Go!*", 149). Eagle County Colorado and the coalition of environmental groups aligned with them now have the audacity and shamelessness to assert that permitting oil, agricultural products, or anything else that a common carrier railroad might transport from present day Ute lands to pass over that very same rail line is a great ill which must be prevented.

The Executive Branch, in defiance of the Act of June 15, 1880,[3] 21 Stat. 199, forcibly marched the White River

2. Governor Pitkin did not care whether "go" meant "go by force from Colorado" or whether it meant extermination. *E.g.*, Gov. Frederick Pitkin to Carl Schurtz (Oct 12, 1879) (quoted in "*The Utes Must Go*!", 147)

3. In the Act of June 15, 1880, Congress took the Tribe's "permanent" reservation, created just more than a decade earlier, and directed the Executive Branch to create a replacement reservation for the Uncompahgre Band around the present-day location of Grand Junction, Colorado if land in that area was cultivable. There was and is such cultivable lands in that area, but the Executive Branch, at the urging of Colorado, created the replacement reservation on non-cultivable lands in Utah.

Bands from Colorado to the Uintah Valley Reservation in Utah and forcibly marched the Uncompahgre Band to the Uncompahgre Band in Utah. *Ute Indian Tribe v. Utah*, 790 F.3d 1000 (10th Cir. 2015).

The area from which the non-Indians forced the Utes now contains common carrier rail lines, interstate roadways, commercial airports, cities, oil and hard mineral producing lands, fertile agricultural lands, etc. It contains substantial oil fields and agricultural lands that *are* connected to the United States rail infrastructure. It is firmly tied to the United States economic and transportation infrastructure.

All of Eagle County Colorado was originally Ute lands. The unemployment rate in Eagle County is under 3%.[4] Eagle County includes Vail, Colorado, where average home prices are over $2,000,000.[5] It also includes Minturn, named after the vice president of the railroad company that brought a rail line to that town and others in the area.[6]

In contrast, the Uintah Basin has to date proven too remote and too difficult to access. It has one two lane road from east to west, an airport with only two small commercial flights per day, no rail access, no ski resorts or chalets for the rich and famous. From some parts of the Uintah Basin, it is a three-hour drive, in good weather, to the nearest four lane road.

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4. https://vailvalleymeansbusiness.com/data-center/d (last visited April 2, 2024).

5. https://www.redfin.com/city/20103/CO/Vail/housing-market (last visited April 2, 2024)

6. https://www.minturn.org/historic-preservation/pages/timelines (last visited April 2, 2024)

The United States and Colorado knew that much of the Uintah Basin was and would remain a remote high desert. Before the United States permitted a reservation to be established in the Uintah Basin,[7] the Utah Territorial Indian Superintendent dispatched a survey team to determine whether the proposed reservation lands would be suitable for non-Indian settlement. The team's "unanimous and firm" verdict was that the proposed reservation lands were "one vast 'contiguity of waste,' and measurably valueless, except for nomadic purposes, hunting grounds for Indians and to hold the world together." *Report of Utah Expedition*, *printed in* Deseret News, Sept. 25, 1961, *quoted in* Charles Wilkinson, *Fire on the Plateau*, 150 (Island Press 2004). *See also* U.S. Department of the Interior, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1886*, 225. ("The Uncompahgre Reserve is a desert. Of the 1,933,440 acres embraced therein not one can be relied on to produce a crop without irrigation, and not more than 3 per cent of the whole is susceptible of being made productive by process of irrigation.").

The Tribe's Uncompahgre Reservation remains one of the least populated areas in the United States. The Uncompahgre Reservation is substantially larger than the State of Delaware. There is only one census area on

7. The Uintah and Ouray Reservation started as two separate reservations: the Uintah Valley Reservation (for the Uintah and later also the White River Bands) and the Uncompahgre Reservation (for the Uncompahgre Bands). Because the Uncompahgre Reservation is virtually uninhabitable, the Reservations were eventually combined and a single government for the three Bands was created.

the Uncompahgre Reservation, and in the most recent decennial census that census area, Bonanza, dropped from a population of one in the 2010 census to a population of zero. Emily Harris, *First Insights—2020 Census Utah Counties and Communities* (Univ. Utah 2021).

Respondents Eagle County Colorado and its aligned NGOs want to keep it that way.

