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 NEXTDECADE LNG, LLC AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

NextDecade LNG, LLC (NextDecade) is an energy company working to advance energy projects that will help accelerate a path to a net-zero future. Through its subsidiary, Rio Grande LNG, LLC, NextDecade is developing the $18.4 billion first phase of a liquefied natural gas (LNG) export facility in Texas designed to offer competitively priced LNG in the global market. The facility obtained FERC authorization to proceed in 2019 and is 14 months into construction, employing more than 1,400 workers. Just last month, however, a panel of the D.C. Circuit, based on regulations promulgated by the Council on Environmental Quality (CEQ), vacated FERC's reauthorization for this project. *See City of Port Isabel v. FERC*, __ F.4th __, 2024 WL 3659344 (D.C. Cir. Aug. 6, 2024). In the panel's view, another round of notice and comment was needed regarding the CEQ-mandated environmental-justice analysis.

Because the standards enforced by the D.C. Circuit in the present case also relied on CEQ regulations, NextDecade files this amicus brief to address whether the D.C. Circuit may properly rely on CEQ regulations as binding authority, and to illustrate the

[1] No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

broader problem with the D.C. Circuit's current approach to the National Environmental Policy Act (NEPA), requiring endless NEPA process.

NextDecade is committed to protecting the environment and supporting communities that are vulnerable to disparate environmental impacts. And NextDecade has no objection to CEQ carrying out its statutory duties of, for instance, gathering information relevant to NEPA's objectives regarding the Federal Government's activities, or making recommendations to the President on environmental policy. *See* 42 U.S.C. § 4344. Nor does NextDecade take issue with FERC adhering to its own NEPA regulations, collecting such data for CEQ. NextDecade does, however, object to a court treating the CEQ standards as binding or as providing a legal basis for vacating the reauthorization of a project that otherwise meets all NEPA requirements and other statutory and regulatory criteria. Treating CEQ mandates as binding is especially inappropriate as to FERC, given that the Executive Order instructing CEQ to develop an environmental-justice framework does not apply to FERC.

INTRODUCTION AND SUMMARY OF ARGUMENT

In NEPA, Congress "impose[d] only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756-57 (2004). In serving its role as a frequent forum for NEPA challenges, however, the D.C. Circuit has substantially deviated from NEPA's text and purpose, to

create a regime with endless process that substantially deters and hampers major energy infrastructure projects, without any meaningful environmental benefit.

In purporting to enforce NEPA, the D.C. Circuit has improperly relied on regulations promulgated by the Council on Environmental Quality (CEQ) to inform NEPA's mandates. Congress did not give CEQ—a three-member council in the Executive Office—authority to promulgate binding standards. CEQ's responsibility, as contemplated by Congress, was to advise the President on environmental policy, not to establish a wide-reaching system of substantive NEPA requirements binding across the federal government. Because CEQ lacks any statutory authority to issue such regulations, courts may not rely on them to define the contours and requirements of NEPA.

This Court should reverse and make clear that the CEQ-informed standards applied by the D.C. Circuit are not properly treated as binding authority.

ARGUMENT

I. NextDecade's Experience Well Illustrates The Problems With The D.C. Circuit's Current Approach, Requiring Endless NEPA Process.

The D.C. Circuit's recent decision in *City of Port Isabel v. FERC*, __ F.4th __, 2024 WL 3659344 (D.C. Cir. Aug. 6, 2024), exemplifies the court of appeals' overreading of NEPA to demand endless process, while placing in jeopardy NextDecade's $18.4 billion

LNG project mid-construction, as well as thousands of well-paying jobs and millions of dollars in regional economic development related to the project.

The lengthy and burdensome FERC approval process for NextDecade's Rio Grande project began in 2016. *See Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1326 (D.C. Cir. 2021). After providing ample opportunity for public comment and spending three years preparing a detailed environmental impact statement (EIS), FERC approved the project in late 2019. *Id.* at 1326-27. In doing so, FERC rejected a bevy of NEPA claims (among others) raised by the numerous challengers who intervened in the approval process. *Id.* at 1327.