Unbeknownst to Coloradans or the United States when the White River and Uncompahgre Bands were forcibly removed from their Reservations in Colorado to land in Utah, the Uintah Valley Reservation and the Uncompahgre Reservation in Utah contained valuable mineral resources. First the United States found that the lands contained Gilsonite. Congress took that land from the Tribe. Act of May 24, 1888, ch. 310, 25 Stat. 157. Later, the United States discovered the Reservation contained one of the largest and best oil fields in the United States. By the time the United States realized the land contained oil, Congress did not have the audacity to take that land.[8]

The United States owns most of the land on the Tribe's Reservation. Similarly, the United States owns much of the land on all Indian Reservations and the United States owns about half of the land west of the Rocky Mountains. Nearly anything occurring on that federally owned land involves federal permitting, leasing, or other federal actions, and therefore requires NEPA review. 42 U.S.C. § 4332(C).

8. The Executive Branch did, and currently still does, have that audacity, but that is a case for a later date.

The Tribe is not complaining about NEPA review. But as will be discussed below, Respondents' perpetual litigation to keep the Ute Indian Tribe from making a living from the Tribe's otherwise barren Uncompahgre lands is particularly egregious. Respondents went to an agency which is expressly barred from considering who is seeking to ship, or the products that are to be shipped, on a common carrier rail line. When that agency correctly denied Respondents' goal, Respondents chose to go to the D.C. Circuit, which had previously adopted an outlier position among the circuits, in which it requires agencies to consider effects outside of the agency's mission or jurisdiction. The D.C. Circuit also holds that it can vacate an agency decision if the three judges drawn for a particular appeal decide that they want the agency to consider additional "but for" effects of the agency decision.

Because so much of what occurs on the Tribe's Reservation and more generally on land in the West involves federal action by multiple federal agencies, the D.C. Circuit's decision would have an inordinate detrimental impact for the Tribe and others living in the West.

Since the early 1900s, there have been efforts to build a railroad that would connect the Uintah Valley to American's railway infrastructure. *E.g.*, Robert Athearn, Rebel of the Rockies: The Denver and Rio Grande Western Railroad (1962) (discussing plans for a railroad from Denver to Salt Lake via the Uintah Basin); Utah Dep't Transp., *Uintah Basin Railroad Feasibility Study Summary Report* (Jan 9, 2015) (hereinafter *2015 Report*) (discussing a prior feasibility study for the "Isolated Empire rail line" in 2001). None of those efforts succeeded.

The most recent effort to connect the "Isolated Empire" to the United States rail infrastructure began in 2013. *2015 Report* §1.0.

B. The Interstate Commerce Act and the duty of common carriers and the limited jurisdiction and role of the Surface Transportation Board

In 1887, Congress passed the Interstate Commerce Act (the ICA). A core purpose of the ICA was to *prohibit* interstate railroads from discriminating in the products they hauled. This was a hard-fought policy issue for decades before the passage of the ICA. In the years leading up to passage of the ICA, much of the concern about harmful discrimination in pricing and access by railroads came from agricultural interests, and many states passed "Granger laws," which included the same anti-discrimination policy later adopted into the ICA. *See Wabash, St. L. & P. Ry Co. v. Illinois*, 118 U.S. 557 (1886); *Munn v. Illinois*, 94 U.S. 113 (1877) (one of the six "Granger cases" decided by this Court in 1877).

In the *Wabash* case, this Court substantially limited the effectiveness of state Granger laws, but it simultaneously reiterated that Congress had the power to pass similar laws. Congress passed the ICA the next year with broad bipartisan support.

The ICA was a first in multiple ways. It was the first federal statute regulating an industry. It created the first of the now numerous federal administrative regulatory agencies and boards. It was "[t]he first federal regulation to impose duties on common carriers." *F.T.C. v. Verity Int'l, Ltd.*, 443 F.3d 48, 57 (2d Cir. 2006).

Congress' policy choice to prevent common carriers from discriminating against products or industries has remained in place since 1887. 49 U.S.C. § 11101. It applied to trains that have runs through Eagle County, Colorado since that east-west common carrier line began operating.

The regulatory agency created by the ICA is now named the Surface Transportation Board. It has a multi-member Board. There are approximately eighty independent federal agency, and there are approximately seventy federal agencies with multi-member boards. Administrative Conference of the United States, Sourcebook of United States Executive Agencies, tables 3 and 4 (2d ed. 2018).

The STB has a five-member Board. The Board is appointed by the President with the advice and consent of the Senate. 49 U.S.C. § 1301(a), (b). It is "charged with the economic regulation of various modes of surface transportation, primarily freight rail." stb.gov/about-stb/. Because of that limited function, its members must have experience in transportation, economic regulation, or business. 49 U.S.C. § 1301(b)(2).