On petition for review by the Sierra Club and others, the D.C. Circuit remanded. The court deemed insufficient under NEPA the *explanation* FERC provided for choosing a particular radius of environmental-justice communities to consider in its EIS, and it directed FERC to either better explain its rationale for the radius it used or perhaps "analyze … a different radius." *Id.* at 1330-31. As discussed below (pp. 16-17), such environmental-justice analysis is not required by NEPA itself, but rather is based on the D.C. Circuit's improper treatment of CEQ regulations and guidance as defining NEPA's requirements.

At that stage, in remanding the case for additional process not even required by NEPA, the court of appeals recognized that vacatur would be "needlessly disrupt[ive]" and refused to vacate FERC's authorization orders, "find[ing] it reasonably likely that

on remand" FERC would "reach the same result." *Vecinos*, 6 F.4th at 1332.

NextDecade and its partners have committed over $6 billion to the project. More than 1,400 jobs have been created since construction began, with plans to ramp up to 5,000 workers in the coming months. The project undertook environmental-conservation efforts, including the creation and enhancement of 377 acres of wetlands. As part of the project, NextDecade's subsidiary also committed to deepening a local ship channel in partnerships with the U.S. Army Corp of Engineers and the Brownsville Navigation District to make it safe for larger vessels to pass through, thus bringing more business to nearby communities.

Meanwhile, on remand from the D.C. Circuit, FERC expanded the radius of its environmental-justice analysis and provided additional opportunity for public comment. *See City of Port Isabel*, 2024 WL 3659344, at *5. Just as the D.C. Circuit predicted, FERC's further analysis did not change its ultimate conclusions, and the agency reauthorized the Rio Grande project in April 2023. *Id.* at *3.

Now, eight years after the approval process began and three years after the prior refusal to vacate FERC's authorization, the D.C. Circuit has done an about-face in *City of Port Isabel* by relying on its own supercharged version of NEPA to vacate the reauthorization. Again, based on an environmental-justice framework not found in NEPA, the court of appeals held that another remand, for still more process, was

necessary. Although FERC's additional environmental-justice analysis did not show any change in significance of the overall environmental impact—the only significant impact was that those living nearby could potentially *see* the new facility, which FERC had already noted in its initial EIS that the court considered in *Vecinos*—the court of appeals nevertheless held that the remand analysis warranted still another round of notice and comment and a supplemental EIS. *City of Port Isabel*, 2024 WL 3659344, at *5-7.[2]

Even though the public had been given notice and opportunity to comment on the environmental-justice data, and later had the opportunity to protest FERC's analysis of that data, the D.C. Circuit deemed the lack

[2] The Court's approach to NEPA in *City of Port Isabel* also discourages a project developer from proposing additional projects that could potentially help the environment. FERC had properly treated a separate Rio Grande proposal to build carbon capture and sequestration system (CCS), as subject to its own separate NEPA analysis. But the D.C. Circuit held that, even though the LNG facility was authorized without any CCS and did not need a CCS to operate, the two projects had to be considered by FERC in a new combined EIS. 2024 WL 3659344, at *8-10. Other courts recognize that projects are not properly considered connected where one can stand on its own, like the LNG facility here. *See Hudson River Sloop Clearwater, Inc. v. Dep't of Navy,* 836 F.2d 760, 763 (2d Cir. 1988); *Friends of Animals v. U.S. Fish & Wildlife Serv.,* 28 F.4th 19, 34-35 (9th Cir. 2022). And for good reason: Any other rule deters improvements. To subject a multi-billion-dollar project that can stand on its own, and does not need a second proposed project, to a new EIS based on that second proposal, effectively punishes the developer for trying to improve the status quo. That is contrary to NEPA's declaration of policy "to promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321; *see also id.* § 4331(a).

of yet another round of notice and comment a serious procedural defect warranting *vacatur of the project's reauthorization*. *Id.* at *14. The court did so despite recognizing that vacatur mid-construction could cause "significant disruption." *Id.* And it did so without even considering whether a further round of notice and comment and a supplemental EIS might lead to a different bottom line. Given FERC's finding, and the extensive process already afforded, there is no basis for expecting anything other than FERC's restoration of its previously granted reauthorization. But that was apparently immaterial to the D.C. Circuit, which has elevated endless rounds of NEPA process (including the CEQ-mandated environmental-justice framework that the D.C. Circuit treats as part and parcel of NEPA) above all common sense and all practical considerations.