Petitioners submitted a petition for a certificate authorizing Petitioners to construct a common carrier spur rail line from a mainline common carrier railroad into the Uintah Basin. Federal statutes provide that upon receipt of a petition to construct a common carrier line, the STB "shall issue a certificate authorizing [construction] unless the Board finds that such activities are inconsistent with the public convenience and necessity." 49 U.S.C. § 10901(a), (c).

As discussed above, the STB does not and cannot determine what products—or whose products—a common carrier line will carry. The products—on both the proposed spur line and on the main line—are determined by the market. Based upon federal policy codified into statute, any person who is willing to pay to have goods carried is treated on an equal basis by the common carrier.

Congress provided further guidance to the STB in 49 U.S.C. § 10101, which defines, through 15 paragraphs, the United States' "rail transportation policy." Paragraph 4 states that the United States policy is "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense."

The State of Utah completed a preliminary feasibility study for the current proposal in 2015. *2015 Report*.

The STB initiated environmental review of the Uintah Basin Railway proposal in June 2019, and Petitioners formally petitioned for a certificate authorizng construction in May 2020. *Eagle Cnty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1165 (D.C. Cir. 2023). The STB issued its final decision in December 2021. *Seven Cnty. Infrastructure Coal.—Rail Constr. & Operation Exemption—in Utah, Carbon, Duchesne, & Uintah Cntys.*, S.T.B. Fin. Dkt 36284, 2021 WL 5960905 (STB served Dec. 15, 2021). Pet. App. C.[9]

9. In contrast to the lengthy process for the 88-mile spur line, the 1900-mile transcontinental railroad from Council Bluffs Iowa to the West Coast was approved by Congress in 1862, 12 Stat. 489,

The STB provided a substantial discussion of potential environmental effects from the proposed rail line. But, consistent with its limited role—freight rail and related surface transportation—it properly rejected Respondents' assertions that the Board should enforce Respondent NGOs' desired energy policy under the guise of NEPA review or Respondent Eagle County's attempt to prevent the common carrier railroad passing through Eagle County from carrying more crude oil.

Quoting and correctly applying this Court's holding from *Public Citizen*, 541 U.S. at 767-68, the STB concluded that because the STB does not regulate, and in fact does not even have "authority or jurisdiction over development of oil and gas in the Basin," any conjectured future changes to that development of oil and gas were not under its environmental review authority. Pet App. 108a. Instead, any such development was for some other agency or agencies to consider.

The STB similarly concluded that because authorization of construction of a common carrier railroad in Utah does not dictate where crude oil will ultimately be refined, conjectured effect of refinement on communities in the Gulf Coast was also not within its authority.

II. The D.C. Circuit erred

In their opening merits brief, Petitioners show that the D.C. Circuit plainly erred. Although the Respondents will attempt to argue otherwise in their upcoming response,

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construction began in 1863, and the line was completed and the golden spike driven on May 10, 1869.

amicus believe the debate about *whether* the D.C. Circuit erred is over. The D.C. Circuit erred.

As Petitioners show, the issue presented is how far down the line (non-literally[10]) an agency *must* look. Amicus emphasis the word must, because that is at the core of the D.C. Court's error.

Public Citizen provided a clear and easily applied standard. An agency meets the procedural requirements for NEPA analysis, and a Court therefore cannot vacate and remand to the agency, if the agency has adequately considered the environmental consequences which are within that particular agency's regulatory authority.[11]

Under *Public Citizen*, the agency was permitted to limit its NEPA analysis to the effects proximately caused by the actions over which they have regulatory responsibility, 541 U.S. at 767, and its decision to so limit its analysis cannot be vacated by a court.

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10. The D.C. Circuit held that the agency had to consider alleged possible effects long after products that could be hauled on the spur line left that spur line, and even long after they left other rail lines 1500 or more miles away, Pet. App. 36a, and yet further when they were ultimately used by consumers, Pet. App. ___

11. The thornier issue which *Public Citizen* did not answer, and which is not presented by the current case, is: can an agency consider effects which are <u>not</u> within its regulatory jurisdiction, and if so, when can it do so and when can it not do so. That thornier question would require the Court to determine when the courts should bar one of agency from invade the province of some other state, tribal, or federal agency.

Applying its very different standard, the D.C. Circuit held that the agency was required to engage in a wide-ranging analysis of activities that are not within the STB's regulatory responsibilities, but which are within the regulatory responsibilities of other agencies. Moreover, the D.C. Circuit required the STB to consider or reconsider possible effects which have been or will be reviewed when those other agencies conduct NEPA review of proposed federal actions within those agencies' responsibilities.