Notably, the D.C. Circuit's passing reference and shoulder shrug to the possibility of "significant disruption," elides the potentially severe consequences from the court's ruling. The decision threatens to grind the Rio Grande project to a halt and put the entire project in jeopardy. The consequences for the local community will be devasting. The loss of thousands of well-paying jobs and related community investments (from fire trucks to housing to port development to wetlands preservation) are now all at grave risk. And the consequences ripple around the globe: The Rio Grande project is slated to add a supply of LNG to the global market equaling almost 6% of the current global supply—at a geopolitical moment when supply of LNG is critical and alternatives to American LNG come from dangerous and unpredictable regions.

The D.C. Circuit's approach to NEPA in *City of Port Isabel* echoes its boundless approach to NEPA in this case. Both cases highlight how the court has deviated from NEPA's text and purpose, to create a regime that will substantially deter and hamper the construction of major energy infrastructure projects.

II. This Court Should Not Rely On CEQ Regulations To Inform The Meaning Of NEPA.

As Petitioners explain, the fundamental problem with the D.C. Circuit's approach to NEPA review in this case is that it removes any meaningful limit on the effects an agency must consider when it analyzes the environmental impact of an action. *See, e.g.*, Pet. Br. 15, 25. In a line of cases starting with *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Sabal Trail*), through the decision below, the D.C. Circuit has concluded that federal agencies must look to remote or minimal effects and contingencies of the project under consideration, regardless whether they are within the agency's remit. *See, e.g.*, Pet. Br. 15, 25; *Sabal Trail*, 867 F.3d at 1373. In developing this approach, the D.C. Circuit has treated CEQ's standards as the governing regulations. *See, e.g.*, Pet. App. 26a-27a.

The D.C. Circuit's reliance on CEQ regulations in this case (and more broadly) to inform the meaning of NEPA is wholly improper because CEQ lacks authority to promulgate substantive NEPA regulations in the first place. *Food & Water Watch v. U.S. Dep't of Agric.*, 1 F.4th 1112, 1119 (D.C. Cir. 2021) (Randolph, J., concurring) (CEQ was "created for the purpose of advising the President on environmental matters").

"No statute grants CEQ the authority to issue binding regulations." *Id.* Courts thus cannot properly rely on CEQ regulations to inform the demands of NEPA.

It is axiomatic that "[a]n agency … 'literally has no power to act' … unless and until Congress authorizes it to do so by statute." *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 301 (2022) ("An agency's regulation cannot 'operate independently of' the statute that authorized it." (citation omitted)). "Administrative agencies are creatures of statute" and "accordingly possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.,* 595 U.S. 109, 117 (2022).

In 1969, NEPA established CEQ as a three-member council within the Executive Office of the President. 42 U.S.C. § 4342; *cf. Food & Water Watch*, 1 F.4th at 1119 (Randolph, J., concurring) ("CEQ is not an independent agency."). Congress did not confer on CEQ the authority to promulgate standards for NEPA enforcement binding on federal agencies. Rather, under NEPA, CEQ was "charged with, *inter alia*, 'develop[ing] and recommend[ing] *to the President* national policies to foster and promote the improvement of environmental quality.'" *Nevada v. Dep't of Energy*, 457 F.3d 78, 87 n.5 (D.C. Cir. 2006) (emphasis added) (quoting 42 U.S.C. § 4344). Throughout all the "dut[ies] and function[s]" Congress assigned to CEQ, the running theme, plainly, was CEQ's advisory role "to the President." 42 U.S.C. § 4344; *see also, e.g.*, *Hodges v. Abraham*, 300 F.3d 432, 438 (4th Cir. 2002) (CEQ was "created by NEPA for the purpose of advising the President on environmental matters"); *Nat'l Indian Youth Council v. Watt*, 664 F.2d 220, 224 (10th