For example, the D.C. Circuit chastises the agency for not reviewing how the building of the spur line into the Uintah Valley will impact areas around refineries on the Gulf Coast. That is not the STB's realm. Either those existing refineries already have approved capacity to refine that oil, or they would need to obtain that approval. In either case, proper NEPA review of the refineries will be conducted by an agency with *direct* responsibility and familiarity. If the existing refineries already have capacity to refine more crude oil, then the environmental effects of increasing production up to that already existing capacity has *already* been analyzed and authorized. And if those existing refineries were to need to expand at some point in the future (whether because of increased oil from the Uintah Basin or from other existing large oil fields in Colorado, Texas, Oklahoma, North Dakota, Wyoming, foreign countries, etc.) then the effects would be studied at that time.

Similarly, if the new rail line were to result in increased applications of permits to drill or other oil production-related federal permits, NEPA review of those actions would be conducted at that time.

The Center for Biological Diversity made the same substantive argument in the current case as it made as Appellants in *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d 1288 (11th Cir. 2019). It prevailed in the current case, but it lost in the Eleventh Circuit. As the Eleventh Circuit held in rejecting the Center for Biological Diversity's argument:

> To take an alternative, unbounded view of the public-interest review would be to appoint the Corps de facto environmental-policy czar. Rather than consider whether the Corps' own action is in the public interest, that broader view would have the Corps consider whether fertilizer production and use is really worth the cost. And that could be just the beginning. The next time the Corps is asked to approve a section of a gas pipeline running through a wetland, would the Corps be required to consider whether the country's reliance on fossil fuels is really in the public interest?

Ctr. for Biological Diversity, 941 F.3d at 1299.

In the quote above, the Eleventh Circuit thought it was asking a softball question or rhetorical question to show the error of the D.C. Circuit's prior decisions, but the D.C. Circuit has yet again answered "yes" to the question. Under the D.C. Circuit's decision each of 70 federal boards not only can, but must act as if it is the czar over federal energy policy, pesticide use, fertilizer production, etc.

Having 70 different unelected czars is, of course, undemocratic. Setting these policies is for Congress, not

for three of four unelected members who constitute the majority on one of the many federal boards.

It is also unworkable. Respondents want to force as many czars as possible to rule on their attempt to harm the Ute Indian Tribe's economy and Uintah Basin's economy, knowing that they only need one czar to agree with them. Under the duties that were wrongfully forced upon the STB by the D.C. Circuit's decision, the STB would be required to be one of those czars, even though the STB lacks jurisdiction or authority over federal energy policy, refineries, or oil field drilling. There are about 70 other three-or-four-member majorities of boards which will have similar powers to set policy.

III. The course-correction that this Court should require lower courts to apply

This Court's prior holdings in NEPA cases can be broken down into two *independent* limitations on a court's review authority:

1) A court cannot vacate based upon an agency's alleged failure to consider environmental consequences that are not within that agency's jurisdiction or authority; and

2) A court generally cannot vacate if an agency has considered all of the "reasonably foreseeable" consequences that are with its authority. [12]

12. Amici view the case law regarding risk of harm somewhat differently than Petitioners, but because those differences are not

The first of these two independent requirements is a bright line rule. The second –"reasonable foreseeability"— is a very common legal standards but it is not a bright line standard.

This Court should clarify that when a court is conducting NEPA review, it should treat the first of these two independent limitations as a threshold issue. The Court should reiterate that when an agency has "no ability to prevent a certain effect due to its limited statutory authority," *Public Citizen*, 541 U.S. at 770, the agency need not consider that effect. Where the agency has considered the effects that are within that agency's statutory authority, that is the end of the judicial inquiry, and the agency's decision withstands NEPA review.

A reviewing court should not even consider a plaintiff's allegations that an agency failed to consider "reasonably foreseeable" effects unless and until it determines that those alleged foreseeable impacts are within the agency's authority or jurisdiction.

Here, the D.C. Circuit plainly violated this Court's precedents, because it skipped over the threshold first issue. The conclusion that the D.C. Circuit erred is particularly obvious here, because the agency was being asked whether to authorize a common carrier rail line. Shippers and the market, not the agency, determines which products a common carrier rail line carries.

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material to the current case, Amici have no need to discuss those differences in the current brief.

CONCLUSION

For all of the above reasons, the Court should vacate the decision of the court below and remand as requested by Petitioners.

Respectfully submitted,

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