Cir. 1981) (CEQ "was created by NEPA to advise the President on environmental policy"); *Env't Def. Fund, Inc. v. Corps of Eng'rs*, 492 F.2d 1123, 1128 (5th Cir. 1974) (CEQ was "created by NEPA to act as consultants to the President"); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 50 (2008) (Ginsburg, J., dissenting) ("NEPA established CEQ to assist and advise the President on environmental policy.").[3]

Congress modeled CEQ after the Council on Economic Advisers (CEA). *See Rushforth v. Council on Economic Advisers*, 762 F.2d 1038, 1041 (D.C. Cir. 1985) ("[T]he statutes organizing CEA and CEQ are, for all practical purposes, identical."); *compare* 15 U.S.C. § 1023 (CEA), *with* 42 U.S.C. §§ 4342-45 (CEQ). As with CEQ, the statutory task of CEA is to advise the President—specifically, to "appraise federal programs relative to a particular statutory policy and make recommendations to the President in that regard." *Rushforth*, 762 F.2d at 1043; *see* Scott C. Whitney, *The Role of the President's Council on Environmental Quality in the 1990's and Beyond*, 6 J. Envtl. L. & Litig. 81, 104 (1991) ("CEQ was originally structured to perform a function similar to that of [CEA]: to serve as an expert advisory body … to the President"). Courts have thus long understood that "CEA has no regulatory power under [its organic] statute." *Rushforth*, 762 F.2d at 1043; *see also, e.g.*,

[3] Notably, CEQ describes itself on its website, not as a Presidential council with limited powers to collect information and make recommendations, but as the federal "agency responsible for implementing NEPA." Council on Envtl. Quality, White House, Homepage (last visited Sept. 3, 2024), https://tinyurl.com/msyf7bhd.

Meyer v. Bush, 981 F.2d 1288, 1293 (D.C. Cir. 1993) ("CEA did not possess any delegated regulatory authority to supervise agencies.").

That all prompts the question: Where, if anywhere, does CEQ derive authority to promulgate regulations governing NEPA compliance that bind all federal agencies? Just as CEA's authority for issuing binding regulations is found nowhere within its organic statute, "CEQ's authority for issuing [such] regulations is found nowhere within NEPA; the statute makes no mention of CEQ having such power." John C. Grothaus, *Questionable Authority: A Recent CEQ Guidance Memorandum*, 37 Envtl. L. 885, 887 (2007); *see also, e.g.*, Whitney, *supra*, at 98-99 ("One role not envisioned by Congress was the CEQ's authority to adopt guidelines for federal agencies and to assist those agencies in the promulgation of their specific NEPA regulations."). That is why, in the years immediately after NEPA established CEQ, courts observed that CEQ "has no authority to prescribe regulations governing compliance with NEPA." *Greene Cnty. Planning Bd. v. Fed. Power Comm'n*, 455 F.2d 412, 421 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); *see also, e.g.*, *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421, 424 (5th Cir. 1973) ("CEQ does not have the authority to prescribe regulations governing compliance with NEPA."). And such authority cannot be found in any unspecified interstices of NEPA, as "'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (quoting Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron*-Based Delegations*, 20 Cardozo L. Rev. 989, 1011 (1999)).

Instead, "[a]ny authority CEQ may have to issue NEPA regulations binding on federal agencies was conferred solely by President Carter's 1977 Executive Order 11991 granting power to CEQ to '[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA],' and requiring federal agencies to 'comply with the regulations.'" Mark C. Rutzick, Regul. Transparency Project of the Fed. Soc'y, *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* 16 (2018), https://tinyurl.com/479yxawf; *see* Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 25, 1977). CEQ itself has often identified its authority to promulgate substantive regulations concerning NEPA as Executive Order 11,991. *See, e.g.*, 85 Fed. Reg. 43,304, 43,307 (July 16, 2020).

But the "President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); *see also, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188 (1999). On that score, the Executive Order comes up empty. *See, e.g.*, Whitney, *supra*, at 102 ("cast[ing] doubt upon the advisability of an Executive Branch attempt to 'strengthen' an entity which originally existed to provide the President with an advisory council for environmental matters").

As for an act of Congress, nothing in NEPA delegates authority to the President to direct the issuance of binding regulations concerning NEPA compliance. *See, e.g.*, Melanie Fisher, *The CEQ Regulations: New*

Stage in the Evolution of NEPA, 3 Harv. Envtl. L. Rev. 347, 349 (1979) (President Carter's Executive Order raises "a complicated constitutional question … given that NEPA does not discuss this type of implementation"). Even the Government has previously conceded that NEPA does not contain any such delegation to the President. *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1293 (1st Cir. 1996) ("[T]he government contends that the Executive Order is not enforceable, at least by private parties, because NEPA did not confer rulemaking authority on the President.").

As for the Constitution, courts have not identified (or even attempted to identify) any provision thereunder that might authorize Executive Order 11,991's directives to CEQ. CEQ itself has suggested in the past that Executive Order 11,991 stems from the President's "constitutional [authority] to ensure that the 'Laws be faithfully executed,' U.S. Const. art. II, sec. 3." 85 Fed. Reg. at 43,307. The Take Care Clause, however, does not serve as a specific authorization of the President to "act as a lawmaker" by way of Executive Order. *See, e.g.*, *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 235 (8th Cir. 1975) (Take Care Clause "alone does not give the executive order [here] the force and effect of law"). Such action by the President is particularly suspect when seemingly "incompatible with the expressed or implied will of Congress," such as that evidenced through NEPA here. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."); *see also Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981).

Courts have largely skipped over all this analysis, instead simply assuming the legality and provenance of CEQ regulations. *See, e.g.*, *Public Citizen*, 541 U.S. at 764; *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979). But when actually tasked with discerning the source of CEQ's rulemaking authority, courts can identify no organic statute granting CEQ rulemaking authority regarding the substantive content of NEPA. *See, e.g.*, *Nevada*, 457 F.3d at 87 n.5 ("[T]he CEQ 'has no express regulatory authority under [NEPA].'" (citation omitted)); *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*,433 F.3d 852, 861 (D.C. Cir. 2006) ("[W]e note that the binding effect of CEQ regulations is far from clear."); *City of Alexandria v. Slater*, 198 F.3d 862, 866 n.3 (D.C. Cir. 1999) ("The Council on Environmental Quality has no express regulatory authority under the National Environmental Policy Act."); *Aertsen v. Landrieu*, 637 F.2d 12, 18 (1st Cir. 1980) ("[T]he Council on Environmental Quality has no authority to prescribe regulations governing compliance with NEPA."); *Greene Cnty. Planning*, 455 F.2d at 421 (CEQ "has no authority to prescribe regulations governing compliance with NEPA").

Under *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), it is clear that prior court rulings assuming the binding nature of CEQ regulations, and deferring to CEQ's reading of NEPA, were in error. *Loper Bright* holds that Congress enacts laws, and courts are not generally allowed to simply defer to the Executive Branch's reading of those laws. That is true even where Congress delegates power to a specific agency. And here, there is no such delegation to CEQ's reading of NEPA. Applying the teachings of

Loper Bright, there is simply no statutory or constitutional basis to defer to CEQ substantive standards for compliance with NEPA or to treat them as binding.[4]

In short, while NEPA gives CEQ authority to collect data, and advise and make recommendations to the President regarding environmental policy, *see* 42 U.S.C. §§ 4342, 4344, it does not give CEQ authority to promulgate binding NEPA standards. Because CEQ lacks such authority, at minimum, CEQ regulations cannot, by themselves, supply the basis for a court's interpretation of NEPA's obligations here or in any other case.

In the present case, D.C. Circuit's understanding of NEPA review appeared to stem at least in part from CEQ regulations. *See, e.g.*, Pet. App. 25a-26a. In reviewing that decision, this Court must take care to limit its review to the statute enacted by Congress and to regulations duly enacted under congressional authority, and not rule on the basis of standards imposed by CEQ regulations. After all, it is "a 'solemn duty' of the Judiciary" to "'interpret[] the laws[] in the last resort.'" *Loper Bright*, 144 S. Ct. at 2257 (quoting *United States v. Dickson*, 15 Pet. 141, 162 (U.S. 1841)); *see also, e.g.*, *Marbury v. Madison*, 1 Cranch 137, 177 (U.S. 1803). "The views of the Executive Branch," especially a three-member council originally

[4] It is notable that in its merits brief in this case, the Government seems to recognize that it is the statute and not CEQ regulation that controls. *See* Fed. Resp. Br. 27 n.4 ("CEQ's discussion was not intended to place limits on an agency's discretion beyond those imposed by the statute itself.").

tasked with advising the President, may not "supersede" "the judgment of the Judiciary." *Loper Bright*, 144 S. Ct. at 2258.

III. The D.C. Circuit's Expansive Enforcement Of CEQ Regulations Must Be Checked.

This Court's reining in of the D.C. Circuit's reliance on CEQ regulations is urgently needed. CEQ regulations not only informed the D.C. Circuit's ruling in this case; they have pervasive effects throughout the D.C. Circuit's NEPA jurisprudence. The CEQ's influence over NEPA stretches across all manner of NEPA analyses, including the foundational standards governing an EIS, *see, e.g.*, 40 C.F.R. §§ 1502.1-1502.2. For instance, CEQ regulations impose an extra-statutory environmental-justice analysis as part of any EIS. *Sabal Trail*, 867 F.3d at 1368-71. The concept stems from President Clinton's Executive Order 12,898, which "required federal agencies to include environmental-justice analysis in their NEPA reviews," and from "the Council on Environmental Quality," which in turn "promulgated environmental-justice guidance for agencies" pursuant to Executive Order 12,898. *Id.* at 1368; *see* Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

The D.C. Circuit routinely relies on CEQ regulations that impose labyrinthine substantive rules and standards, including the environmental-justice analysis, that are unmoored from NEPA or any other statutory authority. *See, e.g.*, *City of Port Isabel*, 2024 WL 3659344, at *5-7. Indeed, the court of appeals even applies the CEQ regulations as the governing standards, mandating an environmental-justice analysis,

in contexts where the Executive Order purporting to empower the CEQ regulations does *not* apply. For example, the D.C. Circuit leverages CEQ's environmental-justice framework as the basis to review and vacate FERC orders, even though the Executive Order that purports to legitimize the CEQ standards does not even apply to FERC. *See N. Nat. Gas Co.*, 184 F.E.R.C. ¶ 61,186 at P 66 n.113 (2022) (FERC "is not one of the specified agencies in Executive Order 12898"). As discussed above, just last month, the D.C. Circuit relied on CEQ regulations and CEQ guidance regarding environmental justice to vacate FERC's reauthorization of an $18.4 billion LNG project that was already 14 months deep into construction and that will employ more than 5,000 workers. *City of Port Isabel*, 2024 WL 3659344, at *5-7, *14. Because in the court's view another round of notice and comment was needed regarding the CEQ-mandated environmental-justice analysis, the D.C. Circuit held that the case had to be sent back to the Commission and the reauthorization of the project vacated. *Id.*

The D.C. Circuit's expansive approach to the CEQ regulations, enforcing extra-statutory standards and procedures, requires this Court's attention in the present case and in general. Absent this Court's clarification regarding the source of authority for CEQ regulations, there is substantial risk that the practice of courts bowing to CEQ regulations and treating them as binding law will continue unfettered.

CONCLUSION

For the foregoing reasons, this Court should reverse and make clear that the CEQ-informed standards applied by the D.C. Circuit are not properly treated as binding authority.

Respectfully submitted,

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